

NO. A11-0705

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State of Minnesota  
**In Supreme Court**

City of Moorhead,

*Appellant,*

vs.

Red River Valley Cooperative Power Association,

*Respondent.*

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

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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).

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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); In re Grand Rapids Pub. Util. Comm’n, 731 N.W.2d 866 (Minn. App. 2007); In re City of Redwood Falls, 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. Co., 567 N.W.2d 42 (Minn. 1997); Gross v. Victoria Station Farms, Inc., 578 N.W.2d 757 (Minn. 1998).

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

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

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

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

- 5. 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 Prod. Litig., 596 F.3d 884 (8th Cir. 2010).

## STATEMENT OF THE CASE

This appeal follows a protracted procedural history beginning with annexation of an electrical service territory in 2006, culminating with a three-day jury trial in October 2010, continuing at the District Court level with post-trial motions decided on February 18, 2011, and ending with an affirmance of the jury's decision by the Court of Appeals. As the questions posed in the City's appeal require a working knowledge of the procedural history, it is discussed below.

## STATEMENT OF THE RELEVANT FACTS

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

Red River Valley Co-op Power Association ("RRVC") is a rural electric cooperative with its offices in Halstad, Minnesota. (T52, 93).<sup>1</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>2</sup>

RRVC provides service within a geographical area, its service territory, which was established in 1975 by the Minnesota Public Utilities Commission ("MPUC") pursuant to Minn. Stat. § 216B.39. (T53-54). RRVC 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> T\_\_ refers to the Trial Transcript.

<sup>2</sup> Ex. \_\_ refers to the corresponding Trial Exhibit.

RRVC purchases wholesale power from Minnkota Power Cooperative. (T64, 66, 95). Minnkota owns the power generation facilities, transmission lines, and substations necessary for delivery of the power that RRVC needs. (T66). RRVC 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). RRVC began providing service to Americana Estates, now a fully developed residential subdivision, in the late 1960's. (T174).

Americana Estates is a very valuable and unique part of RRVC's service territory. (T56-57, 109-10; Ex. 2). In terms of density, one mile of line services sixty-five customers in the area (65:1). (T57, 109-10). On the rest of the system, 1,700 miles of line serve 4,700 customers (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 RRVC's system produces 7.4 cents per kilowatt-hour sold. (T110).

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

On March 9, 2006, the City of Moorhead ("City") annexed Americana Estates.<sup>3</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. § 216B.47. (AX-1-13; see AX-2 ¶ 5).<sup>4</sup> The Court granted the City's petition on May 1, 2007. (AX-15). The Court appointed a panel of Commissioners on February 7, 2008, to

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<sup>3</sup> See Exhibit 1 to Affidavit of Harold LeVander, Jr. in Support of RRVC's Motion for Partial Summary Judgment/Motion in Limine (February 4, 2010).

<sup>4</sup> AX-\_\_ refers to the Appendix to the City's (Appellant's) Brief.

determine the damages due RRVC. (AX-20). An evidentiary hearing was held before the Commissioners in October 2008. (AX-21).

The Commissioners filed their award with the Court on February 19, 2009, which disagreed with the recommended award submitted by both parties. (AX-21-22). The Commissioners awarded RRVC \$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 [RRVC]” factor; (3) \$25,456 representing the “[e]xpenses-resulting-from-integration-of-facilities” factor; and (4) nothing for the final factor, “[o]ther appropriate factors.” (AX-21).

The City filed an appeal of the Commissioners’ Award, and the Cooperative filed a cross-appeal. (AX-23-26). The matter proceeded to the District Court for *de novo* review.<sup>5</sup>

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

Multiple (four) Scheduling Orders were issued in this case, and the trial was continued twice to accommodate counsel for the City. (AD-34).<sup>6</sup> The Third Amended Scheduling Order scheduled the trial for May 4, 2010, and set December 22, 2009, as the deadline to exchange expert reports. (*Id.*). The parties did exchange expert reports on

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<sup>5</sup> Americana Estates was transferred to the City on July 15, 2009, and the subdivision has been served by the City henceforth.

<sup>6</sup> AD-\_\_ refers to the Addendum to the City’s (Appellant’s) Brief.

December 22, 2009.<sup>7</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 and Submissions necessitated by the five-month trial delay. (AD-34). The Fourth Amended Scheduling Order affirmed all other deadlines imposed by the previous orders, however. (Id.). Thus, 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, RRVC and the City filed cross-motions for Summary Judgment, or, in the alternative, Motions in Limine. Relevant to the present appeal, RRVC argued that “the four factors for determining RRVC’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>8</sup> “In the alternative, RRVC 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-market-value of RRVC’s utility business before and after the acquisition of American Estates as the measure of damages....”<sup>9</sup> Conversely, the City argued that “[t]he City’s

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<sup>7</sup> See RRVC’s Memorandum of Law in Support of Motion in Limine (September 13, 2010) at 1.

