

No. A11-0705

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State Of Minnesota  
**In Supreme Court**

City of Moorhead,

*Appellant,*

v.

Red River Cooperative Power Association, et al.,

*Respondent.*

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**BRIEF OF MINNESOTA MUNICIPAL UTILITIES ASSOCIATION,  
MISSOURI RIVER ENERGY SERVICES, WESTERN MINNESOTA  
MUNICIPAL POWER AGENCY AND COALITION OF GREATER  
MINNESOTA CITIES AS *AMICI CURIAE* IN SUPPORT OF APPELLANT**

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## STATEMENT OF LEGAL ISSUE

For more than a century, the courts have considered fair market value when determining just compensation in eminent domain cases. If the legislature remained silent regarding the inclusion of fair market value in eminent domain proceedings under Minn. Stat. § 216B.47, may evidence of fair market value or analysis of fair market value principles be considered by the jury?<sup>1</sup>

The Court of Appeals held that fair-market-value is not the proper measure of damages under Minn. Stat. § 216B.47 and that fair-market-value evidence was therefore properly excluded and that the expert's report containing such evidence was also properly excluded.

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<sup>1</sup> Pursuant to Minn. R. Civ. App.P. 129.03, Municipal Amici certify that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the Municipal Amici made a monetary contribution to its preparation or submission.

The Appellant City of Moorhead is a member of the CGMC. Moorhead Public Service is a member of MMUA, MRES, and WMMPA. Funds to pay for this brief came out of the general funds of each organization and were not paid specifically by the city or its public utility.

## STATEMENT OF IDENTITY OF AMICI

The Minnesota Municipal Utilities Association (MMUA) represents the interests of Minnesota's municipal electric and gas utilities. There are 125 municipal electric and 31 municipal gas utilities in Minnesota. Established in 1931, MMUA's mission is to unify and serve as a common voice for municipal utilities and to provide them with the support they need to improve service to their customers and community. MMUA has long supported the right of municipal electric utilities to grow with their cities, a right they have held since the inception of the electric utility industry more than a century ago.

Missouri River Energy Services (MRES) was established under Chapter 28E of the Iowa Code and exists under the intergovernmental cooperation laws of the states of Iowa, Minnesota, North Dakota and South Dakota. MRES is comprised of 61 municipally-owned utilities in those states, including 24 in Minnesota. Western Minnesota Municipal Power Agency (Western Minnesota) is a Minnesota political subdivision formed under Minn. Stat. §§ 453.51-.62 (2010). The current membership in Western Minnesota consists of 23 Minnesota municipal utilities, each of which are MRES members and owns and operate a utility for the local distribution of energy. Western Minnesota's principal activity is the acquisition and ownership of generation and transmission facilities, both within Minnesota and elsewhere, and the sale of Western Minnesota's

entitlement to power, energy and transmission capabilities to MRES. MRES provides firm power and energy to its member cities to supplement the hydroelectric power and energy needs of its member cities. MRES and Western Minnesota offer the unique perspective of 24 Minnesota municipalities and a municipal power agency that could be directly affected by the outcome of this appeal.

The Coalition of Greater Minnesota Cities (CGMC) is a non-partisan association of 76 cities located throughout greater Minnesota. Its mission is to develop viable, progressive communities for businesses and families through strong economic growth and good local government. The CGMC supports good land use planning that promotes efficiency, protects the environment, and safeguards the interests of taxpayers. Many CGMC members own and operate municipal utilities and could be directly affected by the outcome of this case.

#### **STATEMENT OF INTEREST OF AMICI**

MMUA, MRES, WMMPA, and CGMC (collectively the "Municipal Amici") have a public interest in ensuring that the calculation of damages in eminent domain proceedings under Minn. Stat. § 216B.47 (2010) includes evidence or analysis of fair market value principles. The member cities and their utilities that comprise the Municipal Amici expect to grow, or expect their members to grow, through annexation in the future and further, to

extend their electrical service as their city boundaries grow. The municipalities and their utilities expect to pay just compensation for any service territory they would acquire through eminent domain. Removing the concept of fair market value from the eminent domain analysis would mean that cities pay compensation without any grounding in eminent domain jurisprudence or valuation theory. This damages calculation will result in higher damages awards which in turn will have a chilling effect on the municipalities' decisions to expand. Municipal power agencies will also be adversely affected because their long range plans are based on the growth plans of member cities and WWMPA's ability to exercise eminent domain will likewise be adversely affected.

