

STATE OF WISCONSIN  
IN THE SUPREME COURT

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OF WISCONSIN**

Consolidated Appeal Nos. 2012AP805 and 2012AP840

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SCOTT N. WALLER AND LYNNEA S. WALLER,

Plaintiffs-Respondents,

v.

AMERICAN TRANSMISSION COMPANY LLC,

Defendant-Appellant.

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On Bypass from the Court of Appeals, District II  
Appeal from Final Judgments of the Circuit Court of  
Walworth County, the Hon. James L. Carlson Presiding,  
Circuit Court Case Nos. 2008CV520 and 2010CV691

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**INITIAL BRIEF AND SUPPLEMENTAL APPENDIX  
OF AMERICAN TRANSMISSION COMPANY LLC**

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## INTRODUCTION

“Little value.” “Substantially impaired economic viability.” These two phrases—elements of the statutory definition of an uneconomic remnant in condemnation cases—are valuation concepts. They are unrelated to the right to condemn property, which has never been at issue here.<sup>1</sup>

The court of appeals, however, now requires uneconomic remnant challenges to be resolved in free-standing right-to-take actions *before* valuation is determined.<sup>2</sup> This judicially created procedure contradicts the condemnation statute’s directive that a landowner’s right-to-take challenge “*shall not prevent* a condemnor from filing the petition [to determine just compensation] *and*

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<sup>1</sup> Even though the Wallers initiated a right-to-take action, they acknowledge that they do not contest ATC’s right to take. *E.g.*, R.111:15, 20.

<sup>2</sup> *Waller v. Am. Transmission Co. LLC*, 2011 WI App 91, 334 Wis.2d 740, 799 N.W.2d 487 (*Waller II*); *Waller v. Am. Transmission Co. LLC*, 2009 WI App 172, 322 Wis.2d 255, 776 N.W.2d 612 (*Waller I*).

*proceeding thereon.*” Wis. Stat. § 32.06(5)(emphases added).

This Court can and should resolve the conflict between the court of appeals’ newly-created condemnation procedure and the condemnation statute’s plain language, thereby ending the inefficiency, delay, and added expense in this case and, as a direct result of *Waller I* and *II*, in other cases.

The unauthorized procedural obstacle imposed by *Waller I* and *II* does not safeguard property rights. Instead, it merely imposes added time and expense. Without an uneconomic remnant claim, landowners have complete remedies for any condemnation-related wrong:

- A landowner, unhappy with the compensation offered, may challenge the amount of compensation in a “valuation action.” See Wis. Stat. § 32.06(7)–(10).
- A landowner, if a condemnor takes property without compensation, may bring an “inverse condemnation action.” See Wis. Stat. § 32.10.
- A landowner, if a condemnor takes property without a public purpose (*see* Wis. Const. art. 1,

§ 13) or if there is a fundamental defect in the takings procedure, may bring a “right-to-take action.” Wis. Stat. § 32.06(5); *Warehouse II, LLC v. Wis. DOT*, 2006 WI 62, ¶ 13, 291 Wis.2d 80, 715 N.W.2d 213.

Landowners Scott and Lynnea Wallers’ (the “Wallers”) “uneconomic remnant” challenge—if such a claim can be brought at all—belongs in a valuation action, not in a separate right-to-take action. Given the safeguards built into the condemnation code, the whole-cloth procedure created by *Waller I* and *II* upends the balance between individual property rights and the public interest in efficient, economical condemnation procedures.

Throughout these proceedings, American Transmission Company LLC and its corporate manager, ATC Management Inc. (“ATC”), adhered to the sequential requirements of the condemnation statutes. ATC first negotiated with the Wallers to purchase an easement. *See* Wis. Stat. § 32.06(2a). Later, *ATC offered to acquire the*

*entire property.* See Wis. Stat. § 32.06(3m) (a condemnor “shall offer to *acquire*” any uneconomic remnant); RR.43, Ex.643; RR.55:246.<sup>3</sup> When negotiations failed, ATC made a jurisdictional offer—not for the whole parcel but, rather, for the smallest property interest required to fulfill the transmission line project’s public purpose, a utility easement. See Wis. Stat. § 32.06(3). Ultimately, that offer *exceeded* both the condemnation commission award and the jury verdict of just compensation. By “completing all of the statutory steps” required by the “exclusive procedure” of the condemnation code, ATC had the right to condemn the easement. See *Warehouse II*, 291 Wis.2d 80, ¶¶ 8-9.

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<sup>3</sup> “R.\_\_:\_\_” refers to the record in the right-to-take case (No. 2012AP840). “RR.\_\_:\_\_” refers to the record in the relocation case (No. 2012AP805). In both citations, the number before the colon identifies the record number and the number after the colon identifies the page number. “App.\_\_\_\_” refers to the page number of the appendix that accompanied ATC’s initial brief in the court of appeals, 17 additional copies of which were filed on January 22, 2013. “Supp. App.\_\_\_\_” refers to the page number in the Supplemental Appendix submitted with this brief.

The Wallers' uneconomic remnant challenge should not have been allowed to proceed in the first instance. That is why the first circuit court to evaluate the claim dismissed it. R.53. Yet, once the court of appeals reinstated—impermissibly—the Wallers' right-to-take action, the second circuit court to evaluate the claim correctly entered judgment: the Wallers' property cannot be an uneconomic remnant because it retains economic viability and substantial value. R.197; R.208:41-42. The final judgment in the right-to-take case (R.283)—the circuit court's third review of the issue—should therefore be reversed.

The final order awarding the Wallers litigation expenses and the final judgment awarding relocation benefits also should be reversed. The statutory basis for shifting fees to ATC cannot apply—the Wallers have never challenged ATC's right to condemn the property described in the jurisdictional offer. Further, because their relocation was

voluntary, the Wallers cannot meet the statutory definition of “displaced persons” necessary to trigger relocation benefits. Their house remains a habitable dwelling. A decision to move voluntarily cannot entitle a landowner to relocation expenses.

### **ISSUES PRESENTED FOR REVIEW**

1. If a landowner can bring such a claim, how must a landowner raise a claim that a condemner has taken too *little* property, leaving the landowner with an uneconomic remnant: in a valuation proceeding, in an inverse condemnation action, or in a right-to-take action?

#### ***Court of Appeals in Waller I and Waller II answered:***

A landowner must bring an uneconomic remnant claim in a right-to-take action under Wis. Stat. § 32.06(5).

2. Did the circuit court properly interpret and apply Wis. Stat. § 32.06(3m) to conclude that the Wallers’ property is an uneconomic remnant?

*Circuit court answered:* Yes, implicitly.

3. May a landowner recover litigation expenses under Wis. Stat. § 32.28(3)(b), or any other statute, for a judicial ruling that the property that remains after a taking is an uneconomic remnant?

*Circuit court answered:* Yes.

4. ATC condemned a transmission-line easement on the Wallers' property that did not physically or legally require them to move. Are the Wallers nonetheless displaced, entitling them to relocation benefits based on unsubstantiated and subjective concerns about the alleged effects of the transmission line?

*Circuit court answered:* Yes.

#### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

ATC requests oral argument and publication. This appeal presents several issues of first impression that are

already recurring, including the proper interpretation and procedural application of the uneconomic remnant statute.

### **STANDARD OF REVIEW**

This case presents questions of statutory interpretation and the application of statutes to fact. The dispute over an uneconomic remnant poses questions of statutory interpretation, which this Court reviews *de novo*. *Brenner v. New Richmond Reg'l Airport Comm'n*, 2012 WI 98, ¶ 36, 343 Wis.2d 320, 816 N.W.2d 291.

The circuit court's uneconomic remnant conclusion must be reviewed under a two-part standard. Findings of fact will be upheld unless clearly erroneous. *Id.*, ¶ 36. However, “the interpretation of the statutes and the application of the statutes to undisputed facts” are determined independently of the circuit court. *Klemm v. Am. Transmission Co. LLC*, 2011 WI 37, ¶ 17, 333 Wis.2d 580, 798 N.W.2d 223.

## STATUTE AT ISSUE

### Wis. Stat. § 32.06(3m)

In this section, “uneconomic remnant” means the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability. If acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

## STATEMENT OF FACTS

These appeals, in their essence, originate from proceedings before the Public Service Commission of Wisconsin and the Wisconsin Department of Natural Resources (“DNR”). Before ATC can undertake work on most high voltage transmission line projects—including the one that ultimately affected the Wallers’ property—both the Public Service Commission and the DNR must approve all aspects of the project. *See* Wis. Stat. § 196.491(3); *see also* *Wis. Indus. Energy Group v. Public Serv. Comm’n*, 2012 WI 89, ¶¶ 26-38, 342 Wis.2d 576, 819 N.W.2d 240 (describing

issuance of a certificate of public convenience and necessity (“CPCN Permit”).

As part of its regulatory approval process, the Public Service Commission considered the safety and public health implications of the proposed transmission line, including its distance from houses and other buildings, and the associated electromagnetic fields. RR.55:171-76, 181; *see also* RR.43, Exs.613, 627:18-28. The transmission line complied with every applicable national and state electrical and safety code, including those defining safe distances from a dwelling. RR.55:175, 212-18 (Public Service Commission has authority to alter a proposed transmission-line route to accommodate individual landowners and potential hardships).

On March 30, 2006, the Public Service Commission issued a CPCN Permit to ATC to construct the 138-kilovolt transmission line along the Wallers’ property. RR.43, Ex.660. Following the approved route, and *after offering the*

*Wallers to place the transmission line along just one side of their property* (R.304:64-65), ATC acquired a 45-foot-wide easement along two sides of the property. *E.g.*, R.259, Ex.201.

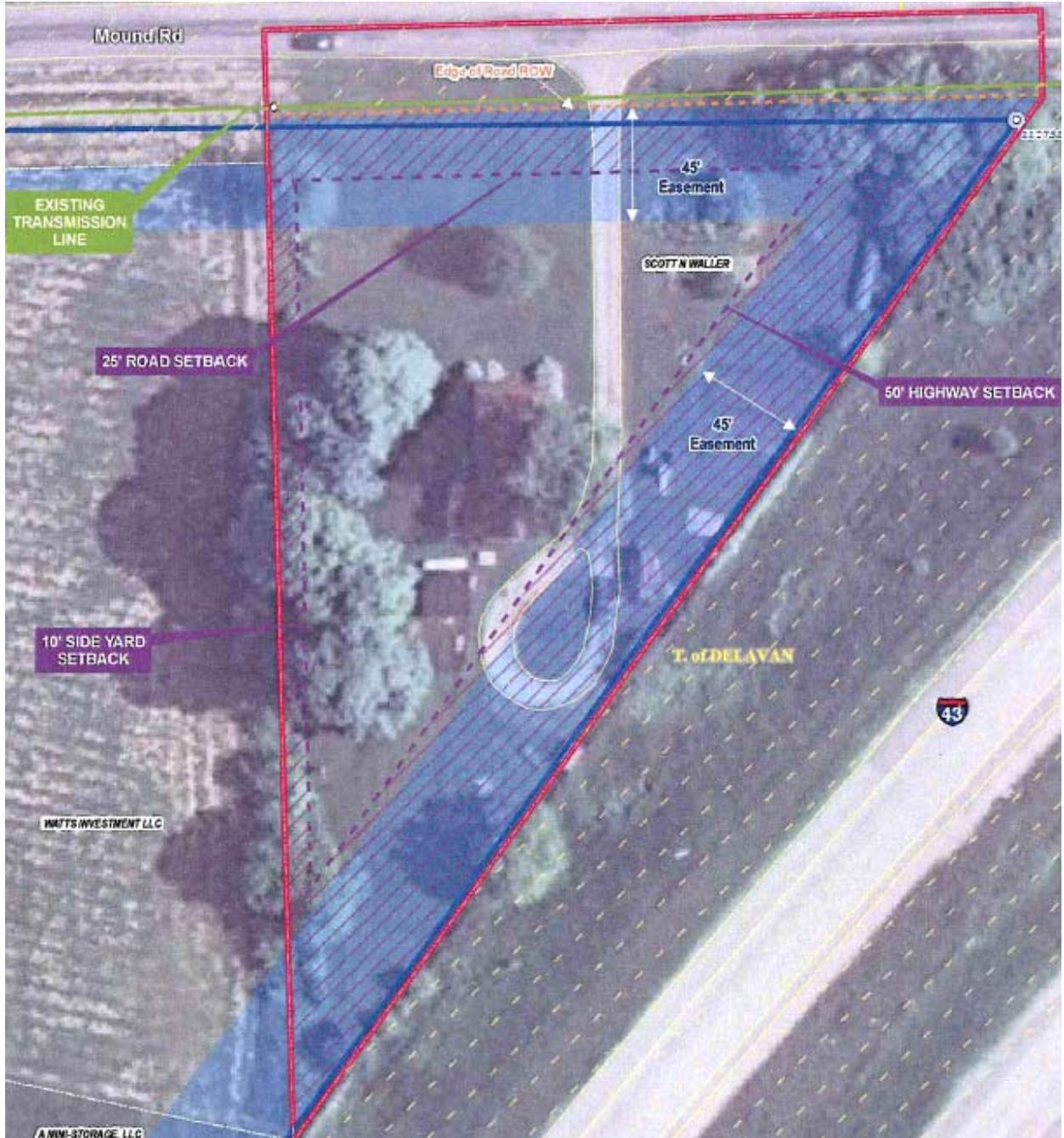
The Wallers own a house on a 1.5-acre triangular lot in the Town of Delavan. App.1. Their property is bounded to the east by Interstate 43, to the north by Mound Road and a retention pond, and to the west by a vacant lot. R.304:60-62; R.259, Exs.234, 235.

The area around the Wallers' Mound Road home changed dramatically between the time they purchased it in 1989 and 2008 when ATC obtained the easement. R.304:9, 59. The Wallers bought a rural farmette surrounded by agricultural land, but by 2008, the property was surrounded by an industrial park. R.304:59-60.

Even before ATC acquired the easement, the property was subject to two notable encumbrances. First, a 69-kilovolt

transmission line with a 20-foot-wide transmission-line easement burdened the property along Mound Road well before the Wallers purchased it. R.304:59. Second, highway setbacks restricted structures on both the Mound Road and interstate sides of the property. Altogether, the setbacks—extending 50 feet deep into the property along Interstate 43 and 25 feet deep along Mound Road—encumber more than 47 percent of the lot. R.296:20; *see* R.259, Ex.201.

After the taking, ATC upgraded the existing transmission line and added a transmission line along Interstate 43. ATC placed a single pole in the northeast corner of the property, adjacent to the overpass of the interstate and Mound Road. *E.g.*, R.259, Ex.201. The following overview of the Wallers' property, excerpted from Exhibit 201, shows the transmission line and easement.



Though the Wallers were not pleased with the transmission line, they confirmed that it did not have a significant effect on the property's use. R.304:58, 63 (noting the loss of four deciduous trees along the interstate and testifying about various problems allegedly caused by the transmission line). Besides, the Wallers, in consultation with ATC, selected the final location of the transmission line rather than an alternative that would have passed only one side of their property. R.304:64-65.

