

NO. A11-705

State of Minnesota
In Supreme Court

City of Moorhead,

Appellant,

vs.

Red River Valley Cooperative Power Association,

Respondent.

BRIEF OF AMICI CURIAE

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INTRODUCTION

This Brief of Amici Curiae is respectfully submitted, pursuant to Rule 129 and 132 of the Minnesota Rules of Civil Appellate Procedure, by: Otter Tail Power Company, a Minnesota corporation ("Otter Tail"); Minnesota Power, a Minnesota corporation ("Minnesota Power"); Interstate Power and Light Company, an Iowa corporation ("IPL"); Northern States Power Company, a Minnesota corporation ("NSP"); Great River Energy, a not-for-profit Minnesota generation and transmission electric cooperative corporation ("GRE"); and the Minnesota Rural Electric Association, a not-for-profit trade association representing all electric cooperative generation/transmission and distribution utilities operating in Minnesota ("MREA") (collectively referred to as the "Service Providers").¹ The Service Providers submit this Brief to support the position of the Respondent, Red River Valley Cooperative Power Association and the decisions of the Clay County District Court and the Minnesota Court of Appeals.

INTEREST OF THE SERVICE PROVIDERS

The Service Providers and their customers have a substantial interest in how damages are determined in relation to municipal acquisitions and the resulting displacement of electric utilities from portions of their assigned service areas. Otter Tail, Minnesota Power, IPL, NSP, and MREA members have been, and are, subject to similar acquisitions and displacements under Minn. Stat. § 216B.47 (the "Statute"). Acquisitions

¹ Red River Valley Cooperative Power Association and its counsel did not prepare any portion of this Brief. No person other than Otter Tail Power Company, Minnesota Power, Interstate Power and Light Company, Northern States Power Company, Great River Energy, and the Minnesota Rural Electric Association have made a monetary contribution to the preparation or submission of this Brief.

and displacement of electric utilities also reduce the level of service provided by GRE.

The Court of Appeals held that the calculation of damages is limited to the four compensation factors listed in the Statute and that fair market value ("FMV") is not the proper measure of damages under the Statute. The Court of Appeals further held that use of the FMV standard: (i) would be inconsistent with those four factors; and (ii) would lead to the use of inconsistent standards for determining the payment to the displaced utility, depending on whether damages were determined by a district court (under the Statute), or determined by the Minnesota Public Utilities Commission ("MPUC") (under Minn. Stat. § 216B.44).

As the Court of Appeals recognized, applying the FMV standard would substantially reduce the damages paid to the displaced utilities when municipalities take by eminent domain under the Statute.² The damages would be substantially reduced because the FMV standard does not appropriately apply the Statute, which requires that the "damages paid ... must include" the four factors. In effect, using the FMV standard would dilute or subordinate the four compensation factors by treating them as merely considerations of a buyer and seller, rather than meeting the requirement that these factors be included in the damages paid. Reducing the damages paid to displaced electric utilities would not reflect the costs imposed on the displaced utility and would cause substantial harm to the Service Providers and their remaining customers.

² *City of Moorhead vs. Red River Valley Cooperative Power Association* (January 30, 2012) Slip Op. at 16.

ARGUMENT

The Court of Appeals appropriately determined that the four factors identified in the Statute must be included in the damages calculation, and that the FMV standard is not the proper measure of damages. The Legislature provided for a different measure of damages in the Statute and a corresponding measure of compensation in Minn. Stat. § 216B.44 because the taking of a displaced electric utility's exclusive service area is unlike a typical condemnation in several fundamental ways.

An acquisition under the Statute (or Minn. Stat. § 216B.44) displaces a utility from a part of its exclusive service area, an area for which it had the obligation to provide service and incurs costs to provide service. Because of long term time lines for investments and planning, significant costs are often incurred before customers require service, and many of the costs of providing service are not reduced when portions of a service area are acquired by municipal utilities. As a result, the per customer costs of service for the displaced utility's remaining customers increase. In addition, the displaced utility and the municipal utility are providing essentially the same service to customers, unlike a typical municipal condemnation in which the municipality is providing a purely governmental service.

To prevent harm to displaced utilities and their remaining customers, the Legislature adopted the four factors that are intended to place displaced utilities and their remaining customers in the same cost and financial position as prior to the acquisition. That rationale was applied by the MPUC in developing the net revenue loss approach, which the District Court and the Court of Appeals found to be persuasive and appropriate

for use in this case.