<sup>8</sup> See RRVC’s Notice of Motion and Motion for Partial Summary Judgment/Motion in Limine (February 4, 2010) at 1.

<sup>9</sup> Id.

fair-market-value should be entered as judgment.”<sup>10</sup> Alternatively, the City argued that “[a]ny evidence, including testimony from Mr. Eicher [RRVC’s expert], that does not comport with fair-market-value must be excluded from evidence.”<sup>11</sup> In reply, RRVC 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>12</sup>

By Order dated March 30, 2010, the District Court granted RRVC’s Motion for Partial Summary Judgment and its Motion in Limine, holding: (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 [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-23-24). The District 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

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<sup>10</sup> See City’s Memorandum of Law in Support of its Motion for Summary Judgment/Motion in Limine (February 5, 2010) at 2.

<sup>11</sup> Id.

<sup>12</sup> See RRVC’s Reply to City’s Motion for Summary Judgment/Motion in Limine (March 5, 2010) at 1, 3.

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-27-28).

## 2. September 2010: RRVC's Motion in Limine.

On September 8, 2010, six months following the previous Motions, and a month before the October 2010 trial, the City served a revised expert report on RRVC ("New Report").<sup>13</sup> In response, on September 13, 2010, RRVC 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, February 19, 2009, the valuation date for the determination of compensation.<sup>14</sup>

RRVC 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

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<sup>13</sup> See Motion in Limine of RRVC (September 13, 2010) at 1.

<sup>14</sup> Id.

infrastructure has necessitated a complete replacement at an estimated cost of \$400,000 in 2011.”<sup>15</sup>

The City opposed RRVC’s Motion, arguing that the Rules of Civil Procedure required it to supplement its discovery responses, including its expert reports.<sup>16</sup> On Reply, RRVC argued: “The 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>17</sup>

By Order dated September 30, 2010, the District Court granted RRVC’s Motion, holding “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-31). However, the Court clarified that this ruling “was not meant to exclude information on the normal maintenance and replacement costs of facilities and objects within the system, which the Court assumed were already presented to the Commissioners.” (AD-36).

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

At trial, the parties **stipulated** as to the amounts of three of the four 216B.47 factors: (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

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<sup>15</sup> See RRVC’s Memorandum in Support of Motion in Limine (September 13, 2010) at 2.

<sup>16</sup> See City’s Memorandum Opposing RRVC’s Motion in Limine (September 20, 2010).

<sup>17</sup> See RRVC’s Reply Memorandum in Support of Motion in Limine (September 22, 2010) at 1, 2.

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 RRVC 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. The expert witnesses for RRVC and the City calculated the damages attributable to the loss of revenue factor from totally different approaches.<sup>18</sup> RRVC’s expert used the “net loss of revenue” approach in accordance with established precedent, which will be described infra. That approach focuses directly on the financial impact on RRVC based on the area being acquired. The purpose of the calculation was to make RRVC 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

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<sup>18</sup> The City, as part of its recitation of “facts,” criticizes the background and methodology of RRVC’s expert. (AB-8-9; 12-15). Because the jury agreed with RRVC’s assessment of damages **to the penny** and the City is not challenging the sufficiency of the evidence which supports the special verdict, it is unnecessary to respond to the City’s critiques here.

expenses for interest. (Ex. 9). The City’s expert used this approach, but with different assumptions related primarily to the determinations of avoided expenses.

**a. Comparison of Expert Testimony.**

A summary table illustrates how the two experts diverged:

	<b>RRVC’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; General Expenses</b>	\$756	\$905
<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 RRVC for the taking of part of its electric service territory, calculate the difference between:

1. The **fair-market-value** of RRVC immediately before the service territory was taken, and
2. The **fair-market-value** of RRVC immediately after the service territory was taken....

(AX-39-41 (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 fourth factors**, so you can focus your attention on factor two, loss of revenue to the utility....

(AX-50-51 (emphasis added)).

### 3. Special Jury Verdict.

On October 13, 2010, the Jury issued its Special Verdict, agreeing with RRVC's expert as to RRVC's damages as to loss-of-revenue:<sup>19</sup>

What sum of money is just compensation for RRVC 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:	\$ <u>385,311</u>

(AD-45). Thus, the jury selected the **exact** measure of loss-of-revenue damages suggested by RRVC's expert (the only calculation in dispute). (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 RRVC in the amount of \$385,311 on May 31, 2011. (AX-90-91, 96).

### 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"

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<sup>19</sup> Again, the proper amount attributed to the other three factors was not before the jury, as the parties had stipulated as to the correct amounts. (AX-50).

means “fair-market-value.” (AX-92). The City also challenged the exclusion of its untimely expert report which purported to calculate replacement costs.

