

NO. A11-0705

State of Minnesota
In Supreme Court

City of Moorhead,

Appellant,

vs.

Red River Valley Cooperative Power Association,

Respondent.

**APPELLANT CITY OF MOORHEAD'S
INITIAL 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

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, ND 58107
(710) 235-5515

Sara Gullickson 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 Valley Cooperative Power Association*

(See next page for listing of amici curiae)

LEAGUE OF MINNESOTA CITIES

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

*Attorneys for Amicus Curiae
League of Minnesota Cities*

FLAHERTY & HOOD, P.A.

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

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

MOSS & BARNETT, P.A.

Richard J. Johnson (#0051676)
Michael J. Bradley (#0010625)
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4129
(612) 887-5000

*Attorneys for Amici Curiae Otter Tail Power
Company, ALLETE, Inc. d/b/a Minnesota
Power, Interstate Power and Light Company,
Northern States Power Company, Great River
Energy, and Minnesota Rural Electric
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).

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LEGAL ISSUES

I. The Judicial Branch has historically interpreted just compensation in condemnation matters to mean fair market value. In a particular takings statute, does legislative silence about fair market value require the jury to disregard all evidence of fair market value?

(1) This issue arose in cross-motions for summary judgment, or in the alternative motions in limine, jury instructions, and in 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, ruled that fair market value may not be considered in determining damages, and denied the City's jury instructions concerning fair market value. The District Court denied the City's post-trial motion. The Court of Appeals affirmed.

(3) This issue was preserved for appeal in the City's offer of proof, proposed jury instructions, objections to final jury instructions, and post-trial motion.

(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).

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

II. Was fair-market-value evidence relevant and admissible?

(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.

(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

III. Should relevant evidence of facility-replacement costs in determining the loss-of-revenue damages have been excluded?

(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)

STATEMENT OF THE CASE

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.¹ The electric-service-territory at issue concerned a residential subdivision known as Americana Estates, with 65 metered accounts (“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.² Following typical eminent-domain proceedings, three court-appointed commissioners held a hearing in October 2008 and filed the commissioners’ award on February 19, 2009.³ Both parties appealed that award.⁴

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.⁵ 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

¹ City’s Appendix at 1 (“Apx-1”).

² Apx-15.

³ Apx-21.

⁴ Apx-23; Apx-25.

⁵ Minn. Stat. § 216B.47 (2010).

Commission (“MPUC”). 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.⁶ The District Court determined that the four factors listed in Minn. Stat. § 216B.47 controlled.⁷

The City provided a supplemental expert report. In an order dated September 30, 2010, the court granted Red River’s motion in limine concerning a damages deduction of \$78,957 for deferred capital investments, the amount to replace all facilities more than forty-years old.⁸

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.⁹

The City filed a post-trial motion for judgment as a matter of law and, in the alternative, for a new trial.¹⁰ In an order filed February 18, 2011, the District

⁶ Addendum (“Add.”) 24.

⁷ Add-24; 28.

⁸ Add-30-31.

⁹ Add-45.

¹⁰ Apx-92.

Court denied the motions.¹¹ The City timely filed its appeal.¹² A corrected judgment was entered on June 3, 2011.¹³

The Court of Appeals affirmed in a published decision filed January 30, 2012. In an order dated April 17, 2012, this Court granted the City's petition for further review.

STATEMENT OF FACTS

Under Minnesota law, every electric utility is assigned a specific territory in which it has the exclusive right to provide electric service.¹⁴ Under Minnesota Statutes Section 216B.47, *inter alia*, 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.¹⁵ The utility owning the facilities, Red River, bore the burden of proof to establish its damages.¹⁶

Americana was developed in the late 1960s as a rural area with private

¹¹ Add-15.

¹² Apx-94.

¹³ Apx-96.

¹⁴ Minn. Stat. § 216B.40.

¹⁵ Minn. Stat. § 216B.47.

¹⁶ Minn. Stat. § 117.175; *State v. Pearson*, 110 N.W.2d 206, 215 (Minn. 1961).

wells and septic systems.¹⁷ When drainage problems resulted in sewage issues, the City agreed to provide municipal sewer and water service in 1986, with the expectation of annexation into the City.¹⁸

Americana was ultimately annexed into the City in 2006.¹⁹ Moorhead Public Service, the City's municipal utility, expressly stated that it will provide electric service to all areas annexed into the City, and it has followed this policy for over 21 years.²⁰ The City Council determines when to annex land, but once annexed, Moorhead Public Service serves all customers.²¹

Consistent with its policy to serve all areas annexed into the City, the City sought to acquire the rights to provide electric service to Americana. Americana held 65 customer accounts.²² The parties agreed that there would be no future or additional customers. Although the expected life of the electric facilities was 30-35 years, 65% of Red River's facilities in Americana were over 33 years old and 35% were over 40 years old.²³

¹⁷ Brennan Affidavit ("Affdvt."), Feb. 4, 2010, Exhibit ("Ex.") A, at 276, 279.

¹⁸ Trial Transcript ("T.") at 343-44; Brennan Affidavit, Feb. 4, 2010, Ex. A at 279-80; *id.*, Ex. D at 5.

¹⁹ T. 343-44.

²⁰ Trial Exhibit ("Ex.") 21; T. 310-11.

²¹ *Id.*

²² T. 393. The number of meters was 65, although Red River at times referred to 63 customers.

²³ T.433; Ex. 73.

The City filed its condemnation petition on November 30, 2006.²⁴ The District Court approved the petition in an order dated May 1, 2007.²⁵ 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, 2009.²⁶ 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.²⁷ The jury trial itself was continued twice by agreement of the parties: first, due to the unexpected death of the City's local counsel, Bruce Carlson, and second, due to the City's 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, Robert Strachota, performed a business valuation using the before-

²⁴ Apx-1.

²⁵ Apx-15.

²⁶ Apx-21.

²⁷ Apx-23; Apx-25.

and-after-the-taking analysis to determine fair market value.²⁸ The report included the four statutory factors of Section 216B.47, but also analyzed the value of the business acquired the way a prudent buyer or seller would. The goal of a fair-market-value-appraisal remains to determine the damages to the acquired business, as well as any damages to the remaining business.²⁹

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.³⁰

Although Mr. Eicher enjoyed significant experience as a consulting engineer, he admitted that he is "not an expert on condemnation theory" nor an

²⁸ Apx-98 ("our written report for the purposes of estimating fair market damages or loss of value."); Brennan Affdvt., Feb. 4, 2010, Ex. A, at 383.

