

5

NO. A11-705

State of Minnesota
In Court of Appeals

City of Moorhead,

Appellant,

vs.

Red River Cooperative Power Association, et al.,

Respondent.

**APPELLANT CITY OF MOORHEAD'S
INITIAL BRIEF, ADDENDUM AND APPENDIX**

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

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

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

Sara McGrane (#233213)
220 South Sixth Street, Suite 2200
Minneapolis, MN 55402-4504
(612) 339-6321

*Attorneys for Appellant
City of Moorhead*

*Attorneys for Respondent
Red River Cooperative Power Association*

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).

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	iii
Legal Issues.....	1
Statement of the Case.....	4
Statement of Facts.....	5
A. The City's Fair Market Value Appraisal	7
B. Red River's Damage Calculations.....	8
C. Pre-Trial Rulings	9
D. Testimony at Trial	11
E. Jury Verdict and Post-Trial Motions.....	16
Summary of the Argument.....	17
Standard of Review	20
Argument	21
I. The Court Should Reverse the Error of Law of Prohibiting Fair Market Value When Measuring Damages.....	21
A. Just Compensation is Measured by Fair Market Value	23
B. The Plain Language of Section 216B.47 Did Not Exclude Fair Market Value.....	28
C. Past Precedent Rejected MPUC Damages in Condemnation Proceedings.....	32
D. The Legislature Did Not Modify the Fair Market Value Standard	34

E. The Court Erred in Excluding Relevant Fair Market Value Evidence	36
F. The Jury Instructions Incorrectly Excluded the Fair Market Value Concept	37
II. By Excluding Evidence of Facility Replacement Costs Critical to Calculating Loss of Revenues, the Court Abused its Discretion	39
III. The Verdict Was Not Supported by the Law or the Evidence	46
Conclusion	48
Certification of Brief Length	50
Addendum	Add-1

TABLE OF AUTHORITIES

Minnesota Statutes and Authorities	Page
Minn. Const. Art I, § 13	1, 23
Minn. Stat. § 117.012 (2010)	31, 32
Minn. Stat. § 117.025 (2010)	23
Minn. Stat. § 117.175 (2010)	6
Minn. Stat. § 117.187 (2010)	35
Minn. Stat. § 117.189 (2010)	35
Minn. Stat. § 216B.40 (2010)	5/6
Minn. Stat. § 216B.44 (2010)	9, 32, 34
Minn. Stat. § 216B.47 (2010)	passim
Minn. Stat. § 465.01 (2010)	23, 26, 31, 32
Minn. Stat. § 645.16 (2010)	28, 31
Minn. Stat. § 645.17(2010)	24, 26, 30, 35
Minn. R. Civ. P. 26.05	3, 41
Minn. R. Evid. 401	2, 37
Minn. R. Evid. 402	37

Minnesota Cases

<i>Alevizos v. Metropolitan Airports Comm'n</i> , 452 N.W.2d 492 (Minn. App. 1990), <i>rev. denied</i> (Minn. May 11, 1990)	21
<i>Amaral v. St. Cloud Hosp.</i> , 598 N.W.2d 379, (Minn. 1999)	29
<i>American Family Ins. Grp. V. Schroedl</i> , 616 N.W.2d 273 (Minn. 2000)	29

<i>Bahr v. Boise Cascade Corp.</i> , 766 N.W.2d 910 (Minn. 2009).....	20, 22
<i>Becker v. Mayo Foundation</i> , 737 N.W.2d 200 (Minn. 2007).....	40
<i>Bondy v. Allen</i> , 635 N.W.2d 244 (Minn. App. 2001).....	20
<i>Cardinal Consulting Co. v. Circo Resorts</i> , 297 N.W.2d 260 (Minn. 1980).....	41
<i>City of Rochester v. People’s Cooperative Power Ass’n</i> , 483 N.W.2d 477 (Minn. 1992)	1, 32
<i>City of St. Louis Park v. Almor Co.</i> , 313 N.W.2d 606 (Minn. 1981).....	24
<i>City of Shakopee v. Minnesota Valley Electric Cooperative</i> , 303 N.W.2d 58 (Minn. 1981)	23, 26
<i>Cornfeldt v. Tongen</i> , 262 684 (Minn. 1977).....	3, 43, 44
<i>County of Ramsey v. Miller</i> , 316 N.W.2d 917 (Minn. 1982)	1, 25, 27
<i>Diesen v. Hessburg</i> , 455 N.W.2d 446 (Minn. 1990).....	3, 21
<i>Domtar, Inc. v. Niagara Fire Ins. Co.</i> , 563 N.W.2d 724 (Minn. 1997)...	21
<i>H Window Co. v. Cascade Wood Prods., Inc.</i> , 596 N.W.2d 271 (Minn. App. 1999), <i>rev. denied</i> (Minn. Aug. 17, 1999).....	2, 21, 39
<i>Hilligoss v. Cargill, Inc.</i> , 649 N.W.2d 142 (Minn. 2002)	21
<i>Housing & Redevel. Auth. Of St. Paul v. Kieffer Bros. Inv.</i> , 170 N.W.2d 862 (Minn. 1969)	25
<i>Iowa Electric Light & Power v. City of Fairmont</i> , 67 N.W.2d 41(Minn. 1954)	23
<i>Jackson v. Reiling</i> , 249 N.W.2d 896 (Minn. 1977)	3, 41
<i>Krech v. Edrman</i> , 233 N.W.2d 555 (Minn. 1975).....	42
<i>Kroning v. State Farm Auto. Ins. Co.</i> , 567 N.W.2d 42 (Minn. 1997).....	21, 40

<i>Lee v. Fresenius Med. Care, Inc.</i> , 741 N.W.2d 117 (Minn. 2007) ..	20, 29
<i>Minneapolis-St. Paul Metro. Airports Comm'n v. Hedberg-Freidheim Co.</i> , 32 N.W.2d 569 (Minn. 1948).....	28
<i>Minneapolis-St. Paul Sanitary District v. Fitzpatrick</i> , 277 N.W. 394 (1937)	24
<i>Moorhead Econ. Dev. Auth. v. Anda</i> , 789 N.W.2d 860 (Minn. 2010)...	43
<i>Olson, Clough & Straumann v. Trayne Properties</i> , 392 N.W.2d 2 (Minn. App. 1986)	3, 46
<i>State v. Carney</i> , 309 N.W.2d 775 (Minn. 1981).....	24
<i>State v. Hayden Miller Co.</i> , 116 N.W.2d 535 (Minn. 1962).....	28
<i>State v. Horman</i> , 188 Minn. 252, 247 N.W. 4 (1933)	25
<i>State v. Lindsey</i> , 284 N.W.2d 368 (Minn. 1979).....	40
<i>State v. Maleecker</i> , 120 N.W.2d 36 (Minn. 1963).....	36
<i>State v. Mecklenburg</i> , 140 N.W.2d 310 (Minn. 1966).....	28
<i>State v. Pahl</i> , 95 N.W.2d 85 (Minn. 1959).....	25
<i>State v. Patterson</i> , 587 N.W.2d 45 (Minn. 1998).....	3, 40, 44
<i>State v. Pearson</i> , 110 N.W.2d 206, 215 (Minn. 1961).....	6
<i>State v. Strom</i> , 493 N.W.2d 554 (Minn. 1992).....	2, 25, 27, 36
<i>Union Depot R.R. v. Brunswick</i> , 17 N.W. 626 (Minn. 1883).....	36
<i>Winona & St. Peter RR v. Waldron</i> , 11 Minn. 515 (Gil. 1866).....	24

Federal Cases and Authorities

<i>Olson v. United States</i> , 292 U.S. 246 (1934)	1, 24, 27, 36
<i>United States v. 2.33 Acres of Land</i> , 704 F.2d 728 (4 th Cir. 1982).....	28

<i>United States v. 9.20 Acres of Land</i> , 638 F.2d 1123 (8 th Cir. 1981).....	28
<i>United States v. 564.54 Acres of Land</i> , 441 U.S. 506 (1979)	26
<i>United States v. Miller</i> , 317 U.S. 369 (1943)	26
Fed. R. Civ. P. 26	41

Other Authorities

Appraisal Institute <i>The Dictionary of Real Estate Appraisal</i> , 4 th ed. (2002)	27
1A <i>Minnesota Practice</i> , D. Herr & R. Hadock (2010)	41
4 <i>Minnesota Practice – Jury Instruction Guides</i> , (5 th ed. 2006 & 2010 Supp.).....	2, 25, 26, 38
Moorhead City Charter § 9.01	26
7 <i>Nichols On Eminent Domain</i> (Rev. Ed. 2009)	28, 38

LEGAL ISSUES

I. Courts have historically interpreted just compensation in condemnation matters to mean fair market value. The District Court ruled that damages may not consider fair market value, and excluded all evidence of fair market value. Was this ruling an error of law?

A. Did the District Court err in denying fair market value to determine damages?

(1) This issue arose in cross-motions for summary judgment, or in the alternative motions in limine, and the City's motion for judgment as a matter of law, or in the alternative, a new trial.

(2) The District Court granted Red River's partial summary judgment motion and ruled that fair market value may not be considered in determining damages. The District Court denied the City's post-trial motion.

(3) This issue was preserved for appeal in the City's offer of proof and post-trial motion for judgment as a matter of law, or in the alternative, a new trial.

