

NO. A11-705

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State of Minnesota  
**In Court of Appeals**

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City of Moorhead,

*Appellant,*

vs.

Red River Valley Cooperative Power Association, et al.,

*Respondent.*

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**RESPONDENT RED RIVER VALLEY COOPERATIVE POWER  
ASSOCIATION'S BRIEF AND APPENDIX**

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McGRANN SHEA CARNIVAL  
STRAUGHN & LAMB, CHTD.  
Kathleen M. Brennan (#256870)  
Corey J. Ayling (#157466)  
800 Nicollet Mall, Suite 2600  
Minneapolis, MN 55402  
(612) 338-2525

WOLD JOHNSON, P.C.  
Benjamin E. Thomas (#0204882)  
500 Second Avenue North, #400  
Box 1680  
Fargo, ND 58107  
(710) 235-5515

*Attorneys for Appellant  
City of Moorhead*

FELHABER, LARSON, FENLON  
& VOGT, P.A.  
Harold LeVander, Jr. (#62509)  
444 Cedar Street, Suite 2100  
St. Paul, MN 55101-2136  
(651) 222-6321

Sara Gullickson McGrane (#233213)  
Jessica M. Marsh (#388353)  
220 South Sixth Street, Suite 2200  
Minneapolis, MN 55402-4504  
(612) 339-6321

*Attorneys for Respondent  
Red River Valley Cooperative Power  
Association*

*(See next page for listing of amici curiae)*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

FLAHERTY & HOOD, P.A.  
Elizabeth A. Wefel (#251951)  
525 Park Street, Suite 470  
St. Paul, MN 55103  
(651) 225-8840

*Attorney for Amici Curiae  
Minnesota Municipal Utilities Association,  
Missouri River Energy Services, Western  
Minnesota Municipal Power Agency and  
Coalition of Greater Minnesota Cities*

LEAGUE OF MINNESOTA CITIES  
Susan L. Naughton (#0259743)  
145 University Avenue West  
St. Paul, MN 55103-2044  
(651) 281-1232

*Attorney for Amicus Curiae  
League of Minnesota Cities*

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## LEGAL ISSUES

**1. Whether the district court correctly determined “fair market value” is not the proper measure of damages under Minn. Stat. § 216B.47?**

**Apposite Authorities:** Minn. Stat. § 216B.47 (2010); Minn. Stat. § 216B.44 (2010); City of Rochester v. People’s Coop. Power Ass’n, 483 N.W.2d 477 (Minn. 1992); Minn. Stat. § 216B.66 (2010); Grand Rapids Public Util. Comm’ns v. Lake Country Power, 731 N.W.2d 866 (Minn. App. 2007); City of Redwood Falls v. Redwood Elec. Coop., 756 N.W.2d 133 (Minn. App. 2008); Minn. Stat. § 645.44 (2010); Minn. Stat. § 645.16 (2010); Minn. Stat. § 645.17 (2010); United States v. 564.54 Acres of Land, 441 U.S. 506 (1979); United States v. Fuller, 409 U.S. 488 (1973).

**2. Whether the district court’s evidentiary rulings excluding fair-market-value evidence constituted an abuse of discretion?**

**Apposite Authorities:** Kroning v. State Farm Auto. Ins., 567 N.W.2d 42 (Minn. 1997); Gross v. Victoria Station Farms, 578 N.W.2d 757 (Minn. 1998).

**3. Whether the district court’s jury instructions constitute legal error?**

**Apposite Authority:** Hilligoss v. Cargill, 649 N.W.2d 142 (Minn. 2002).

**4. Whether the district court’s disallowance of an untimely expert report constituted an abuse of discretion?**

**Apposite Authorities:** Kroning, 567 N.W.2d 42; Gross, 578 N.W.2d 757; Jackson v. Reiling, 249 N.W.2d 896 (Minn. 1997); In re Baycol Products Litig., 596 F.3d 884 (8th Cir. 2010).

**5. Whether the district court abused its discretion in not ordering a new trial?**

**Apposite Authority:** Halla Nursery v. Baumann-Furrie & Co., 454 N.W.2d 905 (Minn. 1990).

**6. Whether the jury’s special verdict is supported by the evidence?**

**Apposite Authorities:** Kelly v. City of Minneapolis, 598 N.W.2d 657 (Minn. 1999); Dunn v. Nat’l Beverage Corp., 745 N.W.2d 549 (Minn. 2008); Domtar v. Niagara Fire Ins., 563 N.W.2d 724 (Minn. 1997).

## STATEMENT OF THE CASE

This appeal follows a rather protracted procedural history that began with annexation of an electrical service territory in 2006, culminated with a three-day jury trial held on October 11- 13, 2010, and ended with post-trial motions decided on February 18, 2011. As the questions posed in the City's appeal require a working knowledge of the procedural history, it is discussed in detail below.

## STATEMENT OF THE RELEVANT FACTS

### **I. Background on Red River Valley Co-op.**

Red River Valley Co-op Power Association (“Red River” or “Cooperative”)<sup>1</sup> is a rural electric cooperative with its offices in Halstad, Minnesota. (T52, 93).<sup>2</sup> It serves its 4,700 customers/members from Barnesville to East Grand Forks from 1,700 miles of electric distribution lines, located mainly in Norman, Polk, and Clay counties. (T53, Ex. 1; Ex. 9 at 6).<sup>3</sup>

Red River provides service within a geographical area, its service territory, which was established by the Minnesota Public Utilities Commission (“MPUC”) pursuant to Minn. Stat. § 216B.39 in 1975. (Tr. 53-54). Red River provides service to the present and future customers within its service territory on an exclusive basis with certain exceptions. Minn. Stat. § 216B.40.

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<sup>1</sup> Respondent was misidentified by Appellant as Red River Cooperative Power Association.

<sup>2</sup> T\_\_ refers to the Trial Transcript.

<sup>3</sup> Ex. \_\_ refers to the corresponding Trial Exhibit.

Red River purchases wholesale power on an all-requirements basis from Minnkota Power Cooperative located in Grand Forks, North Dakota. (T64, 66, 95). Minnkota owns the power generation facilities, the transmission lines, and the substations necessary for delivery of the power that the Cooperative needs. (T66). Red River takes the power from Minnkota's substations and distributes it to its customers through a web of electric distribution facilities in its service territory. (T64-67). Red River began providing service to Americana Estates, now a fully developed residential subdivision, in the late 1960's. (T174).

Americana Estates is a very valuable part of Red River's service territory. (T56-57, 109-10; Ex. 2). In terms of density, one mile of line services sixty-five customers in the area, a ratio of 65/1. (T57, 109-10). On the rest of the system, 1,700 miles of line serve 4,700 customers, a ratio of 2.75/1. (T58). This density factor is financially significant. (T109). On a cents-per-kilowatt-hours of sales, Americana Estates produces 9.3 cents per kilowatt-hour sold. (T110). In contrast, the balance of Red River's system produces 7.4 cents per kilowatt-hour sold. (T110). Thus, Americana Estates represented a valuable and unique part of Red River's customer base. (T110).

## **II. The Acquisition of Americana Estates and Commissioners' Award.**

On March 9, 2006, the City of Moorhead ("City") annexed Americana Estates.<sup>4</sup> On November 30, 2006, the City initiated a condemnation proceeding in the Clay County District Court to acquire Americana Estates from the Cooperative pursuant to Minn. Stat.

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<sup>4</sup> See Exhibit 1 to Affidavit of Harold LeVander, Jr. in Support of Red River's Motion for Partial Summary Judgment, or in the Alternative, its Motion in Limine dated February 4, 2010.

§ 216B.47. (AX 1-13; see AX 2 ¶ 5).<sup>5</sup> The Court granted the City’s petition on May 1, 2007. (AX 15). The Court appointed a panel of Commissioners on February 11, 2008, to determine the damages due Red River. (AX 14-20). A hearing was held before the Commissioners on October 27-28, 2008, to determine the damages sustained by Red River as a result of the acquisition of Americana Estates. (AX 21).

The Commissioners filed their award (“the Award”) with the Court on February 19, 2009, which disagreed with the recommended award submitted by both parties. (AX 21-22). The Commissioners awarded Red River \$307,214 pursuant to the four statutory factors enumerated in Minn. Stat. § 216B.47: (1) \$19,867 representing the “[o]riginal-cost-of-facilities-less-depreciation” factor; (2) \$261,891 representing the “[l]oss-of-revenue-to-the-Cooperative [Red River]” factor; (3) \$25,456 representing the “[e]xpenses-resulting-from-integration-of-facilities” factor; and (4) \$0 for the final factor, “[o]ther appropriate factors.” (AX 21).

The City filed an appeal of the Award on March 25, 2009, and the Cooperative filed a cross-appeal on April 7, 2009. (AX 23-26). The matter proceeded to the District Court for *de novo* review.<sup>6</sup>

### **III. District Court Proceedings.**

Multiple (four) Scheduling Orders were issued in this case and the trial itself was continued twice to accommodate counsel for the City. (AD 17).<sup>7</sup> The Third Amended

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<sup>5</sup> AX \_\_ refers to the Appendix to the City’s (Appellant’s) Brief.

<sup>6</sup> Americana Estates was transferred to the City on July 15, 2009, and the subdivision has been served by the City henceforth.

Scheduling Order scheduled the trial for May 4, 2010, and set December 22, 2009, as the deadline to exchange expert reports. The parties did exchange expert reports on December 22, 2009.<sup>8</sup> The final (Fourth) Amended Scheduling Order, filed on April 4, 2010, moved the trial to October of 2010, and changed the dates associated with the Pretrial Conference, Pretrial Statement, Joint Statement of the Case, and Proposed Jury Instructions necessitated by the five-month trial delay. The Fourth Amended Scheduling Order affirmed all other deadlines imposed by the previous orders, however, which meant, inter alia, that the deadline to exchange expert reports had already passed on December 22, 2009.

