

NO. A11-705

State of Minnesota
In Court of Appeals

City of Moorhead,

Appellant,

vs.

Red River Valley Cooperative Power Association, et al.,

Respondent.

**APPELLANT CITY OF MOORHEAD'S
REPLY BRIEF AND ADDENDUM**

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

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

*Attorneys for Appellant
City of Moorhead*

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

Sara Gullickson McGrane (#233213)
Jessica M. Marsh (#388353)
220 South Sixth Street, Suite 2200
Minneapolis, MN 55402-4504
(612) 339-6321

*Attorneys for Respondent
Red River Valley Cooperative Power
Association*

(See next page for listing of amici curiae)

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FLAHERTY & HOOD, P.A.
Elizabeth A. Wefel (#251951)
525 Park Street, Suite 470
St. Paul, MN 55103
(651) 225-8840

*Attorney for Amici Curiae
Minnesota Municipal Utilities Association,
Missouri River Energy Services, Western
Minnesota Municipal Power Agency and
Coalition of Greater Minnesota Cities*

LEAGUE OF MINNESOTA CITIES
Susan L. Naughton (#0259743)
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232

*Attorney for Amicus Curiae
League of Minnesota Cities*

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SUMMARY OF THE ARGUMENT

The City of Moorhead (the “City”) was denied the opportunity to present its case by arguing for a damages number based upon fair market value. In its brief, Red River Valley Cooperative Power Association (“Red River”) did not dispute that the City’s fair-market-value evidence was relevant to the issue of establishing damages. On this basis alone the evidence should have been admitted, and it was reversible error to deny the City the right to put on its case.

Red River seeks to avoid this result by redefining the case as one of narrow statutory construction. In particular, Red River insists that the evidentiary question is controlled entirely by statute, that the Legislature pointedly omitted the words “fair market value” from Minn. Stat. § 216B.47, and that the District Court had no choice but to refuse the evidence. But this argument ignores the constitutional dimension of the issue. The “fair market value” test is what the Courts have held to be required by the constitutional duty of just compensation. In an eminent domain proceeding, the District Court is required by the Supreme Court’s reading of the Constitution to instruct the jury on the concept of fair market value. The Legislature did not have the authority to overrule the Supreme Court on a question of constitutional law, even in the unlikely event that it truly was the Legislature’s intent to repeal a constitutional doctrine followed by the Minnesota courts over for centuries.

A fair reading of Section 216B.47 is that although the damages “must include” four factors, it is silent with respect to the method of calculating damages. It should have been equally permissible to present fair market value as the “how” or the method of analyzing those four factors. This Court should reject Red River’s dangerous invitation to construe the silence or lack of language in Section 216B.47 to mean that the Legislature prohibited evidence of fair market value.

Red River’s argument, in the end, is that the Minnesota Public Utilities Commission (“MPUC”) “net-loss-of-revenue” analysis, upon which Red River’s expert relied, was not one possible method of analysis – but the only possible method of determining damages. This argument turns on its head the Minnesota Supreme Court’s holding in *City of Rochester*¹ that the MPUC did not enjoy primary jurisdiction over condemnation of electric service territory.

Moreover, the series of MPUC cases cited by Red River is irrelevant to the questions presented in this case. Each case addressed the particular facts at issue, applying a deferential standard of review. But no case adopted the MPUC net-loss-of-revenues method as required in all district court proceedings. If anything, the MPUC itself has altered its approach on these issues, and this Court has suggested that the MPUC consider alternatives to its current net-loss-of-revenues method.

¹ *City of Rochester v. People’s Cooperative Power Ass’n*, 483 N.W.2d 477, 480 (Minn. 1992).

A correct reading of Section 216B.47, harmonized with other statutory provisions in Chapter 117 and over a century of case law, supported allowing other approaches to damages – including the fair market value analysis sought by the City. This Court should reverse the exclusion of fair market value evidence.

In terms of the excluded evidence of the replacement cost for facilities older than forty years, Red River incorrectly confused this analysis with the original-cost-of-the-facilities-less-depreciation factor. The on-going expenses of replacing facilities over the ten-year period starting with the date of taking properly belonged within the loss-of-revenue factor, as the City calculated. The discovery abuse cases cited by Red River are distinguishable. This Court should reverse the exclusion of the replacement-cost evidence.