Applying the four compensation factors adopted by the Legislature has the effect of increasing the damages or compensation paid to utilities displaced by municipal acquisitions as compared to the FMV standard. That increase is needed to prevent the substantial harm to the remaining customers of the displaced utilities that would result from the municipal acquisition under a FMV standard (which would lead to substantially lower payment levels) as the four factors compensate for both loss of the service territory and investments made to provide service.³ If the damages paid to the displaced utility are reduced, the displaced utility and its remaining customers would be required to absorb the increase in the net cost per remaining customer. The result would be a cost shift to the remaining customers of the displaced utility that is contrary to the utility regulatory scheme in Minnesota Statutes Chapter 216B.

The damages and compensation provided under the Statute and Minn. Stat. § 216B.44 were deliberately adopted by the Legislature, and neither violate any rights of municipal utilities, nor raise any constitutional implications. Municipal utilities are not required to provide service in annexed areas, but the Legislature allowed municipal utilities to decide whether to acquire the exclusive service territories of utilities. The Legislature further allowed municipal utilities to choose whether to use eminent domain proceedings under the Statute or a proceeding for the acquisition of utility property

³ *Id.* at 16.

before the MPUC (under Minn. Stat. § 216B.44).⁴ However, the Legislature provided the same measure of damages or compensation to be paid to the displaced utilities and further provided, under the Statute, that “damages paid ... must include” the four factors.

Permitting use of the FMV standard under the Statute would also cause inconsistent levels of payments to displaced utilities based on whether the payment was determined by a district court under the Statute, or by the MPUC in an acquisition. Such an inconsistency would be contrary to the terms of the Statute and the intent of the Legislature, and would not achieve the purpose of the Statute or Minn. Stat. § 216B.44.

A. The Legislature purposefully adopted a different standard to apply to municipal acquisitions of service territory.

The Legislature granted to municipal utilities the right to acquire the service territory of existing electric utilities: (i) in a judicial condemnation proceeding for utility property in an annexed area under the Statute; (ii) in a proceeding before the MPUC for the acquisition of utility property in an annexed area under Minn. Stat. § 216B.44; or (iii) in a proceeding before the MPUC for the acquisition of utility property within municipal boundaries under “license, permit, right, or franchise” under Minn. Stat. § 216B.45.⁵ However, to protect displaced utilities and their remaining customers, the Legislature provided that:

1. The amounts to be paid by municipal utilities to displaced utilities were to reflect the costs and revenue losses imposed on a displaced utility by the municipal utility’s acquisition; and

⁴ See *City of Rochester v. People’s Co-op. Power Ass’n, Inc.*, 483 N.W.2d 477, 479-480 (Minn. 1992).

⁵ *Id.*

2. The amounts to be paid by municipal utilities to displaced utilities were to be the same irrespective of the process used.

The Legislature clearly intended to adopt a standard for compensation of displaced utilities that reflected the unique circumstances of service territory acquisitions, and the Legislature adopted the same standard of compensation contained in the Statute and Minn. Stat. §§ 216B.44 and 216B.45. The FMV standard simply does not meet the Legislature's purpose and is not consistent with the express language of the Statute. If the Legislature had intended FMV to be used, there would be no need to enact the Statute and Minn. Stat. §§ 216B.44 and 216B.45, since FMV is the most typical standard measure of damages for eminent domain proceedings.

- 1. Displaced utilities and their remaining customers incur increased costs per remaining customer as a result of annexation by municipal utilities.**

Annexed areas typically reflect areas with more development than areas further from municipalities. As a result, annexed areas often reflect significantly higher current or potential revenues and lower costs than other areas served by the displaced utilities. In addition, the displaced utility has often made investments to serve these annexed areas prior to annexation in order to meet its obligation to serve under Minn. Stat. § 216B.37. When the displaced utility loses these areas, the displaced utility must spread those costs across its remaining customer base.

Displaced utilities and their customers incur reduced revenues, increased per customer costs, and loss of facilities as a result of municipal acquisitions. When there is an acquisition by a municipal utility, the displaced utility experiences a loss of all of the revenues from current and future customers in the acquired service area, but only saves a

part of the costs of providing services. Fixed costs and overheads – such as the costs for generation and transmission facilities – stay largely the same but with fewer customers, increasing the average costs for the remaining customers. For example, if a displaced utility had invested in a new substation to serve its service territory, and a municipal utility later acquires a portion of that service territory, the displaced utility is left with the entire cost of the substation, but fewer customers from whom to recover the costs.