**A. Pretrial.**

**1. February 2010: Cross-Motions for Summary Judgment or Motions in Limine.**

On February 4, 2010, Red River and the City filed cross-motions for Summary Judgment, or in the alternative, Motions in Limine. Relevant to the present appeal, Red River argued that “the four factors for determining Red River’s damages under Section 216B.47 do not include the fair-market-value of its utility business before and after the acquisition of Americana Estates,” and moved for partial summary judgment on that issue.<sup>9</sup> “In the alternative, Red River move[d] for an order excluding the City’s Expert Witness Report of Robert Strachota [the City’s expert] to the extent that it uses the fair-

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<sup>7</sup> AD \_\_ refers to the Addendum to the City’s (Appellant’s) Brief.

<sup>8</sup> See Memorandum of Law in Support of Motion in Limine of Red River dated September 13, 2010 at 1.

<sup>9</sup> See Red River Valley’s Notice of Motion and Motion for Partial Summary Judgment, or in the Alternative, its Motion in Limine dated February 4, 2010 at 1.

market-value of Red River’s utility business before and after the acquisition of American Estates as the measure of damages....”<sup>10</sup> Conversely, the City argued that summary judgment in its favor was warranted, reasoning “because Red River bears the burden of proof to establish damages, its failure to address fair-market-value means that Red River has failed to meet its burden of proof as a matter of law.... The City’s fair-market-value should be entered as judgment.”<sup>11</sup> Alternatively, the City argued that “[a]ny evidence, including testimony from Mr. Eicher [Red River’s expert], that does not comport with fair-market-value must be excluded from evidence.”<sup>12</sup> In reply, Red River argued:

[T]his is not a traditional eminent domain proceeding.... The City’s motions are an attempt to import into the statute [216B.47] a factor for determining damages that the Legislature did not put there.... The City is attempting here to convert the constitutional minimum payment of just compensation into a statutory maximum amount that the City is obligated to pay the Cooperative.<sup>13</sup>

By Order dated March 30, 2010, the District Court granted Red River’s Motion for Partial Summary Judgment and its Motion in Limine, holding that (1) “the appropriate legal damages standard in this eminent domain proceeding is that of Minnesota Statutes § 216B.47, and that jury will be instructed that the damages awarded should cumulatively include [the four statutory factors]”; (2) “testimony by Robert Strachota [the City’s expert], and portions of his Report, regarding Fair Market Value shall be excluded”; and (3) “all evidence as to ‘fair market value’ is hereby excluded.” (AD 3-4). The District

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<sup>10</sup> Id.

<sup>11</sup> See City’s Memorandum of Law in Support of its Motion for Summary Judgment or, in the Alternative Motion in Limine dated February 5, 2010 at 2.

<sup>12</sup> Id.

<sup>13</sup> See Red River’s Reply to City’s Memorandum of Law in Support of its Motion for Summary Judgment or, in the Alternative Motion in Limine dated March 5, 2010 at 1, 3.

Court's Order was based on its thorough examination of Chapter 216B, and the following reasoning:

Although the federal and state constitutions create a minimum level of compensation, there is nothing which would prevent the Legislature from authorizing an enhanced measure of damages, especially in the case of the annexation of a service area by a neighboring city where the neighboring city could and likely would be the only willing buyer in nearly all circumstances.... The Legislature through sections 216B.41 and 216B.47 has evidenced its clear intent to fully compensate the Cooperative for its losses related to the City's annexation of a portion of its service area.

Therefore, any evidence related to fair market value should be excluded and only evidence specifically addressing the factors in section 216B.47 should be permitted. Evidence of "other appropriate factors" [the fourth 216B.47 factor] should be limited to unusual expenses or losses to the Cooperative (such as improvements made during the course of the condemnation proceedings – which is not an issue in this case), in addition to the first three factors, but does not include any alternative analysis of damages such as fair market value.

(AD 7-8).

## **2. September 2010: Red River's Motion in Limine.**

On September 8, 2010, six months following the previous Motions, and on the eve of the October 2010 trial, the City served a revised expert report on Red River ("New Report").<sup>14</sup> In response, on September 13, 2010, Red River filed a Motion in Limine seeking to exclude certain portions of the New Report titled "Deduction for Deferred Capital Investment" because:

1) the deadline for disclosure of expert reports has expired; 2) this issue would require discovery, the deadline for which is expired; and 3) the issue requires testimony on events which will occur well after the date of taking,

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<sup>14</sup> See Motion in Limine of Red River Valley Cooperative Power Association dated September 13, 2010 at 1.

February 19, 2009, the valuation date for the determination of compensation.<sup>15</sup>

Red River noted that the City:

now claims a credit of \$78,759 in [its expert's] calculation of the Cooperative's net loss of revenue for deferred capital investment, a totally new issue not addressed in his December 22, 2009 Report. This credit is based on an "assessment by the City that the poor condition of the infrastructure has necessitated a complete replacement at an estimated cost of \$400,000 in 2011."<sup>16</sup>

The City opposed Red River's Motion, arguing that the Rules of Civil Procedure require it to supplement its discovery responses, including its expert reports.<sup>17</sup> On Reply, Red River argued that "[t]he New Report does not simply make minor amendments, but rather systematically transforms the calculation of damages" and "if the trial had been conducted when scheduled, the New Report authored approximately five (5) months later would not exist. Put simply, the City should not be able to benefit from its continuance."<sup>18</sup>

By Order dated September 30, 2010, the District Court granted Red River's Motion, holding "[t]hat all evidence as to the new deduction of \$78,957.00 for capital improvements is hereby excluded" for reasons "stated on the record" at the September 27 hearing. (AD 11-12). However, the Court clarified that this ruling "was not meant to exclude information on the normal maintenance and replacement costs of facilities and

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<sup>15</sup> Id.

<sup>16</sup> See Memorandum of Law in Support of Motion in Limine of Red River dated September 13, 2010 at 2.

<sup>17</sup> See City's Memorandum of Law Opposing Red River's Motion in Limine dated September 20, 2010.

<sup>18</sup> See Reply Memorandum of Law in Support of Motion in Limine of Red River dated September 22, 2010 at 1, 2.

objects within the system, which the Court assumed were already presented to the Commissioners.” (AD 19).

**B. October 11-13, 2010: Trial.**

At trial, the parties stipulated as to the amounts of three of the four 216B.47 factors, specifically that: (1) \$19,867 represented the damages for “the original cost of the property less depreciation”; (2) \$25,579 represented the damages for “expenses resulting from integration of facilities”; and (3) the amount of damages for “other appropriate factors” was \$0. (AX 54). Thus, the sole issue to be determined at trial was what amount of damages the City must pay Red River to compensate for its “loss of revenue” attributable to the taking. (*Id.*).

During the three-day jury trial, the District Court made several attempts to inform the City that it was failing to make its case as it was incorrectly focusing on fair-market value, rather than the applicable statutory factors enumerated in Section 216B.47. (*See* T358-64; 372). The City ignored the Court’s guidance.

**1. Battle of the Experts.**

The jury was asked to resolve a battle of the experts at trial. As discussed below, the expert witnesses for Red River and the City calculated the damages attributable to the loss of revenue factor from totally different approaches.

**a. Red River’s Expert.**

Red River’s expert used the “net loss of revenue” approach in accordance with established precedent, which will be described later. That approach focuses directly on the financial impact on Red River of the area being acquired. The purpose of the

calculation was to make Red River whole after the acquisition and considers: (1) revenue loss; (2) avoided operations-and-maintenance expenses; (3) avoided customer-related expenses; (4) avoided administrative-and-general expenses; (5) avoided purchased-power expense; (6) avoided depreciation expense; and (7) avoided expenses for interest. (Ex. 9). Although the City only directly challenges whether the amounts for avoided purchased-power expenses and operations-and-maintenance expenses are supported by the evidence (AB 46-47), it indirectly challenges **all** of Red River's expert's calculations as it is challenging the total number contained in the jury's special verdict.

#### **(1) Revenue Loss**

Red River's expert first calculated the revenue loss by applying Red River's rates for service to the actual billing determinants or usage of the customers in Americana Estates. (T200-12). The revenue loss was \$101,200. (Ex. 8).

#### **(2) Avoided Operations-and-Maintenance Expenses**

Next he determined the operating expenses that Red River would avoid as a result of the acquisition. (T201; Ex. 9). Red River's expert recognized that in a partial acquisition of electric service territory, certain fixed costs of operation may not be reduced in proportion to the loss of revenue. (T220). This is particularly true for operations and maintenance expense, customer-related expenses, and administrative and general expenses. (T221-25). Red River has substantial, imbedded infrastructure in the way of employees, equipment and materials that give rise to these expenses, and that infrastructure will not be eliminated nor materially reduced as a result of the acquisition. (T221-25).

With respect to operations and maintenance expense, Red River's expert testified without dispute that these expenses are essentially a function of the miles of electric lines that a utility operates and maintains. (T222). Approximately one mile of line served sixty-five customers in Americana Estates. Red River's CEO, Lauren Brorby, testified without dispute that the only operations and maintenance expense which Red River would avoid after the acquisition was minimal tree trimming expense. (T112-13). More significant, however, is the fact that Red River maintains a backbone distribution system of substations and circuits surrounding Americana Estates that provides direct and back-up service to Americana Estates. (T113, 232-34). The Americana Estates customers pay their share of the operations and maintenance expense associated with these facilities. After the acquisition, when Americana Estates is gone, the rest of Red River's backbone distribution system remains in place. (T113). Red River will lose the revenues from Americana Estates, a part of which were used to pay for the operations and maintenance of these backbone utility facilities. (Ex. 9 at 6). Based on these factors, Red River's expert testified that avoided operations and maintenance expense was \$3,465 for the first year of the ten-year period (Id.).

### **(3) Avoided Customer-Related Expenses**

Red River's expert testified that the same proposition holds true for customer-related expenses. (T227-28). Red River would continue to have the same number of employees, the same headquarters building, the same number of vehicles, the same computer equipment, etc., after the acquisition, as it had before. (T227). Red River's expert testified that the only avoided customer-related expenses would be the monthly

customer billing service for the Americana Estates customers, approximately \$1.00 per month per customer for the first year of the ten year compensation period or \$756. (T228; Ex. 9 at 8). Red River's CEO supported this analysis. (T113-14).