The Wallers continued living in their Mound Road home until August 15, 2009, nearly one year after the upgraded transmission line was energized at 69 kilovolts and more than four months after the line was fully energized at 138 kilovolts. R.304:44-45; R.296:181. They could have continued to live there. *See* R.304:58 (confirming that the house was in good condition); *see also* R.298:60;

R.113:12-13 (the Wallers' appraiser confirming that the residence remains livable and usable).

Though living in the house was—and is—still one possible use of the property, the appraisers agreed that the utility's taking shifted the property's highest and best use to light industrial use. R.304:95; R.297:60. For most potential buyers seeking light industrial property, both appraisers agreed that the residential improvements contributed negative value—logically, since they would likely have to be removed. R.304:99; R.297:60. The appraisers treated the residential improvements as “obsolete” solely for purposes of their highest-and-best-use valuations. R.304:95; R.298:79-80, 145-46. However, John Rolling, ATC's expert, explained that the improvements contribute value for certain uses, R.298:61, and that the property retains its full utility as a residence:

You can sell this house as a residence to somebody else.  
You could rent this place to somebody else as a

residence. It is just that we believe that there was more value in the property now as vacant industrial than as residential. It does not mean that you cannot do or continue the [residential] use.

R.298:71; *see id.* at 84, 145 (“That is a property where people could go on living in it just as they had before”).

### **STATEMENT OF THE CASE**

In 2008, ATC condemned an easement on the Wallers’ property. Three lawsuits followed.

These consolidated appeals arise out of final judgments and orders entered in two of the cases—the right-to-take case (No. 2008CV520) and the relocation benefits case (No. 2010CV691). The appeals also implicate the valuation case (No. 2008CV955), though neither party appealed the jury verdict assigning \$38,000 in remaining value to the property after the taking of the easement.<sup>4</sup> *See*

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<sup>4</sup> By statute, parties have a right to a jury trial to determine just compensation. Wis. Stat. § 32.06(10).

R.187. To date, the valuation verdict and the resulting judgment have never been appealed or vacated.

After negotiations to purchase either the easement or the entire property failed, ATC made a jurisdictional offer—for the easement only—of \$99,500 on March 20, 2008.

R.259, Ex.1; R.304:79. The Wallers rejected both ATC’s offer to acquire the entire property and the jurisdictional offer.

On April 25, 2008, the Wallers filed this right-to-take challenge, alleging that the taking would leave them with a “valueless” remnant. R.1:4. They did not, nor have they ever, challenged ATC’s right to the easement. Days later, ATC filed its petition to determine just compensation.

On June 11, 2008, the Walworth County Condemnation Commission (“Commission”) viewed the property and received evidence of its before- and after-taking value. *See* R.51, Exs.10-11. The Commission valued the

Wallers' property after the taking at \$40,000, R.47, and the Wallers appealed. R.119.

***The Circuit Court's First Uneconomic Remnant Decision***

The Wallers' right-to-take case and ATC's valuation case proceeded on parallel tracks.<sup>5</sup> On November 5, 2008, the circuit court (Judge Kennedy) dismissed the right-to-take case for the first time. R.113:68; R.53. The court held that an uneconomic remnant claim must be decided in a valuation proceeding, not in a separate right-to-take action.

R.113:65-66. Otherwise, the court concluded, a landowner would "get two kicks at the cat...." R.113:65. The Wallers appealed the dismissal.

***Waller I: The First Appellate Decision***

On October 28, 2009, the court of appeals reversed the circuit court's dismissal, directing the circuit court "to make a

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<sup>5</sup> Three judges have issued decisions, signing final judgments in these cases: the Hons. Robert J. Kennedy, John R. Race, and James L. Carlson.

determination whether ATC's taking creates an uneconomic remnant" in the right-to-take case. *Waller I*, 322 Wis.2d 255, ¶ 17. The court reasoned that "an action to declare an uneconomic remnant is just the type of procedural matter that is meant to be resolved prior to addressing the adequacy of compensation." *Id.*, ¶ 16.

***Post-Remand Proceedings: The Valuation Trial and Second Uneconomic Remnant Decision***

On remand, the circuit court (Judge Race) recognized that the before- and after-taking values were indispensable to the uneconomic-remnant analysis. Accordingly, the court first conducted a three-day jury trial in the valuation case. R.205-207. The jury returned a verdict valuing the property before the taking at \$132,000 and after the taking at \$38,000. R.187. The compensation award of the difference, \$94,000, was *less than* ATC's jurisdictional offer of \$99,500.

After the valuation trial, the circuit court incorporated the record and verdict from the jury trial into the right-to-take record. The court made the following findings:

- The Wallers lived in their house for a year after ATC condemned the easement. R.208:13.
- The Wallers' house is "up to date," allowing people to live comfortably. R.208:14, 16, 32.
- The Wallers' property remains of sufficient size to allow meaningful use. R.208:21, 29, 41 (listing potential uses of the property).
- The improvements retained substantial value after the taking. R.208:11, 14-15, 27-28, 41-42.

Based on these findings and the jury verdict, the court concluded that the Wallers' property was not an uneconomic remnant: it retained substantial value and economic utility after the taking. R.208:8-10, 12-16, 29-32, 40-42. The circuit court dismissed the case, R.103, and the Wallers appealed. R.105.

***Waller II: The Second Appellate Decision***

On May 25, 2011, the court of appeals again reversed the circuit court. *Waller II*, 334 Wis.2d 740. This time, the court held that a “circuit court must first hold an evidentiary hearing under section 32.06(5) to determine whether the remaining parcel is an uneconomic remnant.” *Id.*, ¶ 2. Only after making that determination may a court determine just compensation. *Id.* The court of appeals again remanded the case, directing: “If the circuit court finds that the Wallers’ property is an uneconomic remnant, the jury’s just compensation verdict is vacated.” *Id.*, ¶ 17.

***Post-Remand Proceedings: The Circuit Court’s Third Uneconomic Remnant Decision***

The circuit court then conducted a two-day trial in November 2011, in the right-to-take case. R.296, 298, 304. The same witnesses who testified previously in the three-day valuation trial, except one, testified in the right-to-take trial.

*Compare* R.205, 206 *with* R.296, 298, 304. The evidence and testimony were almost entirely cumulative.

At the conclusion of this trial, the court (Judge Carlson) ruled—contrary to the prior two circuit court rulings—that the remaining property was an uneconomic remnant. App.10-21. The court did not, however, make any findings as to the property’s before- and after-taking value or vacate the earlier valuation verdict. Instead, on March 2, 2012, the court entered final judgment against ATC, effectively nullifying the jury’s award of just compensation in a separate case, and imposing a revised just compensation award that required ATC to pay the Wallers an additional \$47,509.72 to acquire the entire property. App.7. ATC timely appealed.

***Hearing on Litigation Expenses***

On January 26 and February 1, 2012, the circuit court held a hearing on the Wallers’ claimed litigation expenses,

including expenses from the valuation case where the jury verdict was less than ATC's jurisdictional offer. The Wallers sought \$298,026.74 in litigation expenses. At the hearing, no witness testified that the litigation expenses were "reasonable" and "necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners ... or any court." *See* Wis. Stat. § 32.28(1). R.299, 300. Indeed, the Wallers did not call a single witness. Nor did they proffer an affidavit stating that the litigation expenses were reasonable and necessary. *See* R.274.

Over ATC's objection that the Wallers had not met their burdens of proof or persuasion, App.32, the circuit court entered its final order, awarding litigation expenses of \$211,261.74. App.8.

*The Relocation Benefits Case*

On January 25, 2012, the circuit court held a one-day trial in the relocation benefits case. RR.55. Again, the evidence mirrored that in the earlier trials.

The court concluded that the Wallers were displaced: the transmission line left them “with a property that was [not] suitable for a dwelling.” App.130. The court rejected the argument that to qualify as a displaced person, a landowner must be compelled to move because of physical or legal requirements that make it impossible to continue using the property as a residence. App.137. Accordingly, the court entered judgment for \$26,350.00 in relocation benefits. App.125.

ATC timely appealed; the Wallers did not cross-appeal. The right-to-take and relocation cases were consolidated for appeal on ATC’s motion. *See Court of*

Appeals Order (May 1, 2012). This matter is here on ATC's bypass petition, granted on January 28, 2013.

### **ARGUMENT**

#### **I. AN UNECONOMIC REMNANT CLAIM IS NOT A CAUSE OF ACTION.**

If the Wallers' property encumbered by the easement rendered the remaining property an uneconomic remnant, ATC would have been required, as condemnor, to "offer to acquire the remnant" concurrent with its offer to acquire "part of a property." Wis. Stat. § 32.06(3m). ATC disagreed that the statutory definition of an uneconomic remnant had been met, but it nevertheless offered to acquire the entire property as part of a consensual transaction. The Wallers refused. As a matter of law, ATC did all that the statute requires; the Wallers' claim should have been dismissed.

Nothing in the statute or elsewhere suggests that a condemnor must offer to acquire an uneconomic remnant at any price. Moreover, nothing suggests that the legislature

intended to create a separate cause of action for uneconomic remnant claims.

To the contrary, the statutory language and its legislative history disclose that the uneconomic remnant statute was intended to “give[] *condemnors* the *authority* to acquire uneconomic remnants.” (App.161 (emphasis added).) That is, the legislature intended to give condemnors permission to acquire more private property than otherwise necessary for a public purpose—not to give landowners a right to compel the acquisition of more property rights for more money. That remedy already exists in the inverse condemnation statute. *See* Wis. Stat. § 32.10.

Wisconsin Stat. § 32.06(3m) became law more than 30 years ago. *See* 1977 Wis. Ch. 440, § 5. The legislative drafting file discloses that this subsection was “based on” section 208 of the Uniform Eminent Domain Code (“Uniform Law”). App.161. Section 32.06(3m) mirrors the definition of

an uneconomic remnant in the Uniform Law, except that—due to an unexplained, handwritten addition—it substitutes the phrase “substantially impaired economic viability” for the much longer provision in the Uniform Law.<sup>6</sup> It appears the substitution was intended to allow condemnors to acquire landlocked remnants. *See* Special Committee on Eminent Domain, “Summary of Proceedings,” at 5 (Sept. 9, 1977), *reproduced at* App.170 (noting the statute would permit a condemnor to acquire a 30-acre parcel that becomes landlocked by a taking). This makes sense: the utility of an inaccessible property is “substantially impaired” and would

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<sup>6</sup> The Uniform Law defines an uneconomic remnant:

a remainder following a partial taking of property, of such size, shape, or condition as to be of little value or that gives rise to a *substantial risk that the condemnor will be required to pay in compensation for the part taken an amount substantially equivalent to the amount that would be required to be paid if it and the remainder were taken as a whole.*

National Conference of Commissioners on Uniform State Laws, Uniform Eminent Domain Code § 208(b) (1975) (emphasis added), reproduced at App.164.

likely require the condemnor to pay nearly as much for the part as for the whole.

The Comment to the Uniform Law explains that a condemnor should offer to acquire a remnant when the “acquisition would not be likely to increase total costs appreciably.” App.165. The fiscal estimate to 1977 Wisconsin Chapter 440 is consistent, stating that the purchase of uneconomic remnants may increase acquisition costs but that “the increased costs should be minimal.” App.162.

The legislative history thus confirms that “uneconomic remnants” should be determined by condemnors (not by landowners) based on the cost to acquire part of the property compared to the whole. Consequently, the additional cost to acquire the remnant would be part of a condemnor’s analysis of whether to acquire more property than necessary for a public use. Neither the statutory definition of an uneconomic remnant nor the legislative history suggests that the statute

was intended to allow a landowner to *compel* condemners to purchase more property.

In short, the legislature did not create a private cause of action for landowners to bring uneconomic remnant claims.<sup>7</sup> On this basis alone, the Wallers' uneconomic remnant claim can and should be dismissed.

**II. IF A LANDOWNER CAN BRING AN UNECONOMIC REMNANT CLAIM, IT MUST BE PART OF A VALUATION PROCEEDING OR, ALTERNATIVELY, THROUGH AN INVERSE CONDEMNATION ACTION.**

Throughout these proceedings, ATC has advocated “the just, speedy and inexpensive determination” (Wis. Stat.

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<sup>7</sup> This conclusion is consistent with other state and federal uneconomic remnant laws. *See, e.g.*, 42 U.S.C. § 4651(9); *accord* 23 C.F.R. § 710.105(b); 49 C.F.R. § 24.2(a)(27) (2012). Under the federal statute, a landowner has no right to judicial review of an agency's uneconomic-remnant determination. *Nall Motors, Inc. v. Iowa City*, 410 F. Supp. 111, 115 (S.D. Iowa 1975) (citing *Barnhart v. Brinegar*, 362 F. Supp. 464 (W.D. Mo. 1973)), *aff'd*, 533 F.2d 381 (8th Cir. 1976).

Likewise, under Oklahoma law, condemners have the right—by a statute substantially similar to Wis. Stat. § 32.06(3m)—to acquire uneconomic remnants. Okla. Stat. tit. 27, § 13(9) (emphasis added). Under this statute, a landowner has no right “to challenge [the condemner's] determination that the remaining property is an ‘uneconomic remnant.’” *State ex rel. DOT v. Evans*, 241 P.3d 273, 274-76 (Okla. Ct. App. 2010).

§ 801.01(2)) of the Wallers' uneconomic remnant challenge in a single proceeding. At a hearing on August 11, 2008, ATC offered:

I'll stipulate that the issue of whether or not there is a remnant and whether ATC is required to buy the whole property, those are all valuation issues, and I will not raise an objection in the valuation case to those issues being raised.

R.111:24. The Wallers refused.

ATC's position—consistent with the line of appellate cases before *Waller I* and *Waller II*—emphasizes judicial economy based on this Court's precedent:

Brief note may be taken of the existence of an additional potential problem resulting from the dual proceedings created by Statute (the owner's action under sec. 32.06(5) and the condemnation proceedings under sec. 32.06(7)). *Duplication of effort and expense may result if separate trials are held. We see no objection to consolidating the two proceedings for trial, as was done in the case at bar, provided the identities of the proceedings are preserved.*

*Falkner v. N. States Power Co.*, 75 Wis.2d 116, 135 n.9, 248 N.W.2d 885 (1977) (emphasis added). See R.56:1-2. Judge Race employed the *Falkner* procedure: consolidating the

proceedings for evidentiary purposes, but keeping them separate. R.76.

Despite the admonition in *Falkner, Waller II* reversed Judge Race's *Falkner*-inspired procedure. The result has been multiple evidentiary hearings and trials replete with repetitive evidence, contradictory and inconsistent conclusions, and still no legally sustainable result. Consistent with *Falkner*, uneconomic remnant disputes should be resolved in valuation proceedings or, alternatively, through inverse condemnation actions.

In *TFJ Nominee Trust v. Wisconsin DOT*, the landowner brought a right-to-take challenge, claiming that the condemnor either: (1) failed to include access rights allegedly affected by a taking in the jurisdictional offer, or (2) wrongly assigned no value to the lost access rights. 2001 WI App 116, ¶¶ 22-26, 244 Wis.2d 242, 629 N.W.2d 57. The court of

appeals held that a right-to-take challenge was *not* the proper forum. *Id.*, ¶ 26.