It is partly for this reason that the MPUC adopted a ten-year period for calculating lost revenues—to compensate the displaced utility for investments made to serve its service territory over a reasonable planning horizon.⁶ Further, this does not merely compensate the utility, it protects the remaining customers who otherwise would have to pay higher costs for service as a result of the municipal acquisition – an action not within the control of the displaced utility or its remaining customers.

2. The Legislature recognized the unique features of the utility industry and the need to protect displaced utilities and their remaining customers.

The utility industry has features that have significant effects on displaced utilities and their remaining customers, and on the effects of mandated transfers of property from displaced utilities to municipal utilities. As a result, different considerations apply in connection with the acquisition of utility property than in typical eminent domain proceedings, as the Legislature recognized.

⁶ *In the Matter of the Complaint Regarding the Annexation of a Portion of the Service Territory of People's Cooperative Power Association by the City of Rochester (North Park Additions)*, Docket No. E-132, 299/SA-88-270, 117 P.U.R. 4th 192, 1990 WL 488792 (Minn. P.U.C. July 11, 1990), at 9, 11.

The electric utility industry is unique in that the displaced utilities are subject to public interest obligations to provide service. In 1974 the Legislature enacted Minn. Stat. § 216B.37, in order to avoid duplication of electric utility facilities in the same areas and requiring electric utilities to provide service in their area:

It is hereby declared to be in the public interest that, in order to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public, the state of Minnesota shall be divided into geographic service areas within which a specified electric utility shall provide electric service to customers on an exclusive basis. (Emphasis added).

Minn. Stat. § 216B.40 confirms that electric utilities have exclusive service rights to all customers within designated service areas.⁷ As a result, a displaced utility is losing not only its property as a result of an acquisition, but an exclusive right to provide service essentially in perpetuity. The Statute (and Minn. Stat. §§ 216B.44 and 216B.45) reflect the Legislature's balancing of interests of the municipality to provide electric service to its residents and the displaced utility and its remaining customers to not bear higher per customer costs as a result.

In addition, the displaced utility and its remaining customers have interests that are no less important than the interests of the municipal utility and its customers. Electric utilities are "public service corporations" as described in Minn. Stat. Chapter 301B.01.⁸ Public service corporations may be organized to furnish power for public use, and also

⁷ Minn. Stat. § 216B.40 ("Except as provided in sections 216B.42 and 216B.421, each electric utility shall have the exclusive right to provide electric service at retail to each and every present and future customer in its assigned service area ...").

⁸ Minn. Stat. § 301B.01 ("A corporation may be organized to construct, acquire, maintain, or operate internal improvements, ... to furnish power for public use, ...").

have the right to condemn.⁹ As explained above, the taking of utility property can affect the long term fiscal integrity of a displaced utility and the cost of serving its remaining customers due to a loss of revenue that does not proportionately reduce costs. The remaining customers have an interest that is no less significant than the customers of municipal utilities.

The Municipal Amici¹⁰ express concern that precluding the FMV in connection with the displacement of a utility by a municipal utility may undermine the FMV standard in traditional municipal condemnations.¹¹ To the contrary, displacement of utilities by municipal utilities is unlike condemnations to provide traditional governmental services.

Municipal utilities are providing a business service that is comparable to the displaced utility. The municipal utility is not providing a purely governmental service, such as streets and sewers. When a city acts in a proprietary capacity, its functions are notably different from the functions when acting in a purely governmental capacity.¹² To

⁹ Minn. Stat. § 301B.02 (“The corporation may acquire by power of eminent domain the private property necessary or convenient for the transaction of the public business for which it was formed.”); Minn. Stat. § 308A.201, subd. 13 (“A cooperative that is engaged in the electrical ... business may exercise the power of eminent domain in the same manner provided by state law for the exercise of the power by other corporations engaged in the same business.”)

¹⁰ “Municipal Amici” refers to the Minnesota Municipal Utilities Association, Missouri River Energy Services, Western Minnesota Municipal Power Agency, and Coalition of Greater Minnesota Cities.

¹¹ Municipal Amici Brief at 11-14.

¹² *Keever v. City of Mankato*, 129 N.W. 158, 160 (Minn. 1910) (“When the municipality enters the field of ordinary private business, it does not exercise governmental powers. Its purpose is, not to govern the inhabitants, but to make for them and itself private benefit. As far as the nature of the powers exercised is concerned, it is immaterial

put it simply, when a municipal utility acquires the service territory of an electric utility, the public service provided is merely replaced from one provider to another, with the municipal utility receiving revenue previously received by the electric utility. As a result, unlike other condemnations, the Statute and Minn. Stat. § 216B.44 do not involve balancing of a purely public interest versus a purely private interest.