#### **(4) Avoided Administrative-and-General Expenses**

Red River's expert testified that same proposition holds equally true for administrative and general expense: There would likely be no savings of administrative and general expenses after the acquisition. (T228, 237). Again, Red River would continue to have the same headquarters building, the same CEO, the same Board of Directors, the same office equipment, and the same computers after Americana Estates was acquired, as it did before. (T237-38). Red River's expert allocated \$1.00 per month per customer for avoided administrative and general expenses for the first year of the ten year compensation period or \$756. (T228, 234; Ex. 9 at 8).

#### **(5) Avoided Purchased-Power Expenses**

With respect to the calculation of avoided purchased power expense, Red River's expert calculated the reduction in purchased power expense for the first year by applying the wholesale rates of Minnkota Power Cooperative ("Supplier"), Red River's wholesale power supplier, to the wholesale billing units (demand and energy) attributable to Americana Estates. In addition, the calculations recognized two important factors bearing on that expense. First, the Supplier provides a reduced wholesale rate for off-peak energy purchases, which Red River reflected in the power cost component of its retail rate for its customers, including those in Americana Estates in particular. (T220; Ex. 9 at 4). Second, Red River would not be able to avoid the fixed component of the

Supplier's substation charge in its wholesale rate for the substations providing service to Americana Estates. (T219-20). Based on these factors, Red River's expert calculated the avoided purchased power expense to be \$53,473.00 for the first year of the ten year period. (T220; Ex. 9 at 5).

**(6) Avoided Depreciation Expenses**

Red River's expert calculated the avoided depreciation expense due to the sale of distribution facilities in the area to the City to be \$1,663 for the first year. (Ex. 9 at 9).

**(7) Avoided Interest Expense**

Payment by the City for the original-cost-less-depreciation component would allow Red River to pay off any loan associated with financing the facilities, thereby reducing interest expense. Red River's expert calculated this would result in \$993 avoided-interest expense in the first year. (T489-91).

The net revenue loss in the first year of the ten year compensation period was \$40,095. (T239; Ex. 9 at 2). The present value of Red River's loss of revenue was projected at \$339,865. (T244-46; Ex. 9 at 1).

**b. The City's Expert.**

The City's expert's testimony revealed that his calculations were not built on a firm foundation, as he was uncertain as to the source of his calculations for the lost revenues from the area. (T451). He testified that he used Red River's revenue data for the year 2009 for his calculation, but ignored the fact that Red River had served the area only until July 23, 2009, when the City paid  $\frac{3}{4}$  of the Commissioners' Award and took over service rights to the area. (T410, 457-58). When that was pointed out to him on

cross examination, then he changed his testimony and claimed that he had projected Red River's revenues for 2009 as if it had served the area for the entire year. (T451, 457-64). His revenue estimate in any event was \$110,947. (T460; Ex. 69).

The City's expert used system average expenses as a percent of total system revenues for calculating the avoided expenses from the acquisition. (T465). For example, for purchased power expense, the City's expert stated that since the historic system average expense for purchased power constituted 64.2% of system revenues, then the avoided purchased power expense for Americana Estates was 64.2% of the revenues from that area. (T465, 477-78; Ex. 69). The City's expert calculated avoided purchased-power expense at \$71,217. (T477; Ex. 67). Average purchased power costs as a percent of revenue for the entire Red River system, however, is not an appropriate method of estimating purchased power expense for Americana estates as the system average inherently includes purchases on behalf of residential, commercial, industrial, agricultural, and other kinds of customers that purchased wholesale power, whose wholesale load characteristics are very different from those within the subject acquisition area. (T479). Americana Estates, for example, consists of only residential customers, whose average monthly energy usage is lower than the average for residential customers on the rest of the system. (Tr. 57). As a result, purchased power expense, when expressed as a percent of revenue, is much lower for Americana Estates customers. (T480). Finally, system average purchased power expenses would not reflect the residual fixed component of Minnkota Power Cooperative's substation charge to Red River, remaining after the acquisition. (T479-80).

The City's expert employed the same system averaging concept to operations and maintenance expense. (T481-82). He testified that operations and maintenance expense is simply a function of revenue. (T483). Since average system operations and maintenance expense on a per customer basis was \$272 per year, then the avoided operations and maintenance expense for Americana Estates was the product of multiplying 65 customers by \$272, for a total of \$17,653. (T481-83; Ex. 69).

Several flaws in the City's expert's logic were pointed out on cross examination. First, this calculation ignores the density factor, *i.e.*, number of customers per mile of line, associated with operations and maintenance expense. (T483). One mile of line served 65 customers in Americana Estates, a ratio of 0.015 miles per customer. In comparison, the remaining 4,700 Red River customers are served by 1,700 miles of line, a ratio of 0.362 miles per customer. (T109-10; Ex. 9 at 6). This ratio demonstrates that the avoided operations and maintenance expense for Americana Estates is far less than the system average. Second, and most importantly, customer revenues from Americana Estates support not only the internal facilities in Americana Estates, but also the surrounding backbone utility facilities that are necessary to serve this area. (T484-85).

Mr. Strachota opined that one half of Red River's customer-related expenses (\$3,700) and administrative expenses (\$905) could be avoided. (T489-91). He also included what he termed a capital-cost component of \$3,563, which was based on his assumption that the average-useful life of the equipment that the Cooperative purchased was 16.75 years. (T412-13; 418; 492). However, the City's stipulation on factor one (original cost less depreciation) assumed an average useful life more than double that,

thirty-five years. The City's expert admitted that his report on factor one used a 2.8% annual rate of depreciation on the Cooperative's facilities. (T494-95). A 2.8% annual rate of depreciation assumes a thirty-five year average useful life ( $100/2.8 = 35$ ). Therefore, the expert's calculation is directly contrary to his own report and the City's stipulation.

Furthermore, Mr. Stracota's figure was also based on his assumption that the amount shown for purchases of equipment on the Cooperative's financial statements was all for the replacement of that equipment. (T82-83; Ex. 5, part E). Mr. Brobry testified, that 70% of that amount was for new equipment, rather than for replacing old equipment. (T83). Thus, the City expert's starting premise for his calculation was flawed. His net revenue loss was \$13,839, which projected for ten years and a 6% discount factor, produced a loss of revenue of \$125,000. (T493; Ex. 69).

**c. Comparison of Expert Testimony.**

As a summary table of the above-described testimony, the two experts diverged as follows:

	<b>Red River's Expert</b>	<b>City's Expert</b>
<b>Estimated Gross Revenue From Americana Estates</b>	\$101,200	\$111,947
<b>Avoided Purchased Power Expenses</b>	\$53,473	\$71,217
<b>Avoided Operations &amp; Maintenance Expenses</b>	\$3,465	\$17,653
<b>Avoided Customer-Related Expenses</b>	\$756	\$3,700
<b>Avoided Administrative &amp;</b>	\$756	\$905

	Red River's Expert	City's Expert
<b>General Expenses</b>		
<b>Avoided Interest Expenses / Depreciation Expenses</b>	\$2,656	No calculation. Rather calculated a capital cost expense of \$3,563.
<b>First Year's Net Loss of Revenue</b>	\$40,095	\$13,839
<b>Present Value of Net Loss (10-Year Period)</b>	\$339,865	\$125,000

## 2. Jury Instructions.

The City's proposed jury instructions again focused on fair market value:

(1) Proposed Instruction No. 16 ("Definition of 'just compensation'"):

"'Just compensation' is the **fair market value** of the electric service territory that was taken by the City as of February 19, 2009";

(2) Proposed Instruction No. 17 ("Definition of '**fair market value**'"):

"Fair market value" is the price that would be paid for the property by a willing buyer to a willing seller. Consider all facts and circumstances that a buyer and seller in the open market would reasonably consider. The owner is entitled to the value based on the highest and best use of the property; and

(3) Proposed Instruction No. 18 ("Partial Taking – Damages for Part Taken"):

To find just compensation to Red River for the taking of part of its electric service territory, calculate the difference between:

1. The **fair market value** of Red River immediately before the service territory was taken, and

2. The **fair market value** of Red River immediately after the service territory was taken....

(AX 37-42 (emphasis added)).

The District Court declined to give the jury the City's requested instructions.

(T371-72). Instead, the jury's instructions, in relevant part were:

### JUST COMPENSATION

The laws of this state provide that the City may acquire the property of a utility such as the Co-op by eminent domain proceedings provided that it pay "just compensation" as of the date of taking to the Co-op. "Just compensation" includes:

1. the original cost of the property less depreciation;
2. loss of revenue to the utility;
3. expenses resulting from integration of facilities; and
4. other appropriate factors.

The parties have agreed to the amounts which are appropriate for the first, third, and fo[u]rth factors, so you can focus your attention on factor two, loss of revenue to the utility....

(AX 50-51).

### 3. Special Jury Verdict.

On October 13, 2010, the Jury issued its Special Verdict, agreeing with Red River's expert as to Red River's damages, and answering the question submitted as follows:

What sum of money is just compensation for Red River Cooperative Power Association ("the Co-op") for the electrical service territory rights acquired by the City of Moorhead ("the City") on February 19, 2009?

- |    |  |                     |
|----|--|---------------------|
| 1. | the original cost of the property less depreciation: | \$ <u>19,867.00</u> |
| 2. | loss of revenue:                                     | \$ <u>339,865</u>   |
| 3. | expenses resulting from integration of facilities    | \$ <u>25,579.00</u> |
| 4. | other appropriate factors:                           | \$ <u>0.00</u>      |

Total of lines 1-4:

\$ 385,311

(AD 28). Thus, the jury selected the **exact** measure of loss-of-revenue damages suggested by Red River's expert. (Ex. 9 at 1).