#### **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

For more than a century, Minnesota has recognized the right of its citizens to form and develop cities and the accompanying right for the cities to create, operate and expand utilities to serve their citizens. Creating a municipal utility allows citizens to exercise control over the services they receive and the rates charged. Allowing municipal utilities to expand as the cities develop means that everyone within those cities will receive equal service and will equally share the risks and benefits of owning a public utility. The results of this case could undermine those rights and the underlying public policy.

Minnesota courts have consistently held that the calculation of damages in an eminent domain case must include consideration of the fair market value of the property. In this case, however, the District Court ruled in a series of orders affirmed by the Court of Appeals that evidence of fair market value could not be considered when calculating damages under the four factors of § 216B.47.

Excluding fair market value in that manner contradicts the public policy and legislative compromise that undergird the statute. In 1974, the Legislature divided the state into electric service territories. Reflecting the compromise sought by the cooperatives who benefited from this change, the Legislature preserved the right of municipal electric utilities to use eminent domain to expand along with their municipalities. At that time, courts relied on fair market value when analyzing just compensation as a means of ensuring that the interests of both the unwilling seller and the public buyer are protected. Nothing in the legislative history nor the statutory language suggests that the Legislature intended or the municipalities agreed to an eminent domain formulation that did not consider fair market value.

To exclude fair market value will lead to a damage calculation that is, in the words of Red River's expert, "inherently higher." The increasing cost of acquiring service territory is already deterring municipal utilities from exercising their statutory right to expand into annexed areas to serve all of

their citizens. Further raising the cost will make it much more likely that municipal utilities will be unable to exercise their legislatively guaranteed right to grow with their cities and will undermine the legislative preference for promoting growth within cities.

Excluding market value evidence also eliminates an important reasonableness check on the damages calculation that allows the court to determine if the constitutional rights of the property owner and buyer are protected. Restoring consideration of fair market value will ensure that the interests of both the cooperatives and the taxpayers who own the municipal utilities are protected now and in future cases.

#### **STATEMENT OF THE CASE AND FACTS**

Municipal Amici concur with the Appellant's statement of the case and facts.

#### **ARGUMENT**

##### **I. EXCLUDING FAIR MARKET VALUE INTERFERES WITH MUNICIPAL UTILITIES' RIGHT TO GROW WITH THEIR CITIES.**

###### **A. Municipal Services, Including Electric Utilities, Should Expand With Cities.**

At least as early as 1907, Minnesota granted cities the right to establish municipal electric utilities, which included the power to expand or

add to those utilities using eminent domain.<sup>2</sup> The right of municipal utilities to expand with their cities remains in place today as the result of a legislative compromise between municipalities and cooperatives.<sup>3</sup>

Allowing municipal services to follow municipal growth serves broad public policy interests. Minnesota's municipal utility growth policy aligns with the state's preference that commercial, residential, and industrial growth occur within cities.<sup>4</sup> Tying utility growth to city growth preserves the financial stability and fiscal integrity of the city's overall financial structure and credit ratings as well as the financial stability of municipal power agencies.<sup>5</sup> It also ensures that all customers receive the same service and price throughout the city and reduces confusion among city residents. Moreover, because municipal utilities are owned by the taxpayers of the city, the growth policy ensures that all city residents enjoy the benefits of

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<sup>2</sup> Minn. Stat. Ch. 9, § 758.23, 24 (1909 supp.) (repealed 1976 and superseded by Minn. Stat. §412.321, §452.08 (2010)) (granting cities the right to operate municipal utilities and to expand via condemnation and other means).

<sup>3</sup> *Cf. Rochester v. People's Cooperative Power Association, Inc.*, 483 N.W 2d 477, 480 (1992); *see also infra* pp.9-10.

