

NO. A11-705

State of Minnesota
In Supreme Court

City of Moorhead,

Appellant,

vs.

Red River Valley Cooperative Power Association,

Respondent.

REPLY BRIEF OF APPELLANT CITY OF MOORHEAD

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)

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*

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*

MOSS & BARNETT, P.A.
Richard J. Johnson (#0051676)
Valerie M. Means (#0345076)
Jeff Y. Lin (#0389032)
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*

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Summary of the Argument	1
Argument	3
I. The District Court Erred in Prohibiting Fair Market Value In Measuring Damages.....	3
A. The Plain Language of the Statute Did Not Require Excluding Fair Market Value.....	3
B. Minnesota Statutes Did Not Remove Electric Service Territory Takings from Eminent-Domain-Proceedings	7
C. Allowing Evidence of Fair Market Value in the Present Case Would Not Violate the Statute	14
D. The MPUC Approach Should Not Control	17
E. Red River's Policy Arguments Are Not Persuasive	21
II. The District Court Abused Its Discretion in Excluding Evidence of Facility-Replacement-Costs.....	25
Conclusion	29
Certificate of Brief Length	30

TABLE OF AUTHORITIES

Minnesota Statutes	Page
Minn. Stat. § 14.69 (2010).....	19
Minn. Stat. § 117.012 (2010).....	7
Minn. Stat. § 117.019 (2010).....	7
Minn. Stat. § 117.025 (2010).....	8
Minn. Stat. § 117.175 (2010).....	7
Minn. Stat. § 216B.44 (2010)	5, 6, 11, 17, 19
Minn. Stat. § 216B.45 (2010)	5
Minn. Stat. § 216B.47 (2010)	passim
Minn. Stat. § 216B.66 (2010)	6, 7
Minn. Stat. § 238.26 (2010).....	5
Minn. Stat. § 414.02 (2010).....	24
Minn. Stat. § 414.031 (2010).....	24
Minn. Stat. § 465.01 (2010).....	6, 11
Minn. Stat. § 469.117 (2010).....	5
Minn. Stat. § 645.17 (2010).....	5
 Minnesota Cases	
<i>Abel v. Lumber One Avon</i> (Unpub), A05-38 (Minn. App. Dec. 6, 2005).....	27
<i>Alexandria Lake Area Service Region v. Johnson</i> , 295 N.W.2d 558 (Minn. 1980).....	9

<i>City of Rochester v. People’s Cooperative Power Ass’n</i> , 483 N.W.2d 477 (Minn. 1992)	2, 6, 18
<i>Cornfeldt v. Tongen</i> , 262 N.W.2d 684 (Minn. 1997)	28
<i>County of Anoka v. Blaine Building Corp.</i> , 566 N.W.2d 331 (Minn. 1997)	9
<i>County of Dakota v. George W. Cameron, IV</i> , _ N.W.2d_, Court No. A11-1273 (Minn. App. March 26, 2012)	10
<i>County of Ramsey v. Miller</i> , 316 N.W.2d 917 (Minn. 1982)	9
<i>Equitable Life Assurance Soc’y of the U.S. v. County of Ramsey</i> , 530 N.W.2d 544 (Minn. 1995)	20
<i>Frandsen v. Ford Motor</i> , 801 N.W.2d 177 (Minn. 2011)	14
<i>Hendrickson v. State</i> , 127 N.W.2d 165 (Minn. 1964)	9
<i>In re City of Redwood Falls</i> , 756 N.W.2d 133 (Minn. App. 2008).....	20
<i>In re Grand Rapids Public Utilities Comm’n</i> , 731 N.W.2d 866 (Minn. App. 2007).....	20
<i>In re City of Rochester (North Park Additions)</i> , 470 N.W.2d 525 (Minn. App. 1991) <i>rev. denied</i> (Minn. July 24, 1991)	10, 19, 22, 23
<i>Kroning v. State Farm Auto. Ins. Co.</i> , 567 N.W. 2d 42 (Minn.1997)	3
<i>Midwest Motor Express v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.</i> , 512 N.W.2d 881 (Minn. 1994)	18
<i>Minnegasco v. Minnesota Pub. Util. Comm’n</i> , 549 N.W.2d 904 (Minn. 1996)	20
<i>Shakopee v. Minnesota Valley Elec. Coop.</i> , 303 N.W.2d 477 (Minn.1981).....	6

<i>State v. Patterson</i> , 587 N.W.2d 45 (Minn.1998)	28
<i>Vicker v. Starkey</i> , 265 Minn. 464, 122 N.W.2d 169 (1963).....	20