RRVC 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>20</sup> RRVC argued: “The measure of damages is governed by the plain language of the statute (section 216B.47), as this Court correctly decided in March of 2010.”<sup>21</sup>

By Order dated February 17, 2011, the District Court denied the City’s Motion. (AD-32-44). The District Court affirmed its earlier determination that fair-market-value was not the appropriate measure of RRVC’s damages under this 216B.47 proceeding. (AD-36-39). 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,

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<sup>20</sup> See RRVC’s Response to City’s Motion (November 30, 2010) at 1.

<sup>21</sup> Id. at 3.

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-38-39).

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 only a month prior to trial. (AD-39). 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-39). 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-40).

#### **D. Court of Appeals Decision**

The City appealed the District Court’s determination to the Court of Appeals. The Court of Appeals (Judge Hudson) affirmed the District Court in a twenty-page published opinion. (AD-3-22). The Court of Appeals held: “In an eminent-domain proceeding pursuant to Minn. Stat. § 216B.47 (2010), fair-market-value is not the proper measure of damages; rather, the calculation of damages is limited to the factors specifically enumerated in Minn. Stat. § 216B.47.” (AD-4). The Court of Appeals found, therefore: “[b]ecause ... fair-market-value is not the proper measure of damages under Minn. Stat. § 216B.47, ... fair-market-value evidence was properly excluded from the trial and the jury instructions.” (AD-4). The Court of Appeals held further that the District Court did not abuse its discretion by excluding the City’s New Report because “the expert’s report was properly excluded” because it was submitted “well outside of the discovery deadline,” and “the [C]ity had the opportunity to present evidence regarding the estimated cost of improvements and maintenance.” (AD-4, 20-21).

On April 17, 2012, the Minnesota Supreme Court granted the City's Petition for Further Review.

## ARGUMENT

### I. SUMMARY OF ARGUMENT.

The City's numerous arguments on appeal can be simplified as falling into one of two 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-23-50); (2) abused its discretion by excluding the City's untimely New Report from its expert. (AB-50-56).<sup>22</sup> **Neither argument has merit.**

Nearly all of the City's briefing is grounded in its mistaken notion that "fair-market-value" must determine the amount of compensation it owed RRVC for its "lost revenue" (the second statutory factor, the only factor disputed at trial) or, is "a method of how to calculate or 'include' the statutory factors," or, as another alternative, is an "other appropriate factor[]" worthy of consideration (the fourth statutory factor, which the City stipulated amounted to "\$0" in damages).<sup>23</sup> The City's numerous sub-arguments flow

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<sup>22</sup> The City has abandoned a third argument, presented to the Court of Appeals, that the jury's special verdict is not supported by sufficient evidence.

<sup>23</sup> The City disingenuously claims that it did **not** stipulate to this factor because "[n]o written stipulation was filed," and claims "[t]he parties agreed that there should be no specific number due to 'other appropriate factors.'" (AB-11). The City ignores that the District Court instructed the jury that "[t]he 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). The Court of Appeals noted that the City "stipulated at trial that the damages for 'other appropriate factors' were \$0," (AD-18 n.1), and that "\$0" for this factor was pre-filled on the jury's special verdict form. (AD-45). Thus, its argument here on appeal "that this factor could include fair-market-value damages is inconsistent with its stipulation at trial." (AD-18 n.1).

from that incorrect premise: (A) the Constitution requires “just” just compensation; (AB-24); (B) Just compensation “must” be fair-market-value (AB-25-26); (C) 216B.47 is unconstitutional<sup>24</sup> unless it is interpreted to mean that fair-market-value is the only appropriate measure of damages (AB-26-29); (D) Chapter 117 requires that 216B.47 measure damages based on fair-market-value (AB-29-31); (E) Because 216B.47 does not “prohibit” fair-market-value, it must require it (AB-31-32); (F) The word “must” in 216B.47 should, in contravention of canons of statutory construction, be viewed as permissive (AB-32-35); (G) It is irrelevant that the Legislature omitted the phrase “fair-market-value” from 216B.47 (AB-35-38); (H) Fair-market-value “is compatible” with 216B.47’s four factors (AB-38-43); and (I) it violates the separation-of-powers unless “fair-market-value” applies (AB-43-46). As discussed below, despite the City’s attempt, through sheer volume of theories, to create an illusion of complexity, each one ultimately fails for the same simple reason: the City is wrong that fair-market-value is the appropriate measure of RRVC’s damages given the specificity of the statutory scheme at issue.