#### **4. Judgment.**

By Order dated October 19, 2010, the District Court issued its Findings of Fact, Conclusions of Law, and Order for Judgment, and Judgment. (AX 90). The District Court adopted the jury's special verdict, and entered judgment in favor of Red River in the amount of \$385,311 on May 31, 2011. (AX 90-91).

#### **C. Post-Trial.**

On November 12, 2010, the City filed a Motion seeking judgment as a matter of law or, alternatively a new trial based on its persistent theory that "just compensation" means "fair market value" and because the verdict (in terms of purchased-power expense and operations-and-maintenance expense) was not justified by the evidence. The City also challenged the exclusion of its untimely expert report which purported to calculate replacement costs.

Red River opposed the City's Motions, arguing that the challenged rulings "were consistent with Minnesota law," and that the City was "attempt[ing] at a third bite at the apple" regarding its fair-market-value arguments.<sup>19</sup> Red River argued: "The measure of damages is governed by the plain language of the statute (section 216B.47), as this Court

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<sup>19</sup> See Red River Valley's Response to City's Motion for Judgment as a Matter of Law or in the Alternative a New Trial dated November 30, 2010 at 1.

correctly decided in March of 2010.”<sup>20</sup> Regarding the City’s insufficient-evidence argument, Red River responded: “Just because the jury disagreed with the City does not make the verdict wrong. Moreover, the jury’s verdict was supported by the evidence—namely, Mr. Eicher’s [Red River’s expert’s] testimony which the jury apparently accepted.”<sup>21</sup> Specifically regarding the purchased-power expense, Red River explained:

The City wanted Mr. Eicher to use averages [of the entire Red River service territory]; Mr. Eicher did not—he testified he believes averages are completely inappropriate when you have actual power usage from an area. Mr. Eicher did not consider the average usage as he testified he believed such evidence was far weaker and would be speculative, especially when he had the actual usage of customers in Americana Estates. **The jury chose to believe this superior evidence from Mr. Eicher.**<sup>22</sup>

Further, Red River’s CEO testified that Americana Estates was not a “typical” Red River customer subdivision, based on customer density, further underscoring the inappropriateness of using averages. (T57, 109-11). Last, regarding maintenance expenses, Red River stated, again, “[t]he jury heard the evidence, and the jury gave the testimony the weight they believed it deserved. Just because the City spent an exorbitant amount of money trimming trees in Americana Estates does not mean that Red River would have spent the same amount.”<sup>23</sup>

By Order dated February 17, 2011, the District Court denied the City’s Motion of Judgment as a Matter of Law or, in the Alternative, a New Trial. (AD 15). The District Court affirmed its earlier determination that fair market value was not the appropriate

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<sup>20</sup> Id. at 3.

<sup>21</sup> Id. at 11.

<sup>22</sup> Id. at 11-12 (emphasis added); see also T288-89 (relevant testimony).

<sup>23</sup> Id. at 11.

measure of Red River's damages under this 216B.47 proceeding. (AD 19-22). After setting forth general constitutional principles, explaining the two alternative statutory procedures to annex electrical service territory (216B.44 and 216B.47), and articulating canons of statutory construction, the District Court reasoned:

In a regular eminent domain case, lost revenues and expenses and the other factors mandated by section 216B.47 would specifically be excluded from any calculation of damages because they have no place in a fair market analysis, as was addressed by the Minnesota Supreme Court in Strom [State by Humphrey v. Strom, 493 N.W.2d 554 (Minn. 1992)] and as the City apparently agreed by its summary judgment motion. 493 N.W.2d at 558-60 (discussing measure of just compensation for a partial taking of land by the State for a highway). However, the Legislature specifically included the four factors in section 216B.47 with no reference to fair market value analysis; instead that section specifically says that the damages must include the factors, not that an analysis of fair market value should take the factors into consideration. Although the federal and state constitutions create a minimum level of compensation, there is nothing which would prevent the Legislature from authorizing an enhanced measure of damages, especially in the case of an annexation of a service area by a neighboring city could and likely would be the only willing buyer in nearly all circumstances.

In addition to the minimally required substantive and procedural rights and protections of *owners* provided under chapter 117, the Legislature has provided for enhanced damages by statute in other eminent domain proceedings. See Minn. Stat. §§ 117.031 (costs & attorneys fees), 117.186 (on-going concern value, revenues), 117.187 (sets minimum award at cost of relocation). It would be incongruent with the obvious intent of the plain language of section 216B.47 to use the "other appropriate factors" section to include fair market value in order to put a limitation on the first three factors which are worded to address damages from the point of view of what the Cooperative is losing, not what the City is gaining or to what two willing negotiating parties would agree. The Legislature through sections 216B.41 to 216B.47 has evidenced its clear intent to fully compensate the Cooperative for its losses related to the City's annexation of a portion of its service area.

Only evidence specifically addressing the factors in section 216B.47 should be permitted in these types of actions. Evidence of "other appropriate

factors” should be limited to unusual expenses or losses to the owner (such as improvements made during the course of the condemnation proceedings—which is not an issue in this case), in addition to the first three factors, but does not include any alternative analysis of damages such as fair market value. Therefore, any evidence related to fair market value was appropriately excluded by the Court and the jury was instructed as to the proper calculation of damages.

(AD 21-22).

Next, the District Court determined the City’s “new” evidence as to facility replacement costs was properly excluded as “a sanction appropriate for a violation of discovery practice,” as it was served well beyond the deadline for exchanging expert reports and on the eve of trial. (AD 22). The Court found it persuasive that “the evidence the New Report sought to introduce was not available to it when it originally presented its case to the Commissioners, whose award it was appealing” and it “would not have been available had the trial occurred in April 2010,” which “was postponed for the personal needs and convenience of the City’s counsel.” (AD 22). More fundamentally, the District Court noted that the need for capital improvements were already accounted for in the first statutory factor (original cost minus depreciation), the amount of which the City stipulated to at trial: “It does not seem logical that while the Cooperative would have received a credit for improvements had they been made, that they should now be *debited* for not making them.” (AD 23).

Last, the District Court rejected the City’s insufficient-evidence argument, stating that “[t]he City’s characterization of the evidence oversimplifies **and mischaracterizes** the evidence.” (AD 24 (emphasis added)). Put simply, the Court concluded “the jury believed the Cooperative’s expert.... Thus, this Court cannot say that the verdict in this

case was not justified by the evidence when the damages determined by the jury were **exactly in line with the evidence presented by one side's expert's testimony** which had a reasonable basis in fact.” (AD 24-25 (emphasis added)).

This appeal followed.

## ARGUMENT

### I. SUMMARY OF ARGUMENT.

The City's numerous arguments on appeal fall into one of three categories, specifically that the District Court: (1) erred in determining fair-market-value damages were not the proper measure of damages in this Chapter 216B proceeding (AB 21-39); (2) abused its discretion by not allowing the City's untimely New Report from its expert into evidence (AB 39-46); and (3) the jury's special verdict is not supported by sufficient evidence (AB 46-48). **None of these arguments has merit.**

The first 39 pages of the City's briefing is grounded in its mistaken notion that “fair-market-value” determines the amount of compensation it owed Red River for its “lost revenue” (the second statutory factor, the only factor disputed at trial) or, alternatively, was an “other appropriate factor[]” worthy of consideration (the fourth statutory factor, which the City stipulated amounted to “\$0” in damages). The City's six sub-arguments flow from that incorrect premise: (A) Just Compensation is Measured by Fair-Market-Value (AB 23); (B) The Plain Language of Section 216B.47 Did Not Exclude Fair-Market-Value (AB 28); (C) Past Precedent Rejected MPUC Damages In Condemnation Proceedings (AB 32); (D) The Legislature Did Not Modify the Fair-Market-Value Standard (AB 34); (E) The Court Erred in Excluding Relevant Fair-

Market-Value Evidence (AB 36); and (F) The Jury Instructions Incorrectly Excluded the Fair-Market-Value Concept (AB 37). Although different standards of review apply to the City's challenges to various stages of the proceedings before the District Court (as discussed below), each ultimately fails for the same simple reason: the City is wrong that fair-market-value is the appropriate measure of Red River's damages.

After first describing the background on Minnesota Chapter 216B, Red River explains below that: (1) this is not a traditional eminent-domain proceeding; (2) Minnesota Chapter 216B represents a permissible legislative **augmenting** of the Constitutional minimum; and (3) the City's argument ignores statutory-interpretation principles, and attempts to import into the statute a factor for determining damages that the Legislature did not put there. Therefore, the District Court correctly interpreted the statute, excluded irrelevant evidence, instructed the jury, and denied the City's post-trial motions.

Next, the City claims the District Court abused its discretion by excluding the portion of its expert's New Report that calculated facility-replacement costs and sought a corresponding credit as to the damages owed Red River. (AB 39-46). This argument must be rejected given the discretion due to the District Court's evidentiary rulings, that the New Report was untimely submitted, and that the "evidence" should have already been accounted for in the first statutory factor (original cost less depreciation) and the City stipulated to the amount of damages for this factor.

In a last-ditch effort to raise an appealable issue, the City devotes the final two pages of its briefing to argue that the evidence is insufficient to support the verdict. (AB

46-48). However, at its core, the City's objection is simply that the jurors believed Red River's expert, rather than the City's. Thus, this final argument fails, particularly given that this Court reviews special jury verdicts and damage awards under an extremely deferential standard of review.

Therefore, the District Court should be affirmed in all respects.

## **II. THE DISTRICT COURT CORRECTLY DETERMINED THAT "FAIR-MARKET VALUE" DOES NOT APPLY TO DAMAGE DETERMINATIONS UNDER CHAPTER 216B.**

### **A. Standard of Review.**

To the extent the City's appeal challenges the district court's resolution of legal questions, including the meaning of Section 216B.47, it raises questions of law, reviewed *de novo*. See, e.g., Lee v. Fresenius Med. Care, Inc., 741 N.W.2d 117, 122 (Minn. 2007) ("Statutory construction is ... a legal issue reviewed *de novo*.").