The landowner should have filed an inverse condemnation action if the condemnor failed to condemn the proper “bundle of rights” or, alternatively, the landowner should have challenged the compensation award in a valuation proceeding to seek additional damages for the access rights it believed were ignored. *Id.*, ¶¶ 25-26. “In any event the remedy is not to challenge the right to condemn ...” *Id.*, ¶ 26.

The Wallers’ position is like that of the landowner in *TFJ Nominee Trust*. The Wallers claim that ATC either failed initially to include the Wallers’ entire property in the jurisdictional offer, or failed to account for the full extent of the easement’s impact. The first argument belongs in an inverse condemnation action; the second argument should have been raised in the valuation proceeding—as it initially

was. Either way, the court of appeals wrongly required an uneconomic remnant claim to be brought in a right-to-take action.

**A. Disputes Over Uneconomic Remnants Should Be Resolved In Valuation Proceedings.**

Logic, the text of Wis. Stat. § 32.06, and judicial efficiency all dictate that uneconomic remnant determinations be part of the valuation process. The statutory definition of an uneconomic remnant leaves no doubt that disputes over remnants pose, at their core, valuation questions, not questions about the condemnor's right to take, which has *never* been disputed here.

Section 32.06(3m) defines an uneconomic remnant as “the property remaining *after* a partial taking of property, if the property remaining is of such *size, shape or condition* as to be of *little value* or of substantially impaired *economic viability*.” (Emphases added.) The relevant factors,

therefore, are: the size, shape, and condition of the property, and its value before and after the taking. Yet these same factors are indispensable in any valuation proceeding, where relevant evidence includes a “property’s usability, character and the market in which the property would be sold ....” See *Alsum v. Wis. DOT*, 2004 WI App 196, ¶ 19, 276 Wis.2d 654, 689 N.W.2d 68.

Such overlapping and interdependent determinations favor resolution in a unitary valuation proceeding, like the procedure approved in *Pulvermacher Enterprises v. Wisconsin DOT*, 166 Wis.2d 234, 239-41, 479 N.W.2d 217 (Ct. App. 1991). There, the court of appeals held that an adverse possession claim could be tried in a valuation proceeding because it affected just compensation. *Id.* Even though adverse possession is not typically part of a condemnation trial, the court held it should be part of the valuation proceedings because the legislature intended the

“regulatory scheme” of Chapter 32 “to provide an efficient, final resolution to the compensation question.” *Id.* at 241.

The analysis in *Pulvermacher* applies here. Just as adverse possession inevitably affected title and valuation, uneconomic remnant determinations will *always* affect title and the amount of just compensation. Here, the jury in the valuation case determined the remaining value of the property: \$38,000 after the taking. R.187. In reaching that decision, the jury heard all of the relevant evidence regarding the property’s size, shape, and condition as well as evidence of the real estate market and the Wallers’ preferences.

The very evidence heard by the jury in the valuation case is indispensable to the uneconomic remnant determination. Efficient resolution requires uneconomic remnant disputes to be raised, if at all, in valuation proceedings.

Procedurally, this protects landowners' rights and ensures judicial efficiency because—precisely as the court of appeals recognized—

The confusion here stems from the fact that the question of *the existence of an uneconomic remnant is difficult to separate from the determination of the value of the remnant*. By its very name, an uneconomic remnant seems to require valuation.

*Waller I*, 322 Wis.2d 255, ¶ 13 (emphasis added). In fact, separation is not just “difficult,” it is impossible because the same facts and evidence underlie both questions.

But the procedure judicially crafted in *Waller I* and *II* is indefensible for another reason: it defies the condemnation statutes. Wisconsin Stat. § 32.06 requires a condemnation commission to “immediately” value the property taken as long as the condemnor has the right to take any portion of it.

If the petitioner is entitled to condemn the property *or any portion of it*, the judge *immediately* shall assign the matter to the chairperson of the county condemnation commissioners for hearing under s. 32.08.

Wis. Stat. § 32.06(7) (emphasis added). The condemnation commission then conducts a hearing under sections 32.06(8) and 32.08, after which it files an award “specifying therein the property or interests therein taken and the compensation allowed the owner....” Wis. Stat. § 32.06(8); *see also* Wis. Stat. § 32.08(6)(b). Only after the award of compensation is made and *paid* by the condemnor does title pass, allowing a public project to proceed. *See* Wis. Stat. § 32.06(9)(b).

Throughout these cases, the Wallers have never disputed ATC’s right to condemn the easement. *E.g.*, R.111:15. The statutes, therefore, required that the valuation proceedings go forward without interruption.

Here the valuation eventually did proceed, albeit only after the first appeal. That will not always be the case—as a recent Dane County Circuit Court order demonstrates. *See Am. Transmission Co. LLC v. 8341 Murphy, LLC*, No. 2012CV2766. Supp. App.1, 12-13. There, the

condemnation commission and circuit court, following *Waller I* and *II*, indefinitely stayed the valuation proceedings, pending resolution of the uneconomic remnant claim. *Id.* at 1, 12-13, 23-24. Those decisions, in a case alleging that a transmission line might impair a commercial tenant's use of the parking lot for a tire store, are now on appeal in Case No. 2013AP72LV. This Court can take judicial notice of the *8341 Murphy* proceedings and the procedural corruption of Chapter 32's efficient "regulatory scheme" (*Pulvermacher Enterprises.*, 166 Wis.2d at 241) caused by *Waller I* and *II*.<sup>8</sup>

More egregious, *Waller I* and *II* disregard this Court's statement that valuation proceedings and right-to-take challenges proceed simultaneously, *Falkner*, 75 Wis.2d

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<sup>8</sup> The Wallers argue, in their response to ATC's motion for leave to file a supplemental brief (page 4), that this case, unlike *8341 Murphy*, did not present a risk of delay to the transmission-line project. Not so. The Wallers tried to prevent ATC from acquiring even an easement and tried to stay valuation proceedings. *See* R.109:4.

at 120, and the statutory prohibition against staying valuation proceedings:

*The commencement of an action by an owner under this subsection [§ 32.06(5)] shall not prevent a condemnor from filing the petition provided for in sub. (7) and proceeding thereon. Nothing in this subsection shall be construed ... to prevent the condemnor from proceeding with condemnation during the pendency of the action to contest the right to condemn.*

Wis. Stat. § 32.06(5) (emphasis added).

*Waller I* and *Waller II* cannot be reconciled with section 32.06. These decisions should be reversed, and the judgments of two circuit court judges dismissing the Wallers' uneconomic remnant claim reinstated.

**B. Alternatively, Uneconomic Remnant Disputes Should Be Resolved Through Inverse Condemnation Actions.**

The Wallers, through their uneconomic remnant challenge, seek greater compensation by compelling ATC to acquire more property than necessary for a public purpose. This parallels inverse condemnation, where a landowner may seek compensation because a condemnor has effectively

taken property by “depriv[ing] the owner of all, or substantially all, of the beneficial use of his property.” *E-L Enters. v. Milwaukee Metro. Sewerage Dist.*, 2010 WI 58, ¶ 37 & n.24, 326 Wis.2d 82, 785 N.W.2d 409; *see* Wis. Stat. § 32.10. Courts equate the “beneficial use” of property with “economically viable” use. *See, e.g., Howell Plaza, Inc. v. State Highway Comm’n*, 92 Wis.2d 74, 86, 284 N.W.2d 887 (1979); *Mentzel v. Oshkosh*, 146 Wis.2d 804, 810-11, 432 N.W.2d 609 (Ct. App. 1988) (using interchangeably the terms “all beneficial use” and “all viable economic use”).

This substantive similarity, as well as the use of nearly identical language in the uneconomic remnant statute (“substantially impaired economic viability”) and inverse condemnation cases (deprived of “all viable economic use” or “substantially all of the beneficial use”), leaves inverse condemnation actions as the only alternative to valuation proceedings for resolving uneconomic remnant disputes.

The court of appeals itself has confirmed that landowners in the Wallers’ position may bring an inverse condemnation action after a condemnor initiates condemnation and pays just compensation for a partial taking. *Wikel v. Wis. DOT*, 2001 WI App 214, ¶ 3, 247 Wis. 2d 626, 635 N.W.2d 213. The landowner in *Wikel* brought an inverse condemnation action after accepting compensation for a partial taking, alleging that the DOT damaged her house, “rendering it ‘uninhabitable and unsaleable,’ and resulting in a ‘total, permanent taking’ without just compensation.” *Id.*, ¶ 4. The appellate court reversed the dismissal of the landowner’s claim, holding that she was entitled to prove her inverse condemnation claim. *Id.*, ¶ 17.

If uneconomic remnant disputes truly raise issues other than title or just compensation—such as whether a partial taking rises to “occupancy” (*see* Wis. Stat. § 32.10) or “deprivation of beneficial use”—that cannot be fully

addressed through a valuation proceeding, then landowners may initiate inverse condemnation consistent with *Wikel* and section 32.10.

Indeed, the Wallers alleged that the partial taking of the easement left their residential improvements “valueless,” evoking the inverse condemnation standard. R.1:4, ¶ 6. Yet the jury’s decision in the valuation case clearly established that the property has value, and the Wallers concede they cannot meet the standard for inverse condemnation.

R.300:116-19.

Since the facts here fail to qualify for inverse condemnation, they must fail, correspondingly, to establish an uneconomic remnant. The Wallers’ property retains substantial value, and the evidence shows that it remains useful for several reasonable purposes. They were left, then, with an appeal of the valuation award as their remedy. That

verdict and judgment, however, are the only judicial determinations in these cases that have not been appealed.

The valuation trial and an appeal of the just compensation award fully safeguarded the Wallers' rights. The jury considered all evidence relevant to fair market value, including evidence of any severance damages to the remainder. *See* Wis. J.I.–Civil 8101, 8102. The Wallers may be dissatisfied with the just compensation awarded, but this cannot justify giving them a “second kick at the cat” by judicial creation of a right to bring an uneconomic remnant claim in a separate procedural track. The Wallers have already received just compensation and the full extent of due process necessary to protect their property rights.

The purpose of the condemnation statutes is to protect private property interests and ensure just compensation while simultaneously allowing the expeditious transfer of title to condemned property for a public use (but no more than

necessary). Including the uneconomic remnant determination in the valuation process or, alternatively, in the inverse condemnation action preserves landowners' rights without needlessly impeding the Chapter 32 process. The *Waller I* and *II* decisions do not.

### **III. THE WALLERS' PROPERTY IS NOT AN UNECONOMIC REMNANT.**

Even if a landowner could maintain an uneconomic remnant claim as part of a right-to-take action, the Wallers' property is not an uneconomic remnant. Concluding otherwise and contradicting the two earlier decisions, the circuit court committed at least two fundamental errors of law. First, the court refused to apply a narrow standard of judicial review, refusing to give any deference to ATC's decision on the property taken. Second, the court applied an improper *subjective* standard. Under the proper objective standard, the facts properly of record support the conclusion,

as a matter of law, that the property is not an uneconomic remnant.

**A. Judicial Review Of ATC’s Uneconomic Remnant Determination Is Narrow: ATC’s Conclusion Should Be Upheld Because There Is No Fraud, Bad Faith, Or Gross Abuse Of Discretion.**

Any claim that residual property is an uneconomic remnant addresses the scope of a taking—that is, the property interest necessary to accomplish a legitimate public purpose. Courts, therefore, should narrowly review the initial condemnation decision under the standard set forth in *Falkner*, 75 Wis.2d at 139. That case and its progeny hold that a condemnor is obligated to both determine the necessity of a taking and to take as little property as possible to achieve a legitimate public purpose. *Id.*; *see also Mitton v. Wis. DOT*, 184 Wis.2d 738, 748, 516 N.W.2d 709 (1994) (“no more property can be taken than the public use requires”). This means, for example, that a condemnor cannot condemn a

whole parcel when taking a smaller part or, better, an easement will do.

Condemnors have discretion to determine the extent of a taking. *See Falkner*, 75 Wis.2d at 142 (the condemnor “has a large measure of discretion in determining the area and estate of land it needs”). The judicial standard of review should reflect that:

[T]he *scope of [judicial] review is narrow*. Our decisions establish that a court will not disturb a determination of necessity in the absence of fraud, bad faith or gross abuse of discretion; the determination of the necessity of taking will be upheld if there is *reasonable ground* to support it.

*Id.* at 132 (emphasis added).

Thus, as long as “reasonable ground” underlies the extent of the taking, the condemnor’s decision stands. *Mitton*, 184 Wis.2d at 745; *see also Watson v. Three Lakes*, 95 Wis.2d 349, 355, 290 N.W.2d 520 (Ct. App. 1980) (“The extent of the taking is a legislative question” subject to “very narrow” judicial review.). The *Falkner* standard of review

applies to a condemnor's determination of the amount of property that can be taken—even when a landowner challenges the design of a public project as unsafe. *Kauer v. Wis. DOT*, 2010 WI App 139, ¶¶ 10-11, 329 Wis.2d 713, 793 N.W.2d 99. Uneconomic remnant arguments implicate the nature of the property taken and they, too, should be reviewed deferentially.

Under *Falkner*, the Wallers' claim fails. First, the Wallers complaint makes no allegation of fraud, bad faith, or abuse of discretion. Second, an appraiser hired by ATC concluded that the after-taking property retained a value of \$48,000 (R.259, Ex.217A) and that while its highest and best use was light industrial, the property retained value for residential uses. R.298:59, 70-71, 84. Third, the jury's verdict, valuing the remaining property at \$38,000, independently confirms that ATC had "reasonable ground" to conclude that the after-taking property retained substantial

value and economic utility. With the appropriate level of deference to ATC's takings determination, there never would have been a trial in the right-to-take action, much less three appeals.

ATC properly determined that only an easement was necessary for the transmission line on the Wallers' property. Nonetheless, ATC offered to acquire the entire property as part of a consensual transaction. The Wallers, as is their right under Wis. Stat. § 32.06(6), did not consent. Once they refused, ATC made the only jurisdictional offer allowed by statute—ATC offered to acquire the easement, the only property necessary for the public use. The circuit court should have upheld ATC's determination, and it should have dismissed the Wallers' right-to-take challenge.

**B. The Correct Test For An Uneconomic Remnant Determination Must Be Objective, Not Subjective.**

Regardless of whether ATC is entitled to deference, the uneconomic remnant standard must be objective. Like the standard for assessing fair market value, it should assume a reasonably well-informed hypothetical buyer and landowner—not the idiosyncrasies of a particular landowner. *See City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶ 16, 302 Wis.2d 599, 734 N.W.2d 428 (lead opinion) (just compensation “is not the value to the owner for his particular purposes ... but a so-called ‘market value[;]’” market value “does not fluctuate with the needs of ... condemnee but with the general demand for the property”). This conclusion becomes even clearer when the statute is compared to the federal uneconomic remnant statute and those of some other states. While similar to Wis. Stat. § 32.06(3m), they explicitly define an uneconomic remnant as property with

“little or no value or utility *to the owner.*” *E.g.*, 42 U.S.C. § 4651(9) (emphasis added); *accord* Del. Code tit. 29, § 9505(9) (2013); Me. Rev. Stat. tit. 23, § 154-C (2012).