²⁹ Brennan Affdvt., Feb. 4, 2010, Ex. A, at 385-86.

³⁰ *Id.*, Ex. A at 186-7; *id.* at 226-27 (damages "almost inherently" higher than market value).

appraiser.³¹ He took one general course in valuation over 30 years ago.³² But Mr. Eicher conceded that the statute presented a valuation issue.³³

Mr. Eicher followed the methodology that he performed before the MPUC: determining gross revenues, less expenses that could be avoided due to the taking, to reach one year of net revenues, which he extrapolated over ten years and reduced to present value.³⁴

C. Pre-Trial Rulings.

The City filed a Motion for Summary Judgment, or in the Alternative, a Motion in Limine that fair market value was the proper legal standard to determine just compensation. The City argued that Red River's expert not only failed to consider fair market value, but testified that his "seller's approach" to damages was "higher" than fair market value. Red River brought a similar 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 District Court denied the City's motion and granted Red River's motion. The Court ordered "[t]hat testimony by

³¹ T.245-6.

³² T.245.

³³ T.246.

³⁴ Brennan Affdvt., Feb. 4, 2010, 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).

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.”³⁵ The Court further ordered that “all evidence as to ‘fair market value’ is hereby excluded.”³⁶ The Court also ordered the date of valuation to be February 19, 2009.³⁷

In light of the District Court’s Order, the City provided a revised expert report to Red River on September 8, 2010.³⁸ The revised report applied the date of taking determined by the Court.³⁹ 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 March 30, 2010 order. Finally, the revised report reasoned that the facilities in Americana 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 those facilities over forty-years-old.⁴⁰

Red River brought a motion in limine to exclude the pages of the revised

³⁵ Add-4, ¶ 8.

³⁶ *Id.*, ¶ 9.

³⁷ *Id.*, ¶ 8.

³⁸ City’s Memo. Opposing Motion in Limine at 3-4.

³⁹ Apx-159.

⁴⁰ Apx-179-181.

report concerning this deduction for deferred capital investment.⁴¹ 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."⁴² 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. Instead, he 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, an amount presented by Red River and that the City used in both expert reports. The parties agreed that there should be no specific number due to "other appropriate factors." No written stipulation was filed. Although Red River argued below that by this stipulation the City waived its arguments, the record instead reflects that the City took care to make an offer of proof, offer and object to jury instructions,

⁴¹ Apx-35.

⁴² Add-30-31.

and file post-trial motions.⁴³ In presenting a case under the District Court's rulings, the City did not knowingly and voluntarily waive its arguments as to fair-market-value.⁴⁴

The key disagreement, and the issue presented for the jury to decide, was "loss-of-revenues." 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 advocated \$339,865. The City advocated \$125,000.

Red River's CEO, Lauren Brorby, testified that Red River received additional revenue from Americana customers, because it charged Americana customers more than its average residential customers.⁴⁵ He testified that Red River would have minimal savings in its operation and maintenance expenses after the taking.⁴⁶ He also testified that in general Red River spent less money in Americana than in other customer areas.⁴⁷

The City presented evidence that Red River's historic and current financial and planning documents reflected significantly higher costs for expenses such as

⁴³ T.381-2; Apx-37-41, 74-5, 92.

⁴⁴ *Frandsen v. Ford Motor*, 801 N.W.2d 177, 182 (Minn. 2011).

⁴⁵ T. 110

⁴⁶ T. 112.

⁴⁷ T. 164.

purchased power and operations and maintenance.⁴⁸ 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 its wholesale supplier for purchased power costs.⁴⁹ But Mr. Eicher estimated purchase power expenses for Americana customers of only 52.7% of revenues.⁵⁰ According to Red River, power costs were projected to increase by more than thirty percent in the next nine years.⁵¹ As a result, Mr. Eicher underestimated this expense – and so overestimated his loss-of-revenue damages – by nearly \$100,000.⁵² The City's expert, Mr. Strachota, calculated purchase power costs according to Red River's actual financial and planning documents.⁵³

Mr. Eicher testified that the average useful life of the electric facilities was

⁴⁸ Ex. 74 (Red River actual power expenses \$1,206/customer; Eicher \$822/customer; Strachota \$1,060/customer; actual O&M \$2,871/customer; Eicher \$53.30/customer; Strachota \$272/customer); T.444-45; T. 129 (actual 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 (purchased power \$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).

⁴⁹ Ex. 59.

⁵⁰ T. 271.

⁵¹ Ex. 57.

⁵² T. 433.

⁵³T. 405-06; Ex. 67.

“somewhere between 30 and 40 years” and that the 2.8 percent depreciation that Red River used reflected an average life of 36 years.⁵⁴ In Americana, 65% of Red River’s facilities were over 33 years old; 35% were over 40 years old.⁵⁵ But Mr. Eicher included no cost component for replacing facilities in his loss-of-revenue analysis.⁵⁶ He assumed that these facilities would remain throughout the ten-year loss-of-revenue period.⁵⁷ He admitted that Red River first installed facilities in Americana in 1968, and that it had not installed any facilities since 2004.⁵⁸ 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 nor did he make any deduction for replacing facilities over the next ten years.⁵⁹

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.⁶⁰ 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

⁵⁴ T. 253.

⁵⁵ T. 433; Ex. 73.

⁵⁶ T. 254.

⁵⁷ T. 259.

⁵⁸ T. 255, 257, Ex. 73 at 2.

⁵⁹ T. 272.

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."⁶¹

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).⁶² Mr. Strachota enjoyed over thirty-five years of appraisal experience.⁶³ He testified hundreds of times in condemnation proceedings, for both the condemnor and the property owner.⁶⁴ He was experienced in valuing utility matters.⁶⁵

In calculating the loss-of-revenue number, Mr. Strachota testified that he assumed actual expenses for the year 2009, including 64.2% of revenues for purchased power.⁶⁶ In projecting from 2010 to 2018, he assumed 63% of

⁶⁰ T. 268.

⁶¹ T. 549.

⁶² T. 387.

⁶³ T. 387.

⁶⁴ T. 387-88; 389-90.

⁶⁵ T. 390-91.