(4) Apposite authorities:

Minn. Const. Art I, § 13

Olson v. United States, 292 U.S. 246 (1934)

County of Ramsey v. Miller, 316 N.W.2d 917 (Minn. 1982)

City of Rochester v. People's Cooperative Power Ass'n, 483 N.W.2d 477 (Minn. 1992).

B. Did the District Court err in excluding all evidence of fair market value?

(1) This issue arose in cross-motions for summary judgment, or in the alternative motions in limine, and the City's motion for judgment as a matter of law, or in the alternative, a new trial.

(2) The District Court ruled that no evidence of fair market value would be admissible. The District Court denied the City's post-trial

motion for judgment as a matter of law, or in the alternative, a new trial.

(3) This issue was preserved for appeal in the City's offer of proof and post-trial motion for judgment as a matter of law, or in the alternative, a new trial.

(4) Apposite authorities:

Kroning v. State Farm Auto. Ins. Co., 567 N.W.2d 42 (Minn. 1997)

State by Humphrey v. Strom, 493 N.W.2d 554 (Minn. 1992)

Minn. R. Evid. 401

C. Did the District Court err in instructing the jury?

(1) This issue arose in denying the City's requested jury instructions, which included fair market value.

(2) The District Court rejected the City's requested jury instructions concerning fair market value.

(3) This issue was preserved for appeal in the City's objections to jury instructions and post-trial motion for judgment as a matter of law, or in the alternative, a new trial.

(4) Apposite authorities:

4 *Minnesota Practice – Jury Instruction Guides*, CIVIG 52.35, 52.40, 52.65 (5th ed. 2006 & 2010 Supp.)

H Window Co. v. Cascade Wood Prods., Inc., 596 N.W.2d 271 (Minn. App. 1999), *review denied* (Minn. Aug. 17, 1999).

II. Did the District Court err in excluding evidence of facility replacement costs in determining the loss-of-revenue damages?

(1) This issue arose because the City supplemented its expert report and the District Court granted Red River's motion in limine as to certain pages of the report concerning the deduction for facilities

older than 40 years. The City made a post-trial motion for a new trial.

(2) The district court granted the motion in limine to exclude this portion of the report, and denied the City's motion for a new trial.

(3) This issue was preserved for appeal in the City's offer of proof and motion for a new trial.

(4) Apposite authorities:

Jackson v. Reiling, 249 N.W.2d 896, 897 (Minn. 1977)

Minn. R. Civ. P. 26.05

State v. Patterson, 587 N.W.2d 45 (Minn. 1998)

Cornfeldt v. Tongen, 262 N.W.2d 684 (Minn. 1977)

III. Did the District Court err in denying a new trial because the verdict was not supported by the law or evidence?

(1) This issue arose in the City's motion for a new trial.

(2) The District Court denied the City's motion for a new trial, finding the law and evidence supported the verdict.

(3) This issue was preserved for appeal in the City's motion for a new trial.

(4) Apposite authorities:

Diesen v. Hessburg, 455 N.W.2d 446, 452 (Minn. 1990).

Olson, Clough & Straumann v. Trayne Properties, 392 N.W.2d 2, 5 (Minn. App. 1986).

STATEMENT OF THE CASE

On November 30, 2006, the City of Moorhead (the “City”) filed a Petition in Condemnation to acquire the rights to provide exclusive electric service to an area recently annexed into the City. City’s Appendix at 1 (“Apx-1”). The electric service territory at issue concerned a residential subdivision known as Americana Estates, with 65 customers (“Americana”). Americana was located within Respondent Red River Valley Cooperative Power Association’s (“Red River”) assigned electric service territory.

In an order dated May 1, 2007, the district court approved the City’s Petition in Condemnation. Apx.-15. Following typical eminent domain proceedings, three court-appointed commissioners held a hearing in October 2008 and filed the commissioners’ award on February 19, 2009. Apx-21. Both parties appealed that award. Apx-23; Apx-25.

The key area of disagreement between the parties concerned the “loss of revenue to the utility formerly serving the area”, one of the four statutory factors that must be included in damages. Minn. Stat. § 216B.47 (2010). The City’s expert analyzed the four factors using a fair market value method. Red River’s expert analyzed the four factors according to a method he advocated before the Minnesota Public Utilities Commission (“MPUC”). In response to cross-motions for summary judgment, in an order dated March 30, 2010, the District Court ruled that the City’s expert could not testify as to fair market value, and excluded all evidence of fair market value. Addendum “Add.” at 4. The court determined that

the four factors listed in Minn. Stat. § 216B.47 controlled and that no evidence of fair market value could be considered. Add-4; Add-8.

The City provided a supplemental expert report. In any order dated September 30, 2010, the court granted Red River's motion in limine as to certain pages of the report concerning a damages deduction of \$78,957 for deferred capital investments, an amount to replace all facilities older than 40 years old. Add-11-12.

The matter proceeded to a jury trial, with the jury asked to determine "just compensation" by completing the blank for "loss of revenue" to Red River. The parties stipulated to the amounts of the three additional factors in Section 216B.47. After a three-day trial, the jury returned a special verdict in the amount of \$339,865 for the loss of revenue for ten years from the date of taking, the amount advocated by Red River. Add-28. The total verdict, including the stipulated factors, was \$ 385,311. *Id.*

The City filed a post-trial motion for judgment as a matter of law and, in the alternative, for a new trial. Apx-92. In an order filed February 18, 2011, the district court denied the motions. Add-15. The City timely filed its appeal. Apx-94. In response to a correction noted by this Court, judgment was entered on June 3, 2011. Apx-96.

STATEMENT OF FACTS

Under Minnesota law, every electric utility is assigned a specific service territory in which it has the exclusive right to provide electric service. Minn. Stat.

§ 216B.40. Under Minnesota Statutes Section 216B.47, municipal utilities may acquire through eminent domain the electric service territory assigned to another electric utility. Damages “must include” four statutory factors: (1) the original cost of the facilities less depreciation, (2) the loss of revenue to the utility formerly serving the area, (3) integration expenses so that the utility may continue to serve other customers on its system, and (4) other appropriate factors. *Id.* The utility owning the facilities, Red River, bore the burden of proof to establish its damages. Minn. Stat. § 117.175; *State v. Pearson*, 110 N.W.2d 206, 215 (Minn. 1961).

Americana Estates was developed in the late 1960s as a rural area with private wells and septic systems. Brennan Affidavit (“Affdvt.”), Feb. 4, 2010, Exhibit (“Ex.”) A, at 276, 279. When drainage problems resulted in sewage issues, the City reached agreement to provide municipal sewer and water service in 1986, with the expectation of ultimate annexation into the City. Trial Transcript (“T.”) at 343-44; Brennan Affdvt. Feb. 4, 2010, Ex. A at 279-80; *id.*, Ex. D at 5.

Americana was ultimately annexed into the City in 2006. T. 343-44. Moorhead Public Service, the City’s municipal utility, has an express policy that it will provide electric service to all areas annexed into the City. Ex. 21; T. 310-11. The City has followed this policy for over 21 years. T. 306-07; 327. The City Council determines when to annex land, but once annexed, Moorhead Public Service serves all customers. *Id.*

Consistent with its policy to serve all areas annexed into the City, the City

sought to acquire the rights to provide electric service to these Americana Estates customers. Americana Estates had 65 existing residential customers. T. 393. The parties agreed that there would be no future or additional customers. *Id.* The age of the Red River facilities within Americana was also undisputed: 65% of Red River's facilities in the area were over 33 years old and 35% were over 40 years old. T.433; Trial Exhibit ("Ex.") 73.

The City filed its condemnation petition on November 30, 2006. Apx-1. The Court approved the petition in an order dated May 1, 2007. Apx-15. The three court-appointed Commissioners convened a two-day hearing in October 2008. The Commissioners did not accept either party's recommended award. Instead, they filed a just compensation award of \$307,214 on February 19, 2009. Apx-21. Upon payment of three-quarters of the Commissioners' award, the City began providing electric service to Americana on July 23, 2009.

Both parties appealed the award, entitling either party to a *de novo* jury trial. Apx-23; Apx-25. The jury trial itself was continued twice: first, due to the unexpected death of local counsel, Bruce Carlson, and second, due to lead counsel's third-trimester pregnancy complications and medical restriction against travel to Moorhead. The parties jointly requested a continuance before the District Court ruled on the cross summary judgment motions.

A. The City's Fair Market Value Appraisal.

Following the typical condemnation method of damages, the City's appraiser valuation expert, Robert Strachota, performed a business valuation

using the before-and-after-the-taking analysis to determine fair market value. Brennan Affdvt., Feb. 4, 2010, Ex. C at i (“our written report for the purposes of estimating fair market damages or loss of value.”).

To measure the damages at issue in the present case, Mr. Strachota determined and compared the value of Red River before-and-after-the-taking of the electric service territory rights at issue. *Id.*, Ex. A, at 383. This before-and-after-the-taking measure applied to business valuations, not only real estate matters. *Id.* at 384-85. Before the Commissioners, Mr. Strachota testified that the purpose of this approach was to “capture[] all the consequences of the taking. . . . in so doing you will measure all of the moving parts that are affected in that business from the before to the after.” *Id.* at 385, 386.