However, the District Court's evidentiary rulings, jury instructions, and denial of the City's new-trial Motion are reviewed with deference. "[T]he trial judge has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed." Shetka v. Kueppers, Kueppers, Von Feldt & Salmen, 454 N.W.2d 916, 921 (Minn. 1990). "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on a[n] erroneous view of the law or constitutes an abuse of discretion." Kroning v. State Farm Auto. Ins., 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). Unless there is "some indication that the [district] court exercised its discretion

arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result.” Id. at 46. This is particularly true when the challenged ruling involves an expert:

A district court’s evidentiary ruling on the admissibility of an expert opinion rests within the sound discretion of the [district] court and will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion.... Even if evidence has probative value, it is still within the district court’s discretion to exclude the testimony. This is a very deferential standard. In fact, we have stated that even if this court would have reached a different conclusion..., the decision of the district court judge will not be reversed absent clear abuse of discretion.

Gross v. Victoria Station Farms, 578 N.W.2d 757, 760-61 (Minn. 1998) (quotations and citation omitted). And, “[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party’s ability to demonstrate prejudicial error.” Kroning, 567 N.W.2d at 46 (quotation omitted). “The district court has broad discretion in determining jury instructions and we will not reverse in the absence of abuse of discretion.” Hilligoss v. Cargill, 649 N.W.2d 142, 147 (Minn. 2002). The District Court’s decision not to grant the City’s new trial motion will not be disturbed on appeal absent a clear abuse of discretion. Halla Nursery v. Baumann-Furrie & Co., 454 N.W.2d 905, 910 (Minn. 1990).

Regardless of the applicable standard, the City’s challenges on appeal fail.

## **B. Background on Minnesota Chapter 216B.**

Minnesota Statutes Chapter 216B, the Minnesota Public Utilities Act, is a comprehensive law regulating electric utilities in Minnesota. Sections 216B.37-216B.47 deal with the creation, application, and acquisition of electric service territories for Minnesota electric utilities. Section 216B.39 laid out a process for the MPUC to assign

exclusive service territories to electric utilities. This process was completed in 1975. Section 216B.40 authorizes and obligates electric utilities to serve all present and future customers within their service territories. Section 216B.41 provides that the subsequent annexation, incorporation, or consolidation of land in a utility's service territory does not impair the right and obligation of that utility to continue to serve all present and future customers that locate within the service territory, unless a municipal utility elects to purchase the service territory under Section 216B.

**1. Chapter 216B Provides Two Alternative Procedures to Annex Service Territory: Section 216B.44 or Section 216B.47.**

Chapter 216B provides “two alternative statutory procedures by which an expanding municipality who owns and operates a utility may similarly expand or extend its provision of utility services to annexed territory” either: (1) Section 216B.44 (damages determined by the MPUC) or (2) Section 216B.47 (damages determined by Court-appointed Commissioners and, ultimately, the Courts). City of Rochester v. People's Co-op. Power Ass'n, 483 N.W.2d 477, 479 (Minn. 1992). Here, the City chose the latter procedure.

Section 216B.44 provides that a municipal utility can purchase the facilities, customers and service territory rights of the electric utility which is serving areas within the city. If the parties are unable to agree on the terms of purchase, the MPUC makes that determination after consideration of “the original cost of the property, less depreciation, loss of revenue to the utility formerly serving the area, expenses resulting from integration of facilities, and other appropriate factors.”

Section 216B.47 provides that a municipality may also use eminent domain proceedings for the acquisition, “provided that the damages to be paid in eminent domain proceedings **must include** [1] the original cost of the property less depreciation, [2] loss of revenue to the utility, [3] expenses resulting from integration of facilities, **and** [4] other appropriate factors.” (Emphasis added). Instead of the MPUC, court-appointed commissioners (alternately a jury) consider the four factors to determine the damages to be paid the public utility.

Thus, the four factors for determining appropriate compensation for the acquisition of service territory in a judicial proceeding under Section 216B.47 are the same four factors which the MPUC must consider for an acquisition processed through the administrative agency under Section 216B.44. While a municipality may elect the forum in which to proceed with the service territory acquisition, administrative agency or the courts, the factors for determining compensation are identical.

Section 216B.66 sets forth the manner of construction of this law. That section states as follows:

Laws 1974, chapter 429 is complete in itself and other Minnesota Statutes are not to be construed as applicable to the supervision or regulation of public utilities by the commission. All acts and parts of acts in conflicts with Laws 1974, chapter 429 are repealed insofar as they pertain to the regulation of public utilities as defined herein.

Consistent with the requirements of Section 216B.66, therefore, Red River’s damages for the loss of Americana Estates must be based exclusively on the four factors enumerated

in Section 216B.47.<sup>24</sup> Significantly, a comparison of the value of the service territory before the acquisition to its value after the acquisition is **not** a statutory factor.

**2. The “Loss-of-Revenue” Factor Is Determined Pursuant to the “Net-Loss-of-Revenue Method” Not “Fair-Market-Value.”**

Most service territory acquisitions by municipal utilities have occurred before the MPUC under Section 216B.44. A substantial body of law has evolved over the past twenty years which has interpreted the four damages factors. See, e.g., People’s Cooperative Power Ass’n v. City of Rochester, 470 N.W.2d 525 (Minn. App. 1991); City of Rochester v. People’s Coop. Power Ass’n, 556 N.W.2d 611 (Minn. App. 1996); City of Grand Rapids v. Lake Country Power, 731 N.W.2d 866 (Minn. App. 2007); In re City of Buffalo, 2006 WL 1229596 (Minn. App. May 9, 2006); In re City of Buffalo, 2008 WL 2020491 (Minn. App. May 13, 2008); In re City of Redwood Falls, 756 N.W.2d 133 (Minn. App. 2008). In these instances the Court of Appeals affirmed the decision of the MPUC, interpreting the four statutory factors that appear in Section 216B.44.<sup>25</sup>

Although the City baldly asserts that “Past Precedent Rejected MPUC Damages in Condemnation Proceedings,” (AB 32), it fails to point **to a single case** where the MPUC’s damages calculation was rejected by a Minnesota Court. This omission is both striking and irremediable: there is no such case.

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<sup>24</sup>The City’s reliance on Iowa Electric Light & Power v. City of Fairmont, 67 N.W.2d 41, 45 (Minn. 1954), to stand for the proposition that “the Minnesota Supreme Court rejected the notion that utility property – more broadly personal property – were carved out of eminent domain proceedings” is misplaced as this ruling predates Chapter 216B by twenty years. (AB 23).

<sup>25</sup>The Minnesota Supreme Court denied review on all of these cases where review was sought.

Because the four factors the MPUC “shall consider” to determine damages under Section 216B.44 mirror those that “must be considered” under Section 216B.47, this body of law applies with equal force regardless of the municipality’s choice of forum. See Minn. Stat. § 645.44, subs. 15a, 16 (2010) (defining “[m]ust” and “[s]hall” as “mandatory”); see also Jane Resident v. Noot, 305 N.W.2d 311, 312 (Minn. App. 1981) (explaining it is appropriate to defer to an agency’s interpretation of a statute where the language is unclear or if the agency’s interpretation is long standing).

Section 216B.47 (and Section 216B.44) states that damages must include the (second) factor: loss of revenue to the utility. Over the last twenty years, the MPUC has developed a method known as the “net loss of revenue” to calculate the loss of revenue to the displaced utility in proceedings under Section 216B.44. This methodology focuses directly on the financial impact of the area being acquired. This was explained and approved by this Court in Grand Rapids PUC v. Lake Country Power, 731 N.W.2d 866 (Minn. App. 2007):

The “net-revenue-loss” formula was developed by the Commission in 1990, with several refinements and clarifications in subsequent cases. The formula (1) determined gross revenues for each year of the compensation period, which the Commission has set at ten years, to reflect the intermediate planning period of most utilities; (2) determines avoided costs that the utility would not longer be required to incur because it is no longer serving the areas (such costs would include the purchase of power to be sold within the area); (3) subtracts the avoided costs from gross revenues, which results in yearly net-revenue loss for each in the ten year compensation period; and (4) reduces net revenue losses to present value. Due to the uncertainty of future events, the lump-sum amount calculated under this method is often converted to a kilowatt-per-hour rate, or mill rate, and payment is made at this mill rate over the compensation.

This Court went on to find that the “net-revenues-loss” formula is an appropriate method for the MPUC to calculate a displaced utility’s lost revenues under Section 216B.44. “On this record, the Commission’s decision is supported by the record and is not arbitrary and capricious.” Id. at 872. The net loss of revenue formula was also reviewed and approved more recently in City of Redwood, 756 N.W.2d at 139.

Accordingly, this “net-revenue-loss” formula is precisely how Red River’s expert calculated the “loss of revenue” factor. (Tr. 200).

**C. Chapter 216B Is Not a Traditional Eminent-Domain Proceeding.**

The City argues that “[t]he Minnesota Supreme Court already determined that the MPUC method of determining compensation did not control in eminent domain proceedings,” presumably referring to City of Rochester, 483 N.W.2d at 480, which is cited several pages before this bold assertion. (AB 32, 34).

Quite to the contrary, the Minnesota Supreme Court explicitly recognized in City of Rochester that, consistent with the statutory language, “the damages to be paid the displaced utility are determined by court-appointed commissioners and **are to reflect the same factors which the MPUC would have considered had the acquisition occurred by operation of sections 216B.41 and 216B.47.**” 483 N.W.2d at 479 (emphasis added). The District Court recognized the import of this precise sentence, as it emphasized it below. (See AD 20). As explained above, the four factors enumerated in Section 216B.44 are **identical** to those under Section 216B.47. See City of Rochester, 483 N.W.2d at 480 (rejecting argument that uniform awards would be impossible unless the doctrine of primary jurisdiction applied because “the eminent domain statute, Minn. Stat.