⁶⁶ T. 410.

revenues.⁶⁷ He included on-going capital costs of replacing facilities as an appropriate deduction in analyzing the cash flows of the business.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.⁶⁹ In addition, Mr. Strachota would testify concerning the deduction for deferred capital investment. As a result of both items, Mr. Strachota would testify to a significantly lower dollar amount.⁷⁰ 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 \$125,000.⁷¹

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.⁷² The Court allowed the City to present testimony concerning operations and maintenance expense, primarily tree trimming: "Well, if you're getting into tree-trimming and things like that, I'll

⁶⁷ Ex. 69; T. 420.

⁶⁸ T. 418-19; Ex. 68.

⁶⁹ T. 381-2.

⁷⁰ *Id.*

⁷¹ T. 419; Ex. 69.

⁷² T. 43, 44.

allow that”⁷³

The District Court rejected the City’s proposed jury instructions concerning fair market value.⁷⁴ 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 estimate 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 business acquired. The jury was instead instructed to determine “just compensation” and complete the blank for the “loss-of-revenue factor.”⁷⁵

E. Jury Verdict and Post-Trial Motions.

The jury returned a verdict with the loss-of-revenue number advocated by Red River: \$339,865.⁷⁶ With the stipulated factors, the total amount of the verdict for Red River was \$385,311.⁷⁷

The City filed a motion for judgment as a matter of law, or, in the alternative for a new trial.⁷⁸ The District Court denied this motion in an order filed

⁷³ T. 332-33; T. 80-81.

⁷⁴ Apx-37-41; Apx-74-5; T. 371-72.

⁷⁵ Add-45; Apx-54.

⁷⁶ Add-45.

⁷⁷ *Id.*

⁷⁸ Apx-92.

February 18, 2011.⁷⁹ The District Court reasoned that fair market value was inappropriate in considering the four statutory factors of Section 216B.47.⁸⁰ And the order upheld the exclusion of evidence of a deduction for the cost of facilities over 40 years old as untimely.⁸¹ For the first time, the District Court described this issue as a discovery sanction.⁸² The City appealed to the Court of Appeals.⁸³

F. The Court of Appeals Decision.

In a published opinion dated January 30, 2012, the Minnesota Court of Appeals affirmed the District Court rulings. The opinion reasoned that because Section 216B.47 did not include the phrase “fair market value,” the Legislature intended to exclude it under the *expressio unius* doctrine.⁸⁴ The opinion also reasoned that fair market value was not compatible with the four statutory factors.⁸⁵ The Court of Appeals did not reach the issue of whether a court is bound by the Minnesota Public Utilities Commission’s interpretation of the four factors under a separate statute, Section 216B.44.⁸⁶

The City filed a petition for further review. In an order dated April 17,

⁷⁹ Add-32.

⁸⁰ Add-37-38.

⁸¹ Add-40.

⁸² Add-39.

⁸³ Apx-94.

⁸⁴ Add-16.

⁸⁵ Add-16.

⁸⁶ Add-19.

2012, this Court granted the City's petition.

SUMMARY OF THE ARGUMENT

This case presents important issues of separation of powers and statutory interpretation. The fundamental question is whether the Judiciary's constitutional interpretation is deemed to be included in a statute that is otherwise silent, or if it is deemed excluded under the principle of *expressio unius*. From an evidentiary perspective, the issue is whether relevant expert testimony concerning damages should have been admitted, when the statute at issue was silent on the method of calculating damages and when the testimony included the four factors specified by the statute.

Red River's position was that lost revenue is an arithmetic fact. One tabulates the revenue previously generated by the customers and extends it to the future for ten years. Here, because Red River charged the affected customers more, its lost revenues were similarly higher. Indeed, Red River admitted that its "seller's approach" to damages exceeded fair market value. But any amount in excess of fair-market-value simply transfers wealth, from the City to Red River.

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 business 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.

For over a century, the Judiciary has analyzed the constitutional requirement of "just compensation" to mean fair market value. The doctrine has been applied in all kinds of takings – not only real estate – and has created stability and uniformity in valuation issues. Wholesale rejection of any mention of fair market value in a condemnation trial is simply unprecedented. There is danger in departing from this established benchmark – particularly when the Legislature was silent. The condemnor risks paying more than fair-market-value, and the property owner risks receiving less. By isolating the statute at issue to the point of excluding past precedent and constitutional interpretation, it is impossible to know if the constitutional requirements have been satisfied.

The Minnesota Court of Appeals avoided the deeper issue of interpreting Section 216B.47 in light of the Judiciary's historic constitutional analysis. The decision also applied the *expressio unius* doctrine without considering the permissive language of the statute, or the presumptions that the Legislature intends the same construction as the courts and that the public interest is favored against any private interest.⁸⁷ Fair-market-value should have been allowed as a methodology to analyze the four statutory factors. At a minimum, fair-market-value should have been allowed under the catch-all factor "and other appropriate factors" as relevant evidence.

The approach should have been what courts have uniformly done for the past 150 years. Legal concepts of “just compensation” and “damages” are defined in market terms. The owner’s damages for lost revenue are not a subjective valuation of what the owner thinks was lost, nor a dry, arithmetic summation of revenues foregone without fully considering surrounding costs and circumstances. The damages are what a prudent buyer would pay and what a prudent seller would receive for the taken business.

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. This is not a statute that is so plain, narrow, and constrained as to require a court to do nothing more than read its text to the jury. Because the trial was premised on an erroneous legal theory, this Court should reverse and remand.

From an evidentiary perspective, excluding all evidence of fair market value prejudiced the City. 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 “seller’s perspective” 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. At a

⁸⁷ Minn. Stat. §§ 645.16, .17.

minimum, the City should be entitled to put on its case and receive a fair trial like any other party.

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 Section 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 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 forty years old, 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 old 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.

STANDARD OF REVIEW

This Court reviews issues of law de novo, and need not defer to the lower courts' decisions.⁸⁸ 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."⁸⁹

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, the Court must reverse.⁹⁰

ARGUMENT

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

Applying de novo review, this Court must address whether prohibiting reference to fair market value in a condemnation trial constituted legal error. The presumption in analyzing Section 216B.47 was to harmonize the statutory language with the Constitution, with judicial interpretation, and with other statutes. Instead, the rulings below focused on a statutory interpretation of Section 216B.47 in isolation. The Minnesota Constitution requires "just

⁸⁸ *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007); *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009) (rule 50 motions).

⁸⁹ *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997).

⁹⁰ *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).

compensation” and 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.