<sup>4</sup> Minn. Stat. §414.01 subd. 1a (2) (2010).

<sup>5</sup> Municipal Power Agencies such as WMMPA routinely make planning and resource decisions based on cities' and their utilities' comprehensive growth plans. Judicial decisions that hinder municipal utilities' ability to grow with their cities also create uncertainty for these agencies.

this service as well as bear any risks or costs associated with that ownership.<sup>6</sup>

### **B. The Eminent Domain Procedure Reflects A Legislative Compromise Protecting Municipal Utility Growth Rights**

Before 1974, the concept of service territory protection did not exist in Minnesota. A key objective of the 1974 Public Utilities Act was to develop a system that efficiently and cost-effectively served the public.<sup>7</sup> This act divided the state into service territories giving investor owned utilities, rural electric associations (REAs) (*i.e.*, cooperatives) and municipal utilities the right to provide service to their existing customers and halfway to the adjacent utility's existing lines.<sup>8</sup>

The rural electric cooperatives were the primary proponents and beneficiaries of this change. They were planning to build a large new generating facility in North Dakota that would supply wholesale electricity

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<sup>6</sup> See *In re People's Co-Operative Power Association*, 470 N.W. 2d 545, 534 (Minn. Ct. App. 1991) (Davies, J., dissenting) ("One of the reasons, certainly, that the legislature permitted municipalities to extend service to annexed areas was to permit it to keep all residents on an equal basis as both taxpayers and utility customers. Were a portion of the community to be left out of the benefit--or burden--of local power rates, political problems concerning rate setting and investment decisions could result.").

<sup>7</sup> Minn. Stat. § 216B.37 (2010); see also *In re People's Co-Op Power Association*, 470 N.W. 2d 525, 531 (Minn. Ct. App. 1991) (Davies, J., dissenting and reviewing the legislative history of the Public Utilities Act).

<sup>8</sup> *People's Cooperative*, 470 N.W.2d at 532 (citing Minn. Stat. § 216B.37 (1974)).

to most cooperatives in Minnesota. To secure the loan for this facility, the cooperatives had to demonstrate to their lenders that they had protected service territory. “[O]ne of the principle reasons that the cooperatives talked about service territories in the ‘70’s was because we were gonna commit a billion dollars to that plant and we wanted to have some assurance, as our bankers did, that we were gonna be around to pay for it.

”<sup>9</sup>  
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The municipal utilities were willing to accept the proposed service territory law, provided that the law preserved the right of municipal electric utilities to grow with their cities following annexation. As Judge Davies explained, “The municipal utilities . . . insisted upon, *and obtained from the legislature*, the buy-out right upon annexation.”<sup>10</sup>

Because they were receiving significant territorial protection the cooperatives agreed to this legislative compromise. During legislative testimony, Mr. LeVander affirmed that the Legislature was preserving this important right for municipalities, “In other words, we’re preserving really,

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<sup>9</sup> Harold LeVander Jr., counsel for the Minnesota Electric Cooperatives Association, Hearing of the Minnesota House Regulated Industries Committee on HF 619, Concerning Electric Utility Service Territories & Rates, February 20, 1989. Amici Appendix (“Amici Apx.”) at 11-12.

<sup>10</sup> *In re People’s Co-op Power Association*, 470 N.W. 2d 525, 533 (Minn. Ct. App. 1991) (Davis, J., dissenting) (*italics in original*).

the right of the municipally-owned systems to continue to expand with their corporate borders . . . should annexations occur.”<sup>11</sup>

It is in the context of this legislative compromise that the language of Minn. Stat. § 216B.47 should be interpreted. When the Legislature enacted this statute, fair market value had been part of just compensation calculations in eminent domain cases for decades.<sup>12</sup> Given this constitutional backdrop and the Legislature’s determination to preserve municipal utilities right to grow through eminent domain, it follows that the Legislature and municipal utilities expected that fair market value would continue to be part of the just compensation calculation. Why would the municipalities accept a compromise that put them at a severe disadvantage by calculating damages from the seller’s view point only? The exclusion of fair market value would increase costs and deter municipal utility growth.<sup>13</sup> The Legislature would not have created, and the

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<sup>11</sup> Hearing of the Minnesota House State Boards and Commissions Subcommittee of the House Government Operations Committee on H.F. 957 and H.F. 1835 concerning electric utility regulation and the establishment of electric utility service territories, April 19, 1973. Amici Apx. at 9.