§ 216B.47, **requires consideration of the same specifically enumerated factors in determining the compensation award** as those utilized in proceedings before the MPUC pursuant to Minn. Stat. § 216B.44” (emphasis added)).<sup>26</sup>

Contrary to the City’s assertion, City of Rochester involved whether the MPUC had primary jurisdiction and **that** was the question the Supreme Court answered in the negative. See 483 N.W.2d at 481 (concluding “the doctrine of primary jurisdiction in inapplicable to deprive the municipality of that right of election by requiring it to adopt one procedure rather than the other. That conclusion is mandated where the sole issue presented is one of ‘just compensation’ –**an issue guided in either forum by identical considerations** and not implicating the unique administrative experience of the agency” (emphasis added)). **Not** – as the City claims here – that the measure of damages should be calculated differently depending on the path to condemnation the municipality chose (*i.e.* .44 versus .47 of Minn. Stat. Chapter 216B). Accordingly, a proper reading of Rochester supports Red River’s position, not the City’s.

When proceeding in District Court, eminent domain is the legal vehicle by which the City acquires a portion of the Cooperative’s service territory. See City of Shakopee v. Minn. Valley Electric Coop., 303 N.W.2d 58, 60 (Minn. 1981). But the compensation or damages which the City must pay for this acquisition are not the standard eminent

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<sup>26</sup> Thus, the City misconstrues the holding of this case yet again when it asserts: “The Minnesota Supreme Court was not troubled by the possibility of having different results in different forums. It specifically rejected the MPUC’s argument that there must be uniform results.” (AB 34). Rather, the Minnesota Supreme Court recognized that uniformity was impossible “by the obvious fact that valuations, with their many variables, are necessarily considered on a case-by-case basis” and was comforted that uniform factors would govern the inquiry in either forum. 483 N.W.2d at 480.

domain damages based on the before the taking and after the taking values of the Cooperative business. This is not the conventional taking of land by the State or a city to build or widen a road. Land, as such, is not even involved. What is being acquired or taken here is part of an electric utility's service area, and the damages provided by the statute are specific and unique to this kind of acquisition. The before-and-after-the-taking valuations are not mentioned in Section 216B.47. Obviously, if the Legislature had intended this measure of damage to be considered, it would have provided for that measure as an additional factor in the statute. Cf. Minn. Stat. §§ 117.135, .226, .232 (2010) (making explicit reference to "fair-market-value"). The City is trying to impose a requirement that the Legislature did not provide.

**D. Constitutional "Just -Compensation" Principles Do Not Impose a Limit of "Fair-Market-Value" on the Compensation that the City Must Pay Red River.**

Red River does not disagree with the City's premise that the Constitution is the supreme law of the land and that it requires "just compensation" for governmental takings of private property. Further, Red River does not dispute that our Courts have endorsed "fair-market-value" as a measure of "just compensation" in traditional eminent-domain proceedings. However, the City's suggestion that "just compensation" can **only** mean "fair market value" is directly contrary to the statutory language at issue here. Tellingly, none of the cases cited by the City in support of its "fair-market-value" argument involves annexing an electrical-service territory pursuant to Minnesota Chapter 216B.

The City (and the amici) confuses a floor with a ceiling in arguing that it is somehow unconstitutional to require them to pay “more” than fair market value. The City’s argument fails because legislatures can, **and do**, require that a condemning authority pay more than the constitutionally required minimum. Indeed, the Minnesota Legislature has provided:

[A]ll condemning authorities, including home rule charter cities and all other political subdivisions of the state, must exercise the power of eminent domain in accordance with the provisions of [chapter 117]. Including all procedures, definitions, remedies, and limitations. **Additional 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.**

Minn. Stat. § 117.012, subd. 1 (2010) (emphasis added). Therefore, so long as it does not infringe on Red River’s rights as owner, the Legislature may provide additional remedies to compensate it in the event of a taking. Chapter 216B fits squarely in this category of expanding remedies as it enumerates certain categories of damages that Red River must be paid.

The United States Supreme Court, when construing the Just-Compensation Clause of our federal Constitution, has rejected the notion that “just compensation” and “fair market value” are necessarily interchangeable concepts:

In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property “in as good a position pecuniarily as if his property had not been taken.” Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 708 (1934).... Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole, the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property.... **[T]his Court has refused to designate market value as the sole measure of just**

**compensation. For there are situations where this standard is inappropriate....** The instances in which market value is too difficult to ascertain generally involve property of a type so infrequently traded that we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property. This might be the case, for example, with respect to public facilities such as roads or sewers.

United States v. 564.54 Acres of Land, 441 U.S. 506, 510-13, 99 S.Ct. 1854, 1857-58 (1979) (internal citation and footnotes omitted, emphasis added); United States v. Fuller, 409 U.S. 488, 490, 93 S.Ct. 801, 803 (1973) (“Our prior decisions have variously defined the ‘just compensation’ that the Fifth Amendment requires to be made when the Government exercises its power of eminent domain. The owner is entitled to fair market value, but that term is not an absolute standard nor an exclusive measure of valuation.” (Quotation and internal citation omitted)).

Thus, as recognized by the United States Supreme Court, fair market value only equates to “just compensation” for an owner of condemned property if there is a market of willing buyers and sellers. This is such a case where “fair market value” does not result in “just compensation” for Red River as there is no market for small pieces of electric service territory in any meaningful sense. Here, there is effectively only one seller (the cooperative) and one buyer (the municipality). In this instance, Red River has utility infrastructure in place to service Americana Estates. Likewise, the City also has surrounding utility infrastructure, which could service the same area. No third party could bring the same operating synergies to the table. Accordingly, fair market value is not a concept adaptable to service territory acquisitions. The only practical means of determining damages is to assess the direct economic impact on the Cooperative of being

forced to sell part of its service territory. The four statutory factors are geared for that assessment.

At the hearing before the Commissioners, Red River's expert testified as to the difficulty in applying an open market concept to calculating the Cooperative's damages for a service territory acquisition:

Yes, I think it almost inherently is that. If it [Americana Estates] were sold on the open market, it's a little hard to imagine, but a utility would have to come in and build facilities to serve this little area, and they would incur some sort of management costs and administrative fees. They would have to contract for or locate a work crew. **It's hard to even imagine that kind of thing even taking place. I don't – I don't know how you could sell an area like this on the open market.**

(Comm'r Tr. 227 (emphasis added)).<sup>27</sup>

Our Legislature has recognized that additional compensation may be required to compensate owners over and above fair-market-value damages, as it recently (in 2006) enacted several amendments to Minnesota Chapter 117, in response to increasing public concerns over the use of eminent domain exacerbated by the Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469 (2005). These amendments require condemning authorities to pay **more than fair-market-value**, which is wholly inconsistent with the City's arguments to this Court. See, e.g., Minn. Stat. § 117.031 (obligating condemning authority to pay an owner's reasonable attorney's fees,

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<sup>27</sup> Comm'r Tr. \_\_\_ refers to the Transcript of the Hearing before the Court-Appointed Commissioners in October of 2008. This page of the Transcript is attached as Exhibit A to the Affidavit of Harold LeVander, Jr. in Support of Red River's Reply to City's Memorandum of Law in Support of its Motion for Summary Judgment or, in the Alternative, Motion in Limine dated March 5, 2010. The City is referring to this passage when it claims (misleadingly) that Red River's expert "testified that his 'seller's approach' to damages was 'inherently higher' than market value." (AB 9).

appraiser's fees, expert witness fees, and other costs and expenses of litigation); Minn. Stat. § 117.186 (requiring condemning authority pay additional compensation to the owner for the loss of the "going concern value"); Minn. Stat. § 117.187 (requiring condemning authority to pay relocation compensation in lieu of fair-market-value for condemned property if the value of the property is insufficient to purchase a comparable property). These legislative expansions of what must be paid to constitute "just compensation" flies directly in the face of the City's claim that it cannot be asked to pay more than "fair-market-value" for Red River's service territory.

**E. Principles of Statutory Interpretation.**

The City's argument that fair-market-value damages govern the inquiry under Section 216B.47 also ignores canons of statutory interpretation. When construing statutes, this Court attempts "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). In ascertaining the Legislature's intent, this Court is to consider, *inter alia*, the object to be obtained, the consequences of a particular interpretation, and any relevant administrative interpretations. *Id.* Further, this Court "construe[s] statutes to [a]ffect their essential purpose but will not disregard a statute's clear language to pursue the spirit of the law." *Lee*, 741 N.W.2d at 123. "If the meaning of a statute is unambiguous, we interpret the statute's text according to its plain language. If a statute is unambiguous, we apply other canons of construction to discern the legislature's intent." *Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294, 200 (Minn. 2010) (quotations and citation omitted). "A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence

should be deemed superfluous, void, or insignificant.” Am. Family Ins. Grp. v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000).

As set forth above, the two alternative statutory procedures available to a municipality acquiring the service territory of an electrical cooperative are set forth in Minn. Stat. §§ 216B.44 and .47. Although the City takes care to not make this point explicit, to accept the City’s argument, the Court must conclude that the Legislature intended an entirely different damage calculation based on whether the municipality chose to condemn the service territory vis-à-vis Section 216B.44 (damages determined by the MPUC) or 216B.47 (damages determined by court-appointed commissioners and a jury). Moreover, the City asks for an entirely different framework even though both statutory provisions require consideration of the same four factors. This assertion violates several presumptions one must employ when ascertaining legislative intent, specifically that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable” and “the legislature intends the entire statute to be effective and certain.” Minn. Stat. § 645.17(1), (2) (2010); see also Minn. Stat. § 645.16. When identical words appear in two companion statutes, they must mean the same thing. The City’s argument would turn that principle on its head, as it suggests that two totally different levels of compensation can be arrived at under companion statutes with identical language. That result is untenable.<sup>28</sup>

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<sup>28</sup> Although the amici argue that a parade of horrors will result if municipalities are required to pay “more” than fair market value when annexing electrical-service territories, such arguments should be directed to the Legislature, not the Courts. See, e.g., Do v. Am. Fam. Mut. Ins., 779 N.W.2d 853, 860 (Minn. 2010) (finding, in another

As a comparison of the expert reports of Red River and the City reveal, fair-market-value damages (calculated by the City) are far different than damages based on the four statutory factors (calculated by Red River), both in terms of the concepts and the ultimate results. (Compare Exs. 8-10 with 67-69, 73). Moreover, as noted above, it is persuasive that the 216B.44 decisions expounding upon damage calculations have been affirmed by this Court.