A. The Judiciary’s Interpretation of the Constitution Should Prevail.

Both the United States and the Minnesota Constitutions require just compensation; in Minnesota, “[p]rivate property shall not be taken, destroyed, or damaged for public use without just compensation therefor, first paid or secured.”⁹¹ A “taking” broadly “include[s] every interference, under the power of eminent domain, with the possession, enjoyment, or value of private property.”⁹²

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.”⁹³

⁹¹ Minn. Const. Art I, § 13; U.S. Const., amend. V.

⁹² Minn. Stat. § 117.025, subd. 2 (2010).

⁹³ *Iowa Electric Light & Power v. City of Fairmont*, 67 N.W.2d 41, 45 (Minn. 1954); see also *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 charter of such city.”).

1. Just Compensation as Fair Market Value.

This Court has long defined “just compensation” to be fair market value.⁹⁴

This long-standing constitutional interpretation should be entitled to deference, particularly given the great care that courts employ in interpreting the Constitution.⁹⁵

Fair market value is the “practical standard” adopted by the courts to enforce and to appropriately limit the constitutional requirement of just compensation.⁹⁶ The traditional standard to determine fair market value is the “difference between the fair market value of the entire property immediately

⁹⁴ *Winona & St. Peter RR v. Waldron*, 11 Minn. 515 (Gil. 1866); *Minneapolis-St. Paul Sanitary District v. Fitzpatrick*, 277 N.W. 394, 398 (1937) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934) (“Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined.”); *State by Spannaus v. Carney*, 309 N.W.2d 775, 776 (Minn. 1981) (just compensation defined as “the market value of the property at the time of taking contemporaneously paid in money.”); *City of St. Louis Park 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.”).

⁹⁵ 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); *State v. Sutton*, 63 Minn. 147, 149, 65 N.W. 262, 263 (1895) (constitution “must be beyond being shaken or affected by unnecessary construction, or by the refinements of legal reasoning.” (quoting *People v. Rathbone*, 40 N.E. 395 (N.Y. App.)).

⁹⁶ *United States v. Miller*, 317 U.S. 369, 374 (1943).

before the taking and the fair market value of the remainder afterwards.”⁹⁷ Mr. Strachota, the City’s expert, applied these standards to the four factors of Section 216B.47 in his analysis.⁹⁸ By contrast, Red River acknowledged that its “seller’s approach” was higher than fair market value.

2. The Legislature Did Not Disrupt Judicial Interpretation.

Under the hierarchy of laws, the Minnesota Constitution remains the crown. Courts are to construe statutes to comport with the Constitution, rather than presume a conflict.⁹⁹ The City did not challenge the constitutionality of Section 216B.47 precisely because it should be construed in a manner to avoid an unconstitutional result. When the Minnesota Supreme Court has construed a law, the Legislature in later laws on the same subject is presumed to intend the

⁹⁷ *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”).

⁹⁸ Apx-98-99 (specifying appraisal standards “for the purposes of estimating the fair market damages or loss of value” as well as four statutory factors); Apx-104 (“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.”); Apx-105 (“The estimate of damages accounts for Factors 1, 2, and 4 in Minnesota Statutes Section 216B.47” and further estimating integration costs (factor 3)); Apx-110 (quoting fair market value standard); Apx-125 (summarizing three approaches to fair market value); Apx-140 (reconciling three approaches to fair market value and addressing four factors in Section 216B.47); Apx-142-146 (direct valuation of service territory); Apx-148 (final conclusion of value, including four statutory factors).

⁹⁹ Minn. Stat. § 645.17 (3).

same construction.¹⁰⁰ Moreover, laws are presumed to remain valid unless the Legislature expressly repeals them. “[L]aws in force at the time of the adoption of any revision or code are not repealed by the revision or code unless **expressly** repealed therein.”¹⁰¹

The Court of Appeals’ analysis assumed that the Legislature intended to divorce Section 216B.47 from all other constitutional and eminent domain standards. But where in the statute did the Legislature evidence such a sweeping intent? Sometimes silence is simply silence. The presumption is that judicial interpretation fills the void.¹⁰² The Legislature may not eschew constitutional interpretation by silence.

The Court of Appeals’ analysis raises troubling issues well beyond the realm of electric-service-territory. Under the Court of Appeals’ approach, every time the Legislature did not specify fair market value in an eminent domain statute, it is presumed not to apply. But the statutes are replete with this situation.¹⁰³ It makes little sense that the Legislature considered all of these

¹⁰⁰ Minn. Stat. § 645.17(4).

¹⁰¹ Minn. Stat. § 645.28 (2010) (emphasis added).

¹⁰² Minn. Stat. § 645.17.

¹⁰³ See, e.g., Minn. Stat. §§ 1.047 (condemnation by United States in state courts); 103D.335, subd. 11 (watershed districts); 160.85, subd. 5 (toll facilities); 173.17 (advertising device); 216B.1694, subd. 2 (innovative energy project facilities); 216E.12 (utilities, including high-voltage transmission facilities); 222.25 (railroad interconnection); 237.04 (utility facilities and railroad lines); 301B.02 (public service corporations); 308A.210, subds. 12-15 (cooperatives); 360.021 (airport); 368.01, subd. 27 (township); 453.56 (municipal power agency);

takings to be so unique that fair-market-value must be excluded without so stating.

Taking it one step further, under this analysis, the Legislature must expressly affirm every constitutional principle, or it may be deemed to be rejected. But such a position leads to absurd results. It is simply impractical to require the Legislature to affirm in every statute all applicable constitutional principles – including equal protection under the law, freedom of speech, due process, the right to bear arms – all as interpreted by the Judicial Branch. Instead, Minnesota follows the more pragmatic approach that each statute is presumed to be constitutional and in keeping with the most recent interpretation of the Supreme Court. That pragmatic approach should allow the use of fair market value under this otherwise silent statute.

Indeed, the 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. The Minnesota Court of Appeals recently construed a statute that was silent to apply a fair-market-value analysis, reasoning that “[w]e discern no reason not to rely on traditionally utilized market-value approaches when

458A.34, subd. 1 (public service corporation property); 465.01; 469.055, subd. 8 (port authority); 471A.03, subd. 11 (facilities for public services); 473.405, subd. 5 (advertiser’s rights); 473.609 (airport operation, improvements); 473.757 (land, air, and other property rights for ballpark); 515A.1-107 (condos).

determining damages under the minimum-compensation statute.”¹⁰⁴ The analysis of the Court of Appeals in the present case is in direct conflict.