After first describing the background on Minnesota Chapter 216B, RRVC 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; (3) the City’s argument ignores statutory-interpretation principles, and

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<sup>24</sup> The City advances this argument, yet admits that it “did not challenge the constitutionality of Section 216B.47” below. (AB-26). The City admitted in oral argument before the Court of Appeals that it was not challenging the constitutionality of the statute.

attempts to import into the statute a factor for determining damages that the Legislature did not put there; and (4) “other appropriate factors” does not equate to “fair-market-value.” 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 RRVC. (AB-50-56). This argument must be rejected given the District Court’s discretion on evidentiary rulings, and that it is undisputed the New Report was untimely submitted (ten months’ late), a mere month before trial. Moreover, this “evidence” should have been already accounted for in the first statutory factor (original cost less depreciation) and the City stipulated to the amount of damages for this factor.

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

## **II. THE LOWER COURTS 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 lower courts’ 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).

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. Co., 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:

Even if evidence has probative value, it is still within the district court’s discretion to exclude [it]. 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, Inc., 578 N.W.2d 757, 760-61 (Minn. 1998) (quotations and citation 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, Inc. 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 sets forth 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 Coop. 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, RRVC’s damages for the loss of Americana Estates must be based exclusively on the four factors enumerated in

Section 216B.47. 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., In re People’s Coop. Power Ass’n, 470 N.W.2d 525 (Minn. App. 1991); In re City of Rochester, 556 N.W.2d 611 (Minn. App. 1996); In re Grand Rapids PUC, 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 each case, the Court of Appeals affirmed the decision of the MPUC.<sup>25</sup>

Because the four factors the MPUC “shall consider” to determine damages under Section 216B.44 mirror those that “must be included” under Section 216B.47, this body of law is persuasive in this forum.<sup>26</sup> See Minn. Stat. § 645.44, subs. 15a, 16 (2010) (defining “[m]ust” and “[s]hall” as “mandatory”); see also 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).

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

<sup>26</sup>Red River does not argue that the MPUC decisions are binding on this Court.

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 of in Grand Rapids:

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.

731 N.W.2d at 869.

The 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 139-40.

Accordingly, this “net-revenue-loss” formula is precisely how RRVC’s expert calculated the “loss of revenue” factor. (T200).

The City claims “[f]air market value is not mutually exclusive of the four factors, but a method of how to calculate or ‘include’ the statutory factors.” (AB-39). This suggestion is belied by the City’s own characterization of its expert’s approach to measuring fair-market value as “rel[ying] most heavily upon the income approach.” (AB-42). The City explained: “The income approach measures the future benefits or revenues of the business, discounted to present value; it resembles the ‘loss of revenue’ factor.” (AB-50 (emphasis added and footnote omitted)). The City states further that a second approach to determine fair-market value – the “asset approach” – is “similar to the ‘original-cost-of-the-facilities-less-depreciation factor.’” (AB-40 (emphasis added)). Thus, by the City’s own argument, its expert’s fair-market-value calculation only “resembled” one of the four factors which **must** be considered under Section 216B.47.

The City argues that the Court of Appeals needed “empirical evidence” to support its conclusion that fair-market value “is not compatible with the four enumerated factors.” (AB-38). Again, the City’s argument misses the mark as it ignores that - even by its own reasoning - the four mandatory factors are **not** the same as fair-market value. In fact, the concepts pertaining to a fair-market-value analysis are antithetical to the concepts pertaining to an analysis of the four factors in the statute. First, the four factors are additive in reaching a total compensation result. To the contrary, in arriving at fair-market-value, the three approaches, i.e., cost, income, and market are not added together. They are simply different means of arriving at a single value. Second, loss of revenue is not the same as loss of income or profit from the area acquired as the income approach uses. Loss of revenue includes recovery of the residual fixed expenses of operation,

which the utility loses from the customers in the acquired area. That recovery includes far more than just the margin or income from the area. Third, the first factor addresses the depreciated original cost of the facilities. The cost approach to fair-market-value, however, is based on the current replacement cost of the property being acquired. The net loss of revenue under the four factors is capped at ten years. In the fair-market-value analysis, however, the income loss is capitalized and is perpetual.

Finally, in a fair-market-value analysis, the measure of damages is the difference between the value of the property before the taking (the **entire** RRVC system) and the value of the property after the taking (the **entire** RRVC system). (AX-37-42 (City's Proposed Jury Instructions)). The four factors in the statute are **not** directed at the before and after value of the **entire** RRVC system. Instead, they are directed at the specific economic components related only to the loss of the acquired area.

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

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 Elec. 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 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 to build or widen a road. Land is not even involved. What is being 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.