The measure of damages is governed by the plain language of the statute, which requires consideration of four factors, not a determination of “fair-market-value.” The Legislature would not have set forth these requirements if, as the City claimed, it desired the “traditional measure of eminent-domain damages” apply.

**F. “Other Appropriate Factors.”**

The City appears to argue that, even if Red River is correct that “fair-market-value” is not the correct measure, that it should have been included as an “other appropriate factors.” Thus, the City would construe this fourth factor as a limitation on any damages based on the previous three factors. Again, Minn. Stat. § 216B.47 states that Red River’s damages “**must include**” (1) “the original cost of the property less depreciation”; (2) “loss of revenue to the utility”; (3) “expenses resulting from integration of facilities”; (4) “**and** other appropriate factors.” Minn. Stat. § 216B.47 (emphasis added). Because “must” is “mandatory” language, all four factors need to be considered. Minn. Stat. § 645.44, subd. 15a.

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context, that “[u]ltimately, the question of a potential windfall to a plaintiff is one for the legislature and not for the courts”).

Any sensible reading of the statute indicates that “other appropriate factors” are intended to **expand** the acquired utility’s damages to include items that would not neatly fit in the first three factors. The City’s contrary position contradicts fundamental statutory-construction principles. “Every law shall be construed, if possible, to give effect to all its provisions.” Minn. Stat. § 645.16. And, it is presumed “the legislature intends the entire statute to be effective and certain.” Minn. Stat. § 645.17(2); see also Minn. Stat. § 645.08(3) (instructing that “general words are construed to be restricted in their meaning by preceding particular words”). None of the factors can reasonably be construed as a limitation on damages. Further, in People’s Cooperative Power v. City of Rochester, 470 N.W.2d 525, 530 (Minn. App. 1991), this Court interpreted the four damages to be cumulative, and viewed the damages from the Cooperative’s perspective.

Also, the City conveniently fails to acknowledge that **it stipulated at trial that the damages for “other appropriate factors” were \$0**. Therefore, the City cannot argue here that “other appropriate factors” would include the fair-market-value damages as that is wholly inconsistent with its stipulation at trial. See Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, 715 N.W.2d 458, 481 (Minn. App. 2006) (noting “when a party fails to object to evidence at trial, that party has generally waived any objections”), review denied (Minn. Aug. 23, 2006); Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts only review issues presented to and considered by the district court); Minn. Mut. Fire & Cas. Co. v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990) (same).

Because the District Court correctly interpreted the statute to conclude that fair-market-value damages are not an appropriate measure of damages under Minn. Stat. § 216B.47, the City's various derivative challenges lack merit: the District Court acted within its discretion when it excluded the City's fair-market-value evidence and appropriately rejected the City's proposed jury instructions that related to fair-market-value.

### **III. THE DISTRICT COURT PROPERLY EXCLUDED THE CITY'S UNTIMELY EXPERT REPORT WHICH SOUGHT A CREDIT FOR REPLACEMENT OF FACILITIES.**

The City challenges the exclusion of its expert's New Report, claiming that this meant "[t]he jury was not allowed to hear" that the City "anticipated" it would need to replace older facilities during the ten-year loss-of-revenue period. (AB 39). This argument fails on several levels.

First, there was no evidence at trial that any of the facilities at issue were not in working order or would need to be replaced within the loss-of-revenue period. Indeed, the City's own witness was impeached on cross-examination as to the age of the City's own facilities and the City's (lack of) plans to replace the same. (Tr. 350-51; 356-57 ("Q [counsel for Red River]: Here's another photograph of a pole in the city of Moorhead that was taken yesterday? Do you see the date on that one? A [City Witness, General Manager of Moorhead Public Service]: I see the 1970 on that one."; "Q [counsel]: You don't, however, upgrade your plant every 16 years, do you? A [City Witness]: If it needs it, we do. Q: Have you done that?.... A: No, not every 16 years.")). Conversely, there **was** evidence that "if the Cooperative had continued to run the service area, they would

have continued to run it with the same poles, wires and transformers that they had.” (AD 23). As the City recognizes, it is axiomatic that “[d]amages that are speculative, remote, or conjectural ‘cannot be recovered.’” (AB at 41 (quoting Jackson v. Reiling, 249 N.W.2d 896, 897 (Minn. 1997))). These claimed damages are entirely speculative, as they represent a cost that the City might incur in the future if, and only if, it decides to upgrade Red River’s working facilities. In fact, the City has poles in use on its system that are at least 40 years old.

Second, the City misleadingly suggests that its expert’s “replacement costs” figure of \$78,957 represents a figure calculated by Red River’s expert. (AB at 39-40) That is not true. Red River does not keep records of the original cost of its facilities installed in particular areas on its system. Thus to calculate the original cost of the facilities in Americana Estates less depreciation, (Factor One), Red River’s expert had to use the current replacement cost of all of the facility. Then by use of a utility cost index, he converted the replacement cost of the facilities to the original cost of the facilities going back to 1968. The \$78,957 figure simply represents the current replacement costs of the facilities in Americana Estates that were over 35 years old, from which Mr. Eicher then determined the original cost of those particular facilities. At no time, did he testify that any of the facilities in Americana Estates, regardless of age, needed to be replaced.

Third, the City stipulated to the amount of damages as to the first factor (“original cost less depreciation”), which accounts for the age of the facilities. Again, the City is bound by its stipulations at trial and cannot make conflicting arguments to this Court. See Lake Superior Ctr. Auth., 715 N.W.2d at 481; Thiele, 425 N.W.2d at 582; Retrum,

456 N.W.2d at 723. Additionally, it is their expert who engaged in speculation when he guessed at the amount of replacements that might be made in the future.

As aptly reasoned by the District Court:

[I]f the Cooperative had actually made (more) capital improvements leading up to the annexation, the City would have had to pay the Cooperative more for the facilities under the first damage factor (original cost minus depreciation). It does not seem logical that while the Cooperative would have received a credit for improvements had they been made, that they should now be *debited* for not making them. The correct accounting regarding any declined capital improvements would leave a zero on the balance sheet. Not making improvements saved the City from paying more for the facilities, but they should not receive an extra bonus by way of a deduction from revenue for deferred capital investments for any forgone improvements. This would lead to a type of doubling of the benefits of that avoided expense to the City. If, as it claims, the City has purchased a “clunker,” it cannot then expect the Cooperative to pay to upgrade it to a Cadillac.

The Court did not err in excluding untimely evidence regarding the City’s decision to replace, or improve, the facilities which the Cooperative may or may not have undertaken had it continued to service the area.

(AD 23). Red River cannot put it better than the District Court; the District Court acted well within its discretion when it excluded this “evidence.”

Last, the New Report was offered well beyond the deadline imposed by the Scheduling Order, meaning the District Court did not abuse its discretion in excluding it. See In re Baycol Products Litig., 596 F.3d 884, 888 (8th Cir. 2010) (determining prejudice would result to the opposing party if a supplemental expert report was accepted after it had prepared for a dispositive hearing); Wegener v. Johnson, 527 F.3d 687, 690 (8th Cir. 2008) (upholding exclusion of untimely supplemental expert report produced two-and-a-half weeks before trial); Abel v. Lumber One Avon, 2005 WL 3289440 at \*5

(Minn. App. Dec. 6, 2005) (upholding district court’s ruling to limit expert testimony to timely-disclosed issues). Although the City now argues it had “a duty” to supplement its expert report, and was prejudiced by the exclusion of the same, it is noteworthy that in March of 2010, six months prior to the New Report, the City took the contrary position that it was “simply incorrect” to suggest that its expert “used older and outdated data in his [timely-submitted] expert report.”<sup>29</sup>

#### **IV. SUFFICIENT EVIDENCE SUPPORTED THE JURY’S SPECIAL VERDICT.**

Last, the City argues that the jury’s special verdict was not supported by the evidence. (AB 46-48). The City’s argument lacks merit.

##### **A. Standard of Review.**

Last, the City claims that the jury’s verdict is not supported by the evidence. A reviewing court examines a jury’s special verdict through an extremely deferential lens:

If the answers to the questions submitted to the jury [on a special-verdict form] can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, the jury verdict must be sustained. An answer to a special verdict question should be set aside only if it is perverse and palpably contrary to the evidence, or where the evidence is so clear as to leave no room for difference among reasonable persons. Review is particularly limited when the jury finding turns largely upon an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the jury and the [district] court and the latter has approved the findings made.

Kelly v. City of Minneapolis, 598 N.W.2d 657, 662-63 (Minn. 1999) (quotations and citations omitted); see also Dunn v. Nat’l Beverage Corp., 745 N.W.2d 549, 555 (Minn.

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<sup>29</sup> See City’s Response to Red River’s Motion for Partial Summary Judgment or, in the Alternative, Motion in Limine dated March 4, 2010 at 16.

2008) (“If the answers to special verdict questions can be reconciled on *any* theory, the verdict will not be disturbed.” (quotation and citation omitted)); Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 734 (Minn. 1997) (“[A] jury’s answer to a special verdict form can be set aside only if no reasonable mind could find as did the jury.”). And, a reviewing court should not set aside a jury verdict on damages “unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” Raze v. Mueller, 587 N.W.2d 645, 648 (Minn. 1999) (quotation omitted).

**B. The Jury’s Verdict Is Sufficiently Supported by the Evidence.**

The City argues that: (1) “in terms of purchased power expense” the testimony of Red River’s expert conflicted with Red River’s own documentation and (2) operations and maintenance expenses were overstated.

Regarding the first argument, the City is misleading the Court.