B. Red River’s Damages Calculations.

Red River’s expert witness, Dennis Eicher, a professional engineer, also prepared a damages analysis. Mr. Eicher did not consider or perform a fair market value analysis. Before the Court-appointed commissioners, Mr. Eicher testified that he analyzed damages from the “seller’s perspective.” According to Mr. Eicher, damages from the “seller’s perspective” were different from – and higher than – fair market value:

Q. Is it your position that the seller’s perspective is different from fair market value?

A. Yes. The seller’s perspective in this case is focused on its damages.

Brennan Affdvt., Feb. 4, 2010, Ex. A at 186-7; *id.* at 226-27 (damages “almost

inherently” higher than market value).

In testifying before the Court-appointed commissioners, Mr. Eicher acknowledged that it was proper to follow eminent domain law in awarding damages under Minn. Stat. § 216B.47 as long as the four factors were included. *Id.* at 185-86. He agreed that there was nothing wrong with using the before-and-after analysis. *Id.* at 259. Instead, he followed the methodology that he performed before the MPUC. *Id.*, Ex. B at 1 (“The analysis is consistent with the methodology approved by the Minnesota Public Utilities Commission”); 9 (applying MPUC past case); 10 (same).

C. Pre-Trial Rulings.

The City filed a Motion for Summary Judgment, or the Alternative, a Motion in Limine that fair market value was the proper legal standard to determine just compensation in this eminent domain proceeding. The City argued that Red River’s expert, Dennis Eicher, not only failed to consider fair market value, but testified that his “seller’s approach” to damages was “inherently higher” than fair market value. Red River brought a similar summary judgment motion seeking to follow the MPUC approach to damages for agency proceedings under Minn. Stat. § 216B.44 and to exclude Mr. Strachota’s opinion and testimony concerning fair market value.

In an order dated March 30, 2010, the Court denied the City’s motion and granted Red River’s motion. The Court ordered “[t]hat testimony by Robert Strachota, and portions of his Report, regarding Fair Market Value shall be

excluded. Mr. Strachota may testify as to his opinion of damages based on the four statutory factors listed above (such as net revenues), consistent with the Date of Taking, February 19, 2009.” Add-4 (Order, ¶ 8). The Court further ordered that “all evidence as to ‘fair market value’ is hereby excluded.” *Id.* ¶ 9. The Court also ordered the date of valuation to be February 19, 2009. *Id.*

In light of the Court’s Order, the City provided a revised expert report to Red River on September 8, 2010. City’s Memo. Opposing Motion in Limine at 3-4. The revised report applied the date of taking determined by the Court. LeVander Affdvt., Sept. 13, 2010, Ex. 1 at 1. The report also excluded all analysis based upon fair market value and added together the four factors under Section 216B.47, as required by the Court’s March 30, 2010 order. Finally, the revised report reasoned that the facilities in the Americana Estates area had aged to the point of requiring replacement during the ten-year damages period, and deducted the replacement cost of \$78,957 (using Red River’s replacement cost numbers) for all facilities installed before 1970 – those facilities over forty years old. *Id.* at 15-17.

Red River brought a motion in limine to exclude the pages of the revised report concerning this deduction for deferred capital investment. Apx-35. In an order dated September 30, 2010, the Court granted Red River’s motion and ordered that the testimony and portions of the report concerning the “Deduction for Deferred Capital Investment. . . shall be excluded” and “[a]ll evidence of the new deduction of \$78,957.00 for capital improvements is hereby excluded.” Add-

11-12. The order made no reference to a sanction for discovery violations.

D. Testimony at Trial.

The City's expert was not allowed to testify as to fair market value, the approach typically used by appraisers. Instead, the City's expert was required to testify to a methodology remarkably similar to that used by Red River's expert.

The parties stipulated to three of the four factors in Section 216B.47. For the "original-cost-of-facilities-less-depreciation" factor, the stipulated amount was \$19,867. The parties stipulated that "integration expenses" for Red River to arrange its facilities to serve its remaining customers was \$25,579. The parties agreed that there should be no damages due to "other appropriate factors." The key disagreement, and the issue presented for the jury to decide, was the "loss-of-revenues" factor. The loss-of-revenue was for a ten-year period starting with the date of taking, February 19, 2009. On this issue, the parties presented greatly different positions. Red River's expert, Dennis Eicher, advocated \$339,865. The City's expert, Robert Strachota, advocated \$125,000.

Red River's CEO, Lauren Brorby, testified that Red River received additional revenue from Americana customers, because it charged Americana customers two cents per kilowatt hour more than its average residential customers. T. 110 ("So it's an extremely valuable part of our system."). He testified that Red River would have minimal savings in its operation and maintenance expenses after the taking. T. 112 ("Minimally, yes. . . [W]e will no longer have to do . . . an annual line patrol where we drive up to check the lines,

to make sure that all the poles are straight and nothing is broken, line sagging is okay. . . . We'll no longer have to go into Americana Estates for tree trimming.”). He also testified that in general Red River spent less money in Americana than in Red River's other customer areas. T. 164.

The City presented evidence that Red River's financial and planning documents reflected significantly higher costs for expenses such as purchased power and operations and maintenance. Ex. 74 (summarizing differences of parties, Red River data); T. 129 (O&M \$152/customer); Ex. 27 at 24; Ex. 33 at 1 (O&M \$276/customer in 2009, increasing to \$425 in 2019); T. 135; Ex. 27 at 5 (purchased power costs more than doubled from \$4.1 million in 2003 to \$8.5 million estimated for 2010); Ex. 33 (10-year financial forecast) at 1 (\$1,782 - \$2,307 per customer); Ex. 47 (2008 financial statement) (\$1,206 per customer); Ex.48 (2009 financial statement) (purchased power 64.2% of \$10,853,535 revenues); Ex. 27 (2010 budget projects purchased power of 67.6% of \$12,691,102 revenues).

The single greatest expense for Red River was the cost of purchased power. Red River reported that 64.2% of every dollar that comes in the door must go to pay purchased power costs. Ex. 59. But Mr. Eicher estimated purchase power expenses for Americana customers of only 52.7% of revenues. T. 271. According to Red River, power costs were projected to increase by more than thirty percent in the next nine years. Ex. 57. The City's expert, Mr. Strachota, calculated purchase power costs according to Red River's financial

and planning documents, applying 63% of revenues. T. 405-06; Ex. 67.

Although Mr. Eicher, Red River's expert witness, enjoyed significant experience as a consulting engineer, he admitted that he is "not an expert on condemnation theory." T.245. He is not an appraiser and was not trained by the Appraisal Institute. T. 245-46. He did not follow business valuation standards in preparing his analysis. T.246. He took one course in valuation – a general course – over 30 years ago. T. 245. He took one course in accounting, also over 30 years ago. T.246. But Mr. Eicher conceded that the statute presented a valuation issue. *Id.*

Mr. Eicher testified that he estimated the purchase power expenses that Red River would avoid due to the taking. T. 213-14, 219. He estimated the demand for the Americana customers "by assuming the load characteristics are similar to the rest of the system." T. 217. He testified that he estimated the peak and off-peak usage of the Americana customers. T. 219-220. But he admitted in cross-examination that he did not analyze whether the Americana customers differed from Red River's other customers in terms of purchased power costs. T. 271-72. By contrast, Mr. Strachota, the City's expert, testified that he specifically analyzed this issue and concluded there was no difference. T. 421-422. As a result, Mr. Eicher underestimated this expense – and so overestimated his loss-of-revenue damages – by nearly \$100,000. T. 433.

Mr. Eicher testified that the average useful life of the electric facilities was "somewhere between 30 and 40 years" and that the 2.8 percent depreciation that

Red River used reflected an average life of 36 years. T. 253. He agreed that historically Red River was required to replace facilities over time. T. 254. Indeed, 65% of Red River's facilities in Americana were over 33 years old; and 35% were over 40 years old. T. 433; Ex. 73. But Mr. Eicher included no cost component for replacing facilities in his loss-of-revenue analysis. T. 254. He assumed that these facilities would remain throughout the ten-year loss-of-revenue period. T. 259. He admitted that Red River first installed facilities in Americana in 1968, and that it has not installed any facilities since 2004. T. 255, 257, Ex. 73 at 2. Although Mr. Eicher admitted that older facilities require increased operations and maintenance expenses, he did not make any adjustment of this expense due to the age of the facilities in Americana. T. 272.

Although Americana customers represented 1.4% of Red River's customer base, Mr. Eicher acknowledged that his damages represented 10.4% of Red River's total income. T. 268. Counsel for Red River argued in closing argument that the City paid \$19,897 for facilities and would "get \$100,000 in revenue and more from these customers for the next ten years. And the first year's return on that investment. \$13,000. \$13,000 on a \$19,000 investment. I'll take that investment any day. They're getting a rate of return on their investment . . . of about 70 percent." T. 549.

The City's expert, Mr. Strachota, earned the designation of a Master Certified Business Appraiser and was one of approximately two dozen individuals in the country nominated to be a Fellow with the Institute of Business Appraisers,

in addition to his designation as Member of the Appraisal Institute (MAI) and Counselor of Real Estate (CRE). T. 387. Mr. Strachota enjoyed over thirty-five years of appraisal experience. T. 387. He testified hundreds of times in condemnation proceedings, for both the condemnor and the property owner. T. 387-88; 389-90. He was experienced in valuing utility matters. T. 390-91.

