

A11-1116

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Northern States Power Company, *et al.*,

*Appellants,*

v.

Roger A. Aleckson, *et al.*,

and

Victor E. Spears, *et al.*,

*Respondents.*

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APPELLANTS' REPLY BRIEF and SUPPLEMENTAL 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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## FACTUAL BACKGROUND<sup>1</sup>

Only one fact is relevant to this appeal: After Appellants notified Respondents of their intent to acquire a transmission line easement across the edge of their properties, each Respondent had a choice to make. They could (1) choose to move, by making a so-called “Buy-the-Farm” election,<sup>2</sup> which would require Appellants to condemn a fee interest in such part of their property that they designated, or (2) choose to remain on their property, as many of their neighbors did.

Respondents argue that their Buy-the-Farm elections were reasonable choices, sincerely made. But, regardless of *how* or *why* they decided to exercise their choices, the critical fact is that Respondents *had a choice*. They were not required to move. They could have remained on their property. The choice was theirs. The fact that they had a choice is the only fact relevant to this appeal, and it is undisputed.<sup>3</sup>

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<sup>1</sup> References to “A. App.” herein refer to the Appendix attached to Appellants’ initial brief, and “Supp. App.” refers to the Supplemental Appendix attached hereto.

<sup>2</sup> Respondents also had the choice to sell their properties on their own.

<sup>3</sup> Respondents’ briefs contain numerous statements that are both incorrect and not relevant to this appeal. For example, without citation to the record, the Pudases and Mr. Enos incorrectly state that “the easement designated by NSP covered the *entire* homestead . . . .” (Pudas and Enos Br. at 3) (emphasis added). In fact, the record demonstrates that the transmission line easement occupies only a portion of their respective properties. (A. App. 85; Supp. App. 123.) The erroneous statement on page 3 of the Pudas and Enos brief that two non-right-of-way easements were “automatically converted” into a fee taking of the entire property “by operation of law” is discussed *infra* at pp. 7-8.

## ARGUMENT

### I. RESPONDENTS WERE NOT REQUIRED TO RELOCATE.

Appellants' initial brief demonstrates that the minimum compensation and relocation assistance statutes do not apply to owners who have an option or choice as to whether to remain on their property or move, where only an easement is sought. Instead, both statutes apply only where owners have *no choice* but to relocate. Section 117.187 allows owners to make minimum compensation claims only if they "must relocate." *Minnesota Statutes* § 117.187. The Minnesota Uniform Relocation Act ("MURA"), *Minnesota Statutes* §§ 117.50 – 117.56, permits claims for relocation assistance only by a "displaced person," which is expressly defined to exclude "a person who is *not required* to relocate permanently as a direct result of a project."<sup>4</sup> 49 C.F.R. § 24.2(a)(9)(ii)(D) (incorporated by reference into *Minnesota Statutes* § 117.50, subd. 3) (emphasis added). Neither statute applies to owners who can choose to remain. The Legislature chose to not allow parties who have a choice to make a claim.

Respondents could have remained in their homes, but chose not to do so. Their houses have not been, and will not be, destroyed, moved, or altered because of the transmission line easement. In fact, other families will live in Respondents' former houses. Respondents made a *choice* to move, they were *not required* to do so.

Respondents seem to agree that, under the plain meaning § 117.187 and MURA, only persons who are required to relocate can pursue minimum compensation and

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<sup>4</sup> Respondents' briefs fail to even acknowledge this controlling definition.

relocation assistance claims, but then make two arguments to attempt to demonstrate that they had no choice but to relocate.<sup>5</sup> Their arguments are unavailing.

**A. The “Condemnation Process” Did Not Deprive Respondents of Their Choice Regarding Whether to Relocate.**

Respondents’ principal argument is that, once they chose to force Appellants to condemn fee title to their property, the “condemnation process” deprived them of a choice regarding whether to remain or move. The Pudases and Mr. Enos argue that “[t]he *condemnation process* removed entirely [their] ability to decide whether they must relocate.” (Enos and Pudas Br. at 6) (emphasis added). The Hansons and Stiches

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<sup>5</sup> In their brief, the Pudases and Mr. Enos also reference concerns about EMF, stray voltage, and other supposed threats to human health and the environment, although they do not expressly base their arguments on them. (Pudas and Enos Br. at 11 and n. 8-10.) The findings of fact made by the Administrative Law Judge in the route permit process rejected any significance to such concerns. The ALJ, after reviewing the extensive testimony and the Environmental Impact Statement prepared for this transmission line, found that:

159. The maximum electric field associated with Applicants’ proposal, measured at one meter above the ground, is calculated to be 3.76 kV/m. The Commission has imposed a maximum electric field limit of 8 kV/m measured at one meter above the ground.