Federal Cases

<i>Astoria Fed. Sav. & Loan Assn. v. Solimino</i> , 501 U.S. 104 (1991).....	4
<i>Director of Rev. v. CoBank ACB</i> , 531 U.S. 316 (2001).....	4
<i>In re Baycol Products Litigation</i> , 596 F.3d 888 (8 th Cir. 2010)	27
<i>Meyer v. Holley</i> , 537 U.S. 280 (2003)	4
<i>MidAtlantic Nat. Bank v. New Jersey Dept. Env'tl. Prot'n</i> 474 U.S. 494 (1986).....	4
<i>Miles v. Apex Marine Corp.</i> , 498 U.S. 19 (1990)	4
<i>Olson v. United States</i> , 292 U.S. 246 (1934).....	4, 25
<i>Ricci v. Chicago Mercantile Exch.</i> , 409 U.S. 289 (1973)	19
<i>United States v. 564.54 Acres of Land</i> , 441 U.S. 506 (1979).....	8, 25
<i>United States v. Commodities Trading Corp.</i> ,339 U.S. 121 (1950)	25
<i>United States v. Fuller</i> , 409 U.S. 488 (1973)	8, 9
<i>United States v. Texas</i> , 507 U.S. 529 (1993)	4
<i>United States v. Toronto, Hamilton & Buffalo Va. Co.</i> , 338 U.S. 396 (1949).....	8
<i>Wegener v. Johnson</i> , 527 F.3d 687 (8 th Cir. 2008)	26-27

Other Authorities

In re Application of Rochester, MPUC No. E-299,132/SA-93-498,
1995 WL 798917, Order Determining Compensation and Denying
Motion to Dismiss (Nov. 30, 1995) 19

In re City of Buffalo, MPUC No. E221/SA-03-989,
Findings of Fact, Recommended Order (Oct. 26, 2004),
reversed by MPUC Order (April 1, 2005) 23, 25

In re Complaint Regarding Annexation by City of Rochester,
MPUC No. E-132,299/SA-88-270, 1990 WL 600919,
Order Determining Compensation (July 11, 1990) 21

SUMMARY OF THE ARGUMENT

The City of Moorhead (the “City”) was denied the opportunity to present its case by arguing damages 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. At a minimum, this evidence should have been admitted under the broad standards of admissibility.

The question for this Court is whether Minnesota Statutes Section 216B.47 (the “Statute”) required excluding relevant evidence as a matter of law. Put differently, was the jury required to view damages through Red River’s “seller’s perspective,” or could it evaluate damages through the lens of fair market value? The Statute itself is permissive. One factor is general: “other appropriate factors.”

Red River fundamentally argued that the phrase “must include” in the Statute means “must be exclusively based on.”¹ But that is not the language of the Statute. Red River and the Amici Curiae Otter Tail Power, et al. supporting Red River (“Red River Amici”) further argued that the words “fair market value” do not appear in the Statute. But the courts – not the Legislature – created the fair-market-value concept in interpreting the Constitution. Red River’s argument that the Legislature meant to repeal this doctrine – without ever stating so – strains credibility. The Minnesota Legislature never defined and rarely used the

¹ Red River Brief at 21.

fair-market-value phrase. If the facts were different, and the fair-market-value concept would have helped Red River, presumably Red River would argue the City's position. The concept should be neutrally applied to be fair to all parties.

A fair reading of the Statute remains 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 evidence as a method of analyzing those four factors. The City's analysis properly followed the Statute and "included" the four factors. The City did not waive its arguments, but, as the District Court agreed, preserved the fair-market-value issue for appeal.

Red River argued that the Minnesota Public Utilities Commission ("MPUC") "net-loss-of-revenue" analysis, upon which its expert relied, was not one possible method of determining damages – but the only possible method. This argument turns on its head this Court's holding in *City of Rochester*² that the MPUC did not enjoy primary jurisdiction over electric-service-territory condemnation. Moreover, the series of MPUC cases cited by Red River is irrelevant to the questions presented in this case.

No one disputes that just compensation must be paid. The City submits that fair-market-value was designed to provide fair compensation. A correct reading of the Statute supported allowing other approaches to damages –

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

including fair-market-value. 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. The evidence was crucial to the City’s case and prejudiced the trial.

ARGUMENT

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

This Court may simply conclude that excluding the admittedly relevant fair-market-value evidence constituted an abuse of discretion.³ Red River did not contest that this evidence was relevant, or that it was prejudicial to the City’s presentation of its case.

A. The Plain Language of the Statute Did Not Require Excluding Fair Market Value.

Red River rested its argument on the lack of the words “fair market value” in the Statute. But the “fair market value” concept was a judicial creation, in

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

response to analyzing the Constitutional requirement of “just compensation.”⁴ It is presumed that judicial interpretation and common law principles apply to a statute.⁵ “The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.”⁶ Here, the Statute can be read consistently with fair market value.

The plain language of the Statute is permissive. Damages “must include” the factors. The Statute does not state that evidence is “limited to” the four factors, that they are exclusive, or that damages “must be exclusively based on” the factors.⁷ Instead, the fourth factor is broadly phrased: “other appropriate factors.”⁸ The Legislature knew how to draft a statute as a formula or exclusive

⁴ *E.g.*, *Olson v. United States*, 292 U.S. 246, 255 (1934).