While displaced utilities and their remaining customers are subject to compulsory transfers to municipal utilities, municipal utilities (and their customers) have the critical advantage of being able to choose whether or not to extend service into the annexed area.¹³ In deciding whether to displace an existing utility, a municipal utility is able to weigh its own costs and benefits of acquiring the utility service territory and property. The result is that municipal utilities are able to target electric utility service territories that would be financially beneficial to the municipality, and do not need to condemn or acquire service territories that are not financially beneficial. This critical distinction further supports compensation to displaced utilities that protects the displaced utilities and their remaining customers from per customer cost increases resulting from decisions by municipal utilities.

The MPUC and Court of Appeals have both recognized the significance of the displaced utilities' obligations and the effects on their remaining customers. The MPUC

whether the city owns the plant and sells the water, or contracts with a private corporation to supply the water. It is not in either case exercising a municipal function.”)

¹³ Minn. Stat. § 216B.44 (a) allows a municipality the option not to provide service to an annexed area, requiring service to the new annexed area “the municipality shall thereafter furnish electric service to these areas unless the area is already receiving electric service from an electric utility, in which event, the utility may purchase the facilities of the electric utility serving the area.” (Emphasis added.)

has summarized the rationale for the Legislature's decision to adopt specific criteria for compensation when a municipal utility displaces a utility as a result of acquisition:

The Legislature determined that a displaced utility has a compensable right to serve by mandating compensation and setting criteria for compensation under Minn. Stat. 216B.44 (1988). The statute requires this because displaced utilities have an obligation to make the investments necessary to ensure their ability to service areas municipalities may later decide to serve. This obligation is not illusory, and neither is the right to compensation which flows from it.¹⁴

The MPUC also noted the distinction between a public utility condemnation and a typical eminent domain situation:

In non-public utility eminent domain proceedings, ... loss of revenue is not compensable in and of itself. It can only be considered as evidence of a decrease in market value, because many complex and intangible variables, such as the proprietors' initiative and industry, affect revenues. (Citation omitted) In public utility eminent domain proceedings, the Legislature, recognizing the uniqueness of the utility industry, specifically required that damages include lost revenues. Minn. Stat. § 216B.47 (1988).¹⁵

The Court of Appeals has also recognized the need for compensation to protect the displaced utility and its remaining customers:

[C]ompensation is needed to protect member customers, lenders and investors whose prior investments are rendered less usable and more expensive because of the loss of an opportunity to expand services in an annexed area.¹⁶

The compensation provided by the Statute (compared to the FMV standard) fairly reflects the Legislature's consideration of the utility industry and the interests of the

¹⁴ 117 PUR 4th 192, 1990 WL 488792, at 8.

¹⁵ *Id.*, at fn. 4. (Emphasis added.)

¹⁶ *In the Matter of the Complaint Regarding the Annexation of a Portion of the Service Territory of People's Cooperative Power Association by the City Of Rochester*, 470 N.W.2d 525, 528 (Minn. Ct. App. 1991)

displaced utilities and their remaining customers and the interests of the municipal utilities. When a municipal utility decides to compel the transfer of service territory from a displaced utility to the municipal utility, damages or compensation must be paid that are sufficient to enable the displaced utility to continue to provide adequate and reliable services to its remaining customers at costs per customer that are no higher than the costs per customer prior to the acquisition. The Statute and Minn. Stat. § 216B.44 reflect the balance intended by the Legislature.

3. The Legislature intended the same compensation calculation irrespective of the process selected by the municipal utility.

The Legislature made clear the requirement that the amounts to be paid by municipal utilities to displaced utilities was to be the same irrespective of the process selected by the municipal utility: (i) a condemnation proceeding and determination of damages by a district court with possible quick take under the Statute; or (ii) a determination of compensation by the MPUC under Minn. Stat. § 216B.44. The Legislature did so by using the same four factors to establish compensation damages in the Statute and Minn. Stat. § 216B.44. The Legislature underscored its intent for uniform payments by also adopting the same four factors for the purchase of utility service territory under license, permit, right or franchise under Minn. Stat. § 216B.45 (which is the other scenario under which a displaced utility may be compelled to transfer its service territory to a municipal utility).