<sup>12</sup> See, e.g., *Minneapolis-St. Paul Sanitary District v. Fitzpatrick*, 277 N.W. 394, 398 (1937). The City’s brief fully describes the constitutional protection of fair market value at 23-27.

<sup>13</sup> See *infra* p.12.

municipalities would not have agreed to, a remedy that could not be exercised due to ever increasing costs.

**C. Removing Fair Market Value Will Deter Municipal Utility Service Territory Expansion and Undermine the Legislature's Intent.**

Excluding consideration of fair market value removes the constraint on the just compensation damages calculation that has long been present in eminent domain jurisprudence.<sup>14</sup> Red River's expert has explained that his analysis was from the "seller's perspective."<sup>15</sup> This analysis does not follow business valuation standards.<sup>16</sup> With no grounding in eminent domain law or valuation theory, there are no limits on what a seller might perceive its damages to be. Although Minn. Stat. § 216B.47 provides factors that must be included, the factors themselves, particularly the loss of revenue and the other appropriate factors, require interpretation. Fair market value provides the framework for that analysis.<sup>17</sup>

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<sup>14</sup> See, e.g., *Id.*; *State by Spannaus v. Carney*, 309 N.W.2d 775, 776 (Minn. 1981).

<sup>15</sup> Affidavit of Kaela Brennan ("Brennan Aff"), Exh. A at 186 – 87.

<sup>16</sup> Trial Transcript ("T.") at 246.

<sup>17</sup> Otter Tail Power Company, Minnesota Power, Interstate Power and Light Company, Northern States Power Company, Great River Energy, and Minnesota Rural Electric Association (collectively, the "Service Providers Amici") suggest in their request for leave to file an amicus brief that incorporating fair market value analysis means that the four factors identified by statute would not be applied. Neither the City nor the Municipal Amici advocate replacing the four factors. As the City explains

Removing fair market value and relying solely on the seller's perspective will undoubtedly increase the costs to municipal utilities as illustrated by the expert opinions in this case. The City's expert made an offer of proof that the loss of revenue damages would have been significantly less if fair market value analysis were applied.<sup>18</sup> Red River's expert also stated that his calculation of damages is "almost inherently" higher than fair market value.<sup>19</sup> Cities such as Moorhead are willing to pay fair and reasonable compensation, but as these costs escalate with no reasonable limitation, cities will be less likely to exercise their statutory right to extend to their citizens electrical utility service to annexed areas.

It appears that this chilling effect on municipal service territory is already occurring. At least 27 MMUA member cities are not serving all of the residences within their city limits and at least 9 of those have 50 or more residences served by a different utility. If the method for calculating damages loses its grounding in basic eminent domain compensation theory, this problem will only worsen.

The electric cooperatives have recognized that increasing the compensation required for municipal territorial expansions will deter

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throughout its brief, fair market value should work in connection with the four factors rather than replace the factors.

<sup>18</sup> T. at 381-82.

<sup>19</sup> Brennan Aff., Exh. A at 226 – 27.

municipal utilities from exercising their statutory right to expand. For example, in a 2002 territory transfer case, staff at the Minnesota Public Utilities Commission (PUC) expressed the opinion that in a series of service area transfer dockets involving Rochester Public Utilities and the People's Electric Cooperative it appeared the Cooperative was seeking to make these transfers prohibitively expensive. PUC staff pointed out the "Cooperative's apparent strategy of making all facets of the City's acquisition of service rights [to] be so cumbersome and costly that the City eventually would back off and let the Cooperative share in the City's growth."<sup>20</sup>

Another Minnesota electric cooperative explained in a resolution seeking CFC integrity funds<sup>21</sup> that increasing the costs in eminent domain cases would provide service territory protection:

[A]sserting G&T losses on behalf of its other affected distribution cooperatives represents an opportunity to achieve virtual territorial protection by increasing the taking cost. Locally LCP's Request of

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<sup>20</sup> *In re Moorhead*, Staff Briefing Papers, MN PUC Docket E-275, I34/SA-02-1207, Sept. 12, 2002, at Amici Apx at 3.