3. Section 216B.47 Should be Harmonized with Other Law.

Construing Section 216B.47 as one example of an eminent domain taking, rather than an island of law, comports with past precedent. The Minnesota Supreme Court has broadly enforced a city’s power to acquire electric service territory through eminent domain.¹⁰⁵ Condemnation rights are not limited to Section 216B.47.¹⁰⁶ 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.

In reading the text of the statute, the Court considers not simply the literal words of this statute in isolation, but the overall *context* of that statute that gives it life and meaning. That is, the language of the statute must be read in the context of the surrounding body of law and historic practice into which the provision at issue must be integrated.¹⁰⁷

¹⁰⁴ *County of Dakota v. George W. Cameron, IV*, __N.W.2d__, at *7 (Court File No. A11-1273) (Minn. App. March 26, 2012).

¹⁰⁵ See, e.g., *City of Shakopee v. Minnesota Valley Electric Cooperative*, 303 N.W.2d 58, 62 (Minn. 1981).

¹⁰⁶ 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).

¹⁰⁷ See *American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn.

In construing a statute, Justice Scalia advised focusing on two questions: what construction is “most in accord with context and ordinary usage” and what construction is “most compatible with the surrounding body of law into which the provision must be integrated.”¹⁰⁸ Here, the construction most in keeping with context and ordinary usage is to consider the requirement that damages “must include” four factors as permissive. An expert opinion on damages applying fair-market-value principles that includes these four factors should satisfy the statute.

In terms of compatibility with surrounding law, the statute is presumed to accept the construction of the courts.¹⁰⁹ Chapter 117 is presumed to apply, even to electric-service-territory takings.¹¹⁰ The multiple references to eminent domain proceedings in Section 216B.47 – and the many procedural and substantive aspects of condemnation followed in this case – support applying constitutional and eminent domain standards.

The Court may also consider the circumstances under which the statute was enacted in 1974. Section 216B.47 arose as part of a legislative compromise

2000) (“While statutory construction focuses on the language of the provision at issue, it is sometimes necessary to analyze that provision in the context of surrounding provisions”); *Boutin v. LaFleur*, 591 N.W.2d 711, 715 (Minn. 1999) (the statutory language has a plain and logical meaning particularly when read in the context of other legislation); *Christensen v. Hennepin Transp. Co.*, 215 Minn. 394, 409, 10 N.W.2d 406, 415 (1943) (construing statutes “as a whole” and “in the light of their context.”).

¹⁰⁸ *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

¹⁰⁹ Minn. Stat. § 645.17.

between municipal utilities, rural electric cooperatives, and investor-owned utilities enacting assigned-electric-service-areas.¹¹¹ Cities had long enjoyed the power of eminent domain in the utility context; Section 216B.47 did not create this authority.¹¹² It makes little sense for the cities to relinquish or compromise their already-established right to pursue eminent-domain-proceedings and to apply fair market value. Red River cited no legislative intent against fair market value. Finally, the public interest is to be favored against any private interest.¹¹³

By narrowly focusing on the four factors in Section 216B.47, the Court of Appeals 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. Section 216B.47 Did Not Prohibit Fair Market Value.

When construing statutes, courts attempt “to ascertain and effectuate the intention of the legislature.”¹¹⁴ “A statute should be interpreted, whenever possible, to give effect to all of its provisions; ‘no word, phrase, or sentence

¹¹⁰ Minn. Stat. § 117.012.

¹¹¹ *In re People’s Cooperative Power Ass’n*, 470 N.W.2d 525, 531, 533 (Minn. App. 1991) (Davies, J., dissenting).

¹¹² *E.g., Iowa Elec. Light & Power v. City of Fairmont*, 67 N.W.2d 41, 45 (Minn. 1954).

¹¹³ Minn. Stat. § 645.17.

¹¹⁴ Minn. Stat. § 645.16 (2010).

should be deemed superfluous, void, or insignificant.”¹¹⁵ “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.”¹¹⁶ Statutes are presumed to be consistent with the common law.¹¹⁷

1. The Plain Language of the Statute is Permissive.

The plain language of Section 216B.47 did not exclude fair-market-value or exempt electric-service-territory from 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. . . .¹¹⁸

¹¹⁵ *American 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)).

¹¹⁶ *Id.*

¹¹⁷ *Staab v. Diocese of St. Cloud*, ___ N.W.2d __, at *6 (Minn. April 18, 2012).

¹¹⁸ Minn. Stat. § 216B.47 (emphasis added).

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 market value.

The language of the statute is permissive. Damages “must include” the four factors. “Include” is broadly defined as “[t]o contain or take in as a part, element, or member. . . .”¹¹⁹ The statute is silent as to *how* to calculate damages, as long as the four specified factors are included. The statute does not overrule “just compensation” principles nor adopt the executive branch’s methodology of calculating damages. It simply specifies items that must be included in damages. No comprehensive legislative scheme or intent has been presented to prohibit principles of fair market value in electric-service-territory takings. And one of the factors was phrased as a broad catch-all that should cover all relevant evidence: “and other appropriate factors.” Historically, the Minnesota Court of Appeals has only briefly considered this factor as permissible from the evidence in the record.¹²⁰

Section 216B.47 is not written as a formula, unlike statutes concerning electric service territory in other states.¹²¹ In Minnesota, electric-service-territory

¹¹⁹ *American Heritage Dictionary* (5th ed. 2011).

¹²⁰ *In re People’s Cooperative Power Ass’n*, 470 N.W.2d 525, 530 (Minn. App. 1991) (affirming \$11,644 in wholesale power costs and reasoning “[a]lthough it is speculative to say when and in what form the higher costs will be suffered, the evidence permits a finding”).

¹²¹ See e.g., Illinois Comp. Stat. §11-117-7.1(c) (“an amount equal to”); Kansas Stat. § 66-1,176(c) (“sum of the following”); South Dakota Stat. § 49-34A-50

damages are not “an amount equal to the sum of the four factors.” The Legislature knew how to express damages as a formula or amount if desired.¹²² And the Legislature knew how to exclude eminent-domain principles; quick-take is expressly excluded. The statute does not entitle the property owner to the recovery of the *unfair* or *non-market* value.

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.”¹²³ No provision of Chapter 216B may be construed against a city’s power to proceed by eminent domain.

The Court of Appeals reasoned that damages for electric-service-territory must be unique, that there is no market of willing buyers and sellers, and that fair-market-value is not compatible with the four factors.¹²⁴ But this reasoning was not grounded in either the text of the statute or empirical evidence. The text is silent on how damages may be calculated and whether fair-market-value may

(“cash consideration which shall consist of the following”).