In calculating the loss-of-revenue number, Mr. Strachota testified that he assumed actual expenses for the year 2009. T. 410. Projecting from 2010 to 2018, Mr. Strachota considered the expenses that Red River will avoid in Americana. Ex. 69. He analyzed the purchased power costs, using the actual costs in 2009 of 64.2% of revenues and projecting 63% for the remainder of the period. *Id.*; T. 420. He included on-going capital costs of replacing facilities as an appropriate expense. T. 418-19; Ex. 68.

At trial, outside the presence of the jury, the City made an offer of proof that, if allowed, Mr. Strachota would testify as to his opinion on damages in this matter using the fair market value approach. T. 381-2. In addition, Mr. Strachota would testify concerning the deduction for deferred capital investment. *Id.* As a result of both items, Mr. Strachota would testify to a significantly lower dollar amount. *Id.* Before the jury, consistent with the Court's orders, Mr. Strachota testified without analyzing damages according to fair market value or deducting damages due to the age of facilities. He testified to loss-of-revenue damages in the amount of \$125,000. T. 419; Ex. 69.

Throughout the trial, including opening statement, Red River objected to

any even indirect reference to the age of facilities and/or the need for capital improvements during the ten-year damage period. T. 43, 44. The Court allowed the City to present testimony concerning operations and maintenance expense, including tree trimming. See, e.g. T. 80-81; T. 332-33 (ruling on Red River objection, “Well, if you’re getting into tree-trimming and things like that, I’ll allow that . . .”).

The Court rejected the City’s proposed jury instructions concerning fair market value. Apx-37-41; Apx-74-5 (T. 371-72). The City’s case as to the dollar impact of the age of the facilities was limited to stressing operations and maintenance costs due to older facilities. The jury did not learn of the City’s requirement to spend \$400,000 in one year to update facilities in Americana. The jury did not learn of Mr. Strachota’s \$78,957 deduction for deferred capital investment. The jury had no concept of fair market value to assess the value of the taking. The jury was instead instructed to determine “just compensation” and complete a number for the loss-of-revenue factor and total the listing of the other three statutory factors of Section 216B.47. Add-28; Apx-54.

E. Jury Verdict and Post-Trial Motions.

The jury returned a verdict with the loss-of-revenue number advocated by Red River: \$339,865. Add-28. With the stipulated factors, the total amount of the verdict for Red River was \$385,311. *Id.* The District Court issued findings of fact and conclusions of law consistent with the jury’s verdict. Apx-90-91.

The City timely filed a motion for judgment as a matter of law, or, in the

alternative for a new trial. Apx-92. The District Court denied this motion in an order filed February 18, 2011. Add-15. The District Court reasoned that fair market value was inappropriate in considering the four statutory factors of Section 216B.47. Add-21-22. And the order upheld the exclusion of evidence of a deduction for the cost of facilities over 40 years old as untimely. Add-22-23. For the first time, the District Court described this issue as a discovery sanction. Add-22. The City timely filed this appeal. Apx-94.

SUMMARY OF THE ARGUMENT

By excluding the City's evidence of fair market value and by refusing to instruct the jury as to fair market value, the District Court effectively directed a verdict in favor of Red River's just compensation figure. The City was deprived of its expert basis on which to challenge the key claim in the case: Red River's loss of revenue. In effect, the City's expert was forced to follow the general methodology of Red River's expert. The City had no opportunity to present Red River's damages approach as "inherently higher" than fair market value. Because the jury had no concept of fair market value, it was unable to effectively distinguish the two experts' testimony.

Red River's position was that lost revenue is an arithmetic fact, like calculating the flow of water over a dam. One tabulates the revenue previously generated by the customers lost by reason of the taking, extends it to the future for the ten year period that is commonly used in cases of this sort, and adds up the figures. The City sought to value the lost stream of revenue like the market

does: what a willing buyer would pay a willing seller for the asset without the lost customers and revenues. This entails a rigorous analysis of the costs of generating that lost revenue throughout the ten-year period of loss. The City was not permitted to put on its case. The jury was left with no realistic choice other than to accept Red River's damages number.

The only justification for denying a condemnor the right to put on a case at trial is that the owner is entitled to judgment as a matter of law. Yet, where in the governing statutes is the City denied the right to argue fair market value? Where in Minn. Stat. § 216B.47 is Red River entitled – as a matter of law – to the recovery of the *unfair* or *non-market* value of its lost revenue stream?

In fairness to the District Court, it was led astray by an understandable desire to be faithful to statutory language and to simplify the case for the jury. Section 216B.47 lists four factors that “must” be included in the just compensation award. “Loss of revenue to the utility” is one such factor, therefore the District Court duly instructed the jury to consider it. But the term is not self-defining, and the jury was entitled to some guidance as to just what “loss of revenue” means and how it might be calculated. In addition, the fourth statutory factor that “must” be included is “other appropriate factors.” Minn. Stat. § 216B.47. In short, the statute cries out for interpretation and judicial guidance; this is not a statute that is so plain, narrow, and constrained as to require the Court to do nothing more than read its text to the jury.

What the District Court should have done is what courts in this state have

uniformly done for the past 150 years. In the market economy that has flourished in this country over the past three centuries, the legal concept of “just compensation” and “damages” has been defined in market terms. The owner’s damages for lost revenue is not a subjective valuation of what the owner thinks it has lost, nor are the owner’s damages a dry, arithmetic summation of revenues foregone with no adequate consideration of surrounding costs and circumstances. The damages are what the market would pay for that lost revenue stream – the damages are the difference in value before and after the taking.

The District Court was required to instruct and guide the jury on matters that were hardly self-evident. The “other appropriate factors” required by Section 216B.47 included the need to weigh the lost revenue claim as the market would weigh it and to consider the fair market value of the lost revenue stream. In addition to depriving the City of its fundamental right to put its case on, the Court’s evidentiary and instruction rulings left the jury completely at sea as to how to weigh and calculate the statutory compensation factors. The jury had no realistic choice but to accept the arithmetic figure given it by Red River. In the process, 150 years of Minnesota precedent and the statute’s directive to consider “other appropriate factors” were ignored. At a minimum, the City should be entitled to put on a case and receive a fair trial like any other condemning authority. Because the trial was premised on an erroneous legal theory, this Court should reverse and remand.

In addition, the City was precluded from providing testimony that the loss-of-revenue factor should deduct the cost of facilities over 40 years old. Because a significant portion of the facilities here were over thirty-to-thirty-five years old – the average life considered by Red River – at least some facilities would need to be replaced over the ten-year damages period. But the jury had no dollar information as to how to replace these oldest facilities and at what cost. The jury could only assume that the facilities would continue “as is” and produce equivalent revenues throughout the damages period – contrary to Minnesota law that damages must not be speculative or remote.

Finally, the jury verdict was not supported by the law or the evidence. Red River failed to satisfy its burden of proof for purchased power and operations and maintenance expenses, resulting in a speculative damages verdict.

STANDARD OF REVIEW

This Court reviews issues of law de novo, and need not give deference to the district court’s decision.¹ “We apply de novo review to the district court’s denial of a Rule 50 [judgment as a matter of law] motion.”²

On evidentiary issues, this Court generally defers to the District Court “unless [the ruling] is based on an erroneous view of the law or constitutes an

¹ *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007); *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001).

² *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

abuse of discretion.”³

In terms of jury instructions, although the district court enjoys broad discretion, if the instructions as a whole did not fairly and correctly state the applicable law or resulted in substantial prejudice, this Court must reverse.⁴ “Where instructions fairly and correctly state the applicable law, an appellate court will not grant a new trial.”⁵

On challenges to the verdict, “a jury’s answer to a special verdict form can be set aside only if no reasonable mind could find as did the jury.”⁶ The Court “must view the evidence in the light most favorable to the jury verdict” and may grant a new trial if “the jury’s findings are contrary to the law applicable in the case.”⁷

ARGUMENT

I. THE COURT SHOULD REVERSE THE ERROR OF LAW OF PROHIBITING FAIR MARKET VALUE WHEN MEASURING DAMAGES.

Applying de novo review,⁸ this Court must address whether the ruling to prohibit reference to fair market value in a condemnation trial constituted legal

³ *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997).

⁴ *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002); *H Window Co. v. Cascade Wood Prods., Inc.*, 596 N.W.2d 271, 277 (Minn. App. 1999), *review denied* (Minn. Aug. 17, 1999).

⁵ *Alevizos v. Metropolitan Airports Comm’n*, 452 N.W.2d 492, 501 (Minn. App. 1990), *rev. denied* (Minn. May 11, 1990).

⁶ *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 734 (Minn. 1997).

⁷ *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990).

error. If so, this Court should reverse and either require entry of judgment in favor of City or require a new trial with an opportunity to present fair market value evidence.

The rulings below focused on a statutory interpretation of Section 216B.47. The District Court limited testimony and jury instructions to the four factors listed in Section 216B.47, with references to “just compensation,” but prohibited references to fair market value. The Minnesota Constitution requires “just compensation” and the Minnesota courts have long interpreted just compensation to mean “fair market value.” Fair market value should have been applied – or at least permitted – as a method to analyze damages.