<sup>21</sup> The National Rural Utilities Cooperative Finance Cooperation has established a cooperative system integrity fund that funds litigation challenging municipal utilities that exercise their expansion rights. (<http://www.cooperativefinancecorporation.org/cfc-will-not-seek-contributions-to-integrity-fund-this-year/>). The resolution quoted above refers to a request for those integrity funds.

Integrity Funds will ensure that any future degradation of the co-op's service area by the municipal utility will be made more difficult.<sup>22</sup>

In that same resolution, the cooperative noted that it was testing a novel compensation formula before the PUC that could dissuade future takings. "Besides challenging the PUC's taking, the co-op is intent on expanding the current compensation formula. . . . If successful, it could well set a precedent for future compensation cases and may well dissuade future taking by Minnesota's acquisitive municipal-owned utilities."<sup>23</sup> Although that particular attempt at expanding compensation failed, it demonstrates that the cooperatives recognize that increasing the cost of eminent domain will deter municipal utilities from exercising their service territory expansion rights.

The Legislature has not abandoned the rights granted to municipal utilities. Removing the elements of fair market value from the eminent domain analysis would accomplish a similar result, increasing the cost of expanding service territory so that few municipal utilities will exercise their statutory right to expand.

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<sup>22</sup>Minutes of the Lake Country Power, November 27, 2001 Board meeting. The minutes were entered as evidence, Exh. 28, in *In re Grand Rapids Public Utility Commission*, Minn. PUC Docket No.E-2483, 3-896 and are reproduced at *Amici* Apx. 6 – 7.

<sup>23</sup> *Id.*

**D. The Legislature Did Not Intend To Supplant Traditional Eminent Domain Analysis With A Formula Leading to Higher Damages.**

Rather than viewing Minn. Stat. § 216B.47 against the existing constitutional framework of eminent domain, the Court of Appeals determined that the Legislature created a wholly new method for calculating damages. The Court agreed with Red River's suggestion that the Legislature can adopt a different method for calculating just compensation that may result in higher damages and pointed to the minimum compensation for relocation statute, Minn. Stat. § 117.187, as an example.<sup>24</sup> This reading of the statute is not supported by the language of Minn. Stat. § 216B.47 and conflicts with the Legislature's goal of preserving a municipal utility's right to grow with its city.

A recent decision by the Court of Appeals demonstrates how "traditionally utilized market-value approaches" can still be applied under an eminent domain statute that provides factors for determining damages.<sup>25</sup> Just as Minn. Stat. § 216B.47 does not define "other appropriate factors" or explain how to calculate loss of revenue, the minimum compensation statute contains several ambiguous terms.<sup>26</sup> In

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<sup>24</sup> Appellant's Addendum (Add.) at 18.

<sup>25</sup> *Dakota v. Cameron*, \_\_ N.W.2d \_\_, (A11-1273) (Minn. Ct. App. 2012).

<sup>26</sup> *Id.* at 17.

*Dakota*, the Court of Appeals harmonized the requirements of the minimum compensation statute with fair market value principles to determine the damages methodology even though the statute did not mention fair market value.<sup>27</sup>

The *Dakota* decision demonstrates that fair market value analysis can be read in harmony with the legislatively imposed factors of an eminent domain statute, particularly where the statute is ambiguous. No evidence has been presented that the Legislature intended to create a new form of eminent domain analysis when it adopted Minn. Stat. § 216B.47. Given the hard fought legislative compromise and the constitutional backdrop that existed when the statute was enacted, this Court should find that the Legislature intended that the eminent domain procedure proscribed by Minn. Stat. § 216B.47 would include fair market value.