ARGUMENT

I. THE DISTRICT COURT ERRED IN PROHIBITING FAIR MARKET VALUE IN MEASURING DAMAGES.

Although the parties devoted many pages to the important legal issues in this matter, this Court may simply conclude that excluding the admittedly relevant fair-market-value evidence constituted an abuse of discretion.² Red River did not contest that this evidence was relevant, or that it was prejudicial to the City's

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

presentation of its case. To complete the record, the City will address the other legal issues raised in Red River's brief.

A. The Plain Language of Section 216B.47 Did Not Require Excluding Fair Market Value.

Red River narrowly focused upon the statutory language of Section 216B.47, and rested its argument on the lack of the words "fair market value." But the "fair market value" concept was a judicial creation, in response to analyzing the Constitutional requirement of "just compensation."³ This long-standing constitutional interpretation should be entitled to deference, particularly given the great care that courts employ in interpreting the constitution.⁴ "A constitution is intended to be framed in brief and precise language, and represents the will and wisdom of the constitutional convention, and those of the people who adopt it. It stands, not only as the will of the sovereign power, but as security for private rights, and as a barrier against legislative invasion. It has been well said that the 'the constitution, which underlies and sustains the social structure of the state, must be beyond being shaken or affected by unnecessary construction, or by the refinements of legal reasoning.'"⁵ A well-settled

³ *E.g., Olson v. United States*, 292 U.S. 246, 255 (1934).

⁴ *See State v. Holm*, 241 Minn. 125, 129-130, 62 N.W.2d 52, 55-56 (Minn. 1954) (noting "well-established rules" in construing constitution).

⁵ *State v. Sutton*, 63 Minn. 147, 149, 65 N.W. 262, 263 (1895) (quoting *People v. Rathbone*, 40 N.E. 395 (N.Y. App.)).

constitutional interpretation should not be set aside lightly, particularly given the absence of any legislative intent to do so.

Indeed, in vain would one search Minnesota Statutes Chapter 117, which governs eminent domain proceedings, for a legislative definition or determination of fair market value. The entire Minnesota Statutes Chapter 117 contained only three uses of the phrase, none of which applied to the present case. First, when the Minnesota Department of Transportation acquires property, it must pay delinquent taxes, but only up to the fair market value.⁶ Second, if a condemning authority determined that property acquired through eminent domain was not needed, it must notify the original property owner and offer to sell it.⁷ Third, if the parties agreed upon the fair market value of the property but disagreed on appraisal fees or moving fees, the district court may determine them.⁸ None of these statutory provisions was at issue in this case. These three isolated uses of “fair market value” in particular circumstances inapplicable to this case do not evidence a legislative scheme directing when “fair market value” should apply. The Legislature simply did not differentiate electric service territory takings from

⁶ Minn. Stat. § 117.135 (2010) (“This subdivision shall not be construed to require the payment of accrued taxes and unpaid assessments on the acquired property which exceed the fair market value thereof.”).

⁷ Minn. Stat. § 117.226 (2010) (“The offer must be at the original price determined by the condemnation process or the current fair market value of the property, whichever is lower . . .”).

⁸ Minn. Stat. § 117.232 (2010).

any other taking in terms of whether the constitutional doctrine of fair market value should apply.

Instead, a fair reading of Section 216B.47 is that the damages “must include” the four factors, but that it is silent with respect to the method of calculating damages. The “how” of applying the four factors was left to be interpreted by the courts or the litigating parties seeking to persuade the finders of fact.

Moreover, Section 216B.47 was not limited to the four factors. 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.”⁹ 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 plain language of Section 216B.47 did not exclude fair-market-value principles. Red River presented no comprehensive legislative scheme to prohibit principles of fair market value in electric-service-territory takings. One statute noted by Red River in passing, Section 216B.66, was not applicable by its terms. Section 216B.66 provided that “other Minnesota statutes are not to be construed as applicable *to the supervision or regulation of public utilities* by the

⁹ Minn. Stat. § 216B.47 (2010).

commission.”¹⁰ But determining damages in this eminent domain proceeding had no bearing on the MPUC’s supervision or regulation of public utilities. This case presented a purely monetary issue of just compensation.