Section 216B.47 itself did not prohibit the use of fair market value; it simply required that damages “include” four factors. Rather than a constitutional “minimum,” fair market value provides the solution to “just compensation.” No statutory language in Section 216B.47 conflicted with that solution.

To the extent the District Court was troubled about potentially different analysis than the Minnesota Public Utilities Commission (“MPUC”), the Minnesota Supreme Court had already ruled that the method of compensation under eminent domain proceedings need not defer to the MPUC agency’s primary jurisdiction. The Minnesota Legislature did not disrupt the judicial interpretation of either Section 216B.47 or fair market value as just compensation. Fair market value evidence satisfied the broad requirements of

⁸ *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

admissibility. Excluding this evidence was prejudicial to the City and constituted an abuse of discretion.

A. Just Compensation is Measured by Fair Market Value.

Under the Minnesota Constitution, “[p]rivate property shall not be taken, destroyed, or damaged for public use without just compensation therefor, first paid or secured.”⁹ The statute defined a “taking” to “include every interference, under the power of eminent domain, with the possession, enjoyment, or value of private property.”¹⁰

This broad definition of “taking” extended to both real estate and intangible property rights such as the electric service territory rights in the present case. Indeed, the Minnesota Supreme Court rejected the notion that utility property – more broadly personal property – was carved out of eminent domain proceedings under Chapter 117. “Thus, it is apparent that our legislature has never considered Chapter 117 as limited in its application to the condemnation of real estate only.”¹¹ Indeed, the Minnesota Supreme Court has reasoned that principles of Chapter 117 or a city charter apply to condemnation of electric service territory.¹²

⁹ Minn. Const. Art I, § 13.

¹⁰ Minn. Stat. § 117.025, subd. 2 (2010).

¹¹ *Iowa Electric Light & Power v. City of Fairmont*, 67 N.W.2d 41, 45 (Minn. 1954)

¹² *City of Shakopee v. Minnesota Valley Electric Cooperative*, 303 N.W.2d 58, 62 (Minn. 1981); Minn. Stat. § 465.01 (2010) (“The procedure in the event of condemnation shall be that prescribed by chapter 117, or that prescribed by the

v. Almor Co., 313 N.W.2d 606, 610 (Minn. 1981) (“Just compensation is determined by looking at the fair market value of the property taken as of the time the commissioners make the award.”); *State v. Horman*, 188 Minn. 252, 247 N.W.4 (1933); *Housing & Redevel. Auth. Of St. Paul v. Kieffer Bros. Inv. & Constr. Co.*, 170 N.W.2d 862, 864 (Minn. 1969); 4 *Minnesota Practice – Jury Instruction Guides*, CIVIG 52.35 (5th ed. 2006 & 2010 Supp.) (“just compensation is the fair market value of the property that was taken.”).

The traditional standard to determine fair market value is the “difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder afterwards.”¹⁵ Mr. Strachota, the City’s expert, applied these standards to the four factors of Section 216B.47 in his analysis.¹⁶

¹⁵ *State v. Strom*, 493 N.W.2d 554, 558-59 (Minn. 1992); see also *County of Ramsey v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982); *Housing & Redevel. Auth. of St. Paul v. Kieffer Bros. Investment*, 170 N.W.2d 862, 864 (Minn. 1969); *State v. Pahl*, 95 N.W.2d 85, 90 (Minn. 1959) (noting “before and after rule”).

¹⁶ Brennan Affdvt., Feb. 4, 2010, Ex. C at cover letter 1-2 (specifying appraisal standards “for the purposes of estimating the fair market damages or loss of value” as well as four statutory factors); v (“our analysis and business valuation to determine the fair market value of the exclusive right to provide electric service to an area called Americana Estates”, quoting Section 216B.47, and noting “[t]his report analyzes damages according to these four factors.”); vi (“The estimate of damages accounts for Factors 1, 2, and 4 in Minnesota Statutes Section 216B.47” and further estimating integration costs (factor 3)); 3 (quoting fair market value standard); 17 (summarizing three approaches to fair market value); 31 (reconciling three approaches to fair market value and addressing four factors in Section 216B.47); 32-36 (direct valuation of service territory); 38 (final conclusion of value, including four statutory factors).

Fair market value is the “practical standard” adopted by the courts to enforce and to appropriately limit the constitutional requirement of just compensation.¹⁷ Departure from the fair market value standard is permissible only in the most extraordinary circumstances, such as where the standard would be “impracticable or ... would diverge so substantially from the indemnity principle as to violate the Fifth Amendment.”¹⁸ Wholesale rejection of any mention of fair market value in a condemnation trial is simply unprecedented.

The Minnesota Supreme Court has broadly enforced a city’s power to acquire electric service territory through eminent domain.¹⁹ Condemnation rights are not limited to Section 216B.47.²⁰ The broad authority of condemnation required payment of just compensation, but did not separate electric service territory takings from all other precedent, process, or procedures applicable in condemnation.

The District Court incorrectly believed that allowing fair market value testimony would prohibit the four factors of Section 216B.47. Add-21 (“In a

¹⁷ *United States v. Miller*, 317 U.S. 369, 374 (1943).

¹⁸ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979).

¹⁹ See, e.g., *City of Shakopee v. Minnesota Valley Electric Cooperative*, 303 N.W.2d 58, 62 (Minn. 1981).

²⁰ See *id.* (upholding city’s condemnation under power to purchase under Minn. Stat. § 465.01); Minn. Stat. § 465.01 (“The procedure in the event of condemnation shall be that prescribed by Chapter 117, or that prescribed by the charter of such city.”); Apx-2 (City’s Petition in Condemnation, para. 5) (referencing Section 465.01 and City Charter § 9.01).

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”). To the contrary, the fair market value analysis is designed to capture all damages due to the taking.²¹ “[E]vidence will be admitted concerning any factor which would affect the price a purchaser willing but not required to buy the property would pay an owner willing but not required to sell it”²²

The City’s fair market value analysis specifically applied the four statutory factors. Fair market value was not mutually exclusive of the four factors, but a method of how to calculate or “include” the statutory factors. Indeed, the traditional approaches of fair market value remained similar to the four factors in Section 216B.47.²³ The traditional cost or asset approach used in fair market value is similar in nature to the underlying facilities in the original cost less depreciation factor. The traditional income approach used in valuations is similar to the loss of revenue factor. The fair market value method reconciles to a final valuation number. “The measure of damages in condemnation cases

²¹ *Olson v. United States*, 292 U.S. at 257.

²² *State v. Strom*, 493 N.W.2d 554, 559 (Minn. 1992) (allowing jury to consider evidence of construction-related interference and loss of visibility as relevant to fair market value).

²³ *County of Ramsey v. Miller*, 316 N.W.2d 917, 922 (Minn. 1982) (recognizing “four ways to calculate the fair market value of property in takings cases: comparable sales, income capitalization, reproduction cost, and development cost”) (quoting the Appraisal Institute *The Dictionary of Real Estate Appraisal*, 4th ed. (2002)).

comprehends that the award shall be a single award for the entire damage including as well the harm resulting to the remainder because of the taking . . . not as an independent item of loss but as an element which affects the market value of the remaining area.”²⁴

To be sure, care must be taken to avoid double-counting damages.²⁵ But all evidence that may reasonably affect the hypothetical price a willing buyer and seller would reach is properly considered.

By narrowly focusing on the four factors in Section 216B.47, the District Court failed to harmonize the Minnesota Constitution, applicable statutes, and well-established precedent. But the statutory language in Section 216B.47 itself did not require this result.

B. The Plain Language of Section 216B.47 Did Not Exclude Fair Market Value.

When construing statutes, courts attempt “to ascertain and effectuate the intention of the legislature.”²⁶ “We construe statutes to effect their essential purpose but will not disregard a statute’s clear language to pursue the spirit of

²⁴ *State v. Mecklenburg*, 140 N.W.2d 310, 320 (Minn. 1966) (quoting *State v. Hayden Miller Co.*, 116 N.W.2d 535, 536 (Minn. 1962)); *Minneapolis-St. Paul Metro. Airports Comm’n v. Hedberg-Freidheim Co.*, 32 N.W.2d 569, 572 (Minn. 1948).

²⁵ See *United States v. 9.20 Acres of Land*, 638 F.2d 1123, 1127 (8th Cir. 1981) (applying before and after taking measure); Nichols, *Law of Eminent Domain*, § 14.02[1] (noting danger of adding series of impacts); *United States v. 2.33 Acres of Land*, 704 F.2d 728, 730-731 (4th Cir. 1982).

²⁶ Minn. Stat. § 645.16 (2008).

the law.”²⁷ “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.’”²⁸ “We are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *Id.*

The plain language of Section 216B.47 did not exclude fair market value or exempt electric service territory from the typical eminent domain proceedings. It simply provided that damages must “include” the specified factors. Although these factors must be “included” in determining damages, the statute was silent on how to, or the method of, determining damages:

Nothing in this chapter may be construed to preclude a municipality from acquiring the property of a public utility by eminent domain proceedings; provided that damages to be paid in eminent domain proceedings must include the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities, and other appropriate factors. A municipality seeking to acquire the property of a public utility in eminent domain proceedings may not acquire the right to furnish electric service during the pendency of the proceedings through the use of section 117.042 but may petition the commission under section 216B.44 for service rights. . . .²⁹

Section 216B.47 did not exclude or even address fair market value. None of these four factors was inconsistent with the principles of just compensation or fair

²⁷ *Lee*, 741 N.W.2d at 123.