The City claims “[t]he Legislature simply did not differentiate electric-service-territory takings for any other taking in terms of whether fair-market-value should apply.” (AB-36). The City’s argument ignores the obvious: the Legislature **did** create a unique statutory scheme, separate from Chapter 117, to govern electric-service-territory takings and provided for specific statutory factors which “must be considered” when determining damages.<sup>27</sup>

The City argues that “the statutes are replete with this situation” where “the Legislature did not specify fair-market-value in an eminent domain statute.” (AB-27, 35-36). Although the City cites numerous statutes as “examples,” (AB-27 n.103), none are persuasive. Unlike here, the Legislature did **not** include specific factors which “must” be considered in the sections cited by the City. Accordingly, if the Legislature intended that fair-market-value be the sole measure of damages in Chapter 216B, notwithstanding the four mandatory factors, it would have said so. The City baldly asserts, without any

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<sup>27</sup> The City cites Iowa Elec. Light & Power v. City of Fairmont, 67 N.W.2d 41, 45 (Minn. 1954), to state “it is apparent that our legislature has never considered Chapter 117 as limited in its application to the condemnation of real estate only.” (AB-24). Although that point may have been true in 1954 when this Court made it, it is hardly persuasive here given the Legislature’s subsequent enactment of Chapter 216B.

citation to authority, that “[s]ometimes silence is simply silence.” (AB-27). However, as recognized by the Court of Appeals,

[t]he doctrine of *expressio unius est exclusio alterius* means that the the expression of one thing is the exclusion of another. *Expressio unius* generally reflects an inference that any omissions in a statute are intentional.” State v. Caldwell, 803 N.W.2d 373, 383 (Minn. 2011) (citations omitted); *see* Minn. Stat. § 645.19 (2010) (codifying the doctrine of *expressio unius*).

(AD-16).

The City cites Rochester to argue that “although th[is] Court recognized that the four factors in Section 216B.44 and Section 216B.47 were the same, it **disagreed** that the MPUC must decide how to interpret these factors” and “[t]h[is] Court ... specifically rejected the argument that there must be uniform results.” (AB-44 (some emphasis in original)). This argument is incorrect.

Quite to the contrary, this Court explicitly recognized in 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-37). As explained above, the four factors enumerated in Section 216B.44 are **identical** to those under Section 216B.47. See Id. 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)).

Further, the City argues **for the first time** that this appeal “raises additional separation-of-powers concerns,” claiming that the Court of Appeals has “[a]ssign[ed] a broad jurisdiction to the Executive Branch” (the MPUC). (AB-43). Even if this argument was properly before this Court, Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988), it lacks merit. First, it is the **Legislative** Branch which enacted the identical statutory schemes in Chapter 216B. Second, the Court of Appeals did not hold that the MPUC’s decisions controlled here. Rather, utilizing traditional principles of statutory construction, the Court of Appeals simply determined that it made no sense to read a requirement into the statute that the Legislature chose not to put there, given that it **did** specify what factors are part of the damages calculation.

The City also claims that “such an approach would be contrary to past precedent from this Court” in Rochester. (AB-43). Contrary to the City’s assertion, Rochester involved whether the MPUC had primary jurisdiction, and that was the question this Court answered in the negative. See 483 N.W.2d at 481 (concluding “the doctrine of primary jurisdiction is 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 RRVC's position, not the City's.

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

RRVC does not disagree with the City's premise that the United States and Minnesota Constitutions require "just compensation" for governmental takings of private property. Further, RRVC 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," suggesting it represents a Constitutional maximum, is incorrect. 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) confuse a floor with a ceiling in arguing that it is somehow unconstitutional to require them to pay "more" than fair-market-value. It is the opposite that is true: it is unconstitutional for an owner's private property to be taken without just compensation. Because just compensation is **not** necessarily limited to "fair-market-value," there is no Constitutional injury to the City if it pays above what it considers "fair." The City's argument fails because legislatures can, **and do**, require that a condemning authority pay more than a Constitutional minimum of fair-market-value. Indeed, the Minnesota Legislature has provided:

[A]ll condemning authorities ... 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 RRVC'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 RRVC must be paid.<sup>28</sup>

Indeed, the United States Supreme Court has rejected the notion that "just compensation" and "fair-market-value" are always 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.<sup>29</sup>

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<sup>28</sup> The City recognizes, in passing, that "'additional' ... remedies under Section 216B.47 may apply" pursuant to Section 117.012. (AB-37). That is precisely RRVC's point.

<sup>29</sup> Thus, the United States Supreme Court agrees with Court of Appeals' reasoning "that damages for electric-service-territory must be unique, that there is no market of willing

United States v. 564.54 Acres of Land, 441 U.S. 506, 510-13 (1979) (internal citation and footnotes omitted, emphasis added); United States v. Fuller, 409 U.S. 488, 490 (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 RRVC 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, RRVC has utility infrastructure in place to service Americana Estates. Likewise, the City also has surrounding utility infrastructure that 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

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buyers and sellers, and that fair-market-value [is not just compensation],” although the City suggests there is no basis for this conclusion. (AB-34). As recognized by the Supreme Court, even though it is true that “all condemnation proceedings involve unwilling sellers,” (AB-35), it is **not** true that there is a market for all property subject to a taking.