Even assuming that Section 216B.66 applied, it is unclear what other Minnesota statutes Red River contended to be inapplicable. Red River at times sought to apply statutory provisions in Chapter 117, such as additional remedies,¹¹ interest payments,¹² demand for appraisal,¹³ and costs and disbursements.¹⁴ To be sure, it is perplexing that the statute authorizing other legislative remedies, Section 117.012, was enacted over thirty years after the statute authorizing eminent domain for electric-service-territory matters, Section 216B.47. Red River did not address this issue. Instead, it appeared to argue that Section 216B.47 exclusively, and no other statutory provision, controlled.

But Red River’s reliance on Section 216B.47 – apparently to the exclusion of all other statutes and judicial guidance interpreting “just compensation” – would isolate that statute to the point of meaninglessness. Section 216B.47 by its terms referenced eminent domain proceedings, and broadly stated a city’s right to proceed in eminent domain proceedings. Red River’s argument

¹⁰ Minn. Stat. § 216B.66 (2010) (emphasis added).

¹¹ Minn. Stat. § 117.012 (2010).

¹² Minn. Stat. § 117.019 (2010).

¹³ Minn. Stat. § 117.165 (2010).

¹⁴ Minn. Stat. § 117.175, subd. 2 (2010).

overlooked the deeper issue of how to consider and harmonize the language in Section 216B.47 with Chapter 117, Section 465.01, and the well-established judicial interpretation of just compensation. Nothing in Section 216B.47 excluded or prohibited fair market value.

B. Minnesota Statutes Did Not Remove Electric Service Territory Takings from Eminent Domain Proceedings.

Red River also argued that electric-service-territory was so unique as to be its own isolated type of taking, utterly unconnected from “regular” eminent domain proceedings and damages analysis. But Red River’s only Minnesota legal authority for this position was Section 216B.47, which uses the phrase “eminent domain proceeding” three times. Minnesota statutes defined takings to include both land and intangible rights or personal property.¹⁵ No Minnesota statute expressly exempted electric-service-territory takings from eminent domain proceedings.

Red River’s argument, citing two federal cases,¹⁶ that electric-service-territory was too unique to be considered under any fair-market-value analysis as a matter of law, failed to consider the context of the cases. Rather than eschew fair market value, both cases applied the doctrine to the facts of the case. In *564.54 Acres of Land*, the court rejected arguments that a non-profit owner of

¹⁵ Minn. Stat. § 117.025, subd. 2 (2010).

¹⁶ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979); *United States v. Fuller*, 409 U.S. 488 (1973).

three summer camps was entitled to replacement costs, rather than fair market value.¹⁷ The court reasoned that “the concept of fair market value has been chosen to strike a fair ‘balance between the public’s need and the claimant’s loss’ upon condemnation of property for a public purpose.”¹⁸

Red River’s quotation from the case concerning potentially inapplicable markets for fair market value, such as road or sewer utilities, is properly considered dicta.¹⁹ In any event, Red River cited no authority that in Minnesota, eminent domain proceedings involving roads or sewers should apply a standard other than fair market value.²⁰ In terms of the claimed lack of market data, the court in *564.54 Acres* noted that the condemnor’s expert identified 11 sales of comparable facilities. *Id.* at 514.

In *Fuller*, the second case cited by Red River, the court applied the fair-market-value doctrine and rejected compensation concerning a revocable permit to use federal land for grazing.²¹ In short, neither case rejected fair market value

¹⁷ *564.54 Acres of Land*, 441 U.S. at 516.

¹⁸ *Id.* at 512 (quoting *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402 (1949), second ()).

¹⁹ Red River brief at 35; *564.54 Acres of Land*, 441 U.S. at 513.

²⁰ *Alexandria Lake Area Service Region v. Johnson*, 295 N.W.2d 588, 591 (Minn. 1980) (applying fair market value principles to sewer line condemnation); *County of Anoka v. Blaine Building Corp.*, 566 N.W.2d 331, 334 (Minn. 1997) (road condemnation).

²¹ *United States v. Fuller*, 409 U.S. 488, 492-3 (1973).

or held that a standard other than fair market value should be applied. They cannot support Red River's argument that fair market value must be excluded as a matter of law.

As a matter of fact, Red River's argument also must fail. The "market approach" considering comparable sales was only one of at least three approaches used in a fair-market-value appraisal.²² The income approach focused on how to value the stream of revenue, including what expenses must be considered, and how to properly analyze present value.²³ The cost or asset approach considered value by focusing upon the assets at issue.²⁴ The various approaches serve as useful checks and balances to determine the final value number. The appraiser must consider and analyze all three approaches, but use his or her judgment and experience to determine what weight to apply to each approach in concluding a final value number. Mr. Strachota, the City's expert, applied each of these three approaches.²⁵

²² *County of Ramsey v. Miller*, 316 N.W.2d 917, 922 (Minn. 1982).

