

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WRIGHT

TENTH JUDICIAL DISTRICT

Northern States Power Company (d/b/a Xcel Energy)
a Minnesota corporation, by its Board of Directors;
Great River Energy, a Minnesota cooperative
corporation, by its Board of Directors; ALLETE, Inc.
(d/b/a Minnesota Power), a Minnesota corporation, by
its Board of Directors; Western Minnesota Municipal
Power Agency, a municipal corporation and political
subdivision of the state of Minnesota, by its Board of
Directors; and Otter Tail Power Company, a
Minnesota corporation, by its Board of Directors,

Petitioners,

vs.

Scott J. Sypnieski, *et al.*

Respondents.

**PETITIONERS' MEMORANDUM
IN OPPOSITION TO CAROL A.
STICE AND DAVID C. SHORE'S
MOTION REGARDING CHAPTER
117 OF THE MINNESOTA
STATUTES**

(Parcels MQ015 and MQ016)

File No. CV-10-7551

Case Type: Condemnation

**IN THE MATTER OF THE CONDEMNATION OF CERTAIN REAL ESTATE
IN THE COUNTY OF WRIGHT, STATE OF MINNESOTA,
FOR HIGH VOLTAGE TRANSMISSION LINE PURPOSES**

INTRODUCTION

Petitioners' condemnation petition seeks to acquire a 150 foot-wide easement for a transmission line project that will connect substations in Monticello and St. Cloud. The project, the width of the easements to be acquired, and the acquisition of the easements have been authorized by the Minnesota Public Utilities Commission. To construct the project, Petitioners need to acquire only the easement. Petitioners do not need to acquire fee title to any Respondent's property. The acquisition of the easement, by and of itself, has not displaced a single Respondent anywhere along the project's 28-mile length.

The question is not, as Ms. Stice and Mr. Shore would like to frame the issue, why they made the decision to move.¹ Nor is the question whether their decision to move is a reasonable one. Rather, the critical question is whether Ms. Stice and Mr. Shore made the decision to move. Ms. Stice and Mr. Shore were not required to move. They chose to.² And because they made that choice, they are neither “displaced persons” as that phrase is defined by the relocation act, nor are they owners who “must relocate” for the purposes of Minn. Stat. § 117.187, the minimum compensation statute.

ARGUMENT

I. MS. STICE AND MR. SHORE ARE NOT ELIGIBLE FOR RELOCATION ASSISTANCE.

The parties agree that the federal definition of “displaced persons” applies to the present case. Under that definition, displaced persons are those who “move from real property, or move [their] personal property from real property as a *direct result* of written notice of intent to acquire or the acquisition of such real property in whole or in part *for a program or project* undertaken by a displacing agency.” See 42 U.S.C. § 4601(6). Critically, the federal regulations also define those who are not displaced, specifically stating that the definition of displaced person does not include “**a person who is not required to relocate permanently as a direct result of a project.**” 49 C.F.R. § 24.2(a)(9)(ii)(D) (emphasis added).³

¹ In their brief, Ms. Stice and Mr. Shore spend substantial time painting a picture of their property, the Petitioners, and the project. Petitioners do not agree with many of those characterizations and factual allegations. Because the resolution of this motion turns on the language of the relevant statutes, and not the resolution of disputed facts, Petitioners will continue to focus on the law.

² Many other similarly situated owners chose not to make an election under Section 216E.12 (the BTF statute). As a result, those owners are not moving from their homes.

³ Further under the federal regulations, the determination regarding whether a person is required to move “shall be made by the Agency in accordance with any guidelines established by the

For the purposes of this motion, the question for the Court is whether Ms. Stice and Mr. Shore were “required” to relocate permanently as a result of the transmission line project.⁴ They were not. Instead, consistent with Minnesota law, Petitioners condemned only the easement required to construct the transmission line, and nothing more.

The foundation idea upon which the right of eminent domain rests is public necessity. Although lands may not be taken by eminent domain unless such taking appears to be *necessary*, it is well settled . . . that there need be no showing of absolute or indispensable necessity, but only that the proposed taking is *reasonably necessary or convenient* for the furtherance of the end in view.

N. States Power Co. v. Oslund, 51 N.W.2d 808, 809 (Minn. 1951) (emphasis in original) (internal citation omitted). In fact, Petitioners could not have condemned the entire Stice/Shore property, because such an enlarged taking would not be “reasonably necessary” to construct the line. Thus the project itself, requiring only a 150-foot easement, does not obligate Ms. Stice and Mr. Shore to move.