⁵ *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) (“Congress is understood to legislate against a background of common-law adjudicatory principles”); *United States v. Texas*, 507 U.S. 529, 534 (1993) (“In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law”); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation”); *Director of Rev. v. CoBank ACB*, 531 U.S. 316, 317 (2001) (“we find Congress’ silence insufficient to disrupt the 50-year history of state taxation of banks for cooperatives.”); *cf. Meyer v. Holley*, 537 U.S. 280, 291-92 (2003) (Congress “legislates against a legal background of ordinary ... rules and consequently intends its legislation to incorporate those rules”).

⁶ *MidAtlantic Nat. Bank v. New Jersey Dept. Env’tl. Prot’n*, 474 U.S. 494, 501 (1986).

⁷ Red River Brief at 21.

⁸ Contrary to Red River’s argument, the Statute does not state “other appropriate

methodology.⁹ Here, the Statute was silent on the method of calculating damages. The presumption of judicial interpretation and common-law principles favor admitting fair-market-value evidence.

Red River and its Amici speculated that the Legislature’s “primary objective” was “protect[ing] displaced utilities.”¹⁰ Rather than speculate about the Legislature’s intent, the plain language of the Statute emphasized the need to preserve the cities’ rights to acquire electric service territory by eminent domain. “Nothing in this chapter may be construed to preclude a municipality from acquiring the property of a public utility by eminent domain.”¹¹ The plain language of the Statute did not exclude fair-market-value. Nor did it require compensation above fair-market-value. Furthermore, the public interest is presumed to favor any private interest.¹² Red River presented no comprehensive legislative scheme to prohibit fair-market-value principles in electric-service-territory-takings.

Red River and its Amici relied upon the similar statutory language in Sections 216B.44 and 216B.45 as legislative intent to protect displaced utilities.

damages.” The plain language supports considering all appropriate factors, whether they increase damages or not.

⁹ Minn. Stat. §§ 238.26, 469.117.

¹⁰ Red River Amici Brief at 15.

¹¹ Minn. Stat. § 216B.47.

¹² Minn. Stat. § 645.17 (2010).

But each statute addressed different aspects.¹³ No statute excluded fair market value, limited all evidence to the four factors, or required an excess of fair market value. Nonetheless, Red River argued that the results of the three statutes must be identical, and apply an identical analysis to create that result. But this Court already rejected the notion that the results of district court and MPUC proceedings must be uniform.¹⁴ In any event, this Court need only address the particular facts of this case. The City's expert followed the Statute and "included" the four factors.

To the extent the Court considers other statutes, Minnesota Statutes Section 465.01 authorized condemnation (and use of fair market value) well before the Statute was enacted, and it remains in effect to this date.¹⁵

One statute noted by Red River in passing, Section 216B.66, was not applicable by its terms. It stated "other Minnesota statutes are not to be construed as applicable ***to the supervision or regulation of public utilities*** by

¹³ Section 216B.44 provides that if the existing utility is not providing service, then the municipal utility owes no compensation. Section 216B.45 concerns the "purchase" of utility property. References to "just compensation" were required to specify the standard for a "purchase," as opposed to a condemnation or MPUC proceeding.

¹⁴ *City of Rochester v. People's Cooperative Power Ass'n*, 483 N.W.2d 477, 480-81 (Minn. 1992).

¹⁵ See also *Shakopee v. Minnesota Valley Elec. Coop.*, 303 N.W.2d 58, 62 (Minn. 1981) (relying upon both Utilities Act and Section 465.01).

the commission.”¹⁶ 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.¹⁷

The Statute by its terms referenced eminent-domain-proceedings, required damages to “include” four factors, and broadly stated a city’s right to proceed in eminent-domain-proceedings. Nothing in the Statute excluded or required more than fair market value. The plain language favored admissibility.

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

Red River agreed that fair-market-value remains the “default measure of damages in eminent domain proceedings,” but argued that electric-service-territory was so unique as to be its own isolated type of taking, unconnected to “regular” eminent-domain-proceedings.¹⁸ But Red River’s only authority for this position was the Statute, which uses the phrase “eminent domain proceeding” three times. Minnesota statutes defined “taking” to include both land and

¹⁶ Minn. Stat. § 216B.66 (2010) (emphasis added).

¹⁷ Even assuming that Section 216B.66 applied, it is unclear what other Minnesota statutes Red River contended to be inapplicable. Red River at times eschewed but at other times relied upon Chapter 117, such as additional remedies (Minn. Stat. § 117.012), interest payments (117.019), and costs and disbursements (117.175, subd. 2). It is perplexing that the statute claimed to authorize other legislative remedies, Section 117.012, was enacted over thirty years after the Statute. Red River did not address this issue. Instead, it appeared to argue that the Statute, and no other provision, controlled.

¹⁸ Red River Brief at 48, 49.

intangible rights or personal property.¹⁹ Red River apparently argued that fair-market-value applies to each and every taking (including the many statutes referenced by the City that lack this phrase) except electric-service-territories. But the plain language of the Statute undermines this argument.