Wisconsin’s statute contains no subjective intent qualifier. Yet the circuit court’s construction of the statute, in the latest case on appeal, focused almost exclusively on the Wallers’ own subjective view of their own property:

What they had left ... rendered their property of little value, particularly as a residence, no value probably as a residence unless *they wanted to live and they did not want to live with this type of risk* [from electromagnetic fields] in their living arrangements there.

App.30-31 (emphasis added). The statute cannot be read to define an uneconomic remnant with respect to the perceived usefulness of the property to an individual landowner. If it could be, then any landowner with subjective complaints about a public project or a subjective desire to relocate could do so entirely at ratepayer or public expense. That result would revolutionize condemnation law.

Similarly, the standard for uneconomic remnants cannot be a balancing test like that conducted by the latest circuit court. The court framed its uneconomic remnant analysis as an evaluation of (1) “the fairest thing to do”; and (2) whether it would have been more “economical” for ATC to have offered to acquire the remnant (which, in fact, ATC offered to do before making the jurisdictional offer) rather than both parties incur significant litigation expenses. App.19-20. (“It would be economical for all parties if the offer had been made here. .... [T]he costs to [ATC] ... I don’t think would have been that great compared to [the costs] incurred by not making the offer”). That is not the test.

These proceedings have been protracted and complex; the legal fees substantial by any measure. Yet, the statute’s focus remains on the *value* and *use* of the property. *See* Wis. Stat. § 32.06(3m); *cf.* 2A Julius L. Sackman, *Nichols on Eminent Domain* § 7.06[6][b] (Rev. 3d ed. 2011) (“*Nichols*”)

(discussing various remnant theories). A condemnor *cannot* take more property than necessary for the public use under an uneconomic remnant theory merely because of expedience or because it might be less expensive once the costs of protracted litigation are considered. *See* 2A *Nichols* § 7.06[6][b][i], [iii]; *see also* *Nelson Drainage Dist. v. Filippis*, 436 N.W.2d 682, 685-86 (Mich. Ct. App. 1989) (*per curiam*), *abrogated on other grounds by*, *City of Novi v. Robert Adell Children's Funded Trust*, 701 N.W.2d 144, 149 n.4 (Mich. 2005).

Wisconsin's definition forecloses a results-driven approach to uneconomic remnants like that applied by the circuit court. Under its flawed construction, the property that remains after a partial taking will be an uneconomic remnant any time two conditions are met: (1) a landowner would rather move than live near a public project; and (2) the condemnor's acquisition costs might be less than the costs to

litigate the parties' disputes. This rewrites section 32.06(3m) and creates an untenable legal standard for uneconomic remnant determinations, which must be as narrow as possible. *See Mitton*, 184 Wis.2d at 748. Only an objective focus on valuation and economic utility comports with section 32.06(3m).

**C. Under An Objective Standard, The Property Is Not An Uneconomic Remnant.**

Most uneconomic remnant cases arise when the taking of a piece of a parcel effectively "orphans" the remaining property. *See, e.g., People ex rel. Dep't of Public Works v. Superior Court*, 436 P.2d 342, 343-44 (Cal. 1968) (landlocked parcel); *see also App.170*. The only reported appellate opinion on whether the taking of an *easement* gives rise to an uneconomic remnant is *Lake Oswego v. Babson*, 776 P.2d 870 (Or. Ct. App. 1989). In that case, the court held that the post-taking property was *not* an uneconomic remnant

even though the easements consumed 53 percent of one lot and 56 percent of the other lot. *See id.* at 871-73.

The decision turned on the fact that single-family homes remained after the partial taking.

[T]he property remaining after the taking includes not only the fee interests in the land that will be subject to the easements, but also the portions of the property that are not subject to the easements. ***In view of the fact that the tax lots are zoned for residential development and are currently developed with existing homes, they are not valueless.***

*Id.* at 873 (emphasis added). This conclusion that property is *not* an uneconomic remnant when a habitable home remains is not unique. *See Spotsylvania County v. Mineral Springs Homeowners Ass'n*, No. CL02-391, 2003 WL 21904116, at \*3 (Va. Cir. Ct. July 18, 2003).

Just as in *Lake Oswego*, the Wallers' property contains a single-family residence that can be sold for an amount at least comparable to the jury's \$38,000 after-taking valuation. R.298:71; *see also* R.259, Ex.217A. The testimony of Scott

Waller himself and his expert, Kurt Kielisch, was consistent: the Wallers lived there for nearly a year after the taking, and the property retains its utility as a residence. R.304:58; R.113:12-13.

A comparison of the before- and after-taking values of the Wallers' property with those in cases from other jurisdictions reinforces the conclusion that the property cannot meet the statutory definition of an uneconomic remnant. *Compare State Highway Comm'r v. Buck*, 226 A.2d 840, 841-42 (N.J. Super. Ct. App. Div. 1967) (remaining property *was* an uneconomic remnant where the before-taking value was \$46,000 and the after-taking value only \$1,000), *with N.M. ex rel. N.M. State Highway Dep't v. U.S.*, 665 F.2d 1023, 1026, 1028-29 (Ct. Cl. 1981) (remaining property *was not* an uneconomic remnant where the before-taking value of \$111,194.50 was reduced to \$23,500 after the taking).

Here, the cost to acquire the Wallers' remaining property would have been an additional \$38,000. R.187. This is not "minimal," the standard the legislative history shows the legislature contemplated. *See* App.162 (Fiscal Estimate). Indeed, it is more than 40 percent of the jury's just compensation award for the easement (\$94,000)—an appreciable cost increase that cannot be characterized as minimal, of "little value," or not viable economically. The Wallers have already been justly compensated by payment of the just compensation award. No more is required. Nor is more permitted: the statutes do not allow a *second* just compensation award—without a jury—in a declaratory judgment proceeding like a right-to-take action.

**D. The Circuit Court's Judgment Rests On Inadmissible Evidence.**

The relevant trial evidence demonstrates, objectively, the continued value and utility of the property. In concluding

that the property is an uneconomic remnant, the circuit court considered extraneous and improper factors, requiring reversal.

The circuit court used ATC's own jurisdictional offer as evidence of the remnant's value. App.4-5 (deeming the jurisdictional offer "ATC's determination of damages"). In doing so, the court committed two errors.

First, it disregarded the jury's valuation verdict.

R.187. Yet the mandate in *Waller II* was clear: the jury verdict stands for purposes of determining just compensation, including severance damages to the remainder. 322 Wis.2d 255, ¶ 17. Only if the circuit court were to conclude that the remainder is an uneconomic remnant could the court vacate the valuation verdict. *See id.* Up to that point, issue preclusion required the court to accept the jury's before- and after-taking valuations. *See Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶ 17, 281 Wis.2d 448, 699 N.W.2d 54.

The circuit court did not do so. Instead, the court wrongly deemed the jurisdictional offer conclusive evidence of the property's value. In doing so, the court committed its second error. A jurisdictional offer marks the culmination of a condemnor's *settlement* efforts to negotiate a voluntary purchase of property and avoid litigation. It is an offer to compromise subject to Wis. Stat. § 904.08 and not, therefore, admissible.

The policy underlying section 904.08—to encourage settlement and avoid litigation—applies to condemnation negotiations. *Connor v. Michigan Wisconsin Pipe Line Co.*, 15 Wis.2d 614, 624, 113 N.W.2d 121 (1962). Negotiations in the context of condemnation—including jurisdictional offers—are privileged and not admissible to prove liability or damages:

Thus, the legislature, recognizing the public policy which encourages the settlement of controversies without resort to litigation, has made [an] attempt at negotiation compulsory in the field of eminent domain.

Because of this, there exists here an *even stronger basis* for a rule of evidence excluding, as privileged, statements by the parties in such compulsory negotiations ....

*Id.* (emphasis added); *see also Herro v. DNR*, 67 Wis.2d 407, 430-32, 227 N.W.2d 456 (1975).

The circuit court initially agreed that the content of ATC's jurisdictional offer was inadmissible. R.304:39. Inexplicably, however, the court then relied extensively upon the jurisdictional offer in its findings of fact (App.1, 4-5), and its ruling that the Wallers' after-taking property is an uneconomic remnant. R.298:214. These errors, which yielded a result inconsistent with the jury verdict, require reversal. The competent evidence shows, as Judge Race initially concluded, that the property is *not* an uneconomic remnant.

The circuit court also relied upon lay-witness Jack Sanderson's unsupported opinion that the after-taking property was not "safe" and "decent" as evidence that the

Walters were forced to move. App.4, 18. Sanderson flatly concluded that the change in highest and best use from residential to light industrial, alone, meant the property was not “decent” and “not suitable for habitation anymore.” R.296:80, 111-12.<sup>9</sup> To reach this opinion, Sanderson disregarded: scientific evidence; electrical safety codes; and the Public Service Commission’s approval of the transmission line project, which permitted a handful of houses to be *closer* to the transmission line than the Walters’. *E.g.*, RR.43, Ex.613:1.

Sanderson conceded, however, that he is not an appraiser, that he was not familiar with the National Electrical Safety Code or the Wisconsin Electric Safety Code, and that he was unaware that the Public Service Commission

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<sup>9</sup> Legal counsel for the Department of Commerce (“Commerce”) testified that Sanderson and Commerce lacked authority to decide whether the Walters were displaced and that his conclusion that the Walters were displaced was wrong. R.296:131-32, 133, 138; *see also* R.259, Ex.251.

administers Wis. Admin. Code ch. PSC 114 (specifying safe distances between houses and transmission lines).

RR.55:136-38; R.296:96-98. Sanderson was not qualified to testify on habitability, rendering his opinions inadmissible.

*See Green v. Smith & Nephew AHP*, 2001 WI 109, ¶¶ 93-95, 245 Wis.2d 772, 629 N.W.2d 727 (testimony “limit[ed] the witness’s qualifications[,]” rendering opinions inadmissible).

In contrast to Sanderson, licensed professional engineers and other witnesses with deep experience with transmission lines testified that electromagnetic fields would not render the house uninhabitable. *See* R.296:163-64, 168-69 (electromagnetic fields on the Wallers’ property *before* the taking were greater than those produced by the transmission line *after* the taking); R.55:163-66 (the transmission line complied with all national and state electric safety codes).

Accordingly, the circuit court’s explicit reliance on the jurisdictional offer and Sanderson’s testimony was clearly erroneous, undermining the uneconomic-remnant declaration.

**IV. THE STATUTES DO NOT AUTHORIZE LITIGATION EXPENSES FOR A LANDOWNER ON AN UNECONOMIC REMNANT CLAIM.**

The circuit court awarded the Wallers litigation expenses under Wis. Stat. § 32.28(3)(b). App.59-66. The court concluded ATC did not have a right to condemn *any* of the property unless it acquired the *entire* property and that ATC did not negotiate in good faith. App.65. This conclusion rests on a misreading of Wis. Stat. § 32.06(3m) as requiring a condemnor to *acquire* concurrently an uneconomic remnant with the rest of the property. The statute does not require acquisition—it requires a concurrent *offer* and permits acquisition. Wis. Stat. § 32.06(3m) (“may acquire”).

**A. The Wallers Failed To Meet Their Burden Of Proof.**

A party seeking litigation expenses always bears the burden to prove they are reasonable. *Standard Theatres, Inc. v. Wis. DOT*, 118 Wis.2d 730, 748, 349 N.W.2d 661 (1984). A party meets its burden by submitting affidavits from qualified attorneys that the fees are reasonable. *Id.* Here, the Wallers did not even try to meet their burden. They offered no testimony—or even an affidavit from their own counsel—that the requested litigation expenses were reasonable and necessary. *See* R.274. On this basis alone, the Wallers’ request for litigation expenses should have been denied.

**B. No Statutory Basis Exists To Award Litigation Expenses.**

Even if the Court overlooks the failure of proof, there is no statutory basis for an award of litigation expenses. Absent express statutory authorization, attorney’s fees cannot be shifted. *See Wieczorek v. Franklin*, 82 Wis.2d 19, 23, 260

N.W.2d 650 (1978). Here, the circuit court awarded the Wallers litigation expenses even though the right to condemn the easement was never at issue and even though ATC negotiated in good faith. Section 32.28(3)(b), therefore, cannot apply in this case.

The circuit court attempted to equate this case with the facts in *Warehouse II*, 291 Wis.2d 80. There, however, failure to negotiate in good faith was conceded. *Id.*, ¶ 1. Here, by contrast, ATC has always maintained that it complied with the statutory mandates.

*Warehouse II*, moreover, provides no guidance on good-faith negotiation. An earlier decision, *Herro v. Natural Resources Board*, sets out the parameters of good-faith negotiation:

Prolonged negotiations are likewise unnecessary; compliance with the statutory requirement is had when the negotiations have proceeded sufficiently to demonstrate that agreement is impossible. Such impossibility to agree does not mean impossibility to agree upon *any* price, no matter how large, but

impossibility due either to the owner's unwillingness to sell at any price or to sell only at a price which the condemnor deems excessive.... *If it becomes apparent that no agreement can be made at a price satisfactory to the condemnor, the effort to agree may be dropped.*

53 Wis.2d 157, 172, 192 N.W.2d 104 (1971)(emphasis added).

Here, ATC more than fulfilled its obligation to negotiate in good faith.

- On October 8, 2007, ATC offered to acquire the easement for \$49,000. RR.55:235-36.
- Next, ATC offered to acquire the easement for \$84,600. RR.55:237.
- On March 14, 2008, after receiving the Wallers' independent appraisal, ATC offered to acquire the easement for \$99,500. RR.55:240-41, 249-50. Alternatively, ATC offered to acquire the entire property for a maximum of \$132,000—the full amount of the Wallers' appraisal—without relocation benefits because the Wallers' move would be voluntary. *Id.* at 241-42, 246-27.
- The Wallers declined ATC's March 14 offer, and ATC served the jurisdictional offer on March 20, 2008. *See* App.1-2.

These facts show, as a matter of law, that ATC negotiated in good faith. Although *Herro* does not require prolonged negotiations, ATC negotiated over the course of six months, raising its offer three times. During that time, ATC made concessions, taking into consideration additional information, the cost of litigation, its own appraisal, and the Wallers' appraisal. Ultimately, ATC offered to pay \$132,000, no more.

Only after the Wallers refused to sell at a price that ATC determined reasonable, *see* RR.55:246, did ATC serve the jurisdictional offer to condemn the easement—the only property needed to serve the public purpose of the transmission line. Despite good faith negotiations, the Wallers were only willing to sell “at a price which in the condemnor’s judgment [was] excessive.” *See Herro*, 53 Wis.2d at 173.

Throughout these proceedings, ATC has fulfilled its statutory obligations. ATC's offer to purchase the entire property was beyond the law's requirements, but certainly would satisfy any requirement in section 32.06(3m) to "offer to acquire the remnant concurrently" if an uneconomic remnant would exist. When the Wallers declined, ATC made the only jurisdictional offer permitted by the state and federal constitutions—that is, acquiring no more property than necessary. ATC had the right to condemn the Wallers' "property described in the jurisdictional offer," Wis. Stat. § 32.06(5), and the Wallers cannot, therefore, recover litigation expenses.