¹²² See, e.g., Minn. Stat. §§ 238.26 (2010) (“the cable communications system's measure of damages for the taking shall be limited to the actual compensation originally paid by the cable communications system to the property owner under sections” in Chapter 238); 469.117, subd. 1 (compensation “amount shall be fixed by the court in a sum not less than the valuation of the property appropriated as fixed by the assessor and as finally equalized.”).

¹²³ Minn. Stat. § 216B.47.

¹²⁴ Add-16

be applied to the four factors. The empirical evidence in the record supported the principle that there is a market for electric-service-territory.¹²⁵ Finally, all condemnation proceedings involve unwilling sellers; that is why the Judiciary developed the fair-market-value doctrine, and applied it even absent an active market.¹²⁶

Section 216B.47 explicitly stated that municipalities may proceed by eminent domain and added four damage considerations to be included. One such element was the broad catch-all of “other appropriate factors.” The plain language of Section 216B.47 should not be read to exclude fair-market-value standards.

2. The Absence of the Term Fair Market Value is Consistent with Other Statutes.

The statute’s lack of the words “fair market value” was typical of statutory language. That approach makes sense because the fair-market-value doctrine is a judicial one. 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

¹²⁵ Apx-129-130.

¹²⁶ See, e.g., *Singer v. Commissioner*, 3 TCM (CCH) 66, 70 (U.S.T.C. 1944) (applying fair-market-value to restricted stock that could not be sold and reasoning that “courts have repeatedly approved the ascertainment of fair market value of stock when there was no ready market for it, or where there was a restriction against sale.”); cf. *United States v. Cartwright*, 411 U.S. 546, 551 (1973) (“test of fair market value is nearly as old as the federal income, estate, and gifts taxes themselves . . .”).

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.¹²⁷ 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.¹²⁸ 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.¹²⁹ The Legislature simply did not differentiate electric-service-territory takings from any other taking in terms of whether fair-market-value should apply.

Section 216B.47 repeated – three times – the phrase “eminent domain proceedings.” Indeed, this proceeding followed the typical procedure of an eminent domain proceeding – the District 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, and both parties inquired as to appraiser experts.¹³⁰ None of these procedures was found in Section

¹²⁷ 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.”).

¹²⁸ 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 . . .”).

¹²⁹ Minn. Stat. § 117.232 (2010).

¹³⁰ Apx-14; Apx-21; Apx-23; Apx-25; Apx-27; Apx-29.

216B.47, but all followed according to judicial process and eminent domain proceedings under Chapter 117. This proceeding was properly considered an eminent-domain-proceeding.¹³¹

Moreover, the provisions of Chapter 117 were required to apply to this proceeding under Section 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 applied to this proceeding. Although the Legislature carved certain express exceptions from this rule, no exception exists for electric-service-territory.¹³² 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.¹³³ The “additional” remedies in Section 216B.47 specified that the four factors must be “included” in

¹³¹ 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).

¹³² Minn. Stat. 117.012 (providing express exception for drainage, town roads but no such exception for electric service territory); Minn. Stat. § 465.01.

¹³³ Minn. Stat. § 216B.47.

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 interpreting the Minnesota Constitution.

3. Fair Market Value is Compatible with the Four Factors.

The Court of Appeals concluded that fair market value “is not compatible with the four enumerated factors” without empirical evidence.¹³⁴ The District Court incorrectly believed that allowing fair market value testimony would prohibit the four factors of Section 216B.47.¹³⁵ To the contrary, fair-market-value broadly considers all evidence that a prudent buyer or seller would consider.¹³⁶ “[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”¹³⁷ At a minimum, fair-market-value should have been allowed under the catch-all factor “and other appropriate factors” as relevant evidence.

¹³⁴ Add-16.

¹³⁵ Add-27 (“In a regular eminent domain case, lost revenues and expenses and the other factors mandated by section 216B.47 would specifically be excluded from any calculation of damages because they have no place in a fair market analysis”).

¹³⁶ *Olson v. United States*, 292 U.S. at 257.

¹³⁷ *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).

Fair market value is not mutually exclusive of the four factors, but a method of how to calculate or “include” the statutory factors. The City’s fair-market-value analysis specifically considered the four statutory factors. In a business valuation, the goal is to determine the value of the business that is being acquired. Here, the value of the portion of the business taken – the facilities and rights to serve the Americana customers – was measured by considering the value of the business before-and-after the taking. This difference in the before-and-after-scenarios captured all damages not only to the portion of the business taken, but also to the remainder of the business.

This analysis is grounded in actual financial data. The City’s expert studied nearly fifteen years of Red River’s financial data, as well as the electric industry, to understand the revenues, the business cycle and trends, as well as the costs of doing business – the costs to purchase power, the costs to replace facilities, maintenance costs, and accounting and overhead costs. After all, a prudent buyer would complete due diligence because last year’s revenues cannot be assumed to continue automatically for ten years; and revenues require on-going business expenses to collect dollars in the door. A prudent seller would not agree to a selling price that failed to account for future revenue streams.

The fair-market-value analysis tracked costs associated with providing power to these customers and to project realistic future revenues. The theory was not subjective or esoteric, but grounded in business reality. The Court of Appeals’ description of the four factors as “more accurate” than fair-market-value

was simply speculative.¹³⁸ If the factors are included in the analysis, the decision of which expert is more accurate or credible must remain a question for the jury to decide.

Fair market value typically relies upon three approaches to determining value: the asset, income, and market approaches.¹³⁹ The traditional fair-market-value approaches are similar to the four factors in Section 216B.47. The asset approach measures value by focusing on the assets of the business – here, the electric facilities.¹⁴⁰ It is similar to the “original-cost-of-the-facilities-less-depreciation” factor, which also examines the electric facilities. The income approach measures the future benefits or revenues of the business, discounted to present value; it resembles the “loss of revenue” factor.¹⁴¹ The City analyzed the revenues and expenses using actual financial data – with necessary capital replacements – as prudent buyers would evaluate a future income stream. The “market approach” considered sales of similar electric-service-territory partial acquisitions (less than an entire company). The City’s expert analyzed the four

¹³⁸ Add-18.

¹³⁹ *County of Ramsey v. Miller*, 316 N.W.2d 917, 922 (Minn. 1982) (quoting the Appraisal Institute *The Dictionary of Real Estate Appraisal*, 4th ed. (2002)).

¹⁴⁰ 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].