The BTF statute, however, is unique. Unlike every other condemnation action, where there must be a reasonable relationship between the desired taking and the project, the BTF statute gives owners the “option” to “elect” to delineate the limits of the taking. The expanded taking may have little, if any, relationship to the project’s actual needs. The key to the statute, for the purposes of this motion, is that the landowner has a choice. If the landowner chooses not to make an election, the acquisition will not be altered or expanded, and the landowner will not

Federal Agency funding the project (See appendix A, §24.2(a)(9)(ii)(D))” 49 C.F.R. § 24.2(a)(9)(ii)(D).

⁴ The word “required” means “needed; essential; obligatory.” *American Heritage College Dictionary*, 1182 (4th ed. 2002).

relocate.⁵ If the landowner chooses to exercise his or her “option” to expand the taking, it is that choice, and not the acquisition of the easement necessary for the project itself, that results in the move.

Ultimately, Ms. Stice and Mr. Shore had a choice. They could remain on their property, or they could elect to invoke their BTF rights. Because they had a choice, Ms. Stice and Mr. Shore were not, as a matter of law, required to relocate as a direct result of the Project. Therefore, they are not displaced persons for the purposes of the relocation act.

In their brief, Ms. Stice and Mr. Shore contend that Minn. Stat. § 117.521, which provides for the waiver of relocation benefits, supports their position. It does not. Section 117.521 addresses how a displaced person may waive his or her right to relocation benefits. In this case, because Ms. Stice and Mr. Shore are not displaced, Minn. Stat. § 117.521 does not apply.

II. MS. STICE AND MR. SHORE MAY NOT MAKE A CLAIM UNDER MINN. STAT. § 117.187, THE MINIMUM COMPENSATION STATUTE.

Section 117.087 is available to owners who “must relocate.”⁶ For the reasons noted above, below, and in Petitioners’ initial brief, Ms. Stice and Mr. Shore were not required to relocate as a direct result of this project. It necessarily follows, therefore, that they are not owners who “must relocate.” Because they are not owners who must relocate, Minn. Stat. § 117.087 is not available to Ms. Stice and Mr. Shore.

⁵ In dozens of cases involving the subject transmission line, that is exactly what happened.

⁶ The word “must” means “[t]o be obliged or required by morality, law, or custom” *American Heritage College Dictionary*, 918 (4th ed. 2002).

III. THE RECENT AMENDMENTS TO CHAPTER 117 SUPPORT PETITIONERS' POSITION.

Petitioners recognize that Chapter 117 was significantly amended in 2006, and further recognize that Minn. Stat. § 117.189 was amended in 2010. Both amendments altered the framework governing condemnation actions. For the purposes of this motion, the amendments are more significant for what they did not do, than for what they did. The legislature had the opportunity to specifically address the present situation; it did not.

For example, Section 117.187 could have been amended to reference an owner who chooses to make a Section 216E.12 election as being an owner who “must relocate” for the purposes of the statute. Similarly, an owner who chooses to make a Section 216E.12 election could have been added to the definition of a “displaced person” found in Section 117.50, Subd. 3. Finally, Section 216E.12 could have been amended to reference relocation assistance or Section 117.187. Although each of those changes could have been made, they were not.

Nonetheless, Ms. Stice and Mr. Shore contend that, as a result of the amendments to Chapter 117, an owner who is eligible for a BTF election is entitled, regardless of the circumstances, to both relocation assistance and minimum compensation. A practical example illustrates why this cannot be the case. Suppose Ms. Stice and Mr. Shore own an 80-acre farm with the farmhouse located on the most northeasterly corner of the property. Under the hypothetical, the agricultural land is rented under a long term lease. Further, suppose that a utility needs to acquire a 30-foot easement across the extreme southwest tip of the property. Under this scenario, the house would be about 2,900 feet from the transmission line. Yet, under the terms of the BTF statute, Ms. Stice and Mr. Shore could conceivably expand the 30-foot easement to a fee acquisition of the entire 80-acre farm.