**C. Awarding Litigation Expenses For Uneconomic Remnant Claims Does Not Advance The Purposes of Wis. Stat. § 32.28(3).**

The purposes of shifting litigation expenses under Wis. Stat. § 32.28(3) are to make the landowner whole and to discourage condemnors from short-changing landowners.

*Warehouse II*, 291 Wis.2d 80, ¶ 22. Neither purpose is advanced here.

ATC offered to purchase the entire property for \$132,000 or just the easement for \$99,500. This offer for a consensual sale exceeded the just compensation award of both the condemnation commission (\$90,000) and the jury (\$94,000). In short, ATC offered more than the full value of the easement. The Wallers need not be “made whole” for litigating these cases: accepting ATC’s jurisdictional offer would have made them more than whole. The Wallers and their counsel,<sup>10</sup> therefore, must bear the risk and expense of perpetuating this litigation.

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<sup>10</sup> The Wallers’ fee agreement requires them to pay only a “nominal” amount if litigation expenses are not shifted. R.277, Ex. 510.

**V. THE WALLERS ARE NOT ENTITLED TO RELOCATION BENEFITS BECAUSE THEY MOVED VOLUNTARILY.**

If the Court concludes that the Wallers' property is *not* an uneconomic remnant, it need not reach this issue—the Wallers remain the owners of a property with a habitable house, in which they have chosen not to reside.

Yet, even if the taking did create an uneconomic remnant (it did not), the Wallers are still not entitled to relocation benefits because acquisition of the remnant would require the Wallers' consent. *See* Wis. Stat. § 32.06(3m) (“if the owner consents”). That is, the sale of the entire property and the Wallers' move would still be voluntary and, therefore, the Wallers would not be “displaced persons”—the threshold for recovery of relocation benefits.

To qualify as displaced, a person must move from property “as a direct result” of notice that she will be forced from the property or because she is actually forced to move.

*See* Wis. Stat. § 32.19(2)(e); Wis. Admin. Code § Adm. 92.01(14); *cf. Milwaukee v. Roadster LLC*, 2003 WI App 131, ¶¶ 13, 18, 265 Wis.2d 518, 666 N.W.2d 524 (concluding that the lessee was a “displaced person” where it was “forced to give up its leasehold interest” and “forced to relocate”)(emphasis added). The conclusion that the Wallers—whose house has always remained untouched despite the taking—are displaced is an unprecedented expansion of the law of relocation benefits without any statutory or administrative basis.

**First**, relocation benefits are paid only to “displaced persons.” *See* Wis. Stat. § 32.19(1), (3). “Displace” means “[t]o move or shift from the usual place or position, especially to force to leave a homeland ....” *American Heritage Dictionary* 521 (4th ed. 2006). The Wallers were not forced to leave their home. Indeed, they lived there for about one year after the upgraded transmission line was installed.

Nothing—save their own subjective desire to live elsewhere—prevents the Wallers from still living there.

Scott Waller's testimony confirmed that the Wallers chose to move. Since 1989, the Wallers lived with a 69-kilovolt transmission line on their property, directly in front of their house, without any health concerns. RR.55:40. In February 2005, one year *before* the Wallers learned of the new transmission-line project, they listed their house for sale. RR.55:37. They wanted to move to a larger, more rural property—before they even learned of the project. RR.55:37.

The house they moved to has precisely the features they wanted: it has twice as many acres and it is in the countryside. RR.55:79-80. The Wallers moved because they wanted a home with more acreage and because they preferred no longer to live along Interstate 43 in the midst of an industrial park. Their preferences are understandable, but they do not amount to forced displacement.

At trial, Scott Waller stated that they decided to move when they received John Rolling's 2007 appraisal. RR.55:56; *see id.* at 25-26. Yet, accepting that at face value, their decision was based on a *misunderstanding* of Rolling's appraisal:

We believe the installation of the [single] transmission line pole and the lines themselves brings this property to the tipping point from residential appeal toward light industrial appeal. It is more likely that the next buyer of this property will be an industrial developer rather than a residential user. We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land.

R.259, Ex.217:18, App.97. Rolling explained that "obsolete" is a term of art in an appraisal. It does not mean that the house has no value. R.298:79-82. Displaced status cannot result from a misunderstanding of this appraisal term of art.

The fact that, over nearly two decades, the area surrounding the Wallers' property evolved from agricultural use to an industrial park does not mean that the addition of a transmission line on a second side of their property somehow

“forced” the Wallers to move. Nor does it mean that their house was uninhabitable. It was not—by any objective building code or other pertinent standard.

**Second**, the statutory definition of a displaced person requires the person to move from real property “[a]s a direct result of ... the acquisition of the real property ....” Wis. Stat. § 32.19(2)(e)1.a.. Here, however, ATC’s condemnation of the transmission-line easement and the resulting upgraded transmission line did not directly cause the Wallers to move. They could have continued living there indefinitely but for their personal preferences.

It stretches the meaning of “direct result” too far if a person can be displaced because of subjective concerns or a pre-existing desire to move. Here, it was not the transmission line that prompted the Wallers to move. Part of it was always there. Moreover, the Public Service Commission concluded that the transmission line would “not have a significant effect

on the human environment” and would “not have undue adverse impacts on ... public health[.]” RR.43, Ex.660:3.

This dispels any suggestion that the transmission line itself somehow caused the Wallers to move.

**Third**, the second part of the definition of a displaced person limits relocation benefits to people for whom condemnation makes continued use or occupancy of their property physically or legally impossible. *See, e.g.*, Wis. Stat. § 32.19(2)(e)1.b. (a person is displaced because of rehabilitation or demolition of his property). Both rehabilitation and demolition physically prevent a person from using her property, forcing a move. The Wallers were never prevented from using their property.

**Fourth**, the relocation statutes as a whole reflect an assumption that a displaced person cannot physically live in the dwelling. For example, the legislature defines a “[c]omparable dwelling” as “one which, when compared with

*the dwelling being taken, is substantially equal ....*” Wis. Stat. § 32.19(2)(b) (emphasis added). Similarly, the statutes require that a “relocation assistance service plan ... [a]ssure that a person *shall not be required to move from a dwelling* unless the person has had a reasonable opportunity to relocate to a comparable dwelling.” Wis. Stat. § 32.25(2)(i) (emphasis added).

Finally, Wis. Stat. § 32.20 defines the statute of limitations for a relocation claim based on when “the condemnor takes physical possession of the entire property acquired ....” Here, the Wallers’ house was not taken or physically altered, and they were not required to move. The Wallers do not meet the definition of a displaced person.

**Fifth**, if the Wallers are displaced because they moved, then the Wallers, 8341 Murphy, LLC, and any person who owns property subject to a transmission-line easement can claim to be displaced if she moves within two years “after

the condemnor takes *physical possession of the entire property acquired ....*” Wis. Stat. § 32.20 (emphasis added). That cannot be the standard for defining a displaced person. *See Falkner*, 75 Wis.2d at 140-41.

As this Court has held, the “quantum of estate taken” cannot depend on the whims, desires, and feelings of each landowner whose property rights are being condemned. *Id.* Rather, the condemnor’s determination of the scope of the taking must be upheld in the absence of “fraud, bad faith, or gross abuse of discretion.” *Id.* at 135.

Just as the scope of a taking cannot depend on a landowner’s subjective preferences, displacement cannot depend on individual idiosyncrasies. If it did, the costs of public projects would be wildly unpredictable and incapable of meaningful estimation. Further, public utilities could find themselves owning wide swaths of property—with no

possible public use for the land and the attendant burdens of owning unoccupied, essentially abandoned land.

Whether a person is displaced must depend on an objective standard, not the subjective preferences of a landowner. For someone to be displaced, the test must be: Was the person forced to leave his or her dwelling because of a physical or regulatory restriction that precluded him or her from continuing to live there? The Wallers do not meet this standard. They are not displaced persons.

### **CONCLUSION**

For the foregoing reasons, ATC requests that the Court:

1. Conclude that there is no private right of action to bring uneconomic remnant claims—such claims are for just compensation and must be raised in valuation proceedings;

2. Reverse the judgment declaring the after-taking property an uneconomic remnant and remand the case with directions to enter judgment for ATC;

3. Reverse the order granting the Wallers litigation expenses and the judgment awarding the Wallers relocation benefits, remanding both cases with directions to enter judgment for ATC—the Wallers are not displaced persons and they are not entitled to any relocation benefits.

Dated this 11th day of February, 2013.

GODFREY & KAHN, S.C.

By: *s/Bryan J. Cahill*

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**RULE 809.19(8)(D) CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) for a brief and appendix produced with a proportional serif font. The length of those portions of this brief referred to in s. 809.19(1)(d), (e), and (f) is 10,985 words.

*s/Bryan J. Cahill* \_\_\_\_\_

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**ELECTRONIC FILING CERTIFICATION**

I hereby certify, pursuant to Wis. Stat. § 809.19(12)(f),  
that the text of the electronic copy of the brief is identical to  
the text of the paper copy of the brief.

*s/Bryan J. Cahill*

\_\_\_\_\_

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## **APPENDIX CERTIFICATION**

I hereby certify that the appendix previously filed with the court as well as the supplemental appendix filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the

portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

*s/Bryan J. Cahill*

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Bryan J. Cahill

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STATE OF WISCONSIN  
IN THE SUPREME COURT

Consolidated Appeal Nos. 2012AP805 and 2012AP840

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SCOTT N. WALLER AND LYNNEA S. WALLER,

Plaintiffs-Respondents,

v.

AMERICAN TRANSMISSION COMPANY LLC,

Defendant-Appellant.

---

On Bypass from the Court of Appeals, District II  
Appeal from Final Judgments of the Circuit Court of  
Walworth County, the Hon. James L. Carlson Presiding,  
Circuit Court Case Nos. 2008CV520 and 2010CV691

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**SUPPLEMENTAL APPENDIX OF  
AMERICAN TRANSMISSION COMPANY LLC**

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## INDEX TO SUPPLEMENTAL APPENDIX

*Am. Transmission Co. LLC v. 8341 Murphy, LLC*  
Dane County Case No. 12-cv-2766  
Valuation Action

<b>Record No.</b>	<b>Description</b>	<b>Appendix Page</b>
	Order Denying Petitioner's Motion to Compel Condemnation Commission to Conduct Hearing Under Wis. Stat. § 32.28, dated December 26, 2012	Supp. App. 1
	Hearing on ATC's Motion to Compel Condemnation Commission to Conduct Valuation Hearing Transcript, dated December 17, 2012	Supp. App. 2
	Condemnation Commission Opinion and Order, dated October 5, 2012	Supp. App. 23
	Order Assigning Matter to Condemnation Commission, dated September 4, 2012	Supp. App. 25

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COPY

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

IN RE:

Acquisition of Property of:  
8341 MURPHY, LLC  
8341 Murphy Drive  
Middleton, WI 53562

Case No. 12-CV-2766  
Case Code: 30402

By:

AMERICAN TRANSMISSION COMPANY, LLC and its  
Corporate Manager ATC MANAGEMENT, INC.

Petitioner.

---

**ORDER DENYING PETITIONER'S MOTION TO COMPEL CONDEMNATION  
COMMISSION TO CONDUCT HEARING UNDER WIS STAT §32.28**

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The above-captioned matter having come before the Honorable Richard Niess on the 17<sup>th</sup> day of December, 2012 on the motion of the Petitioner to compel the condemnation commission to conduct a hearing under Wis. Stats. §32.28 and 8341 Murphy, LLC having appeared telephonically by its counsel, Robert W. Roth of Niebler, Pyzyk, Roth & Carrig, LLP and American Transmission Company, LLC and its corporate manager, ATC Management, Inc. having appeared telephonically by its counsel Steven M. Streck and Mitchell R. Olson of Axley Brynelson, LLP and the court having reviewed the submissions of the parties, heard the arguments of counsel and being fully advised hereby ORDERS that the Petitioner's motion is hereby DENIED for the reasons expressed on the record.

Dated this 26 day of December, 2012.

BY THE COURT:



---

Honorable Richard Niess  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 9

DANE COUNTY

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AMERICAN TRANSMISSION  
COMPANY, LLC,

Plaintiff,  
vs.

Case No. 12 CV 2766

8341 MURPHY, LLC, OWNERS,

Defendant.

---

**COPY**

PROCEEDINGS: Motion Hearing  
BEFORE: HONORABLE RICHARD G. NIESS  
DATE: December 17, 2012  
TIME: 2:39 p.m.

APPEARANCES: STEVEN STRECK AND MITCHELL OLSON,  
Attorneys at Law,  
Madison, Wisconsin,  
appearing telephonically on  
behalf of the Plaintiff.

ROBERT W. ROTH,  
Attorney at Law,  
Menomonee Falls, Wisconsin,  
appearing telephonically on  
behalf of the Defendant.

1 (whereupon, the following proceedings were  
2 duly had:)

3 THE CLERK: American Transmission  
4 Company, LLC vs. 8341 Murphy, LLC, Owners,  
5 12 CV 2766.

6 Appearances, please.

7 MR. ROTH: Attorney Bob Roth for  
8 8341 Murphy, LLC.

9 MR. STRECK: Steve Streck and  
10 Mitch Olson for ATC.

11 THE COURT: All right. We also have the  
12 companion case as well.

13 We're here on the motion by American  
14 Transmission to compel the Condemnation Commission to  
15 conduct a hearing under Section 32.28 of the  
16 Wisconsin statutes. I've read the materials both for  
17 and against the motion.

18 And Mr. Streck, basically, is it your  
19 opinion that I should just ignore the most recent  
20 decision upon which the Commission based its decision  
21 and just conclude that that's of no moment and will  
22 ultimately be reversed?

23 MR. STRECK: Judge, Mitch Olson will be  
24 arguing, so I'll let him respond to that.

25 THE COURT: Mr. Olson.

1                   MR. OLSON: Good afternoon, Judge. The  
2 position we've tried to take in our brief is that we  
3 concede the Waller case is out there. It says what  
4 it says. But it's our position that the Court by  
5 looking at Chapter 30 in the language we highlighted,  
6 that kind of sets forth the very specific, mandatory,  
7 tight timelines of what has to take place in terms of  
8 the Condemnation Commission taking action in  
9 combination with the TFJ Nominee Trust case, which  
10 from 2001, which we've cited which is a Court of  
11 Appeals case that's on the same standing, at least we  
12 would assert as the Waller Court of Appeals. And  
13 this case presents a rationale whereby the Court  
14 could interpret Chapter 32 in support of finding by  
15 the Court that a valuation is necessary. And unless  
16 we're going to do in that case an inverse  
17 condemnation or proceed in a valuation proceeding, we  
18 shouldn't resort to some other type to take a Waller  
19 type analysis.

20                   So essentially, there's two separate  
21 Court of Appeals cases out there that endorse  
22 alternative approaches. It's our position that the  
23 TFJ Nominee Trust case presents a better approach  
24 when you look at the language in Chapter 32. And  
25 therefore, while the Waller case is out there and

1           deserves to be recognized, we think the Court could  
2           lawfully compel the Condemnation Commission to  
3           proceed.