The Legislature was the most emphatic in requiring use of the four factors in judicial condemnations under the Statute. The Statute provides that eminent domain

damage awards “must include” the four factors. In contrast, Minn. Stat. §§ 216B.44 and 216B.45 provide that the MPUC “shall consider” the four factors. The use of the mandatory term “must include” is also understandable in a context in which a district court may be most familiar with the FMV standard and otherwise be inclined to apply some form of standard eminent domain FMV analysis. The mandate “must include” underscores the requirement to directly include the four factors when applying the Statute and the error in the arguments that the Statute merely requires consideration of the four factors.¹⁷

The Statute applies to judicial condemnation proceedings in relation to service territory acquisitions, and provides:

Nothing in this chapter may be construed to preclude a municipality from acquiring the property of a public utility by eminent domain proceedings; 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. (Emphasis added.)

Minn. Stat. § 216B.44 (b) applies if the municipality and the utility are unable to agree on compensation for utility property, and one of the utilities petitions the MPUC to determine compensation:

In making that determination the commission shall consider 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. (Emphasis added).

Minn. Stat. § 216B.45 uses the same four factors to determine compensation in the event the municipality exercises its right to purchase the service territory of a utility operating

¹⁷ Appellant Brief at 29-33; Municipal Amici Brief at 15-16.

within a city under license, permit, right or franchise:

In determining just compensation, the commission shall consider the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities, and other appropriate factors. (Emphasis added).

The Legislature could hardly have been more clear in setting consistent compensation standards and in making sure that the four factors were directly included in damages awarded by a district court under the Statute.

B. The Court of Appeals correctly applied the Statute and there are no constitutional implications that support a different application.

The enactment of the Statute along with the simultaneous enactment of Minn. Stat. § 216B.44 and Minn. Stat. § 216B.45 evidences a choice the Legislature made to establish specific compensation for takings of utility service territory. None of the Appellant's or Municipal Amici's arguments override the specific terms used by the Legislature, nor does the Minnesota Constitution support their position.

1. Construing the Statute as a whole and as intended by the Legislature supports the Court of Appeals' application of the Statute.

The Appellant advocates an interpretation of the Statute which would limit compensation to FMV.¹⁸ The Appellant's position rests on its belief that because the statutory language *lacks* the words FMV, FMV necessarily applies.¹⁹ To the contrary, application of the FMV standard would be counter to the express terms and intent of the Statute and to established standards for interpretation of statutes in Minnesota.

The purpose of statutory interpretation is to implement the intent of the

¹⁸ Appellant Brief at 30.

¹⁹ *Id.* at 35.

Legislature.²⁰ In doing so, the objectives of the statute are to be considered.²¹ Statutes are to be construed as a whole.²² Thus, the use of the same four factors to determine compensation in the Statute and Minn. Stat. §§ 216B.44 and 216B.45 are significant.

The primary objective of the Statute was to protect displaced utilities and their remaining customers and to maintain consistent levels of compensation. In this context, the District Court and Court of Appeals looked to the MPUC net loss-of-revenue method as persuasive, but not controlling. The goals of consistency and the strong rationale for the net-loss-of revenue approach both support the District Court and Court of Appeals decisions.

The Appellant relies on Chapter 117 in attempting to impose FMV on the Statute.²³ However, Minn. Stat. § 216B.66 provides:

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 [MPUC].²⁴

As a result, the Statute and Minn. Stat. § 216B.44 do not need to be reconciled to the FMV standard of Chapter 117.

²⁰ Minn. Stat. § 645.16 reads in part: “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.”

²¹ Minn. Stat. § 645.16 reads in further part: “When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;”

²² “In ascertaining legislative intent a statute is to be construed as a whole so as to harmonize and give effect to all its parts,” *Anderson v. Commissioner of Taxation*, 93 N.W.2d 523, 528 (Minn. 1958).

²³ Appellant Brief at 23-35.

²⁴ Minn. Stat. § 216B.66.

The prior construction of similar terms of Minn. Stat. § 216B.44 also support the District Court's and Court of Appeals' construction of the Statute. The interpretations of administrative agencies are entitled to consideration.²⁵ As the MPUC has interpreted the identical terms for proceedings filed with the MPUC, the "goal of the compensation provisions of Minn. Stat. § 216B.44 (1988) is to place the displaced utility in the same position it would have occupied but for the municipal utility's acquisition of its service territory."²⁶ The same intent applies to the Statute.²⁷

2. The Statute raises no constitutional implications.

Appellant refers repeatedly to constitutionality in its discussion of the FMV standard.²⁸ The inference is that FMV is a mandatory standard that provides the constitutional *minimum* for compensation and also provides a constitutionally required *maximum* amount that the municipal utility can be required to pay.²⁹ The further inference, raised by the Appellant, is that the Statute should be construed to include the FMV standard in order to avoid any constitutional issues.