Red River, citing two federal cases,²⁰ argued that electric-service-territory was too unique to apply fair-market-value analysis. But 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 three summer camps was entitled to replacement costs, rather than fair market value.²¹ 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.”²² Red River’s quotation from the case concerning potentially inapplicable takings, such as road or sewer utilities, is properly considered dicta.²³ In any event, in Minnesota, eminent-domain-

¹⁹ Minn. Stat. § 117.025, subd. 2 (2010).

²⁰ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979); *United States v. Fuller*, 409 U.S. 488 (1973).

²¹ *Id.* at 516.

²² *Id.* at 512 (quoting *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402 (1949)).

²³ Red River Brief at 30; *564.54 Acres of Land*, 441 U.S. at 513.

proceedings involving roads or sewers apply fair market value.²⁴

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.²⁵ In short, neither case rejected fair market value or held that a different standard should be applied.²⁶ 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 fails. The "market approach" considering comparable sales was only one of at least three approaches used in a fair-market-value appraisal.²⁷ The City's expert analyzed five comparables involving electric-service-territory sales for distribution and transmission electric utilities.²⁸ Red River's arguments are properly made in

²⁴ *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).

²⁵ *United States v. Fuller*, 409 U.S. 488, 492-3 (1973).

²⁶ Similarly, Red River Amici's reference to *Hendrickson v. State*, 127 N.W.2d 165 (Minn. 1964) was inapposite. That case addressed potential damages from a taking of direct highway access. The Court remanded to determine damages. *Id.* at 172. In dicta, it noted that "evidence of lost patronage" may be received for limited purposes, but that no separate award for "diversion of traffic or for loss of customers, business, goodwill, income, or profits" could be made in addition to "the difference between the market value of the property before and after suidtable access has been denied." *Id.* at 173.

²⁷ *County of Ramsey v. Miller*, 316 N.W.2d 917, 922 (Minn. 1982).

²⁸ *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

cross-examination. 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. By contrast, the City could not cross-examine Red River's expert about his qualifications and use of the "seller's perspective" in lieu of fair market value.

Condemnation of service territory is little different than the condemnation of other types of property. Fee-simple ownership is held in perpetuity, and investment in buildings is a long-term investment. The investment parameters of electric-utility infrastructure are substantively identical. Any property owner facing condemnation loses the property forever. Any business owner that loses land, building, or the business loses the ability to sell it forever.²⁹

Red River Amici concluded that a "primary objective" of the Legislature was to "protect displaced utilities."³⁰ Judge Davies, who served as a legislator when the 1974 Utilities Act was enacted, noted that the municipal utilities' right to grow with their cities was "the municipal utilities' portion of that monumental [legislative] bargain."³¹ Under the 1974 Act, the investor-owned utilities and rural electric cooperatives received the right to serve their existing areas plus "halfway

customer base.").

²⁹ Red River ignored the lost-business aspect of the taking in *County of Dakota v. George W. Cameron, IV*, __N.W.2d__, at *7 (Court File No. A11-1273) (Minn. App. March 26, 2012).

³⁰ Brief at 15.

³¹ *In re City of Rochester (North Park Additions)*, 470 N.W.2d 525, 531 (Minn. App. 1991) (Davies, Judge, dissenting) *rev. denied* (Minn. July 24, 1991).

to its nearest nonmunicipal competitor,” automatically including room for future growth.³² Municipal utilities “did not participate equally in the allocation of rights to exclusive service territory for future development” but retained the right to acquire service territory.³³ Other utilities’ service territories were subject to this municipal right of acquisition.³⁴

According to Judge Davies, analyzing Section 216B.44, “[t]he legislature intended a buy-out by municipal utilities based on property value, measured by standard criteria like [listing factors in statute] The only price the city is to pay is **fair value** for facilities taken over from the utility displaced.”³⁵ Judge Davies’ summary of the legislative history supports using fair-market-value to determine the price.

The Legislature also intended to preserve the cities’ already-existing power of eminent domain.³⁶ It makes little sense for cities to abdicate the fair-market-value standard used before the 1974 compromise. The Statute emphasized cities’ rights to continue eminent-domain proceedings.

Red River also erred in suggesting that the City somehow waived its fair-

³² *Id.* at 532.

³³ *Id.* at 533.

³⁴ *Id.* at 533.

³⁵ *Id.* at 535-6 (emphasis added).

³⁶ *E.g.*, Minn. Stat. § 465.01; Municipal Amici Apx-9.

market-value argument by agreeing to the “original cost less depreciation” and “other appropriate factors” components.³⁷ The parties did orally agree on these factors,³⁸ but only in the context of preserving the City’s objections to the fair-market-value rulings. The City objected to these rulings at every appropriate juncture. In particular, it requested specific jury instructions:

Definition of “just compensation”

“Just compensation” is the fair market value of the electric service territory that was taken by the City as of February 19, 2009.

Definition of “fair market value”

“Fair market value” is the price that would be paid for the property by a willing buyer to a willing seller.