## **II. FAIR MARKET VALUE SERVES AS A REASONABLENESS CHECK TO PROTECT PROPERTY OWNERS AND THE PUBLIC.**

Determining damages in an eminent domain case requires careful balancing by the court. As this Court has recognized, the ability to obtain property through eminent domain is an “awesome power.”<sup>28</sup> Both the

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<sup>27</sup> *Id.* at 15-17.

<sup>28</sup> *Moorhead Econ. Dev. Authority v. Anda*, 789 N.W. 2d 860, 876 (Minn. 2010).

Minnesota and United States constitutions require that the party whose property is taken must receive “just compensation.”<sup>29</sup>

Just compensation is not unlimited compensation, however. “The word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity.’”<sup>30</sup> When calculating damages, it cannot be forgotten that the public is on the other side of the damages calculation. As the United States Supreme Court explained, “Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is ‘just’ both to an owner whose property is taken and to the public that must pay the bill?”<sup>31</sup>

Removing any consideration of fair market value from the calculation is neither fair nor equitable. Rather it creates a potential windfall for the seller by removing any reasonableness check on damages from the calculation.<sup>32</sup> Red River’s expert, Dennis Eicher (“Eicher”), admitted that

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<sup>29</sup> *Id.*; see also *United States v. Commodities Trading Corp.*, 339 U.S. 121, 70 S.Ct. 547, 94 L.Ed. 707 (1950).

<sup>30</sup> *U.S. v. Commodities Trading*, 339 U.S. at 124.

<sup>31</sup> *Id.* at 123.

<sup>32</sup> *Cf. Dakota v. Cameron*, \_\_\_ N.W.2d \_\_\_ (A11-1273) (Minn. Ct. App. 2012) (citing *State by Lord v. Malecker* 265 Minn 1, 6-7, 120 N.W. 2d 36, 39 (1963) for the proposition that the property owner should not enjoy a windfall).

he calculated the damages from a “seller’s perspective.”<sup>33</sup> When testifying on the results of his net-loss formulation in an earlier PUC proceeding, Eicher acknowledged the lack of a reasonableness check on the results of his formula. When asked “how much of an excess is reasonable to you” when comparing his results to the average margin of the system, he responded “It could be any number.”<sup>34</sup>

Eminent domain law recognizes that establishing a fair valuation on property to be taken is a difficult and inexact proposition. Fair market value analysis employs three separate valuation methodologies, each of which acts as a check on the others.<sup>35</sup> The ultimate determination of fair market value is the result of harmonizing each of these three approaches. Comparison of three different valuation methodologies helps to ensure that the valuation established is neither too high nor too low.<sup>36</sup>

The seller’s perspective as presented by Eicher in this case is one indicator of damages, but there has to be a means of applying a

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<sup>33</sup> Brennan Aff., Exh. A at 186- 87.

<sup>34</sup> *In the Matter of Buffalo*, Office of Administrative Hearings (OAH 15-2500-15578-2/PUC E-221,148/SA-03-989) p. 190 l. 14 – 23, reproduced at Amici Apx,at 15.

<sup>35</sup> See *County of Ramsey v. Miller*, 316 N.W.2d 917, 922 (Minn. 1982) (quoting the Appraisal Institute *The Dictionary of Real Estate Appraisal*, 4<sup>th</sup> ed. (2002)).

<sup>36</sup> The City details how its expert reconciled these three methods in Appellant’s Brief at 41.

reasonableness check to the results. Fair market value provides the necessary reality check. If the seller's perspective dictates damages that greatly exceed fair market value damages, it is a good indication of an unreasonably high result in that particular case.<sup>37</sup>

Without evidence of fair market value, what limit is there to the seller's perspective? How is limitless compensation fair or equitable to the taxpaying public? Even if the Legislature had intended that the damages calculated under Minn. Stat. 216B.47 be higher than in a typical case, it could not have intended that no limits be placed on the damages. A methodology that ignores whether the compensation is just to the public is not reasonable.<sup>38</sup> Moreover, without a reasonableness check, the court cannot guarantee that the property owner's constitutional rights are protected. Fair market value should serve as that reasonableness check by providing market data and analyzing from both a buyer's and a seller's points of view.