²³ Appraisal Institute, *The Appraisal of Real Estate*, 140-143 (13th ed. 2008); see also Shannon Pratt & Alina V. Niculita, American Bar Ass'n, *The Lawyer's Business Valuation Handbook*, 23-24 (2d ed. 2010) (same standards).

²⁴ *Id.*

²⁵ LeVander Affdvt., February 4, 2010; Ex. 1(Strachota report) at 19 (defining income approach as "estimat[ing] value by considering the income (benefits) generated by the asset over a period of time. . . .In applying the methods under this approach, the appraiser estimates the future ownership benefits and discounts them to present value at an appropriate rate known as the discount rate. . . We have prepared a pro forma income statement for the next ten years."); *Id.* at 17 ("The cost approach in business valuation analysis is based on

But even assuming a limited market for service territory, electric service territory is nonetheless sold. In the present case, the City's expert, Mr. Strachota, analyzed five comparables involving electric service territory sales for distribution and transmission electric utilities.²⁶ In analyzing the three approaches, Mr. Strachota placed the greatest weight on the income approach, not the comparable sales. *Id.* at 35. Red River's arguments are properly made in cross-examination. Each party would have an opportunity to test the strengths and weaknesses of the analysis. But to preclude fair market value altogether because one party doubted the results of one component of fair market value casts too broad a net.

Red River also erred in suggesting that the City somehow waived its objection to excluding fair market value by stipulating to the original cost less depreciation and other appropriate factors components. The City was precluded from applying or referencing fair market value. The City preserved its objection for appeal in its proposed jury instructions, offer of proof at trial, and in its motion

the proposition that the informed purchaser would pay no more than the cost of producing a substitute business with the same utility as the subject."); *id.* at 21 (describing market approach as comparables and noting "[t]he use of guideline companies, when estimating the value of a business is therefore a very useful methodology in that the values have been established in an open market transacted between willing buyers and willing sellers.").

²⁶ *Id.* at 21-22; *Id.* at 23 ("The comparables shared many characteristics with the subject in terms of being specific service territories transacted for a specified customer base.").

for judgment as a matter of law or new trial.²⁷ That the City presented a case in compliance with the District Court's orders while preserving its arguments for appeal did not signify waiver of its arguments.

Electric service territory takings present one type of a broad array of takings covered by Minnesota law. Red River's argument that electric-service-territory should be an island of law governed only by Section 216B.47 must fail as a matter of law and fact. Red River's alternative argument, that only the MPUC analysis of damages may be considered, also fails.

C. The MPUC, Lacking Primary Jurisdiction, Cannot Control the Damages Analysis through "Back-Door" Jurisdiction.

The parties agreed that the Minnesota Supreme Court held that the MPUC lacked primary jurisdiction over eminent domain proceedings involving electric service territory.²⁸ But the parties drew sharply different conclusions from this starting point. Red River contended that although the MPUC lacked primary jurisdiction, the MPUC's method of calculating loss-of-revenues was the only admissible method in this proceeding.²⁹ The City submits that this approach turned the *Rochester* decision on its head. Under Red River's argument, although the agency may not decide the matter up-front under primary

²⁷ Transcript T. 381-2; City's Apx-92, City's Memo. Support Motion for Judgment as a Matter of Law or New Trial, Nov. 11, 2010, at 1-2; 7-20; 28-29.

²⁸ *City of Rochester v. People's Cooperative Power Ass'n*, 483 N.W.2d 477, 480 (Minn. 1992).

²⁹ Red River Brief at 29-31.

jurisdiction, the agency's past methodology in calculating damages would effectively control the damages decision in district court. What the court held the agency could not decide through the front door, it may nonetheless control through the back door.