Consider all facts and circumstances that a buyer and seller in the open market would reasonably consider. The owner is entitled to the value based on the highest and best use of the property.³⁹

The City also requested an instruction on how to calculate just compensation:

To find just compensation to Red River for the taking of part of its electric service territory, calculate the difference between:

1. The fair market value of Red River immediately before the service territory was taken, and

³⁷ Red River confuses legal arguments based on the plain language of the Statute (including a broad catch-all factor) to favor admissibility, with the City’s presenting a case that had already excluded fair-market-value.

³⁸ Although Red River argued for an expansive reach of the stipulation, the stipulation itself did not appear separately in the record. T. 6. A broad reading of the stipulation is inappropriate, given the City’s multiple objections, offer of proof, and post-trial motion on the fair-market-value issue.

³⁹ Apx-39, 40 (City’s proposed instructions 16, 17).

2. The fair market value of Red River immediately after the service territory was taken.

Your calculation must include consideration of the original cost of the property less depreciation, loss of revenue to Red River, expenses resulting from integration of facilities, and other appropriate factors.

The result is the just compensation for the part taken as well as for severance damages for the part that is left.⁴⁰

The District Court declined to use the City's proposed instructions, and the City objected.⁴¹ The District Court noted that the fair-market-value issue was preserved for appeal:

Counsel for the City: [W]e would note to preserve for the record [that] we had also submitted some jury instructions that dealt with fair market value, but I understand that the Judge's order from March 30th of this year has ruled that fair market value is not admissible in this matter, but –

The Court: And I would note that I believe your position on that is preserved for the record should you ever want to appeal or take that issue up on appeal. And if it's not clear from my earlier order, I'll just make it clear that ***it's the Court's understanding that you have preserved that issue.***⁴²

To further preserve the issue for appeal, the City made an offer of proof of expert testimony of fair market value,⁴³ and filed a post-trial motion.⁴⁴ That the

⁴⁰ Apx-41 (City's proposed instruction 18); see also (City's proposed instruction 13 providing background of Statute).

⁴¹ Apx-74-75 (T. 371-2).

⁴² Apx-74-5 (T. 371-2) (emphasis added).

⁴³ T. 381-2.

⁴⁴ T. 381-2; City's Apx-92.

City presented a case in compliance with the District Court's orders while preserving its arguments for appeal in no way waived its arguments.⁴⁵

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 the Statute must fail as a matter of law and fact.

C. Allowing Evidence of Fair Market Value in the Present Case Would Not Violate the Statute.

The City sought to present an expert analysis that admittedly was different from Red River's analysis, but that included the required four statutory factors.⁴⁶ Nothing in the Statute prohibited using an analysis that was different from how Red River or even the MPUC addressed the factors. Red River did not dispute that the City's fair-market-value evidence was relevant.

Red River Amici argued that the "Legislature adopted the four factors that are intended to place displaced utilities and their remaining customers in the same cost and financial position as prior to the acquisition."⁴⁷ This goal, in effect, defines fair market value and just compensation. Under fair market value, Red River is adequately compensated (not over compensated), and the condemning authority pays a fair price that does not result in excessive costs to its customers.

⁴⁵ *Frandsen v. Ford Motor*, 801 N.W.2d 177, 182 (Minn. 2011).

⁴⁶ APX-99, 104-5, 140,148.

⁴⁷ Brief at 3.

The reason for a before-and-after-damage calculation is to capture all the damages associated with the taking, including severance damages to the remainder if there is a particularly onerous after-taking operations result for the condemnee.⁴⁸ Valuation considers the direct effect of the taking on the remaining utility, and considers everything identified in the four factors. This case was a partial taking, involving 65 customers out of 4,657, and a service area of 77 acres out of 350,000. The utility was not destroyed, would continue operating with 4,592 customers instead of 4,657 customers, and hence the condition of the utility before-and-after-the-taking should be considered in proper valuation.

Moreover, it is simply wrong to assume that the four factors will always yield a higher result than fair market value.⁴⁹ Here, the greatest differences between the experts concerned the on-going business expenses to be subtracted from revenues.⁵⁰ But that may not be true of all cases. Red River's argument that the four factors are cumulative misses the point.⁵¹ In fair market

⁴⁸ City's Initial Brief at 25-26.

⁴⁹ Red River Brief at 47.

⁵⁰ Exhibit 74; T. 444-9.

⁵¹ Technically, Mr. Eicher did not duplicate the facilities factor with the loss-of-revenue factor. He subtracted interest on the facilities as an expense (akin to the renting of equipment) from the revenue stream; he therefore allocated the facilities costs. Brennan Affdvt. (Feb. 4, 2010), Ex. B ("Eicher Report") at 10. By contract, the City made no such deduction from the revenues.

value, the value of the future revenues includes both the property and any value (goodwill) over and above the underlying value of the original cost of the property less depreciation.

Red River's argument that fair market value is "antithetical" to the four factors is misguided. Fair market value does not dilute the four factors; it provides an alternate method of determining damages that meets all the statutory requirements. Although Red River quibbles with the wording of the City's description of the three approaches as separate from the four factors,⁵² fair market value remains compatible with, and "includes" the four factors.