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<sup>37</sup> In this case, for example, the customers in the annexed territory represented 1.4% of Red River's customer base, but the damages presented by Eicher represented 10.4% of Red River's total income. T. 268.

<sup>38</sup> See *Cooperative Power Association v. Aasand*, 287 N.W.2d 697, 701 (Minn. 1980) (imposing a requirement of reasonableness into a statute to prevent bizarre and unjustifiable results).

### **III. THE LEGISLATURE GRANTED MUNICIPAL UTILITIES A FORUM OF CHOICE.**

The Legislature granted municipal utilities the ability to pursue their growth rights in two forums: a judicial eminent domain proceeding under Minn. Stat. § 216B.47 or at the PUC under Minn. Stat. § 216B.44. In their petition, the Service Providers Amici indicated they will argue that consideration of fair market value could result in different value determinations depending on whether a court or the PUC decides a matter and that municipal utilities will always choose to pursue judicial condemnation because the results will be better than at the PUC.

The statutory language, however, does not preclude the PUC from considering evidence of fair market value when making a determination of the “appropriate value” under Minn. Stat. § 216B.44. As with the factors listed in § 216B.47, fair market value could be considered as part of the “other appropriate factors” or as the method for valuing the loss of revenue. If this Court holds that fair market value does play a role in determining the value of electric service territory, the PUC may follow that approach. Such a construction of the four statutory factors better harmonizes with just compensation jurisprudence and supports the legislative intent of allowing municipal utilities to grow with their cities.

If the Legislature had wanted one forum to control the results, it could have stated that in the statutory language. Although there is no

requirement for identical results in the two forums, applying fair market value will likely lead to more consistent results. As the statute is written, however, neither the courts nor the PUC are required (or authorized) to compel identical results or otherwise link the two forums.

Regardless of the outcome of this case, municipal utilities have reason to be reticent about pursuing claims under Minn. Stat. § 216B.44. The PUC has expressed disdain for municipals' statutory rights to acquire service territory and suggested that coops should receive whatever damages they want. In one case, a commissioner claimed that the city was "cherry picking" by extending service territory into the areas that it was annexing under an orderly annexation agreement.<sup>39</sup> A second commissioner stated that the cooperative should receive whatever damages it wants. "The Co-op wants this number. They don't want to sell it, but they'll take that number because they have to by law. . . [S]o why not give the Co-op what they want for it?"<sup>40</sup> If the role that fair market value

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<sup>39</sup> Chair Koppendraye commented: "Rural electrification has a long and very good result. . . . as the City expands, and you say the City is expanding, here's some folks I want to serve, here's a commercial area I want to serve . . . if you do this in every community, all that the Co-op is left with is some very difficult-to-serve rural areas . . . .Consequently you cherry pick and drive costs up, and in the long run it's not a good deal when someone can take someone else's territory. . ." *In re Grand Rapids*, Oral Argument before Minnesota Public Utilities Commission, MPUC E-243, 106/SA-803-896, August 4, 2005 at 60, lines 5 - 15, at Amici Apx. at 16.

<sup>40</sup> *Id.* at 96, line 10 – 97 line 1, at Amici Apx 17 - 18.

plays in valuing electric service territory is affirmed, municipal utilities may be more willing to pursue their remedy before the PUC in anticipation that future cases will give due consideration to both the buyer's and seller's viewpoint when calculating damages.

#### **IV. FAIR MARKET VALUE EVIDENCE CAN PREVENT CONSTITUTIONAL AND EVIDENTIARY PROBLEMS.**

Reading the four factors in Minn. Stat. 216B.47 through the lens of fair market value may prevent future evidentiary headaches and constitutional quandaries. Courts have looked to fair market value when calculating just compensation as the means to protect both the buyer and the seller.<sup>41</sup> Yet if the lower courts' ruling is upheld, property owners may lose that protection in the future.

Red River Valley's expert in this case, Eicher, disavowed the use of fair market value.<sup>42</sup> Eicher has been the primary expert for many cooperatives over the last two decades.<sup>43</sup> In the future, however, another cooperative property owner relying on a different expert may seek to introduce fair market value evidence to bolster its proposed valuation.