²⁸ *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quoting *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)).

²⁹ Minn. Stat. § 216B.47 (2010) (emphasis added).

market value. Indeed, one factor, “other appropriate factors,” was broad enough to encompass judicial and constitutional principles of fair market value.

Red River provided no case law or legislative history to interpret the factors as precluding a fair market value method of analysis. The statute was silent on *how* to calculate damages, although the damages “must include” the four factors.

Courts are to construe statutes to comport with the Constitution, rather than presume a conflict.³⁰ Section 216B.47 explicitly stated that municipalities may proceed by eminent domain and simply added four damage considerations to be included. The plain language of Section 216B.47 should not be read to exclude fair market value standards or to require a district court to adopt the MPUC analysis.

Section 216B.47 repeated – three times – the phrase “eminent domain proceedings.” Indeed, this proceeding followed the typical procedure of an eminent domain proceeding – the Court appointed three commissioners, they held a hearing, they filed an award, both parties appealed to the district court with the right to have a jury determine damages, both parties inquired as to appraiser experts. Apx-14; Apx-21; Apx-23; Apx-25; Apx-27; Apx-29. None of these procedures was found in Section 216B.47, but all followed according to judicial process and eminent domain proceedings under Minnesota Statutes Chapter

³⁰ Minn. Stat. § 645.17 (3).

117. This proceeding was properly considered an eminent domain proceeding.³¹

Indeed, the provisions of Chapter 117 were required to apply to this proceeding under Minn. Stat. § 117.012: “Notwithstanding any other provision of law . . . all condemning authorities . . . must exercise the power of eminent domain in accordance with the provisions of this chapter, 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.” Chapter 117 must apply to this proceeding.³² The judicial construction of damages in eminent domain proceedings remained fair market value.

At most, “additional” procedures, limitations, or remedies under Section 216B.47 may apply. For example, the quick-take option was expressly not applicable to electric service territory condemnation.³³ The “additional” remedies in Section 216B.47 specified that the four factors must be “included” in damages. But courts must consider and harmonize the language in Section 216B.47 with Chapter 117, Section 465.01, and judicial interpretation. Nothing in Section 216B.47 excluded or prohibited the remainder of Chapter 117 or case law

³¹ Minn. Stat. § 645.16 (“Every law shall be construed, if possible, to give effect to all its provisions.”); Minn. Stat. § 465.01 (Chapter 117 applies).

³² Minn. Stat. 117.012 (providing express exception for drainage, town roads but no such exception for electric service territory); Minn. Stat. § 465.01.

³³ Minn. Stat. § 216B.47.

interpreting the Minnesota Constitution or Chapter 117. Indeed, under Sections 117.012 and 465.01, these provisions were mandatory.

Moreover, the opening language in Section 216B.47 emphasized the breadth of a city's right to use eminent domain: "Nothing in this chapter may be construed to preclude a municipality from acquiring the property of a public utility by eminent domain." Minn. Stat. § 216B.47. No provision of Chapter 216B – including section 216B.44, concerning proceedings before the MPUC – may be construed against a city's power to proceed by eminent domain. The Minnesota Supreme Court construed these two sections against adopting the "MPUC-only" method of compensation in eminent domain proceedings.

C. Past Precedent Rejected MPUC Damages In Condemnation Proceedings.

The Minnesota Supreme Court directly addressed the two forums of eminent domain in district court (under Section 216B.47) and the MPUC (under Section 216B.44).³⁴ The court reasoned that under Section 216B.44, the "value" of the electric service territory would be "determined by the MPUC in the event of a dispute."³⁵ But under Section 216B.47, damages would be determined "under the jurisdiction of the courts." *Id.* The district court reasoned that the MPUC had concurrent jurisdiction because "the subject matter involved is not within the traditional knowledge of Court-appointed commissioners whose primary

³⁴ *City of Rochester v. People's Cooperative Power Ass'n*, 483 N.W.2d 477, 480 (Minn. 1992).

experience is in real estate valuation'"³⁶ The Minnesota Supreme Court reversed.

The Minnesota Supreme Court declined to construe Section 216B.47 to limit the ability of municipalities to proceed by eminent domain. *Id.* at 480.³⁷ The court phrased the issue as “whether the matter of **compensation and its method of determination** is one uniquely suited to agency disposition.”³⁸ The court considered arguments by the MPUC and the condemnee, People’s, that (1) the statewide regulatory framework would be harmed by “judicial determination of the compensation award” and (2) uniformity of results was required. *Id.* The court rejected both arguments.³⁹

The Supreme Court held that “it is our view that this question of the **method of determining compensation** is not of a nature which invokes the [primary jurisdiction] doctrine. We have long acknowledged the competence of court-appointed commissioners to determine ‘just compensation,’ and, in view of that circumstance, we perceive no reason to interfere with the legislatively

³⁵ *Id.* at 479.

³⁶ *Id.* at 478.

³⁷ “The election is, therefore, the product of the legislative alternatives and is, accordingly, secured to the municipality. What then remains for our consideration is whether, by operation of the doctrine of primary jurisdiction, that right of election may be judicially limited.” *Id.*

³⁸ *Id.* at 480 (emphasis added).

³⁹ *Id.* at 480-81.

approved alternatives available to the municipality.” *Id.* at 481 (emphasis added).

In short, although the 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 those factors. Instead, courts must decide the “method of compensation” under eminent domain proceedings. This method should follow the typical approach of appointing commissioners. The typical approach to damages, under the Minnesota Constitution and case law, was fair market value. The court authorized judicial decisions in eminent domain proceedings – not the MPUC – to determine the method of determining compensation. The Minnesota Supreme Court was not troubled by the possibility of having different results in different forums. It specifically rejected the MPUC’s argument that there must be uniform results.

In any event, this Court need not speculate as to what the Legislature intended by establishing two potential forums. The Minnesota Supreme Court already determined that the MPUC method of determining compensation did not control in eminent domain proceedings.

D. The Legislature Did Not Modify the Fair Market Value Standard.

The Minnesota Legislature did not modify the fair market value standard as the appropriate standard to measure just compensation. Although the Legislature has addressed various aspects of Chapter 117 and eminent domain proceedings over the years, it has not revoked or modified the fair market value

standard.⁴⁰

For example, in 2006, the Minnesota Legislature established certain required procedural safeguards and minimum compensation standards under Chapter 117. These provisions were largely inapplicable to public service corporations such as municipal utilities.⁴¹ But the legislative changes to Chapter 117 did not modify or even reference the fair market value standard.⁴² Instead, fair market value was inherent in these legislative changes. For example, under this minimum compensation concept, an owner may choose to relocate or purchase a comparable property in the community.⁴³ In some cases, the cost of this relocation may be greater than the property taken.⁴⁴ But the compensation for the property taken was determined by the fair market value standard. The price to be paid for any substitute property must also be predicated on the fair market value of the substitute property. Fair market value remained the standard for compensation.

The jury should have been guided by principles of “eminent domain

⁴⁰ Minn. Stat. § 645.17 (Legislature presumed to intend same construction as judicial interpretation in later laws on same subject).

⁴¹ Minn. Stat. § 117.189.

⁴² Minn. Stat. § 645.17 (“when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language”).

⁴³ Minn. Stat. § 117.187.

⁴⁴ Relocation is inapplicable to utilities such as the present case. Minn. Stat. §117.189.

proceedings” and market value as specified in Minnesota law as the proper measure of just compensation.

E. The Court Erred in Excluding Relevant Fair Market Value Evidence.

At a minimum, this case presented an evidentiary issue. Given the broad standards of relevance, and past precedent that only evidence relating to fair market value may be admitted in condemnation cases, the District Court’s decision to exclude fair market value evidence constituted an abuse of discretion.

Minnesota courts have defined relevant and admissible evidence in condemnation proceedings in terms of whether “it legitimately bears on the market value.”⁴⁵ Evidence that was not relevant to fair market value must be excluded.⁴⁶ Courts have long defined fair-market-value evidence as the hallmark of admissibility in condemnation matters; the decision to exclude all fair market value in this case directly conflicted with this long-standing practice.

Even under a deferential standard of review for evidentiary rulings, it is difficult to argue that all fair market value evidence was properly excluded. As long as the fair-market-value analysis considered each of the factors under Section 216B.47, as Mr. Strachota’s expert report did, it was illogical to consider this evidence as somehow violating the statute or as irrelevant to determining

⁴⁵ *State v. Maleecker*, 120 N.W.2d 36, 38 (Minn. 1963); *State by Humphrey v. Strom*, 493 N.W.2d 554, 559 (Minn. 1992).

⁴⁶ *Olson v. U.S.*, 292 U.S. 246, 257 (1934) (“Considerations that may not reasonably be held to affect market value are excluded.”); *Union Depot R.R. v.*

damages.

Of course, the threshold to determine relevant evidence was quite broad.⁴⁷ In the present case, the fair market value of Red River and quantifying the damages resulting from the taking necessarily related to, and made less probable, the damages advocated by Red River.