¹⁴¹ 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 (2^d ed. 2010) (same standards).

statutory factors by applying each of these three fair-market-value approaches.¹⁴²

The fair-market-value method reconciles to a final valuation number. “The measure of damages in condemnation cases 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.”¹⁴³ The three fair-market-value 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. To be sure, care must be taken to avoid double-counting damages.¹⁴⁴ But all evidence that

¹⁴² Apx-127 (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.”); Apx-125 (“The cost approach in business valuation analysis is based on 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.”); Apx-129 (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.”).

¹⁴³ *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).

¹⁴⁴ 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*

may reasonably affect the price a willing buyer and seller would reach is properly considered.

Unlike Red River’s “seller’s approach” to damages, the fair-market-value appraisal analyzed damages as prudent buyers and sellers. The Court of Appeals reasoned – without empirical evidence – that the market was too limited to apply fair-market-value. But even assuming *arguendo* that the market for electric-service-territory is limited, it is nonetheless sold. The City’s expert analyzed five comparables involving electric-service-territory sales for distribution electric utilities.¹⁴⁵ Although the two parties here had facilities in place, the Court of Appeals’ speculation that no other utility could readily serve these customers is misplaced; electrons flow regardless of facility ownership, and it is not uncommon for utilities to arrange service by agreements, even using another utility’s facilities.¹⁴⁶ In any event, in analyzing the three approaches, the City’s expert relied most heavily upon the income approach.¹⁴⁷ The City’s analysis did not rely exclusively, or even primarily, upon comparable sales of service territory.

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

of Land, 704 F.2d 728, 730-731 (4th Cir. 1982).

¹⁴⁵ Apx-129-130; Apx-131 (“The comparables shared many characteristics with the subject in terms of being specific service territories transacted for a specified customer base.”).

¹⁴⁶ Add-16; Matthew Brown, *Electricity Transmission: A Primer*, at 29-30 (June 2004).

damages. Nothing in determining the fair-market-value of the taking removed the four statutory factors; they were properly considered – especially when the fourth factor states “and other appropriate factors” – in the analysis and reconciled to a final value number.

C. The Executive Branch’s Analysis of Damages Should Not Control Eminent Domain Proceedings.

The Court of Appeals correctly noted that electric-service-territory may be acquired through an MPUC proceeding (Section 216B.44) or through eminent domain in district court (Section 216B.47), and that the “city may choose which procedure to follow.”¹⁴⁸ Although the Court of Appeals did not decide the issue of whether MPUC decisions must control in eminent domain proceedings,¹⁴⁹ the opinion creates uncertainty and confusion. Assigning a broad jurisdiction to the Executive Branch raises additional separation-of-powers concerns. No statute granted the MPUC control over court proceedings. And such an approach would be contrary to past precedent from this Court.

This Court directly addressed the two forums of eminent domain in district court and the MPUC, and declined to construe the MPUC’s role to limit the ability of municipalities to proceed through eminent domain. *Id.* at 480.¹⁵⁰ The Court

¹⁴⁷ Apx-131;140.

¹⁴⁸ Add-13.

¹⁴⁹ Add-19.

¹⁵⁰ *City of Rochester v. People’s Cooperative Power Ass’n*, 483 N.W.2d 477, 480 (Minn. 1992).

phrased the issue as “whether the matter of **compensation and its method of determination** is one uniquely suited to agency disposition.”¹⁵¹ The Court rejected arguments by the MPUC and the condemnee that (1) the statewide regulatory framework would be harmed by “judicial determination of the compensation award” and (2) uniformity of results was required.¹⁵²

This 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 approved alternatives available to the municipality.”¹⁵³

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. The typical approach to damages, under the Minnesota Constitution and case law, was fair market value. The Court was not troubled by the possibility of having different results in different forums. It specifically rejected the argument that there must be uniform results.

¹⁵¹ *Id.* at 480 (emphasis added).

¹⁵² *Id.*

¹⁵³ *Id.* at 481 (emphasis added).

Why would the Legislature specify two different forums if it expected identical calculations, or expected the MPUC to determine how to calculate damages in either forum? In any event, this Court need not speculate as to what the Legislature intended by establishing two potential forums. As this Court earlier ruled, “[t]he election is, therefore, the product of the legislative alternatives and is, accordingly, secured to the municipality.”¹⁵⁴

Interestingly, the MPUC itself has considered eminent domain principles.¹⁵⁵ Although recent decisions have not applied this approach, the MPUC initially reasoned that it must treat the buyer and the seller fairly.¹⁵⁶

Red River has argued that the Court of Appeals has affirmed past MPUC cases. But even applying a deferential standard of review, the Court of Appeals has failed to endorse the MPUC’s net-loss-of-revenues-method as the only alternative to establishing damages. Instead, the Court of Appeals relied upon

¹⁵⁴ *Id.* at 480.

¹⁵⁵ See, e.g., *In re Application of the City of Olivia to Extend its Municipal Electric Service Area into Area Served by Renville-Sibley Cooperative Power Association*, MPUC No. E-288, 136/SA-85-93, Order Setting Compensation at 11 (June 27, 1986) (“Eminent domain proceedings recognize severance damage, which in this case in the effect the loss of the area will have on the balance of the Cooperative’s system. . . . [T]he loss of revenue factor is geared precisely for consideration of that effect.”) (Add-57). But the *Olivia* decision incorrectly cited the fair market value standard as a “rule of fair value of the physical property,” perhaps proving the danger of agency decisions interpreting judicial precedent. *Id.* at 10 (Add-56).

¹⁵⁶ *Id.* at 13 (concluding that statute “requires, to the extent possible, equitable treatment of the buyer and seller.”).

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.”¹⁵⁷ At a minimum, the City should have been permitted to use its fair-market-value analysis as a “reasonableness check” on Red River’s damages analysis.

D. 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 the only method to determine “loss of revenue” was the method advocated by Red River. 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.

The City proposed a series of standard jury instructions used in condemnation matters relying upon fair market value.¹⁵⁸ The City objected to the

¹⁵⁷ *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)).

¹⁵⁸ 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);

decision to reject these instructions.¹⁵⁹

The black letter law for jury instructions 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.”¹⁶⁰ The District Court’s rulings cannot be reconciled with the binding and long-standing precedent in this area 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.¹⁶¹

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.

CIVJIG 52.65 (partial taking, measuring fair market value; modified to include statutory factors of Section 216B.47).

¹⁵⁹ T. 371-72.