Statutes are also to be construed to avoid conflict with constitutional

²⁵ Minn. Stat. § 645.16 (8) referring to: "legislative and administrative interpretations of the statute."

²⁶ Docket No. E-132, 299/SA-88-270, Order Affirming And Clarifying Earlier Order, 1990 WL 600805 (Minn. P.U.C. October 29, 1990), at 3.

²⁷ *Id.*

²⁸ The term "constitution, " "constitutional," or "unconstitutional" is used no less than forty times in Appellant's Brief.

²⁹ "The Minnesota Supreme Court has long defined 'just compensation' to be fair market value." Appellant Brief at 25.

requirements.³⁰ However, there are no constitutional implications arising from the compensation required under the Statute. As a result, the principle of construing a statute to avoid constitutional issues simply does not apply in this case.³¹

Appellant and the Municipal Amici also suggest that additional compensation is suspect and must be reconciled to the FMV standard, and that both the displaced utilities and the condemning municipal utilities have equal rights and interests in the level of compensation to be paid.³² To the contrary, the protections that arise from requiring compensation for governmental takings of private property are intended to protect the private property from the governmental entity and are not intended to protect the governmental entity that is doing the taking. The Minnesota Constitution provides:

Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.³³

This Court has also recognized that the Minnesota constitutional provision was intended to protect citizens from unjust takings.³⁴

Moreover, the position of the Appellant and the Municipal Amici are directly at

³⁰ Minn. Stat. § 645.17 states in part: “(3) the legislature does not intend to violate the Constitution of the United States or of this state”.

³¹ *Hutchinson Technology, Inc. v. Commissioner of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005) (“Where possible, this court should interpret a statute to preserve its constitutionality”); *Head v. Special School Dist. No. 1*, 182 N.W.2d 887, 893-894 (1970) (“If the language of the law can be given two constructions, one constitutional and the other unconstitutional, the constitutional one must be adopted, though the unconstitutional construction may be more natural.”)

³² Appellant Brief at 38, 42; Municipal Amici Brief at 11-12, 22-24.

³³ Minnesota State Constitution, Article 1, Section 13.

³⁴ *Moorhead Economic Development Authority v. Anda*, 789 N.W.2d 860, 876 (Minn. 2010) (“[W]e have observed that because a constitutional provision for just compensation was inserted for the protection of the citizen, it ought to have a liberal interpretation, ...”) citing *Adams v. Chicago, Burlington & N. R.R.*, 39 N.W. 629, 631 (Minn. 1888).

odds with Minn. Stat. § 117.012, Subd. 1, which makes it clear that additional compensation of owners (the displaced utilities) may be required:

Notwithstanding any other provision of law, ... all condemning authorities ... must exercise the power of condemnation in accordance with the provisions of this chapter, including all procedures, definitions, remedies, and limitations. Additional procedures, remedies, or limitations that do not diminish the substantive and procedural rights and protections of owners under this chapter may be provided by other law, ordinance, or charter. (Emphasis added.)

In short, there is no bar to increasing compensation above FMV through the four factors in the Statute. FMV is a minimum payment standard. This statutory minimum standard is intended to protect property owners, not condemning authorities.

In *Matter of Peoples Co-Op Power Ass'n* the Court of Appeals upheld an award that required compensation from a municipal utility that arose under Minn. Stat. § 216B.44, which contains the same four compensation factors as the Statute. The Court recognized the municipality's argument that the compensation award "imposes a heavy cost on municipalities' but found that: "What is material is not the City's cost, but the justness of compensation awarded to the rural cooperative."³⁵ Thus, there is no basis within the language of the Statute to apply the FMV standard.

In *Cooperative Power*³⁶ this Court rejected a constitutional challenge to a statute that significantly increased the cost of a utility's exercise of eminent domain for right-of-way for a high voltage transmission line. The cost was increased by a statutory

³⁵*In the Matter of the Complaint Regarding the Annexation of a Portion of the Service Territory of People's Cooperative Power Association by the City of Rochester (North Park Additions)*, 470 N.W.2d 525, 528-529 (Minn. Ct. App. 1991).

³⁶*Cooperative Power Association v. Aasand*, 288 N.W.2d 697 (Minn. 1980).

expansion of the *amount* of property that a utility could be required to purchase (from a typical easement to an outright purchase of property contiguous to the easement). *Cooperative Power* shows that an entity exercising eminent domain does not have a constitutional interest in limiting the amount of compensation that must be paid to the constitutional minimum. Rather, the condemning utility's constitutional protection is far more limited.