Although it is true that the three methods used in fair market value (the cost, income, and market approaches) are not added together, they are all evaluated in concluding to a final value number. And in this case, the City's report specifically included the integration factor and facilities factor.⁵³ The income approach considered fixed as well as variable costs in determining future revenues.⁵⁴ And the cost approach here used the same facilities number as Red River's expert.⁵⁵ Far from being antithetical, the methodology is similar, except that fair market value rigorously analyzes on-going expenses that the utility will

⁵² Red River Brief at 24-25.

⁵³ APX-105, 140, 148.

⁵⁴ APX-122-3.

⁵⁵ APX-137,140.

no longer face. The four factors were included and captured in the City's fair-market -value determination.

Interestingly, Red River's expert referred to the "compensation value," at least implying fair market value in applying a multiple to EBIDTA.⁵⁶ At most, both parties attempted to apply aspects of "value," although only the City properly conducted the before-and-after-the-taking analysis. At a minimum, this exercise in semantics demonstrates the difficulty of determining value without the guidance of fair market value. The City included all four factors; its report should have been admissible under the Statute.

D. The MPUC Approach Should Not Control.

Red River clarified that the MPUC rulings do not control.⁵⁷ But at times Red River appeared to argue that its expert's "loss-of-revenue" approach was the only permissible approach under the Statute.⁵⁸ Red River also noted a number of decisions in which the MPUC determined damages under Section 216B.44.⁵⁹ 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

⁵⁶ Eicher Report at 13.

⁵⁷ Brief at 22, n.26. Contrary to Red River's claim of a "new" issue, the City has consistently argued against an executive agency determining the method of compensation in district court. City's Memo. Oppos. Sum. Jdmt., at 11-12 (March 5, 2010); City's Reply Memo., at 5-6 (March 10, 2010).

⁵⁸ *Id.* at 22-24.

⁵⁹ Red River Brief at 23-24.

the present case. But each case decided the specific facts before it. No case required a particular result in the present case. Instead, the MPUC decisions support a variety of approaches to the four factors.

First, this case need not decide an amount or one methodology for all future cases. Red River argued that there cannot be an “entirely different damage calculation to govern” based on the forum.⁶⁰ But this Court was not persuaded by arguments of required uniformity of results in different forums.⁶¹ It makes little sense to deny the MPUC primary jurisdiction in condemnation cases, but hold that the MPUC’s method of calculating loss-of-revenues effectively controls the damages decision in district court.⁶²

Here, the City seeks the ability to refute the property owner’s theory of the case. Red River’s reassurance that its methodology “sets definable limits”⁶³ is

⁶⁰ Red River Brief at 34.

⁶¹ *City of Rochester v. People’s Cooperative Power Ass’n*, 483 N.W.2d 477, 480 (Minn. 1992).

⁶² Of course, the primary jurisdiction doctrine is appropriate when an issue “at least arguably” lies within an agency’s jurisdiction. *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.”). If only the MPUC’s method of calculating this issue may be considered in district court, it “at least arguably” have enjoyed primary jurisdiction over this issue. But this Court rejected this notion. *City of Rochester*, 483 N.W.2d at 481.

⁶³ Brief at 43.

belied by its expert's testimony that the result of his analysis "could be any number."⁶⁴ This Court is not required to crown any particular "damage calculation" as governing. Neither the Statute nor Section 216B.44 requires a particular damage calculation, as long as the four factors are included.

Second, it was incorrect to suggest that past MPUC cases applied a uniform holding.⁶⁵ The MPUC applied an "expense residual method" for a number of years.⁶⁶ The MPUC did not adopt the "net loss of revenue" method until 1995.⁶⁷ Nothing in Section 216B.44 required the MPUC to use the net-loss-of-revenues method it currently uses, or the expense-residual-method it used for a number of years, or a new method of analysis in the future.

Third, the Court of Appeals' review of the MPUC decisions under Section 216B.44 was typically subject to a deferential standard of review.⁶⁸ 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

⁶⁴ Municipal Amici Apx-14 (referencing loss-of-revenue exceeding margin of a utility's system as a whole).

⁶⁵ Red River Brief at 41.

⁶⁶ *In re City of Rochester*, 470 N.W.2d at 529.

⁶⁷ *In re Application of Rochester*, MPUC No. E-299,132/SA-93-498, 1995 WL 798917 Order Determining Compensation at 5 (Nov. 30, 1995). It did so because both parties applied it. *Id.*

⁶⁸ See Minn. Stat. § 14.69 (2010) (limiting grounds to reverse or modify an agency's decision to six specified grounds).

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."⁶⁹ Red River therefore cannot assume that the decisions agreed with the MPUC's analysis or conclusions. When the Court of Appeals recently applied de novo review, it reversed the MPUC's decision to require loss-of-revenue payment to a cooperative without legal authority to serve the area.⁷⁰

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 option. Instead, it 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."⁷¹

Finally, none of the cases cited by Red River addressed a fair-market-value analysis. The MPUC is a state agency, with powers limited by statute.⁷² No statute granted the MPUC the authority to decide damages in district court

⁶⁹ *Vicker v. Starkey*, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963).