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<sup>41</sup> See, e.g., *Moorhead Econ. Dev. Authority v. Anda*, 789 N.W.2d 860, 876-77 (Minn. 2010) (noting that market value is used to determine how to put the property owner in an equivalent position).

<sup>42</sup> Brennan Aff., Exh. A at 186 – 87.

<sup>43</sup> See, e.g., *In the Matter of Buffalo*, Amici Apx. at 14.

In those circumstances, the district court will face a dilemma. Should the cooperative as property owner and seller be allowed to invoke the long-standing principle that any competent evidence pertaining to fair market value is relevant to the calculation of just compensation even though the municipal utility as buyer is not allowed to introduce such evidence?<sup>44</sup>

This Court has emphasized the need to be vigilant in enforcing the just compensation requirement and protecting the property owner.<sup>45</sup> “Any competent evidence may be considered [in an eminent domain trial] if it legitimately bears on the market value.”<sup>46</sup> If a court does not allow a property owner to introduce evidence other than the “seller’s perspective, how can the court ensure that the constitutional requirements of just compensation have been met? To avoid depriving a property owner the right to introduce evidence relevant to just compensation, the court would likely allow the property owner to introduce fair market value evidence.

Allowing a property owner to introduce such evidence while prohibiting the buyer from introducing the same, however, would likely violate the rules of evidence and potentially the equal protection rights of

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<sup>44</sup> *Anda*, 789 N.W.2d at 876-877.

<sup>45</sup> *Anda*, 789 N.W.2d at 876.

<sup>46</sup> *Id.* at 877 (citing *State v. Malecker*, 265 Minn. 1, 5, 120 N.W.2d 36, 38 (1963)).

the municipal utility. In Minnesota, all evidence that is relevant is admissible.<sup>47</sup> If the evidence is relevant when introduced by the property owner, it should also be relevant if introduced by the buyer.

The equal protection clause also requires that similarly situated persons be treated the same under the law.<sup>48</sup> There is no legitimate state interest in allowing a seller to introduce fair market value evidence while prohibiting a buyer from doing so. To avoid these dilemmas, the traditional calculation of just compensation should continue so that both buyers and sellers receive the protection afforded by fair market value analysis.

### CONCLUSION

Minnesota has long recognized the right of municipalities to establish utilities and to grow the utilities as the city expands. Removing the concept of fair market value from the calculation of damages when a municipal utility exercises its rights to expand through eminent domain frustrates the public policy behind this long standing right and the compromise that led to the creation of electric service territories. It also removes an important reasonableness check that protects the rights of the public. Municipal Amici urge this court to reverse the Court of Appeals' rulings that just compensation calculations may not consider fair market

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<sup>47</sup> Minn. R. Evid. 203.

<sup>48</sup> *Price v. Amdal*, 256 N.W. 2d 461, 468 (Minn.1977).

value, that fair market value should be excluded, and that any jury instructions referencing fair market value should be rejected.

Respectfully submitted,

FLAHERTY & HOOD, P.A.

Dated: \_\_\_\_\_

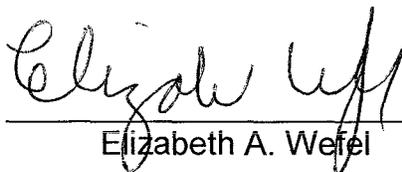
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CERTIFICATION OF COMPLIANCE WITH THE  
REQUIREMENTS OF MINN. R. APP. P 132.01

I, Elizabeth A. Wefel, the attorney *for Amici Curiae* of Minnesota Municipal Utilities Association, Missouri River Energy Services, Western Minnesota Municipal Power Agency and Coalition of Greater Minnesota Cities, hereby certify that this brief complies with the form and length requirements of Minn. R. App. P. 132.01, subds. 1 and 3. Counsel for *amici* prepared this brief using the word processing software Microsoft Word 2007. The *amici* brief was printed in 13-point type using the proportional font Arial. According to this software's word count utility, the brief contains 5,963 words, and hence is within the 7000 word limit set by Minn. R. App. P. 132.01, subd3.

May 24, 2012

  
Elizabeth A. Wefel