Moreover, the City was prejudiced by excluding this evidence. The City's expert could not testify as to his typical practice and methods of his expertise. Instead, he was required to follow the methods used by the opposing party's expert. The jury was presented no concept of valuing a business, making appropriate analysis of facilities and revenues according to a market view of revenues.

The district court's decision to exclude all evidence of fair market value not only excluded relevant evidence, it fundamentally prevented the City from presenting its case to the jury. This evidentiary ruling therefore constituted reversible error.

F. The Jury Instructions Incorrectly Excluded the Fair Market Value Concept.

The jury was charged to decide "just compensation" and fill in the blank for "loss of revenues" in the four statutory factors. The jury could only assume that

Brunswick, 17 N.W. 626, 627 (Minn. 1883).

⁴⁷ Minn. R. Evid. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable"); Minn. R. Evid. 402

the only method to consider “loss of revenue” was the method advocated by Red River as adopted by the MPUC. No explanation of *how* to calculate lost revenues through a fair market value analysis was allowed. The jury was thus instructed to determine “just compensation” without the benefit of a century of guidance developing fair market value principles, to assist in deciding *how* to determine just compensation.

The City proposed a series of standard jury instructions used in condemnation matters relying upon fair market value. Apx-37-41; 4 *Minnesota Practice – Jury Instruction Guides*, CIVIG 52.35 (5th ed. 2006 & 2010 Supp.) (“just compensation is the fair market value of the property that was taken.”); see also CIVJIG 52.40 (defining fair market value); CIVJIG 52.65 (partial taking, measuring fair market value; modified to include statutory factors of Section 216B.47). The City objected to the decision to reject these instructions. T. 371-72.

The black letter rule for jury instructions in this kind of case is that they “should address each legal issue in the case, including the claims in the petition, the defenses, the constitutional requirements of just compensation, and the legal definitions of ‘fair market value,’ and ‘highest and best use,’ the effect of contamination, and the role of expert witnesses.”⁴⁸ The District Court’s rulings cannot be reconciled with the binding and long-standing precedents in this area

(“All relevant evidence is admissible . . .”).

of law. The instructions, considered as a whole, did not fairly and correctly state the applicable law, caused a miscarriage of justice, or resulted in substantial prejudice.⁴⁹

The jury should have been instructed as to the definition of just compensation, the use of fair market value, and allowed to use these principles to reach its verdict. Removing the concept of fair market value entirely from the jury instructions was error. This error prejudiced the City because it was unable to present testimony and argument according to applicable law and expertise of its expert.

II. BY EXCLUDING EVIDENCE OF FACILITY REPLACEMENT COSTS CRITICAL TO CALCULATING LOSS OF REVENUES, THE COURT ABUSED ITS DISCRETION.

The jury was not allowed to hear that the City anticipated spending \$400,000 in one year to replace the electric facilities at issue in this case. The City did not advocate an offset of \$400,000 in damages.⁵⁰ Instead, the City's expert deducted \$78,957 from the final loss-of-revenues number, assuming that the oldest facilities (those over 40 years old) would need to be replaced over the ten-year loss-of-revenue period. This assumption relied upon Red River's own

⁴⁸ 7 *Nichols On Eminent Domain* § G8.10[6] at pp. G8-66-7 (Rev. Ed. 2009).

⁴⁹ *H Window Co. v. Cascade Wood Prods., Inc.*, 596 N.W.2d 271, 277 (Minn. App. 1999), *review denied* (Minn. Aug. 17, 1999).

⁵⁰ It is unclear if there was some confusion by the District Court as to the nature of the deduction, in terms of whether it was to occur in 2011 and the amount of it. T. 78 ("I thought that the opinion he rendered was that the whole system would have to be replaced in 2011 and that was the new opinion . . .").

analysis in two ways: first, that the average life of these facilities was 30 to 35 years, and, second, using Mr. Eicher's replacement numbers.

On evidentiary issues, this Court generally defers to the district court "unless [the ruling] is based on an erroneous view of the law or constitutes an abuse of discretion."⁵¹ "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error."⁵² Excluded evidence may justify a new trial if it might reasonably have changed the result of the trial.⁵³

Although the district court's order ruling on the motion in limine did not characterize the ruling as a discovery sanction, the post-trial order did. "[District] courts have broad discretion in imposing sanctions for violations of the discovery rules."⁵⁴ Nonetheless, "[d]espite the [district] court's broad discretion, '[p]reclusion of evidence is a severe sanction which should not be lightly invoked."⁵⁵

Mr. Eicher, Red River's expert, testified that his loss-of-revenue analysis reflected an average useful life of the electric facilities of 30 – 35 years. T. 253. But 65% of Red River's facilities in the area were over 33 years old; and 35% were over 40 years old. T. 433; Ex. 73. In his loss-of-revenue calculation, Mr.

⁵¹ *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997).

⁵² *Id.* at 46.

⁵³ *Becker v. Mayo Foundation*, 737 N.W.2d 200, 214 (Minn. 2007).

⁵⁴ *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998).

⁵⁵ *Id.* (quoting *State v. Lindsey*, 284 N.W.2d 368, 374 (Minn. 1979)).

Eicher included no costs to replace any of those facilities over the ten-year damages period, ignoring significant expenses. T. 254, 259. Damages that are speculative, remote, or conjectural “cannot be recovered.”⁵⁶ Failing to include replacement costs made the damages speculative and remote. Mr. Strachota’s revised expert report simply assumed that facilities over 40 years old would need to be replaced, and subtracted the replacement cost using Red River’s replacement numbers.

In ruling on the motion in limine, the district court emphasized that the revised report was untimely in that it was made after the trial scheduled for April 20, 2010. The City’s revised report and related discovery was provided a month before trial. The City had a duty to supplement its discovery responses, including expert reports.⁵⁷ Although Rule 26.05 sets no time limit to supplement responses, the Federal Rules of Civil Procedure require disclosure thirty days before trial.⁵⁸ The City used its best efforts to produce this information in a timely fashion. The City identified these costs in a report dated July 20, 2010, which counsel first received in mid-August, and worked to provide a supplemental response with an expert with significant testimony, scheduling, and travel

⁵⁶ *Jackson v. Reiling*, 249 N.W.2d 896, 897 (Minn. 1977); see also *Cardinal Consulting Co. v. Circo Resorts*, 297 N.W.2d 260, 266 (Minn. 1980) (lost profits may only be recovered when “their amount is shown with a reasonable degree of certainty and exactness.”).

⁵⁷ Minn. R. Civ. P. 26.05; 1A *Minnesota Practice*, D. Herr & R. Haydock, at 75 (2010).

⁵⁸ Fed. R. Civ. P. 26(e)(2); 26(a)(3).

commitments. LeVander Affdvt, Sept. 13, 2010, Ex. 2; City's Mem. Opposing Motion in Limine, Sept. 20, 2011 at 3-4.

The City did not disclose a new witness, although the Minnesota Supreme Court has upheld allowing the testimony of an entirely new expert witness disclosed the day before trial.⁵⁹ The City's deduction was consistent with Mr. Strachota's testimony in 2008 before the Court-appointed Commissioners about concerns with the age of the facilities and need for on-going capital replacement. City's Mem. Support New Trial, (Nov. 10, 2010), at 19.

Moreover, taken literally, the District Court's position that anything after the April 20th trial date was untimely results in an impossible situation. The Court's March 30th ruling struck the City's expert's reasoning and the heart of its case three weeks before trial.⁶⁰ The City attempted to accommodate the District Court's legal concerns by preparing an alternative analysis, including applying the date of valuation ordered. It would be draconian and unfair to strike this alternative approach as untimely. But even assuming the alternative analysis was untimely, it still begs the question of whether the District Court should have struck the original analysis. It was error to eliminate Mr. Strachota's fair-market-

⁵⁹ *Krech v. Edrman*, 233 N.W.2d 555, 556-7 (Minn. 1975).

⁶⁰ Before the District Court's summary judgment order, the parties jointly requested a continuance of the trial and rescheduled pre-trial deadlines in response to lead counsel's third-trimester pregnancy medical complications and medical restriction on travel to Moorhead. Joint Letter to Judge Kirk (March 23, 2010).

value opinion. That error was preserved, and this Court should reverse on that basis. That the City attempted a “Plan B” approach with an alternative analysis is beside the point. The fact remains that the original fair-market-value approach should have been permitted and the City should never have been put in the unenviable position of struggling to put together a “Plan B” approach on the eve of trial.

Red River also argued that the deduction evidence was untimely because the costs arose after the date of taking. But the Minnesota Supreme Court has held that evidence of a “condition that exists on the property at the time of the taking may be relevant to determining just compensation, regardless of whether the parties were aware of the condition at the time of the taking.”⁶¹

The district court was clearly concerned with prejudice to Red River. But this potential prejudice⁶² of responding to information provided a month before trial must be balanced against the prejudice to the City from excluding this evidence.⁶³ In considering the discretion accorded the district court on

⁶¹ *Moorhead Econ. Devel. Auth. v. Anda*, 789 N.W.2d 860, 875-6 (Minn. 2010) (considering contamination discovered after taking).

⁶² Red River’s motion in limine and memorandum noted the issue would require discovery, but did not specify the nature or scope of any desired discovery nor articulate a specific claim of prejudice. Apx-35.