⁷⁰ *In re City of Redwood Falls*, 756 N.W.2d 133, 138-9 (Minn. App. 2008).

⁷¹ *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)).

⁷² *Minnegasco v. Minnesota Pub. Util. Comm'n*, 549 N.W.2d 904, 907 (Minn. 1996).

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.⁷³ These cases are simply not relevant to the issues before this Court.

In sum, the MPUC cases cited by Red River involved other utilities, with different facts, without analyzing the facts in the present case. They did 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 it is fundamentally unfair for the City, as the condemnor, to initiate a proceeding and so select the forum. 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, and was otherwise silent on how the damages should be determined. Nothing in the Statute required presenting only the MPUC net-loss-of-revenues-method.

Red River Amici identified a concern with “stranded investment” due to a

⁷³ The *City of Rochester* case cited by Red River Amici (page 11) is inapposite. There, the MPUC analyzed a statutory argument of whether there can be any damages if no facilities are acquired. 1990 WL 600919 (July 11, 1990). It analogized the eminent-domain-principle that “a taking can occur without a transfer of physical possession. . . .” *Id.* at * 7. The footnote reference to fair-market-value not providing an additional remedy of loss-of-revenue was dicta.

new substation that the displaced utility cannot use.⁷⁴ But Red River owns no substations. No infrastructure was stranded. Integration expenses were included in the award. In short, the argument was entirely inapplicable. A before-and-after-the-taking valuation would capture all the unique conditions of the utility in the after-taking condition. If there were excessive stranded infrastructure, that would be fully taken into account.

Red River is simply incorrect in arguing that municipal utilities easily grow with their cities.⁷⁵ Indeed, Red River's listing of cities in which multiple utilities operate in one city demonstrates the very difficulties in the law, and the daunting and expensive process that deters cities from acting as the exclusive provider.⁷⁶ At least three cities were subject to "freeze" agreements that prohibit the city from expanding service territory: New Prague and Willmar for a period of twenty years, and Chaska for an astonishing period of fifty years. It cannot be claimed that these cities are unimpeded in their efforts to grow with their cities. Another two of the supposedly content cities in Red River's list were so concerned with having multiple utilities (although no municipal utilities), that they petitioned the

⁷⁴ Brief at 7.

⁷⁵ Red River Brief at 41-42, 49.

⁷⁶ Red River brief at 49; *compare City of Rochester*, 470 N.W.2d at 535 (Davies, J., dissenting) (reasoning cities "will be tempted to leave new portions of their city unserved by the municipal utility. The consequence, then, is a divided community and a potentially unhealthy political climate."). Red River's listing of cities with multiple utilities unfortunately proves Judge Davies' prediction.

Legislature in an effort to have only one utility within the city limits.⁷⁷

Even communities not subject to a freeze agreement face serious difficulties with multiple utilities. Citizens are not treated equally.⁷⁸ Municipal customers make payments-in-lieu-of-taxation or otherwise assist the city, while private-utility customers do not. The municipal customers effectively subsidize private-utility customers. Neighbors bear different rates and reliability of service.⁷⁹ Cities pay different rates for street lights served by private utilities. Municipal customers may complain at public meetings to the city; private-utility customers cannot be guaranteed a similar forum.

As a practical matter, having multiple providers hampers system planning, as cities must determine what parts of the city it should plan facilities to serve. Serving less-than-the-entire-city denies the municipal the economies-of-scale in

⁷⁷ House Reg. Indus. Com. (Feb. 20, 1989) (hearing with representatives of Coon Rapids and Blaine testifying in favor of HF 619, which was not enacted) (Municipal Amici Apx-10-12).

⁷⁸ *City of Rochester*, 470 N.W.2d at 534 (Davies, J., dissenting) (“One of the reasons, certainly, that the legislature permitted that the legislature permitted municipalities to extend service to annexed areas was to permit it to keep all residents on an equal basis as both taxpayers and utility customers. Were a portion of the community to be left out of the benefit--or burden--of local power rates, political problems concerning rate setting and investment decisions could result. These are problems the legislative buy-out authority was designed to avoid.”).

⁷⁹ See, e.g., T. at 329 (City’s reliability of power all but 20-40 minutes/year); *In re City of Buffalo*, MPUC No. E221/SA-03-989, Findings of Fact, Recommended Order, at 9 (Oct. 26, 2004) (noting insufficient service by cooperative to City’s lift station, with resulting discharge of wastewater and fines by the MPCA), *reversed by*, MPUC Order (April 1, 2005).

the purchase of power, infrastructure, and operations and maintenance. And cities bear the risk and expense of supplying water, sewer, and wastewater to attract development, which the other utilities do not offer. Suffice it to say that the public policy concerns of different utilities within one city are significant.