Ms. Stice and Mr. Shore implicitly assert that this Court may not consider the facts surrounding such an election. Yet in the case of the hypothetical, they would assert that the owner was forced to move from the farmhouse. The legislature could not have intended such a result, and thus Respondents' position that they are entitled to relocation assistance as a matter of right must be rejected.

IV. MN/DOT'S POLICY AND PROCEDURE DO NOT SUPPORT THE STICE/SHORE ARGUMENT.

In certain cases involving a partial taking by Mn/DOT for highway purposes, an owner may ask Mn/DOT to acquire additional parts of his or her property. (*See* Mn/DOT Policy and Procedure attached to Lenzner Affidavit as Exhibit C.) If the Mn/DOT Commissioner deems the additional taking to be in the "best interests of the state," the taking may be expanded. Minn. Stat. § 161.23. If the expanded taking is not in the "best interests of the state," the Commissioner may deny the request. The Stice/Shore analogy to the BTF statute breaks down because the Commissioner has the discretion to decide whether to accept or reject an owner's request, and the decision is based upon the best interests of the state. Under the BTF statute, by contrast, the owner's decision binds the utility.

In their brief, Ms. Stice and Mr. Shore contend that Representative David Bly, a sponsor of the bill which amended the statute in 2010, stated at a committee hearing that he was introducing this bill to force Petitioners to "act in the same manner as the Minnesota Department of Transportation when acquiring properties." (Stice/Shore Br., p. 10.) Representative Bly's statement does not help Ms. Stice and Mr. Shore.

First, as explained above, Petitioners, unlike the Mn/DOT Commissioner, have no discretion to reject an owner's valid election. Second, let's take Representative Bly at his word and examine how Mn/DOT would consider this acquisition request by assuming that the 3.2 acre

easement in this case is for an expansion of Interstate 94, and not for a transmission line. Under this hypothetical, Ms. Stice and Mr. Shore could, pursuant to the Mn/DOT policy, ask Mn/DOT to expand the taking from a 3.2 acre easement taking, to a 60 acre fee taking. In reviewing the request, Mn/DOT would consider whether the expansion of the taking to a 60 acre fee taking is in the “best interests of the state.” Given the circumstances, there is little question that Mn/DOT would deny such a request.⁷ Because the request to expand the taking would almost certainly be denied, Ms. Stice and Mr. Shore would not be eligible for relocation assistance, and they could not make a claim for minimum compensation.

V. MS. STICE AND MR. SHORE WILL RECEIVE THE FAIR MARKET VALUE FOR THEIR ENTIRE PROPERTY.

As it decides this motion, this Court should not lose sight of the fact that the BTF statute provides certain owners, like Ms. Stice and Mr. Shore, with a unique and substantial right. Unlike owners who are subject to a taking for a road, library, school, sewer line, or even a transmission line with a voltage under 200 kV, Ms. Stice and Mr. Shore have the ability to expand the taking. They are able, subject to the limitations placed upon them by the United States and Minnesota Constitutions, the courts, and the legislatures, to define the property that will ultimately be acquired by Petitioners. Given how condemnation proceedings typically work (the petition must establish that the property being taken is reasonably related to a public purpose), that right, regardless of how the Court rules on the pending motions, is substantial.

Further, the Supreme Court in *Aasand* provided perspective regarding the application of the BTF statute. The Court stated that the statute “affords landowners **not wishing** to be

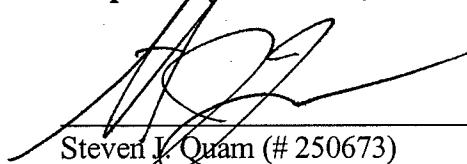
⁷ Of course, if Representative Bly’s intention had been carried through into the statute and Petitioners were given the same discretion as the Mn/DOT Commissioner, Petitioners’ position on this motion demonstrates that it would exercise that discretion and decline to expand the taking.

adjacent to such right-of-ways the opportunity to obtain expeditiously the **fair market value** of their property and go elsewhere.” *Coop. Power Ass’n v. Aasand*, 288 N.W.2d 697, 700 (Minn. 1980) (emphasis added). In this case, if the Court adopts Petitioners’ position, that is exactly what will happen.⁸ Ms. Stice and Mr. Shore, who do not wish to be adjacent to the utility right-of-way, will obtain the fair market value (not more than fair market value) for their entire property. And they will go elsewhere.