160. The highest projected magnetic field level during peak operation at the edge of the right-of-way is 23.79 mG. These levels are considerably less than one percent of the recommended exposure guidelines.

161. There is no indication that any significant impact on human health and safety from EMFs will arise from the Proposed HVTL, regardless of which route is chosen.

(A. App. 30.) The Minnesota Public Utilities Commission expressly adopted these Findings of Fact. (Supp. App. 138.)

similarly argue that “once the Buy the Farm election is made, the matter proceeds through the condemnation process under Chapter 117” and, therefore, “Appellants were required to obtain all of Respondents’ property.” (Hanson and Stich Br. at 7.) Respondents’ argument that the condemnation process forced them to relocate is misplaced for two reasons.

First, it is a circular, bootstrap argument. Respondents argue that they were deprived of a choice regarding whether to remain or move by the condemnation process, but they ignore the fact that it was Respondents’ freely-exercised elections that resulted in their moving. A person who *chooses* to do something cannot say that he was *compelled* to do the thing. Owners who voluntarily choose to expand easement takings into full fee title acquisitions that include their houses cannot say that their resulting relocations were compelled simply because of the fact that *once they chose to expand the taking* by making the elections, they were required to actually relocate. As noted, the minimum compensation and MURA statutes apply to owners who have no choice but to relocate. Here, it cannot be disputed that Respondents had a choice. They could choose whether or not to make elections under the Buy-the-Farm statute. Having willfully chosen to initiate the process that resulted in the total divestment of their property, they cannot now equate themselves with owners who have no choice.

Second, even *after* making their Buy-the-Farm elections, Respondents *still* had a choice about whether or not to allow the expanded condemnation taking to continue. Respondents erroneously contend that once they made their Buy-the-Farm elections, an irrevocable process began that would inexorably lead to their eviction from their homes.

They incorrectly argue that, after expanding the condemnation taking by making Buy-the-Farm elections, “they will be forced to move whether they wish to do so,” and that “the amount of payment and the timing of that payment, the date of their eviction, are all judicially determined, whether the landowners like it or not.” (Pudas and Enos Br. at 7, 16.) They attempt to equate themselves with owners who are subject to a total taking, arguing that once they made their elections, “their position was exactly the same” as any other owner who has to relocate as a result of a total taking of its property. (*Id.* at 7.)

Respondents decidedly are *not* in the same position as owners who are forced to relocate as a result of a total taking. In an ordinary condemnation, the owner cannot choose whether to expand the taking, what type of proceeding should occur (e.g., quick-take), what property should be included, and whether the proceeding should continue to a final conclusion. The condemnor makes those decisions. It initiates the process, chooses the type of proceedings, determines that portion of the property to be acquired, and chooses whether to continue the condemnation process.

By contrast, in a Buy-the-Farm election, the owner controls those important choices by virtue of its “*option*” to “require the utility to condemn a fee interest in any amount of contiguous, commercially viable land” it owns. *Minnesota Statutes* § 216E.12, subd. 4 (emphasis added). There is nothing to prevent an owner, after making a Buy-the-Farm election, from withdrawing its election and reversing the scope of the taking at any time up to the time that fee title passes to the utilities.<sup>6</sup> Throughout the proceedings, an

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<sup>6</sup> *Minnesota Statutes* § 216E.12, subd. 4, contains no provision stating that an owner cannot *withdraw* an election at any time. The statute does state that an owner “may not

electing owner retains its ability, at will, to withdraw its election and terminate the Buy-the-Farm portion of the proceedings.<sup>7</sup>

Thus it is not true, as Respondents contend, that once they made their elections, it would be only a matter of time before they would be evicted by a court order, and that they therefore meet the statutory definitions of “displaced persons” and persons who “must relocate.” Instead, they had ongoing, continuing choices to either let the condemnation process play out or to terminate the Buy-the-Farm portion of the process at any time, until the moment that title passed to Appellants. The fact that they have had ongoing choices to allow the Buy-the-Farm portions of the proceedings to continue, or to withdraw their elections, negates their argument that the process left them with no choice but to relocate.<sup>8</sup>

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*expand* or otherwise modify an election without the consent of the utility,” but even if that provision were read to apply to an owner’s decision to withdraw an election, the utility would always consent. That is because the utility does not need and does not want fee title to the owner’s land. Had Appellants needed and wanted fee title to all of Respondents’ land, they would have commenced condemnation proceedings to acquire fee title in the first place. Instead, the utilities in this case began proceedings to acquire only an easement, which is all they needed.

<sup>7</sup> Indeed, one of the property owners in the Stearns County proceedings below, Highland Four LLP, recently decided (without the need to seek Appellants’ consent) to withdraw its Buy-the-Farm election, eleven months after it originally made the election. (Supp. App. 129, 135.) Similarly, in the Wright County proceedings, several other owners (represented by the same counsel that is representing some of the Respondents in this case) decided to withdraw their elections long after they were made. (Supp. App. 136.)