4                         THE COURT: Let me ask you this. What  
5           is the vehicle by which I compel them to proceed?  
6           Isn't it a writ of mandamus?

7                         MR. OLSON: In our reply brief, we  
8           attempted to address that, Judge. I think while  
9           mandamus may be an appropriate vehicle, we also  
10          believe that the special proceeding approach that we  
11          endorsed in our brief, and I think that Mr. Roth is  
12          in agreement that it's an appropriate procedure for  
13          this particular instance, it is effective here.

14                        THE COURT: Isn't it a command for them  
15          to do their job one way or the other? I mean,  
16          whether you call it a writ of mandamus or not, isn't  
17          it, in essence, a writ of mandamus?

18                        MR. OLSON: It definitely is an order  
19          compelling them to do their job. I agree with you.  
20          To try to make this as simple as we could and as  
21          streamlined as we could, it was our impression that  
22          the special proceeding that the Court acknowledged in  
23          the Schoenhofen appears to be effective to give the  
24          Court authority to act.

25                        THE COURT: Right. But I've still got

1 to figure out how to act. If I have authority to  
2 act, it's by virtue of a writ of mandamus, isn't it?

3 MR. OLSON: The only difficulty I see  
4 there is whether the procedure that's been engaged in  
5 to date is sufficient for the Court to grant a writ  
6 of mandamus.

7 THE COURT: Well, that's my problem too.  
8 And the question is, are you trying to circumvent a  
9 writ of mandamus by coming up with an alternative  
10 which is, in essence, a writ of mandamus but not  
11 subject to the requirements of mandamus?

12 MR. OLSON: It's certainly not our  
13 intent to circumvent but rather to find an  
14 alternative that the Court has acknowledged in doing  
15 the due diligence. And working with Attorney Roth,  
16 we found the Schoenhofen case appeared to offer an  
17 alternative under the special proceeding that would  
18 directly allow the Court to take the jurisdiction at  
19 least to the point of ordering the Condemnation  
20 Commission to act under the circumstances.

21 THE COURT: Well, does that case say  
22 that where there are -- there is a split in authority  
23 in the Court of Appeals that I have authority to  
24 order them to do a compensation hearing?

25 MR. OLSON: That case certainly did not

1 go to that length. No, Judge.

2 THE COURT: My question is then, what  
3 good is that case? I mean, I understand that you've  
4 got some alternative procedure, but -- and I  
5 understand that there are things -- orders that I can  
6 issue which direct the Commission if they have a  
7 clear duty to do something, to go ahead and do it.  
8 Here, they take the position that they're bound by  
9 Waller, and you take the position they aren't; and  
10 thus, there's, at best, an ambiguous or uncertain  
11 duty which would certainly make mandamus improper.  
12 And I question if that's the case, why it would be  
13 proper under this special proceeding theory that you  
14 have?

15 MR. OLSON: I think we get back to the  
16 basic Chapter 32 interpretation that requires the  
17 Condemnation Commission to act in a timely basis. If  
18 we've got this case law ambiguity, then I would  
19 suggest the Court should defer to the statute. And  
20 we contend the interpretation there is pretty clear  
21 that the legislature hasn't given them any discretion  
22 or authority to decide whether or not to act in a  
23 timely fashion. And given the ambiguity in the  
24 cases, the Court ought to rely on the statute and ask  
25 them to proceed.

1 THE COURT: And just ignore Waller?

2 MR. OLSON: I can't ask the Court to  
3 ignore it. It's out there. But we've got -- our  
4 position is there is an alternative approach? And  
5 the Court has the discretion, I think, to exercise  
6 that and determine which approach is better under the  
7 circumstances.

8 THE COURT: Let me ask you this. Even  
9 if I were to accept your theory, don't I have to  
10 allow the Compensation Commission to -- or  
11 Condemnation Commission to be heard?

12 MR. OLSON: We certainly have tried to  
13 notice the Commission and their chairman at all times  
14 through these proceedings. There hasn't been any  
15 interest or response shown from them. Under a  
16 mandamus approach, I would agree that they were --  
17 certainly, they would be an interested, necessary  
18 party. Under the special proceeding approach, I'm  
19 not sure that was necessary. Nevertheless, we  
20 attempted to copy them and notify them of the  
21 entire -- all the proceedings that have occurred up  
22 to this hearing including the notice of it.

23 MR. STRECK: And Judge, if it matters to  
24 you, I can tell that you Charles Larsen, the chair of  
25 the Condemnation Commission, knew about the hearing

1           today. And I was talking to him on a completely  
2           different matter earlier, and he said that he wasn't  
3           going to be attending. Good thing, because we're  
4           doing this by telephone. He told me he was aware of  
5           it. He wasn't going to attend.

6                         THE COURT: All right. And so what --  
7           do we trigger some sort of constitutional crisis if I  
8           order the Condemnation Commission to do a hearing on  
9           just compensation? And they say, no, we don't have  
10          any authority, what is my remedy at that point? Hold  
11          them in contempt?

12                        MR. STRECK: Well, as a practical  
13          matter, if you issued a decision saying that you  
14          believed the better rule was that the Commission  
15          should, in fact, hold a hearing, the Commission will  
16          hold a hearing. I don't think you even have to order  
17          them to do anything as a practical matter.

18                        THE COURT: Boy, you've got greater  
19          confidence in my abilities to move other agencies  
20          than I do.

21                        What should we make of the last -- or  
22          second to the last paragraph in the second Waller  
23          decision that says that a Court must first determine  
24          whether a property is an uneconomic remnant before  
25          moving on to the just compensation issue, and then

1 further procedural issues must be resolved before an  
2 administrative body or a Court calculates  
3 compensation, and that a Court must prioritize  
4 uneconomic remnant determination over a just  
5 compensation determination. And if they don't want  
6 the two going simultaneously because they want the  
7 local Condemnation Commission to devote its full  
8 attention to the just compensation issue without  
9 having to deal with the collateral procedural matter.  
10 What do I do with that?

11 MR. OLSON: Judge, this is Olson.  
12 Again, your reading of Waller, if the Court chooses  
13 to follow that opinion, it is clear what happened.  
14 Our approach has been there's an alternative to  
15 Waller and that if the Court chooses not to follow  
16 Waller, can do so. I don't dispute to you how you  
17 interpreted that case and that if you're going to  
18 follow it, the procedure in terms of the stay of the  
19 Condemnation Commission in the court proceeding to  
20 address the remnant case that's appropriate under  
21 Waller.

22 THE COURT: Mr. Olson, let's say I deny  
23 your motion, how do we proceed here? We determine  
24 the economic remnant then?

25 MR. OLSON: Correct.

1 THE COURT: Why do you say that's not a  
2 good way to go here?

3 MR. OLSON: Because the very issue  
4 that's up to Supreme Court in Waller and our client's  
5 concern is that you've got, essentially, a valuation  
6 issue on the economic remnant. It's virtually the  
7 identical valuation issue on the overall condemnation  
8 case. You're doing the same thing twice. It's not  
9 effective. It's not efficient. And it appears to be  
10 contrary, in our mind, to Chapter 32.

11 THE COURT: How far along is Waller in  
12 the Supreme Court?

13 MR. STRECK: I believe there's a  
14 petition to bypass the Court of Appeals on the third  
15 Waller appeal. And I don't believe that petition has  
16 been decided.

17 THE COURT: We actually have a third  
18 Waller decision out of the Court of Appeals? A third  
19 appeal. Okay.

20 MR. STRECK: Third appeal.

21 THE COURT: It's that third appeal which  
22 is going to wrap everything up in a nice tidy little  
23 bow and deliver it to the appellate court?

24 MR. STRECK: Wouldn't that be nice? I  
25 don't know. We'll see.

1 THE COURT: Mr. Roth, have you changed  
2 your opinion as to whether or not I can blow off  
3 Waller and go forward with a remand to the  
4 Condemnation Commission?

5 MR. ROTH: I have not, Your Honor.

6 THE COURT: Well, I don't think I can  
7 either.

8 You know, it's a nice try, Mr. Olson and  
9 Mr. Streck, but the fact of the matter is I'm stuck  
10 with Waller. I don't think that because there is  
11 Waller and there may be another case that has got an  
12 alternative -- I mean, Waller seems to me very clear  
13 what they're telling me to do and that is exactly  
14 what the Condemnation Commission interpreted its role  
15 to be, and that is to hold off on any kind of just  
16 compensation determination until after the uneconomic  
17 remnant issue is resolved. Whether that is a  
18 misinterpretation of the statutes or bad public  
19 policy or both is an issue that is above my pay  
20 grade. Not one that is accorded to a circuit court.

21 I'm bound by the Court of Appeals'  
22 decisions, and it seems to me Waller is controlling.  
23 I welcome the Supreme Court looking at it. I don't  
24 know what you folks -- maybe we should put this on  
25 hold until the Supreme Court tells us what they're

1 going to do. Although, if they haven't accepted it,  
2 we're still a year out, and I don't know whether  
3 that's more efficient for any of the parties here to  
4 just sit and wait and see what the Supreme Court's  
5 going to do when they may very well affirm what they  
6 did in Waller.

7 MR. ROTH: Your Honor, this is Bob Roth.

8 THE COURT: Yes, sir.

9 MR. ROTH: I somewhat hesitate to move  
10 into this mulligan stew of different problems. I  
11 think that I have the laboring oar. It's pretty  
12 clear to me that we won't know what's going on either  
13 in the appeals court or the Supreme Court for at  
14 least a year.

15 THE COURT: Yep.

16 MR. ROTH: So we are where we are.  
17 Within the next 90 days, I will know whether or not I  
18 have the right condemnation of appraiser, electrical  
19 engineer, and realtor experts who can bring forward  
20 an appropriate, logical, and reasoned position in  
21 connection with this unbelievably unique case. I  
22 don't think we're ever going to see one quite like  
23 this again.

24 Where I can't move -- I'll give you some  
25 facts, I shared these with opposing counsel, just to

1 give you some background. We have tried to move the  
2 handicapped parking spaces from out from underneath  
3 the wires. We've even gone to the guy who sold the  
4 ground who owned the dirt to try to get some land  
5 from him. He won't give it to us. We're stuck on  
6 this ridiculously small footprint of land and I can't  
7 get them out from where they are. We have a problem  
8 that really isn't a medical problem. It isn't an  
9 engineering problem. It's an economic remnant  
10 problem. I have to come back to you with at least  
11 those three experts and try to posit the problem in  
12 that notion. The notion is would a reasonably  
13 competent, sophisticated, commercial tenant have  
14 purchased this property on the cusp of this project  
15 knowing all the details of the project, or is this  
16 the kind of property that would not get leased at  
17 all? And that's what an economic remnant case is  
18 about. It's not about valuation per se. It's about  
19 the effect, the severance damage effect on the  
20 remainder of the property.

21 Now, first of all, that's a tall order.  
22 And my client and I are not at all happy that we're  
23 stuck in this sort of situation. And Waller says to  
24 us, well, you've got to get this out of the way  
25 first. We can't get to the simple valuation loss if

1           it's not an economic remnant case. So I think it's  
2           incumbent upon me to --

3                         And I've found the engineer. It's very  
4           hard to find an electrical engineer in the United  
5           States that's not otherwise working for a utility  
6           company, but I did finally find one. I'm looking  
7           forward to try and pull all of this stuff together.

8                         I'd like to come back within 90 days and  
9           let you know whether or not I think we have to go  
10          forward on this, because I still don't know for sure  
11          if we should be going forward. I'm just trying to  
12          get all my stuff together.

13                        THE COURT: You're suggesting that you  
14          may mine this field long enough and not find an  
15          expert that's suitable for your case and dismiss or  
16          what?

17                        MR. ROTH: No. It's just that -- if you  
18          think about it, we're coming back to you with our hat  
19          in our hand saying given the unique circumstance of  
20          this particular property, particular circumstances  
21          what happened, it would appear that the downstream  
22          possibility of this property being able to be rented  
23          and/or ever getting a tenant is very bad. It's a  
24          severe economic impact. And then you get the good  
25          fortune because there's no case law in this state

1           that I know of at this point to determine what the  
2           heck the term means, the substantial economic impact.  
3           What the heck is that? Is that what this is? Are  
4           you looking at it satisfied that's what it is? If it  
5           is, then we have a total taking case and a relocation  
6           case instead of a partial taking and fair market  
7           value loss case. That's the real difference between  
8           the challenge and the compensation case.

9                         THE COURT: Then we probably should do  
10           this part of the case before we do the just  
11           compensation just like Waller suggests.

12                        MR. ROTH: I think so. And I think that  
13           that's really -- that's the underlying policy thread  
14           in the Waller case is they're looking at the  
15           development of the terminology which came out of the  
16           Kelo case and the other cases out east. And the  
17           Supreme Court said that you could do this and that  
18           and sell properties this way and that way for  
19           development. And they wanted to put some arms around  
20           the concept of blight and they wanted to put some --  
21           and then they define blight as substantial economic  
22           impairment, and oh, boy, do we get a nice confusion  
23           for ourselves to work out. Yes, I do think so.

24                        I, at least, have gotten to first base.  
25           Maybe to second base. The trifecta of mine: The

1 realtor and appraiser and the engineer. I'm going to  
2 plow into this over the next 30, 45 days. Like I  
3 said, I think I'll know within 90 days whether or not  
4 I can posit the kind of case I want to bring into a  
5 court on this, then we can test it and see where it  
6 goes. If not, I'd be very happy to tell Mitch and  
7 Steve that this is not my idea of a case that should  
8 go forward and we'll get over to the compensation  
9 case.

10 THE COURT: At that point, you'd be  
11 stipulating to that it was an uneconomic remnant and  
12 move it to the just compensation phase? Is that what  
13 you're thinking?

14 MR. ROTH: I think so. I think that's  
15 the right thing to do. As I say, I don't think  
16 anyone's done one of these in the state. Another one  
17 of these great first impression situations you tend  
18 to run into in eminent domain. That's the best way I  
19 can do it.

20 THE COURT: As you can tell from dealing  
21 with me, virtually every issue in eminent domain is  
22 an issue of first impression with me, so --

23 MR. ROTH: I understand.

24 THE COURT: Mr. Streck or Mr. Olson, is  
25 any of that particularly surprising to you, his

1 thinking on this case?

2 MR. STRECK: No. No. We chatted before  
3 we got on the phone with you. We understand these  
4 little difficulties, but we think -- I know this  
5 is -- our motion has been denied.

6 THE COURT: Yes, it has.

7 MR. STRECK: But a lot of the problems  
8 that Mr. Roth is having now is caused by Waller, but  
9 that's what we have.

10 THE COURT: Well, except as I understand  
11 what he's saying, it may not be an uneconomic remnant  
12 issue. Maybe a complete taking, in which case it's a  
13 different issue for the Condemnation Commission to  
14 consider, right?

15 MR. STRECK: Well, no. What we're going  
16 to end up doing is trying this whole case to you, to  
17 the Court, on the issue of whether it's an uneconomic  
18 remnant. We're going to each name experts and have  
19 discovery and do all of that stuff like in every  
20 civil case. We're going to get to you and you're  
21 going to decide whether there's an uneconomic  
22 remnant. If the answer's yes, then we go down one  
23 fork. If the answer's no, then we go all the way  
24 back to the Condemnation Commission and do it all  
25 over again, same appraisers, same witnesses, and do

1           it all over again to the jury. That's the problem we  
2           have with Waller.