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

The City attempts to claim that Chapter 117 requires the result it urges because “[w]hen the Minnesota Supreme Court has construed a law, the Legislature in later laws on the same subject is presumed to intend the same construction.” (AB-26-27). This assertion is inaccurate as 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. 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, 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 RRVC’s service territory.<sup>30</sup>

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<sup>30</sup> The City’s reliance on County of Dakota v. Cameron, --- N.W.2d ----, 2012 WL 987299 (Minn. App. Mar. 26, 2012), to suggest that this Court must “rely on traditionally utilized market-value approaches” and that the Court of Appeals’ analysis here “is in direct conflict” is misleading. (AB-28-29). Cameron involved the condemnation of a

### 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 ambiguous, 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).

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liquor store, pursuant to Section 117.187, and the Court held "[a] determination of damages under Minn. Stat. § 117.187 is based on traditional market-value analysis." Id. at \*1 (emphasis added). Indeed, this case actually supports Red River's position that "fair-market-value" of the property in question is not always just compensation: the County offered the liquor-store owner "\$560,400 for the taken property based on a real-estate appraisal." The commissioners awarded \$655,000. Id. at \*2. However, because Section 117.187 provided for additional compensation ("the amount of damages ... must be sufficient for an owner to purchase a comparable property"), the owner ultimately "was entitled to \$997,055.84 as just compensation," and approximately \$200,000 in attorney fees and costs. Id.

As set forth above, the two alternative statutory procedures available to a municipality acquiring the service territory of an electric cooperative are set forth in Minn. Stat. §§ 216B.44 and .47.

The City asks: “Why would the Legislature specify two different forums if it expected identical calculations”? (AB-45). To accept the City’s argument, the Court must conclude that the Legislature intended an entirely different damage calculation to govern based on whether the municipality chose to acquire 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. Smith v. City of Jackson, 544 U.S. 228, 233 (2005). Thus, the appropriate question is: “Why would the Legislature establish that two different forums must consider identical factors when construing damages for an electrical-service-area taking, and expect totally different approaches”? If the amount of just compensation due to the owner depended on the forum, that would be an absurd and uncertain result. The City’s argument would turn these canons on their 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>31</sup>

As a comparison of the expert reports of RRVC 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 RRVC), 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 the Court of Appeals.

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 RRVC is correct that “fair-market-value” is not the correct measure, 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 RRVC’s damages “**must include**” (1) “the original cost of the property less depreciation”; (2) “loss of

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<sup>31</sup> Although the City’s 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. Family Mut. Ins. Co., 779 N.W.2d 853, 860 (Minn. 2010) (finding, in another context, that “[u]ltimately, the question of a potential windfall to a plaintiff is one for the legislature and not [for the] court[s]”).

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.<sup>32</sup>

A plain reading of the statutory language 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. Again, 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, 470 N.W.2d at 530, this Court interpreted the four damages to be cumulative, and viewed the damages from the Cooperative’s perspective.

Also, the City now attempts to deny 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

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<sup>32</sup> In arguing that “must include” is permissive the City erroneously focuses on the word “include” and completely ignores the word “must.” (AB-33).

& Abrahamson, Inc., 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). This argument is also procedurally improper as City failed to make it to the District Court or the Court of Appeals.<sup>33</sup> Thiele, 425 N.W.2d at 582 (holding that appellate courts only review issues presented to and considered by the district court).

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, appropriately rejected the City’s proposed jury instructions that related to fair-market-value, and did not abuse its discretion in denying the City’s new-trial motion.

### **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-50). 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,

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<sup>33</sup> To the contrary, counsel for the City admitted during the Court of Appeals’ argument that the City **did** stipulate at trial that the other-appropriate-factor damages equaled \$0.

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 RRVC]: 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-51-52 (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 RRVC'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 RRVC's expert. (A-50) That is not true. RRVC 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), RRVC'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 RRVC's expert 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. 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). RRVC 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 Prod. 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, Inc., 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>34</sup>

**V. THE AMICI’S POLICY ARGUMENTS ARE GROSSLY OVERSTATED.**

The arguments in the two amici briefs submitted in this case are unpersuasive.

**A. Arguments of Minnesota Municipal Utilities Association, et. al.**

The amici’s 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

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<sup>34</sup> See City’s Response to RRVC’s Motion for Partial Summary Judgment/Motion in Limine (March 4, 2010) at 16.

expand with city borders. (MMU-6). 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. Rochester, 556 N.W.2d 611; Grand Rapids, 731 N.W.2d 866; Buffalo, 2006 WL 1229596; Buffalo, 2008 WL 2020491; 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. There have also been numerous settlements of service territory acquisition in which the municipal utility has paid the electric cooperative the agreed compensation for its service territory. Thus, the actions of municipal utilities over the last twenty years refute the amici’s contention that 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 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-8). 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 was at the negotiating table and attended the Legislature hearings when the bill for the 1974 Act was under consideration. Its legislative representatives were well aware in 1974 that fair-market-value was not a statutory factor for determining compensation. The actions of the MMUA in 1974 when the Act was adopted speak much louder than the words in its Brief 38 years later.