The exhibit to which the City refers (Ex. 8) shows the purchased power expenses paid by all of Red River’s customers on its entire utility system. As described earlier in the Battle of Experts part of this Brief, Red River’s expert calculated the avoided purchased power costs solely for the 65 customers in Americana Estates being acquired by the City. The jury could certainly find the testimony of Red River’s expert, which focused specifically on the purchased power expenses for Americana Estates, more credible than the City’s expert, which relied on averaging information for the entire Red River system.

The City’s second argument fares no better. The City’s utility manager testified that the City spent \$13,000 on tree trimming in Americana Estates because some trees

had grown into the lines. Red River's CEO testified that any tree trimming would be minimal and that no customers had complained about service outages. Furthermore, on cross examination, the City's witness admitted that trees had grown into the City's lines in several places and that the City had not trimmed trees on its system in those areas. (T352-56). The jury, when weighing this evidence, could reasonably conclude that the City's tree trimming costs in Americana Estates was excessive and that Mr. Eicher's determination of \$3,465 for avoided operations and maintenance expense per year, which would include periodic tree trimming, was appropriate.

Further, the jury's special verdict accepted the damages amount advocated by Red River's expert – **to the dollar**. Therefore, it is illogical to suggest that the verdict lacked evidentiary support. Rather, the jury verdict simply credited Red River's expert's opinion. Thus, viewed in the light most favorable to the jury's damages award, the jury's special verdict is wholly consistent with the evidence presented at trial and should not be disturbed on appeal.

## **V. THE AMICI'S POLICY ARGUMENTS ARE GROSSLY OVERSTATED.**

The arguments in the two amici briefs submitted in this case, Minnesota Municipal Utilities Association *et al.* and the Minnesota League of Cities, are unpersuasive.

### **A. Arguments of Minnesota Municipal Utilities Association.**

The amici parties' main contention is that not using fair market value as the measure of damages in service territory cases will undermine the ability of municipal utilities to expand with city borders. (MMU 4-5). History rejects that contention. Most municipal utility acquisitions of electric cooperative service territory have occurred under

Minn. Stat. § 216B.44, where the MPUC awards compensation based on the identical four factors that appear in Minn. Stat. § 216B.47. Almost twenty years ago, the Commission developed a methodology for determining compensation under the loss of revenue factor in the statute, known as the “net-loss-of-revenue” methodology. The Commission has never considered determining compensation using the concept of fair-market-value, nor have the municipal utilities argued that it should be.

The Commission has applied the net loss of revenue methodology, with occasional refinements or adjustments, in all of the cases that it has decided. Furthermore, the Commission’s decisions on this factor have been approved in several appellate cases, as noted supra. City of Rochester, 556 N.W.2d 611; City of Grand Rapids, 731 N.W.2d 866; In re City of Buffalo, 2006 WL 1229596; In re City of Buffalo, 2008 WL 2020491; In re City of Redwood Falls, 756 N.W.2d 133.

Significantly, all of the service territory acquisitions initiated by municipal utilities have been completed, and the appropriate compensation was paid to the electric cooperative. Thus, the actions of municipal utilities over the last twenty years refute the amici parties’ contention municipal utilities will not grow with the expanded borders of their cities, if fair market value is not used as the measure of damages in service territory acquisitions proceedings.

Amici parties criticize the electric cooperatives for attempting to maximize the compensation that it receives from the forced loss of their service territories. (MMU 12-13). The efforts of the electric cooperatives in this regard are no different from those of thousands of other land owners across the state, who fight for the maximum amount

allowed by law when their properties are condemned by the State or other political subdivisions. Amici parties cite one sentence from one PUC staff report in 2002 that Peoples Cooperative wanted to make things difficult, so that the City of Rochester might dismiss its acquisition proceeding. Amici parties fail to include the part of the PUC staff report which states that “the strategy was unsuccessful.” (MMUX 4). The City of Rochester acquired the service territory anyway.

Amici parties cite a 2001 resolution of the board of directors of Lake Country Power in which an attempt to assert a claim for compensation for the generation and transmission cooperative, as well as Lake Country Power’s claim, was being considered. (MMU 12). It should be observed that no such claim was ever asserted in that proceeding involving Grand Rapids PUC.

Amici parties assert that the rights of municipal utilities to expand with their city borders was part of a legislative compromise that resulted in the Minnesota Public Utilities Act of 1974. (MMU 14). It was, and that right is preserved in both Sections 216B.44 and 216B.47. That compromise also specified the use of four specific factors in both statutes for determining the compensation to be paid when the incumbent utility’s service territory was acquired. The Minnesota Municipal Utilities Association and its legislative representatives were well aware in 1974 that fair-market-value was not a statutory factor for determining compensation.

The fact is that the areas annexed to cities, which municipal utilities want to acquire, are always the most lucrative parts of the electric cooperative’s service territory. A cooperative invests in facilities to serve sparse, rural areas. Once these areas are

developed with homes, businesses and schools served by the cooperative, then they become desirable targets for acquisition by the municipal utility. The Legislature intended in that event that the remaining cooperative members be adequately compensated for the loss of revenue from valuable parts of their service territories so that they do not suffer economically as a result. The four statutory factors are geared precisely to accomplish that end.

**B. Arguments of League of Minnesota Cities.**

The Amicus League's contentions are grossly exaggerated. It argues that this case is important to all 854 Minnesota cities, "because their eminent-domain authority is at stake." (LMC 4). No, it isn't. They retain their full eminent domain authority. This case has nothing to do with the damages that cities have to pay when they condemn private property for a road, for example. The city will pay the fair-market-value of the property taken in that instance, subject to enhancements in value provided in Minn. Stat. §§ 117.031; 117.186; and 117.187. The four specific statutory factors for damages determined under Section 216B.47 are unique to electric service territory cases and cannot be extrapolated into the damages awarded in standard eminent domain proceedings.

Amicus League worries that cities will be forced to abandon their general policy of extending municipal services to areas annexed into municipal borders, resulting in confusion and inconsistency for citizens served by different utility providers in terms of different rates, different customer services, and different renewable energy programs. (LMC 6). Numerous cities in Minnesota, however, have at least two electric utilities

providing service to their residents without the results that Amicus League fears: Burnsville, Apple Valley, Inver Grove Heights, Hastings, Coon Rapids, Blaine, Anoka, Elk River, Maple Grove, St. Michael, Plymouth, and St. Cloud to name a few. Furthermore, both the municipal utility and the electric cooperative provide service to the residents of Chaska, New Prague, Arlington, Le Sueur, Buffalo, Delano, Willmar, Alexandria, Halstad, and Roseau, to name a few, without the concerns raised by Amicus League.

Finally, Amicus League claims that excluding fair-market-value from consideration under Section 216B.47 “will violate constitutional principal of separate governmental power.” (LMC 7-8). Amicus League ignores the fact that the Legislature decided in 1974 what the public policy should be regarding compensation to be paid for the acquisition of electric service territory. That policy was embedded in Section 216B.47, where the Legislature provided “that damages to be paid in eminent domain proceedings must include the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities, and other appropriate factors...” Fair-market-value is not mentioned. The legislature obviously decided that fair market value was not a factor to be considered in the determination of damages.

The trial court performed the traditional role of statutory interpretation in this case that the judiciary plays in our system of government. It considered the purpose and language of the statute and arrived at a reasonable interpretation of the term, loss of revenue. The trial court applied the common sense interpretation that if the Legislature

had meant that the well-known concept of fair-market-value should be used to determine damages under the statute, it would have said so.

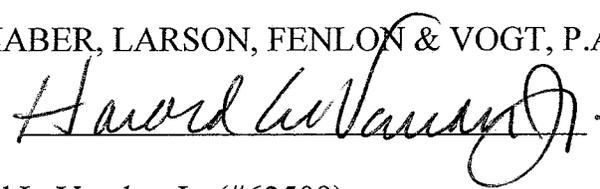
Amicus League and Amici Minnesota Municipal Utilities Association, et al., have no answer to a very simple question regarding statutory interpretation. Would the Legislature have intended to allow totally different compensation results, depending on whether a service territory acquisition was pursued under Section 216B.44 or 216B.47, when it used the same four factors for awarding damages in both statutes? That question cannot reasonably be answered in the affirmative.

### CONCLUSION

For the foregoing reasons, and those to be advanced at oral argument, Red River respectfully requests that this Court affirm the district court. The Minnesota Rural Electric Association, a trade association of all electric cooperatives in Minnesota, concurs in Red River's Brief.

Date: July 22, 2011.

FELHABER, LARSON, FENLON & VOGT, P.A.

By: 

Harold LeVander, Jr. (#62509)  
444 Cedar Street, Suite 2100  
St. Paul, MN 55101-2136  
(651) 222-6321

Sara Gullickson McGrane (#233213)  
Jessica M. Marsh (#388353)  
220 South Sixth Street, Suite 2200  
Minneapolis, MN 55402  
(612) 339-6321  
*Attorneys for Respondent*  
*Red River Valley Cooperative Power Association*

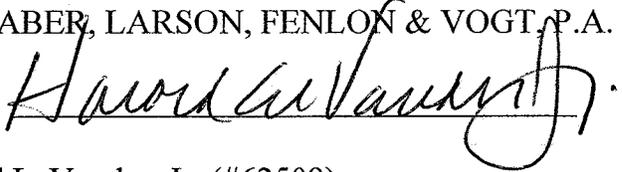
**CERTIFICATE OF COMPLIANCE**

I hereby certify that Respondent's Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3. The length of this brief is 13,987 words. This brief complies with the typeface requirement of the above rule (13 point, Times New Roman). This brief was prepared using Microsoft Word 2003.

Date: July 22, 2011.

FELHABER, LARSON, FENLON & VOGT, P.A.

By:

  
Harold LeVander, Jr. (#62509)  
444 Cedar Street, Suite 2100  
St. Paul, MN 55101-2136  
(651) 222-6321

Sara Gullickson McGrane (#233213)  
Jessica M. Marsh (#388353)  
220 South Sixth Street, Suite 2200  
Minneapolis, MN 55402  
(612) 339-6321  
*Attorneys for Respondent*  
*Red River Valley Cooperative Power Association*