3                         THE COURT: What Mr. Roth is suggesting  
4           is we may skip the first step if he can't get an  
5           expert to put a credible case together for him. Is  
6           that basically it?

7                         MR. STRECK: That's true. If he needs  
8           time to get that together, we don't object to that.

9                         THE COURT: So is there anything that  
10          you want me to do at this point? Do you want me to  
11          set this for a scheduling conference in March?

12                        MR. ROTH: I think that's excellent.

13                        THE COURT: Mr. Streck or Mr. Olson?

14                        MR. STRECK: Sure.

15                        MR. OLSON: I have a couple of weeks  
16          worth of trial in the middle of March. So if we  
17          could do it towards the end, that would be great.

18                        THE COURT: I'm hoping -- if it's toward  
19          the end, I'm hoping to be someplace where I'm not  
20          worried about condemnation except the condemnation of  
21          my soul.

22                        MR. STRECK: I can't imagine where that  
23          would be.

24                        MR. ROTH: What dates are you looking  
25          at, Judge?

1 THE COURT: March 27<sup>th</sup>.

2 MR. ROTH: Perfect.

3 THE COURT: 1:00?

4 MR. ROTH: Fine.

5 THE COURT: Do you want us -- we can do  
6 it by phone, but if you think we can accomplish more  
7 in person, I'm always happy to see your faces.

8 MR. OLSON: No. It's all right. Phone  
9 for me is just fine.

10 THE COURT: Who wants to be in charge of  
11 placing the call? Since you're in town, we'll give  
12 it to you, Mr. Roth.

13 MR. ROTH: Okay. Sure. No problem at  
14 all.

15 THE COURT: Or did you do this one?

16 MR. ROTH: Steve's phone seems to work  
17 better than mine.

18 MR. STRECK: I don't mind doing it.

19 THE COURT: All right. Set it up,  
20 Mr. Streck.

21 And Mr. Roth, you'll be submitting an  
22 order denying the motion or do you just want to rely  
23 on the record here?

24 MR. ROTH: Oh, I think --

25 Steve, do you want an order on this for



1 STATE OF WISCONSIN )

2 ) SS

3 COUNTY OF DANE )

4

5 I, TARA L. MONTHIE, Official Court Reporter  
6 for Dane County Circuit Court, Branch 9, do hereby  
7 certify that the foregoing is, to the best of my  
8 ability under telephonic reporting conditions then  
9 present, a full, complete and correct transcript of the  
10 proceedings had on the hearing in the above-entitled  
11 matter as the same are contained in my stenographic  
12 notes taken at said proceedings held on the 17th day of  
13 December, 2012.

14

15 Dated this 9th day of January, 2013.

16

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Tara L. Monthie, RPR, CRR  
Official Court Reporter

22

23

24 The foregoing certification of this transcript does not  
25 apply to any reproduction of the same by any means  
unless under the direct control and/or direction of the  
certifying reporter.

8341 Murphy LLC

OPINION AND ORDER

Condemnee

v.

Case No. 12 CV 2766

American Transmission Company, LLC

Condemnor

COPY

This matter was commenced with the filing of a Petition for Condemnation Proceedings by condemnor on July 12, 2012. Subsequently, on July 26, 2012, condemnee filed a complaint alleging the creation of an uneconomic remnant, or total taking. The Petition for Condemnation Proceedings was assigned by the court to the chairperson of the Dane County Condemnation Commission by order dated September 4, 2012.

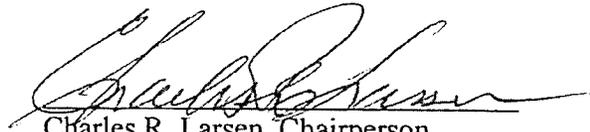
Condemnor asserts that it is entitled to a hearing on the issue of just compensation pursuant to the provisions of sec. 32.08(5), Stats., and asks that the chairperson immediately, or as soon as schedules permit, set the matter for hearing. Condemnor asserts that the chairperson has no discretion to do other than to set the hearing, pointing to the statutory command that upon assignment by the court, the chairperson of the commission "shall" select commissioners and set the matter for hearing.

Condemnee contends that the current state of the law in Wisconsin prevents the commission chairperson from proceeding with this matter by setting a hearing, citing Waller v. American Transmission Co. LLC, 334 Wis.2d 740. In that case, the Court of Appeals held that, as a procedural matter, a properly brought uneconomic remnant claim must take priority over the just compensation issue and be resolved before the court or commission can address the just compensation issue. The court's reasoning was that this would allow the court or commission to devote its full attention to the compensation, without being distracted by collateral procedural matters.

I have concluded that the decision in Waller precludes me from proceeding in this matter. Whether or not an uneconomic remnant has been created must obviously be determined in order to determine just compensation. The commission cannot make that determination. The court must do that. I have also concluded that I cannot set the matter for hearing and adjourn it for a long enough period of time to allow the court to make that determination. I will, therefore, construe condemnee's objection to proceeding to be a motion for a stay of the proceedings.

The motion for a stay is granted and these proceedings before the commission are stayed until the question of the uneconomic remnant claim is resolved and the chairperson of the commission is provided with evidence of such resolution.

Dated this 5<sup>th</sup> day of October, 2012.

A handwritten signature in black ink, appearing to read "Charles R. Larsen", written in a cursive style.

Charles R. Larsen, Chairperson  
Dane County Condemnation Commission

IN RE:

Acquisition of Property of:  
8341 Murphy LLC  
8341 Murphy Drive  
Middleton, WI 53562

By:

Case No. **12CV2766**  
Condemnation Review: 30402

American Transmission Company LLC  
and its corporate manager, ATC Management Inc.  
W234 N2000 Ridgeview Parkway Court  
Waukesha, WI 53188

Petitioner.

**ORDER OF ASSIGNMENT TO DANE COUNTY  
CONDEMNATION COMMISSION AND FOR IMMEDIATE POSSESSION**

I, Judge of the Circuit Court of Dane County, Wisconsin, having received the Verified Petition for Condemnation proceedings and other filings in this matter, and acting in accordance with Wis. Stat. §§ 32.06(7) and 32.08(5), hereby:

(1) assign the matter to the Chairperson of the Dane County Condemnation Commission for further proceedings under Wis. Stat. § 32.08 to determine the amount of just compensation to be paid by the Petitioner for the easement over the property described in Paragraph 3 of the Verified Petition, which easement is described in Paragraph 6 of the Verified Petition; and

(2) grant possession of the Easement Premises as defined in the Verified Petition to the Petitioner in accordance with the provisions of §32.12 (1), Wis. Stats.

Dated this 4 day of September, 2012.

BY THE COURT:



Honorable Richard G. Niess  
Dane County Circuit Court, Branch 7

February 14, 2013

**HAND DELIVERED**

Diane Fremgen  
Clerk of Wisconsin Supreme Court  
110 E. Main Street, #215  
Madison, WI 53701-1688

**RECEIVED**

FEB 14 2013

CLERK OF SUPREME COURT  
OF WISCONSIN

*Waller v. American Transmission Co., LLC*  
Consolidated Appeal Nos. 2012AP840 and 2012AP805

Dear Ms. Fremgen:

We write pursuant to Rule 809.19(10) to advise the Court of developments since American Transmission Company LLC (“ATC”) filed its supplemental brief earlier this week (authorized by Court order dated January 28). The Court accepted this case, scheduled for argument on April 11, 2013, on ATC’s petition to bypass the Court of Appeals.

At pages 37 and 38 and pages Supp.App.1 through 23 of the February 11 *Initial Brief and Supplemental Appendix of American Transmission Company LLC*, ATC discussed the status of a Dane County Circuit Court action, *8341 Murphy LLC v. American Transmission Company LLC*, Case No. 12-CV-2981. There, a landowner raised an uneconomic remnant argument expressly based upon the Court of Appeals’ precedent in these consolidated appeals. Both the condemnation commission and the circuit court had indefinitely stayed the valuation proceeding under Wis. Stat. § 32.06(7) to allow the landowner’s *Waller* challenge to proceed in a separate action.

ATC filed both an appeal as of right and a petition for leave to appeal a non-final order in the *8341 Murphy* case. On February 12, the Court of Appeals, District IV, expressly in deference to *Waller I* and *Waller II*, entered the enclosed order, both dismissing the appeal as of right and denying the motion for leave to appeal a non-final order. That essentially rendered unappealable the circuit court’s decision to require the right-to-take proceeding to conclude before the just compensation hearing can begin in the condemnation commission. “Although the Wisconsin Supreme Court is currently considering a successor case to *Waller* that may modify or clarify its holding, the decision in *Waller* is currently binding upon both the circuit court and this court.” *8341 Murphy LLC v. American Transmission Company LLC*, Appeal No. 2013AP72-LV, Order at p. 3.

The plain language of Wis. Stat. § 32.06(5) mandates that “[n]othing in this subsection shall be construed to ... prevent the condemnor from proceeding with condemnation during the

Diane Fremgen  
February 14, 2013  
Page 2

pendency of the [landowner's] action to contest the right to condemn." The Court of Appeals has now confirmed that its own holdings in the previous *Waller* cases require precisely the opposite.

Very truly yours,

GODFREY & KAHN, S.C.



Katherine Stadler  
Bryan Cahill

KS  
Encl.

cc: Hugh Braun

9088727\_1



OFFICE OF THE CLERK  
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**DISTRICT IV**

February 12, 2013

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Circuit Court Judge  
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You are hereby notified that the Court has entered the following opinion and order:

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2013AP72-LV

In Re the Acquisition of Property Easement from: American  
Transmission Company LLC and ATC Management Inc. v. 8341  
Murphy, LLC (L.C. # 2012CV2766)

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

American Transmission Company, LLC has filed both a notice of appeal, and an alternate petition for leave to appeal, from an order denying its motion to compel the Dane County Condemnation Commission to lift its stay on a just compensation proceeding, while a related circuit court action between the same parties is pending to determine whether the proposed taking would render the subject property an "uneconomic remnant."

The first issue before us is whether the order from which review is being sought is final and appealable as of right. *See* WIS. STAT. RULE 809.10(4). A judgment or order is final when it disposes of the entire matter in litigation as to one or more of the parties. WIS. STAT. § 808.03(1). “A court disposes of the entire matter in litigation in one of two ways: (1) by explicitly dismissing the entire matter in litigation as to one or more parties or (2) by explicitly adjudging the entire matter in litigation as to one or more parties.” *Tyler v. RiverBank*, 2007 WI 33, ¶17, 299 Wis. 2d 751, 728 N.W.2d 686. In addition, “[f]rom September 1, 2007 forward, the final document will have “a statement on the face of [it] that it is final for the purpose of appeal. Absent such a statement, appellate courts should liberally construe ambiguities to preserve the right of appeal.” *Id.*, ¶25.

The circuit court’s order refusing to lift the stay and to compel the commission to proceed forthwith is not a final determination of the condemnation action, because the court explained from the bench that it contemplates that the commission will proceed to decide the just compensation issue once the uneconomic restraint issue has been resolved. [30:9,11] No claims have been disposed of or parties dismissed.

With respect to the alternate request for leave to appeal, we note that interlocutory review is disfavored in this state. *State ex rel. A.E. v. Circuit Court for Green Lake County*, 94 Wis. 2d 98, 102, 288 N.W.2d 125 (1980). While we have discretion to review an order not appealable as of right when an appeal would materially advance the termination of the litigation or clarify further proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice, we will not grant leave to appeal absent compelling circumstances. *See* WIS. STAT. § 808.03(2) (2011-12); *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268, 569 N.W.2d 45 (Ct. App. 1997).

This policy “is designed to protect pretrial and trial court proceedings from the interruptions and delays caused by multiple appeals, and to limit each case to a single appeal” under ordinary circumstances. *Id.* The petitioner must demonstrate both that there is a substantial likelihood of success on appeal, and that the necessity of immediate review outweighs our general policy against the piecemeal disposition of litigation. *Id.* at 268 n.2; *State v. Salmon*, 163 Wis. 2d 369, 374-75, 471 N.W.2d 286 (Ct. App. 1991).

Having considered the arguments of both the petitioner and the respondent, we conclude that there are no sufficiently compelling reasons to warrant interlocutory review in this case. The circuit court’s refusal to compel the compensation commission to proceed was based upon the holding of *Waller v. American Transmission Co.*, 2011 WI App 91, 334 Wis. 2d 740, 799 N.W.2d 487, which explicitly stated that an uneconomic remnant claim must be given priority and decided before a just compensation issue can be determined. *Id.*, ¶16. Although the Wisconsin Supreme Court is currently considering a successor case to *Waller* that may modify or clarify its holding, the decision in *Waller* is currently binding upon both the circuit court and this court. Therefore, as a practical matter, granting interlocutory review would not achieve the petitioners’ aim of accelerating the proceedings before the condemnation committee.

IT IS ORDERED that the notice of appeal is dismissed for lack of jurisdiction because the order from which review is sought is not final.

IT IS FURTHER ORDERED that the petition for leave to appeal is denied.

---

*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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Consolidated Appeal Nos. 2012AP840 and 2012AP805

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Scott N. Waller and Lynnea S. Waller,  
Plaintiffs-Respondents,

Appeal No. 2012AP000840

Appeal No. 2012AP805

v.

Circuit Court Case

No. 2008CV000520

No. 2010CV691

American Transmission Co., LLC  
Defendant-Appellant.

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On Bypass from the Court of Appeals, District II  
Appeal From Final Judgments of the Circuit Court  
Of Walworth County, the Honorable James L. Carlson, Presiding  
Circuit Court Case Nos. 208CV520 and 2010CV691

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**RESPONSE BRIEF AND APPENDIX  
OF SCOTT N. WALLER AND LYNNEA S. WALLER,  
PLAINTIFFS-RESPONDENTS,  
TO THE SUPPLEMENTAL BRIEF AND APPENDIX  
OF AMERICAN TRANSMISSION CO., LLC.**

---

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## INTRODUCTION

ATC has been granted the option to file a supplemental brief to its brief to the Court of Appeals. The supplemental brief is essentially a restatement of ATC arguments in its brief to the Court of Appeals and its Petition for Bypass. The Wallers' response is consistent with their original brief to the Court of Appeals.

The justification for the supplemental brief appears to be that in ATC, LLC v. 8341 Murphy LLC, No. 2012CV2766, a pending case in Dane County, a property owner initiated a challenge action which was not immediately heard by the trial court as required by the provisions of Wis. Stat. § 32.06(5). While the record is not complete, it appears that the trial court in the 8341 Murphy LLC case would not permit ATC to file its petition for a hearing before the Condemnation Commission. As a result, ATC could not proceed to acquire an easement because in "slow take" cases under § 32.06(7) title cannot be acquired until after there has been a hearing before the Condemnation Commission, an Award, and a payment of that Award.

The result in 8341 Murphy LLC is unusual because the provisions of Wis. Stat. § 32.06(5) provide specifically:

The commencement of an action by an owner under this said section shall not prevent a condemnor from filing the Petition provided for in (7) and proceeding thereon.