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.

Amici parties argue that there will be no limit on the damages which a selling utility will seek in acquisition proceeding, if fair-market-value is not a factor in

determining damages. (MMUA-11, 16.) It is true under Section 216B.47 that the damages are to be viewed from the seller's perspective, but it is not true that the damages, therefore, will be unlimited. The first factor, original cost of facilities, less depreciation, can be taken directly from the accounting records of the selling utility. The third factor, expenses of integration of facilities, is largely an engineering decision tying off the displaced utility's surrounding facilities where the acquisition occurred. It has rarely been disputed in acquisition proceedings. The fourth factor, other appropriate factors, usually involves relatively small amounts, and often is mutually agreed upon. See Rochester, 470 N.W.2d 525 (Minn. App. 1991) (recovering incremental increase in wholesale power costs of approximately \$11,600). In fact, the parties in this case stipulated to the damages on these three factors.

With respect to the loss of revenue factor, the method for calculating the damages for this factor has been developed by the MPUC. It is known as the net-loss-of-revenues method, and it has been judicially approved. This methodology sets definable limits on the loss of revenue that can be claimed, i.e., actual or estimated gross revenues from the acquired area, netting off of avoided expenses, a ten-year limit on the net revenue loss, which loss is then discounted to present value.

The City's expert witness testified that RRVC's net revenue loss was \$125,000, an amount considerably lower than the amount to which RRVC's expert testified at \$339,865. The jury simply found RRVC's expert testimony to be more credible than the City's expert testimony. Amici do not seek to use fair-market-value as a reasonableness check on the four factors in the statute. Rather, they seek to use fair-market-value as the

limit on compensation that the four factors produce under the net loss of revenue methodology.

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 contend by analogy that the recent Court of Appeals’ decision in Dakota County, --- N.W.2d ----, 2012 WL 987299, demonstrates how fair-market-value can be incorporated into the four factors of Section 216B.47. Dakota County has no application to this case. First, the minimum compensation statute, Section 117.187, appears in Chapter 117, the statute that governs typical condemnation proceedings. In

Chapter 117, fair-market-value is the standard measure of damages, subject to the enhancements in Sections 117.031, 117.186, and 117.187.

Second, the Court of Appeals found that several terms in the minimum compensation statute were ambiguous and required statutory interpretation. The terms in question were “comparable property,” “community property,” and the measure of compensation when there could be no guarantee that the relocation property could or would be purchased. The Court of Appeals affirmed the use of fair-market-value as the measure of damages, because there was no other measure of value that would carry out the purposes of the statute.

The ambiguities found in Section 117.187 do not exist with respect to the four factors in Section 216B.47. These factors have been repeatedly applied and interpreted in service territory acquisition cases over the last 20 years. Amici attempts to create an ambiguity by arguing that the non-existent fair-market-value standard should be imported into Section 216B.47. The non-existence of fair-market-value in the statute logically means that it is not a factor to be considered.

Most importantly, however, Dakota County is directly contrary to the City’s position that RRVC’s damages must be limited to the fair-market-value of the service territory taken. See supra at n.30.

Amici attempts to answer the anticipated position that Amici Service Providers will take, namely, that importing a fair-market-value factor into Section 216B.47 means that just compensation decided by the courts under Section 216B.47 will differ from just compensation decided by the MPUC under Section 216B.44. (MMUA-20). Amici’s

answer is to import the non-existent fair-market-value factor into Section 216B.44 as well. That would only compound the same statutory misconstruction inherent in amici's argument with respect to Section 216B.47.

Amici's basic argument for inserting fair-market-value into section 216B.47 is because that statute provides for an eminent domain proceeding. In other words, the use of eminent domain as the vehicle for acquisition automatically means damages based on fair-market-value. But, an administrative proceeding under Section 216B.44 is not an eminent domain proceeding. Without there being an eminent domain proceeding, there can be no damages based on fair-market-value. In fact, the MPUC has already rejected the use of fair-market-value as a factor in determining compensation under Section 216B.44. Application of the City of Olivia, et al., PUC Docket No. E-288,136/SA-85-93. (AD-47, 56).

Amici parties assert that municipal utilities have reason to be reticent about using the MPUC to resolve compensation issues, because of statements made years ago by past MPUC commissioners. Neither of these commissioners currently serves on the MPUC. In addition, the MPUC acts as a body, and its written decisions are the final decisions of the agency, regardless of comments made by individual commissioners during their open meeting deliberations.