CONCLUSION

For the reasons stated above and in Petitioners’ memorandum on its related motion, Petitioners ask the Court for an order declaring that the relocation benefits and minimum compensation provisions of Chapter 117 are not available under Minn. Stat. § 216E.12, subd. 4, as applied to Ms. Stice and Mr. Shore’s election.

Respectfully submitted,



Steven J. Quam (# 250673)

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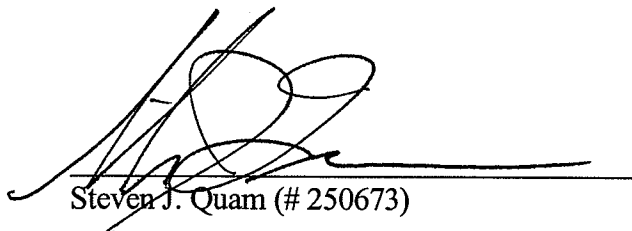
Dated: May 6, 2011

⁸ The Petitioners’ appraisal for the entire Stice/Shore property is \$745,000.00.

ACKNOWLEDGMENT

The undersigned acknowledges that sanctions may be awarded pursuant to *Minnesota Statutes*, Section 549.211 (2010).

Dated: May 6, 2011



Steven J. Quam (# 250673)

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WRIGHT

TENTH JUDICIAL DISTRICT

Northern States Power Company (d/b/a Xcel Energy) a Minnesota corporation, by its Board of Directors; Great River Energy, a Minnesota cooperative corporation, by its Board of Directors; ALLETE, Inc. (d/b/a Minnesota Power), a Minnesota corporation, by its Board of Directors; Western Minnesota Municipal Power Agency, a municipal corporation and political subdivision of the state of Minnesota, by its Board of Directors; and Otter Tail Power Company, a Minnesota corporation, by its Board of Directors,

Petitioners,

vs.

Scott J. Sypnieski, *et al.*,

Respondents.

**PETITIONERS' MEMORANDUM
IN OPPOSITION TO CAROL A.
STICE AND DAVID C. SHORE'S
REPLY TO PETITIONERS'
RESPONSE TO MS. STICE AND
MR. SHORE'S NOTICE OF
INTENT PURSUANT TO
MINNESOTA STATUTE 216E.12**

(Parcels MQ015 and MQ016)

File No. CV-10-7551

Case Type: Condemnation

**IN THE MATTER OF THE CONDEMNATION OF CERTAIN REAL ESTATE
IN THE COUNTY OF WRIGHT, STATE OF MINNESOTA,
FOR HIGH VOLTAGE TRANSMISSION LINE PURPOSES**

INTRODUCTION

In connection with a Stearns County condemnation proceeding for the same CapX2020 project (*N. States Power Co., et al. vs. Spears, et al.*, Stearns Cnty. Ct. File No. 73-CV-10-9472), counsel for Petitioners and counsel for Ms. Stice and Mr. Shore have been working on establishing a process to govern BTF elections. Although the parties have not yet reached an agreement on the process, they have made a great deal of progress. Further, they have agreed that any unresolved issues regarding the process will be submitted to the Honorable Frank Kundrat, Judge of Stearns County District Court, on June 3, 2011. Petitioners are hopeful that the parties will be able to reach an agreement by June 3, 2011. If they cannot, Petitioners

suggest that the submissions made in Stearns County also be filed in Wright County, and that this Court reserve its decision regarding the process at least until those submissions are made.

Because Ms. Stice and Mr. Shore have asked to be heard on this issue at the May 16 hearing before this Court, however, Petitioners submit this memorandum, which sets forth Petitioners' proposal on how BTF matters should proceed, for the Court's consideration.

ARGUMENT

I. THE BTF STATUTE REQUIRES THAT THE PROPERTY DESCRIBED IN A BTF ELECTION BE COMMERCIALY VIABLE.

Section 216E.12, Subd. 4 of the *Minnesota Statutes* provides in part:

When private real property that is an agricultural or nonagricultural homestead, nonhomestead agricultural land, rental residential property, and both commercial and noncommercial seasonal residential recreational property, as those terms are defined in section 273.213 is proposed to be acquired for the construction of a site or route for a high-voltage transmission line with a capacity of 200 kilovolts or more by eminent domain proceedings, the fee owner, or when applicable, the fee owner with the written consent of the contract for deed vendee, or the contract for deed vendee with the written consent of the fee owner, **shall have the option to require the utility to condemn a fee interest in any amount of contiguous, commercially viable land** which the owner or vendee wholly owns or has contracted to own in undivided fee and elects in writing to transfer to the utility within 60 days after receipt of the notice of the objects of the petition filed pursuant to section 117.055. Commercial viability shall be determined without regard to the presence of the utility route or site.