<sup>8</sup> Respondents contend that Appellants incorrectly focus on the time period *before* they made their elections. (Pudas and Enos Br. at 6-7.) However, the pre-election and post-election distinction they attempt to draw ultimately does not matter. The fact remains that Respondents chose to expand the taking, and throughout the process retained the ability to withdraw their Buy-the-Farm elections at any time.

**B. No “Automatic Conversion” of the Non-Right-of-Way Easements Took Place When Respondents Made Their Buy-the-Farm Elections.**

When Respondents made their Buy-the-Farm elections, they designated their *entire properties* for condemnation by Appellants, including their homes. (A. App. 88, 94, 97; Supp. App. 125.) As discussed, the transmission line easement does not extend to Respondents’ houses, and does not require that Respondents relocate. The only reason that Appellants are condemning fee title to the entirety of Respondents’ properties is that Respondents exercised their options to elect to force Appellants to condemn fee title to their entire properties.

Respondents argue that the acquisition of their entire properties occurred “automatically” and “by operation of law,” rather than because of their own choices. (Pudas and Enos Br. at 3.) Their argument is factually misleading and legally unsupported. It is factually misleading because it focuses *not* on the easement for the transmission line right-of-way, but instead on two other easements (the “non-right-of-way easements”) – one that is intended to provide temporary access to the transmission line during construction, and a second that is intended to allow temporary access to property adjacent to the right-of-way easement, if needed, to repair or maintain the transmission line. Neither of the two non-right-of-way easements requires Respondents to relocate. Their homes did not need to be vacated, demolished, altered, or moved because of the non-right-of-way easements.

Respondents’ argument that the non-right-of-way easements “automatically converted” to a fee taking when they made their elections is also legally unsupported.

The statute provides only that the “*transmission line*” right-of-way easement is converted into a fee taking following an owner’s election, not the non-right-of-way easements:

Upon the owner's election made under this subdivision, the easement interest over and adjacent to the lands designated by the owner to be acquired in fee, *sought in the condemnation petition for a right-of-way for a high-voltage transmission line* with a capacity of 200 kilovolts or more shall automatically be converted into a fee taking.

*Minnesota Statutes* § 216E.12, subd. 4 (emphasis added). Nothing states that any non-right-of-way easements are converted to a fee taking. Thus, the only reason that land beyond the transmission line easement ends up being condemned by the utilities is because the owners choose to compel the utilities to condemn it.

**II. APPELLANTS ARE NOT ARGUING THAT THEY ARE EXEMPT FROM THE MINIMUM COMPENSATION AND MURA STATUTES.**

Respondents argue that they are entitled to relocation assistance and minimum compensation under §§ 117.52 and 117.187 by virtue of the fact that public service corporations are not expressly “exempted” from those statutes. However, that argument is irrelevant because Appellants do not contend that an exemption applies.

Instead, Appellants submit that the plain language of the statutes does not allow minimum compensation or relocation assistance claims to be made by owners who have a choice of whether or not to relocate. Appellants acknowledge that such claims might be appropriate where a transmission line easement actually requires an owner to relocate. For example, if houses were located within the transmission line right-of-way, relocation might well be necessary. Unlike the present case, the owners in that circumstance might have no choice but to move, and the statutory requirements would be met – a claim for

minimum compensation would be available because such owners “must relocate,” and relocation assistance could be sought because the owners would meet the definition of a “displaced person.”

### **III. RESPONDENTS’ RELIANCE ON EXTRINSIC EVIDENCE OF ALLEGED LEGISLATIVE INTENT IS MISPLACED.**

#### **A. The Statutes at Issue are Unambiguous and the Court Need Only Apply Their Plain Meaning.**

Statutory construction presents a question of law. *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 910 (Minn. 2006). The Court “begin[s] with the language of the statute, inquiring first whether the statute is ambiguous.” *Id.* (citing *Zurich Am. Ins. Co. v. Bjelland*, 710 N.W.2d 64, 68 (Minn. 2006)). It is well settled that “[i]f the statute is plain and unambiguous, we apply the words of the statute according to their plain meaning and engage in no further construction.” *Reiter*, 721 N.W.2d at 910 (citing *Wynkoop v. Carpenter*, 574 N.W.2d 422, 425 (Minn. 1998)). Consideration of extrinsic evidence of legislative intent is simply not appropriate for an unambiguous statute. *Id.*

Here, the language found in *Minnesota Statutes* § 117.187, that minimum compensation is available only if an owner “must relocate,” is unambiguous. Resort to extrinsic evidence is not necessary to understand the meaning of the word “must.” The plain meaning of “must” is something that is mandatory, not something that is optional. A person who can choose whether to relocate is *not*, under the plain meaning of the statute, a person who “must relocate.” Similarly, the definition of a “displaced person” entitled to relocation assistance under MURA is not ambiguous. As the governing definition plainly states, “a person who is *not required* to relocate permanently as a direct

result of a project” is *not* a “displaced person.” 49 C.F.R. § 24.2(a)(9)(ii)(D) (incorporated by reference in *Minnesota Statutes* § 117.50, subd. 3) (emphasis added).