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

¹⁶¹ *H Window Co. v. Cascade Wood Prods., Inc.*, 596 N.W.2d 271, 277 (Minn. App. 1999), *review denied* (Minn. Aug. 17, 1999).

II. RELEVANT FAIR-MARKET-VALUE EVIDENCE SHOULD HAVE BEEN ADMITTED.

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 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.”¹⁶² Evidence that was not relevant to fair market value must be excluded.¹⁶³ Courts have long defined fair-market-value evidence as the hallmark of admissibility in condemnation matters; the decision to exclude all fair-market-value evidence 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 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

¹⁶² *State v. Maleecker*, 120 N.W.2d 36, 38 (Minn. 1963); *State by Humphrey v. Strom*, 493 N.W.2d 554, 559 (Minn. 1992).

¹⁶³ *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. Brunswick*, 17 N.W. 626, 627 (Minn. 1883).

damages. The Court of Appeals opinion repeatedly stated that “fair market value is not *the* proper measure of damages”¹⁶⁴ But it should have been admitted as *one* measure of damages, or to refute Red River’s damages calculation.

Of course, the threshold to determine relevant evidence was quite broad.¹⁶⁵ Here, the fair-market-value of the business acquired and quantifying the damages resulting from the taking necessarily related to, and made less probable, the damages advocated by Red River. This Court has reasoned that artificially limiting evidence, particularly in valuation cases, hinders a jury from “arriving at a just result.”¹⁶⁶ At a minimum, the fair-market-value analysis challenged the reasonableness of Red River’s expert’s position.

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 revenues, expenses, and facilities according to a market view.

¹⁶⁴ Add-4, 9, 19 (emphasis added).

¹⁶⁵ 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 (“All relevant evidence is admissible”).

¹⁶⁶ *County of Ramsey*, 316 N.W.2d at 921 (“In no branch of the law is it more important to remember this, than in cases involving the valuation of property, where at best, evidence of value is largely a matter of opinion.”).

The 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.

III. BY EXCLUDING EVIDENCE OF FACILITY-REPLACEMENT COSTS CRITICAL TO CALCULATING LOSS OF REVENUES, THE DISTRICT 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.¹⁶⁷ 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 analysis in two ways: first, that the average life of these facilities was 30 to 35 years, and, second, using Red River'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."¹⁶⁸ "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate

¹⁶⁷ 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 . . .").

¹⁶⁸ *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997).

prejudicial error.”¹⁶⁹ Excluded evidence may justify a new trial if it might reasonably have changed the result of the trial.¹⁷⁰

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.”¹⁷¹ Nonetheless, “[d]espite the [district] court’s broad discretion, [p]reclusion of evidence is a severe sanction which should not be lightly invoked.”¹⁷²

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.¹⁷³ But 65% of Red River’s facilities in the area were over 33 years old; and 35% were over 40 years old.¹⁷⁴ In his loss-of-revenue calculation, Mr. Eicher included no costs to replace any of those facilities over the ten-year damages period, ignoring significant expenses.¹⁷⁵ Damages that are speculative, remote, or conjectural

¹⁶⁹ *Id.* at 46.

¹⁷⁰ *Becker v. Mayo Foundation*, 737 N.W.2d 200, 214 (Minn. 2007).

¹⁷¹ *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998).

¹⁷² *Id.* (quoting *State v. Lindsey*, 284 N.W.2d 368, 374 (Minn. 1979)).

¹⁷³ T. 253.

¹⁷⁴ T. 433; Ex. 73.

¹⁷⁵ T. 254, 259.

“cannot be recovered.”¹⁷⁶ 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 originally 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.¹⁷⁷ Although Rule 26.05 sets no time limit to supplement responses, the Federal Rules of Civil Procedure require disclosure thirty days before trial.¹⁷⁸ 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 commitments.¹⁷⁹

¹⁷⁶ *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.”).

¹⁷⁷ Minn. R. Civ. P. 26.05; 1A *Minnesota Practice*, D. Herr & R. Haydock, at 75 (2010).

¹⁷⁸ Fed. R. Civ. P. 26(e)(2); 26(a)(3).

¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

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.¹⁸² 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 because it was received after the expert report deadline – months before the District Court even ruled on the summary judgment motions.

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

¹⁸⁰ *Krech v. Edrman*, 233 N.W.2d 555, 556-7 (Minn. 1975).

¹⁸¹ City's Mem. Support New Trial, (Nov. 10, 2010), at 19.

¹⁸² 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).

was error to eliminate Mr. Strachota's fair-market-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 appraisal 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 this 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."¹⁸³

The District Court was clearly concerned with prejudice to Red River. But this potential prejudice¹⁸⁴ of responding to information provided a month before trial must be balanced against the prejudice to the City from excluding this evidence.¹⁸⁵ In considering the discretion accorded the District Court on

¹⁸³ *Moorhead Econ. Devel. Auth. v. Anda*, 789 N.W.2d 860, 875-6 (Minn. 2010) (considering contamination discovered after taking).

¹⁸⁴ 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.

¹⁸⁵ *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.¹⁸⁶ 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.¹⁸⁷ But this view confused replacement of facilities (also called capital improvements) with repairing facilities (also called operation and maintenance).¹⁸⁸ Only the City accounted for the costs to replace facilities over the ten-years of 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

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."

¹⁸⁶ *Patterson*, 587 N.W.2d at 50; *Cornfeldt*, 262 N.W.2d at 697-8.

¹⁸⁷ Add-39-40; T. 358-65; T. 382.

¹⁸⁸ 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

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 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 prepared 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-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.

that I think either expert is free to have testified about.”).

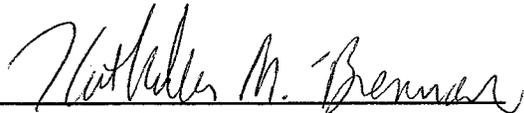
CONCLUSION

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 rulings below 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 as relevant. 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.

Dated: May 17, 2012.

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
MINNESOTA SUPREME COURT

The City of Moorhead,

Appellant,

Court Appeals No: A11-705

vs.

CERTIFICATION OF BRIEF LENGTH

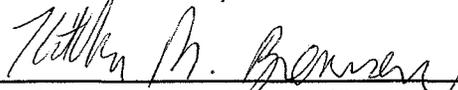
Red River Valley Cooperative Power
Association,

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 and this certification page is 13,574 words. This brief was prepared using Microsoft Word 2007.

Dated: May 17, 2012.

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