Condemning authorities have protections in relation to amounts paid, but they do not have a constitutional interest in limiting the compensation to be paid to FMV. In *Cooperative Power*, this Court described the level of constitutional protection for a condemning authority:

Notwithstanding its ability to constrain the power of condemnation, the legislature may not impose unreasonable restraints rendering the exercise of the delegated power [eminent domain] unduly burdensome and fundamentally unfair. Hence, the constitutionality of [the statute] rests ultimately upon the reasonableness of the condition it imposes upon the exercise of the power of eminent domain; however, a legislative declaration of public purpose is entitled to great deference. (citation omitted). This court will intervene as an ultimate arbiter of constitutionality only where the statute is manifestly arbitrary and unreasonable. (citations omitted)³⁷

There is no basis to conclude that the Statute is either manifestly arbitrary or unreasonable or needs to be constrained by a FMV limitation to prevent a manifestly arbitrary or unreasonable result, or to prevent an unduly burdensome or fundamentally unfair price. Rather, the loss of revenues standard is fully justified and necessary to prevent a municipal utility condemnation from imposing an undue burden on the

³⁷ *Cooperative Power*, 288 N.W.2d at 700-701.
(Emphasis added.)

customers of the utility whose service territory is being condemned.

Further, in *Cooperative Power* this Court recognized the role of the Legislature in resolving conflicting interests in relation to the condemnation of property:

The enactment of [the statute] reflects a creative legislative response to a conflict between rural landowners and utilities concerning HVTL right-of-ways. ... The legislature, sensitive to these concerns [of opponents to the HVTL projects] but perceiving the occasion as demanding the construction of additional high voltage transmission lines, enacted [the statute] in partial response.³⁸

The Statute in this case reflects that same type of creative legislative response. The four factors provided in the Statute are intended to provide just compensation to the electric utility whose facilities are being acquired in order to protect the displaced utility's customers from damage to the ongoing cost of service that results from loss of revenue that is offset by only limited cost reductions.

In *Cooperative Power*, this Court also described the foundation of eminent domain for entities other than the State (such as municipal utilities), and recognized that those entities do not have a vested interest in the exercise of eminent domain:

The power of eminent domain inheres in the state as an attribute of sovereignty. (citations omitted) That power may be delegated, but no vested right to acquire property by condemnation is created by virtue of that delegation. (citations omitted) In its discretion, the legislature may impose reasonable conditions upon the exercise of the power and accordingly may modify the terms of the delegation.³⁹

³⁸*Id.* at 699-700 (Emphasis added).

³⁹*Id.* at 700 (Emphasis added).

As discussed above, the rationale for imposing restrictions on the exercise of eminent domain in cases involving municipal utility acquisitions of the facilities of other utilities is that:

(i) the interests of the entity whose property is being condemned (the cooperative or investor owned utility) and its customers have public interest implications that are no less important than the municipal utility and its customers; and

(ii) the municipal utility and its customers have one significant additional protection that the cooperative or investor owned utility and its customers do not have: The municipal utility has the opportunity to choose whether or not to exercise eminent domain.⁴⁰

Thus, the equities for full protection of the cooperative or investor owned utility and its customers deserve the additional consideration provided by the Legislature.

Appellant argues that the District Court and Court of Appeals inappropriately subordinated the judicial role and a claimed judicial tradition favoring the FMV standard to the MPUC and its application of the four factors.⁴¹ Again, it appears that the Appellant is suggesting that this approach had constitutional implications.⁴² To the contrary, as discussed below, the decisions of the District Court and the Court of Appeals were based on the goal of using identical compensation considerations in both judicial and MPUC proceedings consistent with the language included in both the Statute and Minn. Stat.

⁴⁰ There is no obligation on a municipality to exercise the power of eminent domain under Chapter 117. Further, Minn. Stat. § 216B.44 (a) expressly allows a municipality the option not to provide service to an annexed area if it is already receiving electric service from another provider: “[T]he municipality shall thereafter furnish electric service to these areas unless the area is already receiving electric service from an electric utility, in which event, the utility may purchase the facilities of the electric utility serving the area.” (Emphasis added.)

⁴¹ Appellant Brief at 20, 27, 43.

⁴² *Id.* at 20, 27.

§ 216B.44, and the persuasiveness of the MPUC’s long standing approach. These factors do not support a claim of inappropriate judicial deference to the MPUC.