Red River was also incorrect in claiming that cities target “lucrative” parts of a cooperative’s service territory.⁸⁰ Typically annexation decisions are made at a landowner’s request, or balancing a variety of public policy decisions that have nothing to do with service territory. Here, the city council determined annexation; the municipal utility then served all annexed areas.⁸¹ Minnesota law presumes that cities should provide sewer, water, and other services to areas annexed into a city.⁸² It makes little sense to separate electric service from the host of other services provided by a city. And typically private utilities that surround a city reap growth benefits.⁸³

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

⁸⁰ Red River Brief at 42; Red River Amici Brief at 10.

⁸¹ T. 306 (“We have no control whatsoever over annexed areas”); T. 310-11; Ex. 21.

⁸² Minn. Stat. §§ 414.02, subd. 6(3); 414.031, subd. 4.

⁸³ *In re City of Buffalo*, MPUC No. E221/SA-03-989, at 10 (Oct. 26, 2004) (cooperative experienced annual customer growth equal to city’s growth over 30 years), *reversed by*, MPUC Order (April 1, 2005).

its burden of proof and to keep the damages to just compensation. 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?”⁸⁴ The owner of the condemned property “must be made whole but is not entitled to more.”⁸⁵ The public policy of just compensation should govern, disfavoring the unreasonable ban of fair market value.

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 period.⁸⁶ The City prepared a supplemental expert report to comply with the District Court’s order prohibiting fair-market-value evidence. Red River’s argument that the report was untimely because it was submitted after the initial

⁸⁴ *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)).

⁸⁵ *Olson v. United States*, 292 U.S. at 255.

⁸⁶ Curiously, Red River faults the City for not providing this testimony in contravention of the District Court’s order. Brief at 37. But Red River mischaracterized the record in claiming that no facilities would require replacement. The City analyzed the capital expenditures of Red River as well as ongoing maintenance expenses. APX-115; T. 431-34.

report deadline ignored that this deadline was months before the District Court's fair-market-value ruling. Red River's approach would mean that the City could never respond to the District Court's ruling. 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 concerned the cost of facilities that the City was acquiring as of the date of taking.⁸⁷ 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 or untimely, the cases cited by Red River were distinguishable.⁸⁸ In *Wegener v.*

⁸⁷ The City preserved this issue for appeal through its offer of proof and post-trial motion. T. 381-2; APX-92. In any event, the issue is more appropriately addressed under factor two, loss of revenue.

⁸⁸ Red River Brief at 43.

Johnson,⁸⁹ all parties agreed that the expert report was untimely because it was provided some two weeks before trial. The court reasoned that the excluded supplemental testimony was cumulative, in that “a substantial amount of other evidence was presented to the jury” on that issue.⁹⁰ In *Baycol Products Litigation*,⁹¹ 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.⁹²

And the unpublished decision *Abel v. Lumber One Avon*⁹³ 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.⁹⁴ Despite these “continual[] fail[ures]” to comply with orders, the Court of Appeals recognized “the harshness of prohibiting expert testimony” and the availability of lesser sanctions, although it ultimately affirmed

⁸⁹ *Wegener v. Johnson*, 527 F.3d 687, 690 (8th Cir. 2008).

⁹⁰ *Id.* at 692.

⁹¹ *In re Baycol Products Litigation*, 596 F.3d 884, 888(8th Cir. 2010).

⁹² *Id.* at 888.

⁹³ *Abel v. Lumber One Avon* (Unpub), A05-38 (Minn. App. Dec. 6, 2005) (Red River Addendum at RX 30).

⁹⁴ *Id.* at *2 (RX 31).

the district court's decision.⁹⁵

In the present case, by contrast, there were no repeated violations of court orders. Red River mischaracterized the report as untimely because it was prepared after the initial expert report deadline. That deadline was months before the District Court ruled on fair market value. 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, the City would have no opportunity to respond to the District Court's ruling, and would proceed to "trial by ambush" by not providing Red River with any revised expert report. Minnesota law does not favor such a harsh approach.⁹⁶

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.

⁹⁵ *Id.* at *5 (RX 34).

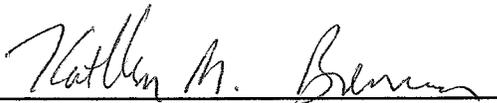
⁹⁶ *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998); *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697-98 (Minn. 1977)

CONCLUSION

This Court should reverse the District Court's ruling prohibiting all fair-market-value evidence 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. This Court should also reverse the exclusion of facility-replacement costs, which prejudiced the City.

Dated: July 9, 2012.

McGRANN SHEA CARNIVAL
STRAUGHN & LAMB, CHARTERED

By: 

Kathleen M. Brennan (No. 256870)
Corey J. Ayling (No. 157466)
800 Nicollet Mall, Suite 2600
Minneapolis, Minnesota 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
Phone: 701-235-5515

Counsel for the City of Moorhead

STATE OF MINNESOTA
MINNESOTA SUPREME COURT

The City of Moorhead,

Appellant,

vs.

Red River Valley Cooperative Power
Association,

Respondent.

Court of Appeals No: A11-705

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 6,942 words. This brief was prepared using Microsoft Word 2007.

Dated: July 9, 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, ND 58107
P: 701-235-5515

Counsel for the City of Moorhead