Red River's argument misconstrued the breadth of the primary jurisdiction doctrine. This doctrine "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency."³⁰ Indeed, the doctrine is appropriate when an issue "at least arguably" lies within an agency's jurisdiction.³¹ Here, Red River argued that the issue of calculating "loss of revenues" is committed to the MPUC and only the agency's method of calculating this issue may be considered in district court. But if that argument were true, then the MPUC would "at least arguably" have enjoyed primary jurisdiction over this issue. Of course, the Minnesota Supreme Court rejected this argument and held that the MPUC did not enjoy primary jurisdiction to

³⁰ *United States v. Philadelphia National Bank*, 374 U.S. 321, 353 (1963); see also *Bankruptcy Estate of United Shipping v. Tucker Co.*, 474 N.W.2d 835 (Minn. App. 1991) (ICC has primary jurisdiction to determine reasonable rate), *rev. denied* (Minn. Oct. 31, 1991); *Jara v. Buckbee-Mears Co.*, 469 N.W.2d 727 (Minn. App. 1991) (NLRB primary jurisdiction over good faith bargaining), *rev. denied* (Minn. Aug. 2, 1991).

³¹ *Midwest Motor Express v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 512 N.W.2d 881, 890 (Minn. 1994) (hiring permanent employee to replace striker "at least arguably, under the umbrella of federal labor law" and subject to NLRB regulation); *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973) (doctrine applicable if issue "at least arguably protected or prohibited by another regulatory statute enacted by Congress.").

decide damages for electric-service-territory-takings in eminent-domain proceedings.³²

The arguments that Red River raised in this case include the same arguments raised by the MPUC and the cooperative in the *Rochester* decision, namely that there could be different results in district court and in agency proceedings.³³ But, as the court reasoned in *Rochester*, these arguments fail to account for a municipal's right to proceed in district court.³⁴ If the Legislature intended the MPUC to decide loss-of-revenues, why did it create the right to proceed in eminent domain proceedings, and using such broad terms? "Nothing in this chapter may be construed to preclude a municipality from acquiring the property of a public utility by eminent domain."³⁵ Just as the Minnesota Supreme Court rejected the argument that the MPUC must decide damages under the primary jurisdiction doctrine, so should this Court reject the argument that the MPUC's method of calculating damages must control in eminent domain proceedings.

³² *Id.* at 481.

³³ *Id.* at 480-81.

³⁴ *Id.* ("[W]e perceive no reason to interfere with the legislatively approved alternatives available to the municipality.").

³⁵ Minn. Stat. § 216B.47 (2010).

D. The Cited MPUC Precedent Was Not Controlling.

Red River noted a number of decisions in which the MPUC determined damages under Section 216B.44 and reviewed by the Court of Appeals under certiorari review.³⁶ Red River presented these cases as almost a uniform holding, without specifying the particular facts, expenses, or rationale that it contends should be applied in the present case. But Red River painted with too broad a brush. Each case decided the specific facts before it, often employing a deferential standard of review. No case considered “just compensation” or excluding fair-market-value evidence. No case required a particular result in the present case.

First, it was incorrect to suggest that past MPUC cases applied a uniform holding. Instead, each decision addressed the particular facts and circumstances of that case. No one case decided all electric-service-territory cases for all time. The commonality appears to be that Red River’s expert appeared in each of these cases. But one expert’s approach to damages should not govern all proceedings. At most, a particular appellate decision upheld the MPUC order *in that specific case*. No decision has held – nor would it be proper to hold – that only one methodology could be considered for all cases.

Indeed, the MPUC itself has not followed a uniform approach in these

³⁶ Red River Brief at 29-31; 47.

matters. The MPUC applied an “expense residual method” for a period of time.³⁷ The MPUC did not adopt the “net loss of revenue” method until 1995.³⁸ Nothing in Section 216B.44 required the MPUC to use the net-loss-of-revenues method it currently uses, or the expense-residual-method that the MPUC used for a number of years, or a new method of analysis in the future. Nothing in the cases cited by Red River precluded a party from presenting an analysis based on fair market value, or another alternative analysis, if the damages include the four statutory factors.

Second, this Court’s review of the MPUC decisions under Section 216B.44 was typically subject to a deferential standard of review.³⁹ The Court of Appeals must affirm even if it would have reached a different conclusion than the agency. “Although a reviewing court might reach a contrary conclusion to that arrived at by an administrative body, the court cannot substitute its judgment for that of the administrative body when the finding is properly supported by the evidence.”⁴⁰ Red River therefore cannot assume that the decisions agreed with the MPUC’s analysis or conclusions. When this Court recently applied *de novo*

³⁷ *In re North Park Additions*, 470 N.W.2d 525, 529 (Minn. App. 1991), *rev. denied* (Minn. July 24, 1991).