Lastly, Amici contend that excluding fair-market-value will avoid constitutional and evidentiary problems. (MMUA-22). Amici assert over and over and over that the four factors in Section 216B.47 will yield a compensation level much higher than fair-market-value. Amici parties claim that such a result was not intended by the Legislature.

Amici parties contend that such a result was not part of a 1974 legislative compromise between municipal utilities and electric cooperatives. Amici parties claim that such a result will prevent municipal utilities from growing with their cities. Amici parties contend that such a result has no reasonableness check. After all this, amici parties reverse fields and disingenuously claim in this section of their Brief that an electric cooperative in the future acquisition proceeding may want to introduce fair-market-value evidence to bolster its damages calculation. Amici are concerned that the Court of Appeals' decision would prevent it from doing so, or worse, an electric cooperative would be allowed to introduce fair-market-value evidence, but that the municipal utility would be precluded from doing so.

Amici are needlessly concerned about the constitutional issue. There is no doubt that the four factors measure of damages will exceed fair-market-value in any acquisition proceeding. The four factors are an additive result. The three approaches to market value, i.e., cost, income, and market are not. They are different approaches to reach a single value. Loss of revenue under Section 216B.47 is a totally different concept from an income approach to value in a typical condemnation case. The "other appropriate factors" factor has no parallel in the standard fair-market-value methodology.

Amici are needlessly also concerned also about an evidentiary problem. If fair-market-value is not permissible evidence in determining damages under the statute, then neither party can offer such evidence.

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

The Amicus League's contentions have no merit. It should be noted that Dean Lund, then executive secretary of the League of Minnesota Municipalities, was the main sponsor of the bill that led to the 1974 Act. In re People's Coop., 470 N.W.2d at 531. It argues that this case is important to all 853 Minnesota cities, "because their eminent-domain authority is at stake." (LMC-4). No, it is not. 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 fears the property owners will claim enhanced damages under eminent domain statutes that are silent regarding fair-market-value. They will not be able to do that, unless a particular statute has a specific set of damage factors like those contained in Section 216B.47. Absent a statute that expands just compensation beyond the constitutional minimum of fair-market-value, fair-market-value will remain the default measure of damages.

Amicus League equates any amount that exceeds fair-market-value in eminent domain proceedings as "falsely inflated damages." (LMC-5.) Amicus League offers

absolutely no proof of this bald assertion and ignores the several statutory provisions in Chapter 117 that provide damages beyond the fair-market-value of the property taken.

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, for example, Chaska, New Prague, Arlington, Le Sueur, Buffalo, Delano, Willmar, Alexandria, Halstad, and Roseau without the concerns raised by Amicus League.

Amicus League claims that excluding fair-market-value from consideration under Section 216B.47 will be bad public policy and there will be confusion in eminent domain law in that if the fair-market-value standard is not specified in a particular eminent domain statute, it will be presumed not to apply. This argument is specious. Fair-market-value is the default measure of damages in eminent domain proceedings, unless the legislature has provided an enhanced measure of damages in eminent domain, as it has in Section 216B.47.

Amicus League argues that an exception to the fair-market-value standard will cause separation of powers conflicts, because the judiciary will be unilaterally amending eminent domain law to change the historic standard of damages, (LMC-8-9). 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 imbedded in Section 216B.47, where the legislature provided the four factors which the damages for the displaced utility must include. 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 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 also 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. Consistent with the separation of powers doctrine, courts do not add language to statutes that the Legislature has not put there.

Amicus League next maintains that not using the fair-market-value standard with established precedent holding the statutes should be interpreted to comply with constitutional requirements. (LMC-9). The legislature has full power, however, to prescribe that just compensation to a property owner in a condemnation proceeding may exceed the constitutionally required minimum of fair-market-value of the property taken.

The City itself has made no claim that the provisions of Section 216B.47 are unconstitutional.

Amicus League maintains that it would be unreasonable to prohibit the consideration of fair-market-value in the interpretation of Section 216B.47 (LMC-10). In Coop. Power Ass'n v. Aasand, 288 N.W.2d 697 (Minn. 1980), this court held that a requirement of reasonableness must be read into a legislative delegation of eminent domain power. In that case, this court upheld as reasonable and constitutional a requirement that a utility company be compelled to purchase the entire farm in a case the utility company sought to acquire an easement over a very small part of the farm. If Section 116C.63, subd. 4 is the reasonable measure of damages in the context of a utility condemnation proceeding, there can be no doubt that the four factors for damages in Section 216B.47 pass any reasonableness test.

CONCLUSION

RRVC respectfully requests that this Court affirm the decision of the Court of Appeals.

Date: June 19, 2012

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that Respondent's Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3. The length of this brief is 13,667 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: June 19, 2012

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