(Emphasis added). Pursuant to the BTF statute, in order for a property to be eligible for a BTF election, it must be commercially viable.

A. Commercial Viability Necessarily Means Marketability.

Although the phrase "commercially viable land" is not defined, commercial viability is inextricably linked to marketability. In short, if a property cannot be transferred, for whatever reason, it cannot be "commercially viable," as the property cannot be sold. Thus, common sense

dictates that, in order for a parcel of property to be eligible for a BTF election, the property defined by the BTF election must be marketable. Stated another way, once the Petitioners obtain title and possession to the BTF property, they must be able to sell it.

B. Like any Other Proceeding, Ms. Stice and Mr. Shore Have the Burden of Proof With Respect to the Elements of Their Claim.

Although the BTF statute does not provide a definition of “commercially viable,” it contemplates that a factual determination regarding whether the described property is commercially viable may need to occur: “Commercial viability shall be determined without regard to the presence of the utility route or site.” Minn. Stat. § 216E.12, Subd. 4. If a fact issue regarding commercial viability arises, the question becomes how that issue is resolved. It is here where the parties’ positions diverge.

Ms. Stice and Mr. Shore contend that they do not have to do anything to establish commercial viability. Instead, under the Stice/Shore theory, they simply need to draw a line, and make a written election under Minn. Stat. § 216E.12, Subd. 4. Once that occurs, they contend, the property is presumed to be commercially viable. The burden, then, under the Stice/Shore theory, is on Petitioners – who may or may not have had access to the BTF property – to prove that the elected property is not commercially viable.

The Stice/Shore theory is not consistent with the allocation of burdens in a typical civil lawsuit, where “the party who stands to benefit from the establishment of the affirmative of a proposition of fact essential to a claim bears the burden of proof as to that proposition.” *Chemlease Worldwide Inc. v. Brace, Inc.*, 338 N.W.2d 428, 437 (Minn. 1983). Moreover, because they are seeking the benefit of the BTF statute, the Stice/Shore theory violates “[t]he general rule . . . that the burden proof rests on the party seeking the benefit from a statutory

provision.” *C.D. v. Doe*, 757 N.W.2d 343, 353 (Minn. 2008). There is no reason to diverge from the general rule.

In this case, Ms. Stice and Mr. Shore have made the allegation that the BTF property is commercially viable. To be eligible under the BTF statute, the property must actually be commercially viable. As Ms. Stice and Mr. Shore are the parties seeking to obtain the benefit of the BTF statute, they must bear the burden of proving the commercial viability of their land. This includes, among other things, demonstrating compliance with applicable restrictions on conveyances of property in Wright County. If they do not (or cannot) do so, they are not entitled to obtain the benefits of the BTF statute.¹

Section 117.041 of the *Minnesota Statutes*, which governs a petitioner’s ability to enter upon land to conduct surveys and other examinations in condemnation proceedings, does not support the Stice/Shore position. The fact that Petitioners have the ability to enter the property to conduct surveys and examinations – surveys and examinations that relate to the construction of the transmission line – does not change the burden of proof any more than the right to take a deposition in a civil matter shifts the burden of proof.

C. Applying the “General Rule” Does not Place an Extraordinary Burden on Ms. Stice and Mr. Shore.

In their brief, Ms. Stice and Mr. Shore contend that Petitioners – by making sure that Petitioners will be able to sell the property that they are being required to acquire – are somehow placing an extraordinary burden on Ms. Stice and Mr. Shore. That is not the case. Instead, requiring Ms. Stice and Mr. Shore to prove their land is commercially viable simply places the

¹ It is significant that, although Petitioners could put Ms. Stice and Mr. Shore to their burden of proof in this proceeding, the process the parties are working to establish could allow Ms. Stice and Mr. Shore to satisfy their obligations in a less burdensome setting. For example, certain issues relating to the commercial viability of the Stice/Shore property could be dealt with through representations and warranties made by Ms. Stice and Mr. Shore, rather than requiring them to bear the actual costs of the work.

same burdens on Ms. Stice and Mr. Shore that any seller bears. Take the issue regarding septic systems: Wright County ordinances prohibit a person from conveying a property with a residence without a certification that the septic system is in compliance with the applicable code. *See* Wright County Ordinance 716.2(22). Consistent with the Ordinance, the Wright County Recorder will not record a deed for a residence without the septic system certificate. In short, unless there is a septic system certificate, the property cannot be transferred.