⁶³ *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697-98 (Minn. 1977) (upholding exclusion of expert testimony for inadvertent failure to disclose but noting “[i]t must not be forgotten during our efforts to ensure compliance with discovery rules that the judicial process is an attempt to seek the truth. We should not unduly hamper that search by excluding relevant evidence where other means

evidentiary matters, courts have cautioned that exclusion of evidence remains a severe sanction, even in case of repeated discovery violations.⁶⁴ The present case did not involve repeated discovery violations.

The post-trial order, consistent with the District Court's questioning of counsel outside the presence of the jury, reflected the district court's fundamental disagreement that the age of the facilities affected the amount of damages. Add-23; T. 358-65; T. 382. But this view confused replacement of facilities (also called capital improvements) with repairing facilities (also called operation and maintenance).⁶⁵ Only the City accounted for the costs to replace facilities over the ten-years of revenues.

At trial (outside the presence of the jury), the District Court questioned whether the City benefited from acquiring older facilities, as opposed to a new system. T. 358-365. The District Court reasoned that if Red River had installed new facilities, the City would pay a higher amount under the original-cost-less-depreciation factor. But the loss-of-revenues factor would then be zero; the depreciation expense on the new facilities would effectively erase any revenues.

are available to protect a party from the effects of an inadvertent failure to disclose [T]he exercise of that discretion should be tempered by an effort to seek a solution short of exclusion that will accommodate the competing interests inherent in the discovery rules and the adjudicative process itself."

⁶⁴ *Patterson*, 587 N.W.2d at 50; *Cornfeldt*, 262 N.W.2d at 697-8.

⁶⁵ T. 382 (District Court reasoning, outside of jury, that "Because of the age of the facilities there may have been more need to replace poles, wires, transformers and that goes to the maintenance and operation avoidable costs that I think

And, in the present case, the expense of purchasing new facilities greatly outweighed any lower facilities price in factor one. Assuming a net-loss-of-revenues number of \$13,000 in the first year, spending nearly \$400,000 in one year to replace facilities would eviscerate any revenues.

The excluded evidence may reasonably have changed the result of the trial. The jury could only assume that City would acquire these facilities and enjoy ten years of revenues without incurring significant expenses to replace the facilities. Indeed, counsel for Red River argued in closing argument that a \$13,000 “profit” from an “investment” of \$19,867 in facilities was “a rate of return of about 70 percent” and that “I’ll take that investment any day. You tell me where you can find a deal like that.” T. 549. No dollar impact was presented to the jury as to the cost of replacing facilities older than 40 years.

By limiting the City to challenging operation and maintenance expenses, such as tree trimming, the jury could trivialize the scope of the dispute. Red River estimated operation and maintenance expense of \$3,465 per year. The City could only be seen as nit-picking Red River’s damage claim. The jury was not presented with the clear cost of \$78,957 – a significantly higher number, and a number adopted by Red River itself – as the costs to replace facilities.

The jury knew the age of the facilities. But the jury was not presented with a method to replace the oldest facilities. It was left to calculate the “loss of revenues” to Red River from 2009 through 2018, knowing the disputed tree-

either expert is free to have testified about.”).

trimming costs, but not the cost to replace the oldest facilities over that period. The testimony concerning loss of revenues was incomplete, and speculative in that it assumed even forty-year-old facilities would continue another ten years without any planned replacement costs. The district court abused its discretion in excluding evidence of the deduction for deferred capital maintenance.

III. The Verdict Was Not Supported by the Law or the Evidence.

In addition to the legal error in applying the damages standard, verdict was not supported by the evidence. Even viewing the evidence in the light most favorable to the verdict, Red River did not satisfy its burden of proof as to damages. The loss-of-revenue verdict was contrary to the evidence as to purchased power and operations and maintenance expenses. These two expenses were significantly understated, overstating the damages. Damages must not be speculative.⁶⁶

First, in terms of purchased power expense, Red River's own financial and planning documents stated that purchased power expenses comprise over 64% of the revenues that Red River receives. Ex. 59 (purchased power costs 64.2% of every dollar received).⁶⁷ But Red River's expert, Mr. Eicher, calculated

⁶⁶ *Olson, Clough & Straumann v. Trayne Properties*, 392 N.W.2d 2, 5 (Minn. App. 1986) (holding damages speculative and failing to "meet the requirement that an alleged loss be proven with certainty and exactness.").

⁶⁷ See also Ex. 27 at 5 (purchased power costs more than doubled from \$4.1 million in 2003 to \$8.5 million estimated for 2010); Ex. 33 (10-year financial forecast) at 1 (\$1,782 - \$2,307 per customer); Ex. 47 (2008 financial statement) (\$1,206 per customer); Ex.48 (2009 financial statement) (purchased power

purchased power costs for the Americana customers at a significantly lower amount: 52.7% of revenues. T. 271; 441-42. Mr. Eicher admitted that he did not analyze whether the Americana Estates customers were different from any other Red River customers in terms of purchased power expense. This error totaled nearly \$100,000 over the ten-year damages period. T. 443. The City's expert, Mr. Strachota, testified that in analyzing these Americana Estates customers from the other Red River customers, there was no difference in terms of off-peak energy purchases. Mr. Eicher assumed only \$823 per customer for purchased power expenses, as compared to Red River's own financial documents stating \$1,206 to \$2,307 per customer for purchased power expenses. Ex. 47; Ex. 33. In short, Red River failed to meet its burden of proof, overstating damages.

Second, in terms of operations and maintenance expense, Mr. Eicher assigned only \$3,465 in expenses for the first year. Ex. 74. But the City presented testimony and evidence of spending nearly \$13,000 in the first year to properly trim the trees in Americana. Ex. 62. Red River did not dispute this evidence. The operations and maintenance expenses were understated by at least \$10,000 in the first year alone.

Moreover, Red River's own planning documents projected operations and maintenance expenses of \$276 per customer in 2009, rising to \$425 per

64.2% of \$10,853,535 revenues); Ex. 27 (2010 budget projects purchased power of 67.6% of \$12,691,102 revenues). Power costs were only projected to increase in upcoming years. Ex. 57 (power costs to increase more than 30% in next nine years).

customer by 2019. Ex. 33 at 1; see also *id.* at 2 (O&M \$1,416,910 in 2010 projected to increase by 2019 to \$2,016,705); Ex. 27 at 5 (O&M actual expenses 2003 \$471,000 to increase dramatically in 2010 to \$721,000). Mr. Eicher allowed only \$53 per customer. Ex. 74; Ex. 9. Even if the jury accepted arguments that some portion of Red River's expenses could not be avoided as a result of this taking, the expenses that Red River proposed were so minimal as to be speculative and unsupported by the evidence.

CONCLUSION

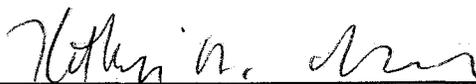
The City was not allowed to fairly present its damages case to the jury. The City was instead required to argue the opposing party's method of calculating damages. Because Minnesota law allowed – indeed for over a century required – fair market value to ascertain “just compensation,” this Court should reverse the District Court's decision that just compensation in this matter must not be based upon fair market value, to exclude all evidence concerning fair market value, and to reject all jury instructions referencing fair market value. At a minimum, this evidence satisfied the broad rules of evidentiary admissibility and should have been admissible.

Therefore, this Court should either reverse the District Court's denial of judgment as a matter of law, or reverse the denial of a new trial, and direct the District Court to employ the correct legal standards of fair market value, and allow in the new trial evidence of fair market value analysis as relevant evidence. This Court should also reverse the District Court's decision excluding evidence

concerning the deduction to damages due to the age of the facilities. Such evidence was relevant to the jury calculating damages and determining just compensation. Finally, this Court should reverse the judgment as unsupported by the law or evidence.

Dated: June 20, 2011.

McGRANN SHEA CARNIVAL
STRAUGHN & LAMB, CHARTERED

By: 
Kathleen M. Brennan (No. 256870)
Corey J. Ayling (No. 157466)
800 Nicollet Mall, Suite 2600
Minneapolis, MN 55402-7035
Phone: 612-338-2525
Fax: 612-339-2386

WOLD JOHNSON, P.C.
Benjamin E. Thomas (No. 0204882)
500 Second Avenue North, Suite 400
P.O. Box 1680
Fargo, North Dakota 58107
Telephone: (701) 235-5515

Counsel for the City of Moorhead

STATE OF MINNESOTA
IN COURT OF APPEALS

The City of Moorhead,

Appellant,

Court Appeals No: A11-705

vs.

CERTIFICATION OF BRIEF LENGTH

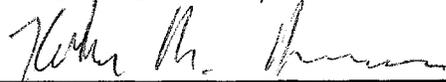
Red River Valley Cooperative Power
Association,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 10,806 words. This brief was prepared using Microsoft Word 2007.

Dated: June 20, 2011.

McGRANN SHEA CARNIVAL
STRAUGHN & LAMB, CHARTERED

By: 

Kathleen M. Brennan (No. 256870)
Corey J. Ayling (No. 157466)
800 Nicollet Mall, Suite 2600
Minneapolis, MN 55402-7035
P: 612-338-2525; F: 612-339-2386

WOLD JOHNSON, P.C.
Benjamin E. Thomas (No. 0204882)
500 Second Avenue North, Suite 400
P.O. Box 1680
Fargo, North Dakota 58107
Telephone: (701) 235-5515

Counsel for the City of Moorhead