Respondents do not contend that the statutes are ambiguous. They make no attempt to argue that the Legislature’s intent cannot be discerned from reading the language selected by the Legislature. Nevertheless, Respondents devote substantial portions of their briefs to arguing that extrinsic materials (such as how the Legislature allegedly failed to react to arguments made in the *Aasand* briefs more than 30 years ago, but which were not addressed in the Court’s opinion), and different enactments of the Legislature, are somehow relevant to determine the meaning of §§ 117.187 and 117.52. Without a determination that the statutes are ambiguous, the extrinsic material is simply irrelevant.

**B. The Extrinsic Evidence Does Not Support Respondents' Arguments.**

In any event, the extrinsic evidence that Respondents identify does not support their arguments. They rely mainly on 2010 legislation that amended § 117.189 by, among other things, removing exceptions from certain provisions of Chapter 117 that previously had been applicable to public service corporations. *See* 2010 Minn. Laws ch. 288, § 1.

However, nothing about the 2010 amendment addresses the Buy-the-Farm statute, *Minnesota Statutes* § 216E.12, subd. 4. The Buy-the-Farm statute is neither expressly nor implicitly referenced in the 2010 amendment. In fact, the wording of the amendment appears to *exclude* the amendment’s application to land that an owner elects to force a utility to acquire under the Buy-the-Farm statute. The 2010 amendment states that the

minimum compensation and relocation provisions now apply “to the use of eminent domain authority by public service corporations *for . . . construction or expansion of . . . a high-voltage transmission line . . .*” 2010 Minn. Laws ch. 288, § 1 (emphasis added). Appellants are using eminent domain to acquire *easements* for construction of the transmission line. The additional land that Respondents, through their Buy-the-Farm elections, are compelling Appellants to condemn fee title to is not “for” the construction or expansion of a transmission line. That land will not be used “for” the transmission line, but simply will be held by Appellants until such time that it can be re-sold. On its face, the 2010 amendment does not apply to Buy-the-Farm elections.

In addition, the fact that the Legislature, at one time, exempted public service corporations from the minimum compensation and relocation assistance provisions, but later removed the exemption, says nothing about what the phrases “must relocate” and “displaced person” mean. It is conceded that if Appellants acquired a transmission line easement, and a house were located within the easement, the owner could be entitled to make minimum compensation and relocation assistance claims (if all other requirements were met). The fact that the Legislature removed the exemption does not signal that courts are now free to ignore the plain language of the statutes.<sup>9</sup>

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<sup>9</sup> In their brief, the Pudases and Mr. Enos reason that “[s]ince minimum compensation does not apply to easement acquisitions, it seems incontrovertible that the legislature intended to grant minimum compensation to electing landowners.” (Br. at 28.) That reasoning is faulty because the premise is incorrect – an easement acquisition *could* require an owner to relocate, as described above, in which case minimum compensation would be available because the “must relocate” and “displaced person” requirements would be met.

Finally, the legislative history materials that Respondents cite contain a statement by one legislator that the purpose behind the 2010 amendment's removal of the exemption for electric transmission lines and pipelines was to create uniformity, so that public service corporations would have the same obligations as all other condemning authorities. (Hanson and Stich Br. at 6 and n. 3.) The uniformity goal expressed by the legislator does not support Respondents' arguments. If Mn/DOT acquired an easement over the same portion of Respondents' property for the expansion of Interstate 94, or a pipeline company acquired the same easement for the construction of a pipeline, those condemning authorities *would not* be faced with minimum compensation or relocation assistance claims because those projects, just like the instant transmission line easements, would not require the owners to relocate. Public service corporations, like Appellants, are now "on par" with other condemning authorities. Regardless of who is exercising the power of eminent domain, when an owner must relocate, minimum compensation and MURA apply. Where an owner has a choice, the minimum compensation and MURA statutes do not apply.

### CONCLUSION

Based on the record below, Respondents are neither owners who must relocate nor are they displaced persons. Therefore, under the plain meaning of *Minnesota Statutes* §§ 117.187 and 117.52, Respondents are not eligible to make claims for minimum compensation or relocation assistance. The trial court's order should be reversed.

Respectfully submitted,

Dated: January 3, 2012.

A handwritten signature in black ink, appearing to read "Steven J. Quam", written over a horizontal line.

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