³⁸ *In re Application of Rochester*, MPUC No. E-299,132/SA-93-498, at 5 (Nov. 30, 1995) (City’s Reply Addendum at R-Add-5).

³⁹ See Minn. Stat. § 14.69 (2010) (limiting grounds to reverse or modify an agency’s decision to six specified grounds).

⁴⁰ *Vicker v. Starkey*, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963).

review, it reversed the MPUC's decision to require loss-of-revenue payment to a cooperative without legal authority to serve the area.⁴¹

Even applying a deferential standard of review, the Court of Appeals failed to endorse the MPUC's net-loss-of-revenues-method as the only alternative to establishing damages. Instead, this Court relied upon condemnation principles to suggest that the MPUC consider alternative approaches to the net-loss-of-revenues approach. "We observe that in future cases, it may be appropriate for the Commission to consider alternative-revenue formulas as a "reasonableness check" to its valuation determination under the statute."⁴²

Third, none of the cases cited by Red River addressed fair market value or just compensation. Of course, the MPUC is a state agency, with powers limited by statute.⁴³ No statute granted the MPUC the authority to decide damages in district court proceedings. In all of the cases cited by Red River, neither the MPUC nor the courts sought to balance the four factors with the standards of just compensation or fair market value. These cases are simply not relevant to the issues before this Court.

⁴¹ *In re City of Redwood Falls*, 756 N.W.2d 133, 138-9 (Minn. App. 2008).

⁴² *In re Grand Rapids Public Utilities Comm'n*, 731 N.W.2d 866, 872 (Minn. App. 2007) (citing *Equitable Life Assurance Soc'y of the U.S. v. County of Ramsey*, 530 N.W.2d 544, 553 (Minn.1995)).

⁴³ *Minnegasco v. Minnesota Pub. Util. Comm'n*, 549 N.W.2d 904, 907 (Minn. 1996) ("The MPUC, as a creature of statute, only has the authority given it by the legislature.").

In sum, the MPUC cases cited by Red River involved other utilities, with different facts, without analyzing the facts in the present case. They do not support the argument that fair market value cannot be considered in an eminent domain proceeding.

E. Red River's Policy Arguments Are Not Persuasive.

Red River argued that there cannot be an "entirely different damage calculation" based on the forum.⁴⁴ But neither Section 216B.47 nor Section 216B.44 requires a particular damage calculation, as long as the four factors are included in the damages. If the four factors are addressed, nothing precludes any number of different methods of calculating damages.

The City sought to present an expert analysis that admittedly was different from Red River's analysis, but that addressed the required four statutory factors. But nothing in the statute prohibited using an analysis that was different from how Red River or the MPUC addressed loss-of-revenues. Red River did not dispute that the City's fair market value evidence was relevant to the issues of the case.

Red River fundamentally argued that it is unfair for the City, as the condemnor, to initiate a proceeding and so select the forum to decide the dispute. Of course, if the Legislature intended only one forum, or intended the MPUC's analysis to govern both forums, it could have so provided. Instead, the Legislature established two forums, required damages to include four factors,

⁴⁴ Red River Brief at 38.

and was otherwise silent on how the damages should be determined. It remains up to the finder of fact in either forum to consider the evidence and determine damages. Nothing in the statute required presenting only the MPUC net-loss-of-revenues-method.

Although Red River noted that it is natural for an owner to try to maximize damages, it is also natural for condemning authority, which is also a not-for-profit entity and whose citizens must ultimately pay for any taking, to hold the owner to its burden of proof and to keep the damages to just compensation, not undue or excessive payment. The fair-market-value doctrine was meant to accomplish both goals. “[T]he dominant consideration always remains the same: What compensation is ‘just’ to both an owner whose property is taken and to the public that must pay the bill?”⁴⁵ The owner of the condemned property “must be made whole but is not entitled to more.”⁴⁶ The City should have been allowed to present fair-market-value evidence in presenting its case.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE OF FACILITY REPLACEMENT COSTS.