Outside of this project, if the property were ever sold, Ms. Stice and Mr. Shore would be obligated to provide a septic system certificate to complete the transaction. A burden faced by every other owner who makes the decision to sell their property does not seem unreasonable, or extreme. By requiring Ms. Stice and Mr. Shore to do the same thing that every other seller in the market does, the Court would not be placing an unreasonable burden on Ms. Stice and Mr. Shore.

Ms. Stice and Mr. Shore contend that the Supreme Court in *Aasand* contemplated that part of the purpose of the BTF statute was to shift “the transactional costs from the homeowner to the power utility company.” (Stice/Shore Br., p. 4). That is not what *Aasand* says. Instead, a closer reading of *Aasand* reveals that the Supreme Court had a much narrower (and more precise) view of the costs that would be shifted.

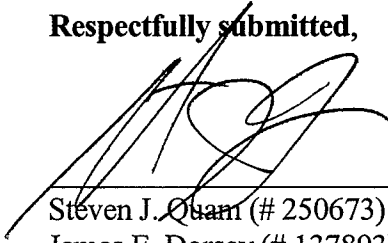
In *Aasand*, the Supreme Court recognized that the statute “eases the difficulties of relocation by **shifting the transaction cost of locating a willing purchaser** [for the property burdened by a transmission line] from the landowner to the utility.” *Coop. Power Ass’n v. Aasand*, 288 N.W.2d 697, 700 (Minn. 1980). The Supreme Court’s reference to the shifting of transaction costs is specific – the costs related to “locating a willing purchaser” are being shifted.

The Supreme Court did not state, as Ms. Stice and Mr. Shore infer, that the purpose of the statute was to shift all of the costs associated with a transaction.

CONCLUSION

For the reasons stated above, Petitioners ask the Court for an order declaring that the Ms. Stice and Mr. Shore have the burden of proving that their property is “commercially viable land” under Minn. Stat. § 216E.12, Subd. 4.

Respectfully submitted,



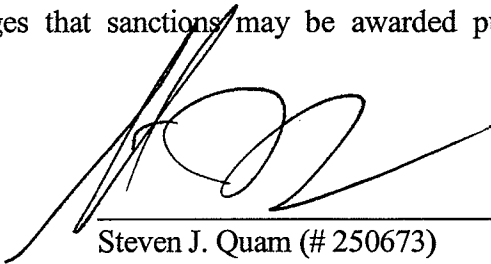
Dated: May 6, 2011.

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ACKNOWLEDGMENT

The undersigned acknowledges that sanctions may be awarded pursuant to *Minnesota Statutes*, Section 549.211 (2010).



Dated: May 6, 2011.

Steven J. Quam (# 250673)

Northern States Power Company, *et al.* vs. Scott J. Sypnieski, *et al*
Wright County District Court File No. CV-10-7551

AFFIDAVIT OF SERVICE
VIA ELECTRONIC E-MAIL AND U.S. MAIL

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

Jennifer Bjorklund, being first duly sworn on oath, deposes and states that on the 6th day of May, 2011, she served the following:

1. Petitioners' Memorandum in Opposition to Carol A. Stice and David C. Shore's Motion Regarding Chapter 117 of the Minnesota Statutes (Parcels MQ015 and MQ016); and
2. Petitioners' Memorandum in Opposition to Carol A. Stice and David C. Shore's Reply to Petitioners' Response to Ms. Stice and Mr. Shore's Notice of Intent Pursuant to Minnesota Statute 216E.12 (MQ015 and MQ016)

upon the parties on the attached Service List by electronic email to counsel, and by placing a true and correct copy thereof in an envelope, addressed as indicated on the Service List, postage prepaid, and depositing the same in United States mails at Minneapolis, Minnesota.

Jennifer Bjorklund

Jennifer Bjorklund

Subscribed and sworn to before me
this 6th day of May, 2011

J. Costilla

Notary Public