C. Loss of revenue should be determined consistently and the Courts’ decisions to use the “net loss-of-revenue” approach were appropriate.

The Statute and Section 216B.44 were intended to provide two procedures in connection with a service territory acquisition, but the same standard for compensation. A consistent standard is necessary to meet the legislative goal of protecting displaced utilities and their customers.

In *Rochester v. People’s Co-Op. Power Ass’n*,⁴³ this Court noted that Chapter 216B provides two alternative procedures: (i) condemnation under Chapter 117, which provides the opportunity for a “quick-take” under which the municipal utility obtains the immediate right to provide service in the area; and (ii) a proceeding before the MPUC under which the rural utility continues to provide service in the area until the conclusion of the proceeding.⁴⁴ However, the compensation to be paid by the municipal utility under a judicial condemnation proceeding is clearly intended to reflect the “same factors”⁴⁵ as would be considered under a MPUC proceeding:

[T]he 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.44.⁴⁶

⁴³*City of Rochester*, 483 N.W.2d 477.

⁴⁴*Id.* at 479.

⁴⁵ *Id.* “[T]he 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.44.”

⁴⁶ *Id.* at 480. (Emphasis added.)

The Court emphasized the importance of consistent compensation, even as it held that a judicial determination of damages was appropriate:

That conclusion is mandated where the sole issue presented is one of “just compensation” — an issue guided in either forum by identical considerations⁴⁷

The goal of internal consistency and the prior construction of the same language by the MPUC support the decisions of the District Court and the Court of Appeals.

The Court of Appeals has recognized the MPUC’s rationale of the net revenue loss approach:

The Commission concluded that it would use the “net-revenue-loss” formula to calculate the “loss of revenue to the utility formerly serving the area” required by statute, with the objective of putting the displaced utility in the same position it would have occupied but for the loss of service rights to the area for which compensation is being determined.⁴⁸

The MPUC has also explained the goal of the compensation of displaced utilities and how the net revenue loss method fits that goal:

The Commission determines loss of revenue using the “net revenue loss” method, with the goal of putting the displaced utility in the same position it would have occupied but for the loss of service rights in the area for which compensation is being determined.⁴⁹

The District Court and Court of Appeals adopted the net revenue loss approach because the rationale was persuasive and consistency is a clear Legislative goal. There was nothing inappropriate in their decision to do so.

⁴⁷ *Id.* at 481.

⁴⁸ *In re Grand Rapids Pub. Utils. Comm 'n*, 731 N.W.2d 866, 869 (Minn. Ct. App. 2007).

⁴⁹ *In the Matter of the Application of the Grand Rapids Utilities Commission*, Docket No. E-243, 106/SA-03-896, Order Determining Compensation (Minn. P.U.C. September 29, 2005) at 3-4.

There is also persuasive support for the decision to reject an approach that was inconsistent with the four factors. In *Grand Rapids*, the Commission rejected a “gross revenue multiplier” method, and the Court of Appeals upheld the Commission:

Here, the Commission rejected the gross-revenue-multiplier formula on the basis that it does not calculate the statutory factors that must be applied to determine a compensation award.⁵⁰

The overlay of FMV that the Appellant seeks to compel is fundamentally inconsistent with the four factors approach expressly provided in the Statute. It was equally appropriate to reject that inconsistent approach in this case.

The Municipal Amici also argue that FMV should be applied as a test of reasonableness. To the contrary, FMV would not provide an appropriate test of reasonableness because FMV does not include each of the four factors which the Legislature determined the valuation “must include.”⁵¹ As a matter of basic logic, an inconsistent standard (FMV) cannot provide an appropriate test of reasonableness for a new approach, especially when the new approach was intended to replace the inconsistent standard. The inconsistency between FMV and the Statute makes FMV an inappropriate test of reasonableness. Accordingly, the claim that the FMV standard should be applied as a test of reasonableness should be rejected.

⁵⁰ *In re Grand Rapids*, 731 N.W.2d at 872.

⁵¹ *Hendrickson* demonstrates that lost revenues cannot be directly included in a FMV study. *Hendrickson v. State*, 127 N.W.2d 165, 173 (Minn. 1964).

CONCLUSION

For the reasons set forth above, the Service Providers respectfully request that the Minnesota Supreme Court affirm the decisions of the Clay County District Court and the Minnesota Court of Appeals.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, in Times New Roman font, 13 point, and according to the word processing system's word count, is not more than 6,886 words, exclusive of the cover page, table of contents, table of authorities, signature block and this certification, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: June 25, 2012.



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