The jury was not allowed to hear that the City’s expert deducted \$78,957 from the final loss-of-revenues number, because the oldest facilities (those over 40 years old) would need to be replaced over the ten-year loss-of-revenue

⁴⁵ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 512-13 (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

⁴⁶ *Olson v. United States*, 292 U.S. at 255.

period. The City prepared a supplemental expert report to comply with the District Court's order prohibiting fair-market-value evidence. Contrary to Red River's argument, the original-cost-less-depreciation factor did not address this issue. The cases cited by Red River involving repeated violations of court orders are distinguishable.

First, Red River was incorrect that the original-cost-less-depreciation factor addressed this issue. This factor was one of the four factors specified in Section 216B.47. It concerned the cost of facilities that the City was acquiring as of the date of taking. But this number did not signify an elaborate agreed-upon life of facilities, or any measure of replacing facilities going forward. Simply put, this number addressed the cost of the facilities at the date of taking. It did not address the revenues and associated expenses of the utility, including necessary upkeep and capital replacement, during the next ten years. Those concepts were properly grounded in the loss-of-revenues factor, which concerned revenues and expenses of the utility throughout the ten-year period after the date of taking.

Second, although Red River presented this issue as a discovery abuse, the cases cited by Red River were distinguishable.⁴⁷ In *Wegener v. Johnson*,⁴⁸ all parties agreed that the expert report was untimely because it was provided some two weeks before trial. The court reasoned that the excluded

⁴⁷ Red River Brief at 43.

supplemental testimony was cumulative, in that “a substantial amount of other evidence was presented to the jury” on that issue.⁴⁹ In *Baycol Products Litigation*,⁵⁰ the expert report was submitted nearly a year after the discovery deadline. The plaintiff’s only proffered reason for the delay was that his expert reviewed the plaintiff’s medical records in greater detail.⁵¹

And the unpublished decision *Abel v. Lumber One Avon*⁵² involved the repeated failure to comply with court orders regarding expert disclosure. The plaintiffs missed the initial expert disclosure deadline, disclosed an additional unnamed expert on the revised disclosure deadline, and even after the district court prohibited any further experts, attempted to produce a previously undisclosed expert witness.⁵³ Despite these “continual[] fail[ures]” to comply with orders, this Court recognized “the harshness of prohibiting expert testimony” and the availability of lesser sanctions, although it ultimately affirmed the district court’s decision.⁵⁴

⁴⁸ *Wegener v. Johnson*, 527 F.3d 687, 690 (8th Cir. 2008).

⁴⁹ *Id.* at 692.

⁵⁰ *In re Baycol Products Litigation*, 596 F.3d 884, 888(8th Cir. 2010).

⁵¹ *Id.* at 888.

⁵² *Abel v. Lumber One Avon* (Unpub), A05-38 (Minn. App. Dec. 6, 2005) (Red River Addendum at RX 13).

⁵³ *Id.* at *2 (RX 13).

⁵⁴ *Id.* at * 5 (RX 17).

In the present case, by contrast, there were no repeated violations of court orders. Instead, the City's supplemental report was in direct response to the District Court's order prohibiting all reference to fair market value and therefore gutting the City's case weeks before trial. The City did not fail to disclose a new expert witness; it sought to supplement its expert report to comply with the District Court's order. Under Red River's approach, any report after the summary judgment order (indeed, after the expert report deadline and before filing any dispositive motions) would be untimely. Minnesota law does not favor such a harsh approach.⁵⁵

The supplemental report was not of limited probative value, but a crucial part of City's damages testimony. It quantified the costs of replacing facilities during the ten-years stream of revenues. It did not duplicate other evidence from other sources. Excluding the report was prejudicial to the City and its presentation of the case. Without this evidence, the jury had no way to quantify the prospective costs of replacing the facilities over forty years old.

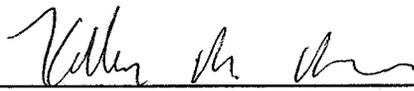
⁵⁵ *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998); *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697-98 (Minn. 1977)

CONCLUSION

This Court should reverse the District Court's ruling prohibiting all evidence of fair market value in this eminent domain proceeding. This ruling was contrary to Minnesota law and denied the City an opportunity to present its case. The City's proposed evidence of fair market value was relevant and should have been admissible.

Dated: August 4, 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

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Association,

Respondent.

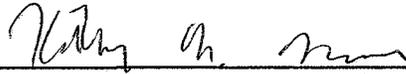
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CERTIFICATION OF BRIEF LENGTH

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 4234 words. This brief was prepared using Microsoft Word 2007.

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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