In its Introduction, ATC states that the Waller decisions by the Court of Appeals hold that the right to take challenge actions should be heard before a hearing on valuation. That ruling of the Court of Appeals is based on the sound

determination that there cannot be a hearing on valuation until there has been a preliminary hearing on what is going to be condemned.

A condemnor like ATC has a right to demand an immediate hearing on any challenge to its right to take based on the claim that it has left the condemnee with an “uneconomic remnant”. Wis. Stat. § 32.06(5) If the trial of that issue is delayed for any reason, it should pursue enforcement of the language in § Wis. Stat. 32.06(5) providing that commencement of a challenge action shall not delay acquisition of a needed easement. A typical condemnee will not object to the acquisition of the easement for the amount of the Jurisdictional Offer if for some reason there is a delay in the trial on its claim that ATC must also acquire an uneconomic remnant. ATC can also pursue a remedy in the State Legislature and obtain a change in the statute which gives utility companies the same “quick take” privilege enjoyed by those acquiring for transportation purposes under the provisions of Wis. Stat. § 32.05. The Wisconsin Supreme Court lacks jurisdiction to accommodate ATC’s needs for a “quick take” prerogative.

Significant here is that ATC was not delayed in acquiring an easement on the Waller property. The Waller action to compel acquisition of an uneconomic remnant was commenced on April 25, 2008 and was scheduled for an initial hearing on May 22, 2008. On May 22, 2008 the case was adjourned until November 5, 2008 and ATC was given immediate possession of the easement area it sought to acquire without objection from the Wallers.

Pursuant to its rights under the statute, ATC obtained a hearing before the Walworth County Condemnation Commission on June 11, 2008. An Award of

Damages was filed by the Commission on June 11, 2008. ATC proceeded to pay the Award of Damages and acquire title pursuant to the procedure outlined in Wis. Stat. §32.06(9)(b).

ATC encountered no delay in the acquisition of the utility easement in the Waller case. If the statutes are observed as they were in the Waller case, ATC will not be delayed in its acquisition of an easement, simply because a property owner commences an action under Wis. Stat. § 32.06(5) to require ATC to also acquire an uneconomic remnant, and trial of that issue is delayed.

The facts in the 8341 Murphy, LLC case are not in the record, were not considered by the Trial Court, and are not probative here regarding the procedures implemented under Wis. Stat. § 32.06(5) by the Trial Court.

The issues that need to be addressed in the Supreme Court are set out in the Waller brief to the Court of Appeals:

1. Wis. Stat. § 32.06(5) providing for the commencement of a challenge action is the only way to raise the issue of whether the property left in the ownership of the property owner is an “uneconomic remnant”;
2. An “uneconomic remnant” under Wis. Stat. § 32.06(3m) is a parcel that, following a partial taking, has sustained “substantially impaired economic viability”;
3. Wis. Stat. § 32.28 authorizes payment of litigation expenses for litigants who prevail in a challenge to a right to take action commenced pursuant to Wis. Stat. § 32.06(5);
4. The Wallers were displaced persons under Wis. Stat. § 32.19(2)(e)(a) because of the acquisition of the utility easements by ATC.

### STANDARD OF REVIEW

The standard of review for findings of fact made by a trial court is that they will be affirmed unless clearly erroneous. *Employers Ins. of Wausau v. Jackson*, 190 Wis. 2d 597, 527 N.W.2d 681 (1995); Wis. Stat. § 805.17 (2). When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, 257 Wis. 2d 421, 651 N.W.2d 345.

Review of the application of an unambiguous statutory standard to agreed facts is a question of law to be reviewed *de novo*. *Marotz v. Hallman*, 2007 WI 89, ¶15, 302 Wis. 2d 428, 734 N.W.2d 411.

STATEMENT OF FACTS

Scott and Lynnea Waller are husband and wife and have owned property at 6249 Mound Road, Delavan, Wisconsin since 1989. The property involves 1.51 acres of land (65,775 square feet), a one family residence, site improvements, landscaping and out buildings. The property is zoned A-1 Agricultural. It has been used by the Wallers since its acquisition in 1989 for residential purposes, for hobby farming activities including raising chickens, turkeys and pasturing sheep. R-296, p. 8.

On March 20, 2008, American Transmission Company, LLC served the Wallers with a Jurisdictional Offer of \$99,500 for the purchase of a forty-five foot utility easement along two sides of their triangular property covering .799 acres (34,804 square feet) and running for a distance of 291 feet along the north boundary of the property and 482 feet along the southeastern boundary for a total distance of 773 feet. The easement covered 52.91% of the lot. On June 11, 2008 ATC acquired the easement to install a 138 KV electric transmission line. R-259 Ex. 1.

The property was appraised for ATC by John Rolling and Rolling & Co. He concluded:

Before:	\$130,000
After:	<u>\$ 48,000</u>
Damage	\$ 82,000 63%

Mr. Rolling allocated \$7500 of the \$82,000 in damages to demolish and remove the residential improvements. The Rolling appraisal report contained the following conclusion at page 18:

“We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land.”

R-259, Ex. 6

The Wallers retained Kurt Kielisch of Appraisal Group One to appraise their property before and after taking. Mr. Kielisch made these findings:

Before:	\$132,000
After:	<u>\$ 15,500</u>
	\$116,500 88%

Mr. Kielisch also concluded that the residential improvements after taking had no value. Mr. Kielisch allocated \$15,000 to remove the residential improvements. His report stated:

“Granting of such rights to the Grantee reduces the property owner’s right to enjoy their property and utilize it to its fullest use. Due to the restricted use of the property and the giving up of the right to control the easement area, it is concluded that the easement area represents a 100% loss of property value to the property owner.”

R-259

Ex. 9

The Jurisdictional Offer set the following values:

Before:	\$130,000
After:	<u>\$ 30,500</u>
Damage	\$ 99,500 76.53%

R-259 Ex. 1

On March 14, 2008, Dave Davies, a representative of ATC, wrote to the Wallers and proposed that they accept \$99,500 for the taking of the easements. The Wallers requested that the entire property be purchased and Dave Davies agreed to buy the entire property for \$132,000. But he conditioned that purchase

on having the Wallers waive their relocation benefits under the provisions of Wis. Stat. §32.19. R-266 p. 2

The Wallers rejected the offer. At a deposition on June 4, 2009, Lynnea Waller quoted Dave Davies as saying, “You folks need to understand the ATC has unlimited resources. If you try to take us to court, we will drag this out for years and leave you penniless.” R-146, R. App. 113. This threat turned out to be prophetic. By February 1, 2012 the Wallers had incurred \$298,026.74 in litigation expenses<sup>1</sup>.

The claim of the Wallers in this action involved only two items:

1. The Wallers asked ATC to acquire their property for \$132,000. This is the amount that the property was appraised for by their appraiser; the State’s appraiser appraised the property at \$130,000. Since ATC’s Jurisdictional Offer was in the amount of \$99,500 for acquisition of the easements, the entire property could have been acquired by the payment of an additional amount of \$32,500. ATC offered to pay that amount, but only upon the condition that the Wallers would waive their relocation rights.

2. The relocation claim was in the amount of \$66,948.68 (R-43 Ex. A; R-47; R-50). In the Findings of Facts and

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<sup>1</sup> By negotiating for a waiver of relocation benefits Mr. Davies may have violated the provisions of Wis. Stat. §32.197, §32.25, §32.26, §32.29 and Comm 202.001, 202.08(3), 202.10, and 202.12, Wis. Adm. Code. That issue is not before the court but is part of the context of this case.

Conclusions of Law, Judge Carlson allowed \$58,936.81<sup>2</sup> but then applied the statutory cap of \$25,000 for relocation costs set out in Wis. Stat. § 32.19(4). R-47. The Court then added \$1,350 for moving costs, and awarded judgment for relocation costs in the amount of \$26,350, plus Court costs of \$1,811.92 for a total judgment of \$28,161.92. R-250, R. App 119.

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<sup>2</sup> Only \$211,261.74 was allowed. The principal exclusion involved litigation expenses related to the valuation trial (\$52,097.50) and work done which related to the relocation claim and trial (\$11,892.00). The Wallers were forced to participate in the valuation trial and sought a Writ of Mandamus from the Court of Appeals to prevent it from proceeding. The exclusion of litigation expenses in the valuation trial may have been improper. In *Maxey v. Redevelopment Authority of the City of Racine*, 120 Wis. 2d 13, 353 N.W. 2d 812 (1984), similar circumstances existed in an inverse condemnation action, and litigation expenses were allowed. The Wallers did not raise the issue on cross-appeal, principally because of their conviction that litigation of this dispute had already far exceeded reasonable boundaries. A similar decision was made regarding the Court's application of the § 32.19(4) limitation of \$25,000 on the cost of replacement housing. Such a limitation was ruled unconstitutional in *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N.W. 2d 380 (1970).

STATEMENT OF THE CASE

On March 20, 2008, American Transmission Co., LLC, ATC, served the Wallers with a Jurisdictional Offer to acquire a forty-five foot utility easement along two sides of their triangular property at 6249 Mound Road, Delavan, Wisconsin. (R. 259, Ex. 1, R-App. p. 101.) The Jurisdictional Offer of \$99,500 represented 76.53% of the \$130,000 appraised value of the property. *Id.*

On April 25, 2008, the Wallers commenced an action pursuant to the provisions of Wis. Stat. § 32.06(5) claiming that the remnant left after the acquisition of the easements was an uneconomic remnant as that term is defined in Wis. Stat. §32.06(3m) (Case No. 08CV520). On May 7, 2008 ATC petitioned the Court for a hearing before the Condemnation Commission pursuant to the provisions of Wis. Stat. § 32.06(7) (Case No. 08GF78). (R. 6). At a hearing on May 22, 2008, Judge Robert J. Kennedy declined to address whether the Wallers were left with an “uneconomic remnant” and the case was adjourned to November 5, 2008. He then referred the matter to the Condemnation Commission on May 22, 2008 and gave ATC immediate possession of the property without objection from the Wallers. (R. 10.)

Following a hearing on June 11, 2008, the Condemnation Commission filed an Award of Damages in the amount of \$90,000 based on the following findings:

Fair Market Value before the taking	\$130,000.00
Fair Market Value immediately after the taking	<u>\$ 40,000.00</u>
Reduction in fair market value	\$ 90,000.00 69%

(R. 47.) The Award of Damages of the Condemnation Commission was appealed to Circuit Court of Walworth County on July 29, 2008 (Case No. 08CV955).

On November 5, 2008 in Case No. 08CV520, the Court dismissed the action, ruling that Wis. Stat. § 32.06(5) did not authorize the Wallers to raise the issue of whether they had been left with an uneconomic remnant. (R. 113.) An Order for Dismissal was signed on November 18, 2008. (R. 53.)

On October 28, 2009, the Court of Appeals reversed the ruling and remanded the case to the Circuit Court of Walworth County for trial on the issue of whether the Wallers were left with an uneconomic remnant. *Waller v. ATC (Waller I)*, 2009 WI App. 172, 322 Wis. 2d 255, 776 N.W.2d 612.

On remand, the case was assigned to the Honorable John R. Race who conducted a scheduling conference on January 4, 2010. On January 22, 2010, the Court signed and filed a Scheduling Order which, contrary to the decision of the Court of Appeals, directed that a jury trial be conducted in the related valuation case (Case No. 08CV955) involving the Waller appeal from the award of the Condemnation Commission, before a trial in the uneconomic remnant case would occur (Case No. 08CV520). (R. 76.)

On February 24, 2010, the Wallers petitioned the Court of Appeals to issue a Writ of Mandamus directing the trial court to comply with the remand in its decision dated October 28, 2009. (R. 82.) On March 17, 2010, the Court of Appeals denied the Petition for Mandamus on the ground that the trial court had discretion on how to proceed after remand and on the ground that the Wallers retained an adequate remedy by appeal. (R. 87.)

A jury trial was conducted on March 22, 23 and 24, 2010 in the related valuation case involving the Waller appeal from the adequacy of an Award of Damages by the Condemnation Commission (Case No. 08CV955). The jury found:

Before Value:	\$132,000
After Value:	<u>\$ 38,000</u>
Damage	\$ 94,000

(R. 187.)

Without taking evidence on the issue of whether the property left in the ownership of the Wallers was an uneconomic remnant, the Court made an oral ruling dismissing the Waller action in Case No. 08CV520, in which they contended that they were left with an uneconomic remnant under Wis. Stat. § 32.06(3m). (R. 208, p. 42.) Judgment was entered on May 21, 2010. (R. 197.) The Wallers appealed on June 9, 2010.

On May 25, 2011 the Court of Appeals reversed the dismissal of the Waller uneconomic remnant action and stated:

As the Wallers were entitled to a determination of whether their remaining property is an uneconomic remnant as defined in Wis. Stat. § 32.06(3m) prior to the just compensation phase of the eminent domain proceedings, we reverse and remand for a § 32.06(5) hearing and proceeding consistent with this decision. If the circuit court finds that the Wallers' property is an uneconomic remnant, the jury's just compensation verdict is vacated.

*Waller v. ATC (Waller II)*, 2011 WI App 91 ¶17, 334 Wis.2d 740, 799 N.W.2d 487.

On this second remand, the uneconomic remnant case was tried by Judge James Carlson on November 10 and 14, 2011. Judge Carlson found the acquisition of the 45-foot easements resulted in the Waller property sustaining

“substantially impaired economic viability”. (R. 266, p. 5, ¶13, R-App. p. 108.) The Court then concluded the Wallers were left with an uneconomic remnant and signed detailed Findings of Fact and Conclusions of Law and an Order for Judgment and Judgment directing ATC to acquire the “uneconomic remnant” based on a value of \$130,000 for the entire property. (R. 266, p. 6, R-App. p. 109; R. 283, R-App. p. 110.)

On January 26, 2012, Judge Carlson conducted a hearing regarding the claim of the Wallers to reimbursement of litigation expenses in the amount of \$299,626.74 pursuant to Wis. Stat. § 32.28(3)(b). At that hearing, the Judge ordered reimbursement of attorneys fees, and on March 9, 2012 signed a final order awarding the Wallers \$211,261.74 in litigation expenses. (R. 286, R-App. p. 111.)

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On December 15, 2008 the Wallers filed a claim with ATC pursuant to the provisions of Wis. Stat. § 32.20 for relocation benefits due under Wis. Stat. § 32.19. ATC denied the claim. The Wallers then petitioned, pursuant to Wis. Stat. § 32.26(5) that the Department of Commerce make a determination that the Wallers should be considered “displaced persons” entitled to relocation benefits as a result of ATC’s acquisition. (RR. 43., Ex. 7.) On April 30, 2010 the Wallers commenced an action pursuant to Wis. Stat. § 32.20 to recover the amount of the claim (Case No. 10CV691).

The action to recover relocation expenses in the amount of \$66,948.68 was tried before Judge James Carlson on January 25, 2012. Judge Carlson found that the Wallers were displaced persons entitled to relocation benefits. (RR. 47, R-App. p. 116.) On February 29, 2012 Judgment was entered in favor of the Wallers in the amount of \$28,161.92. (RR. 50, R-App. p. 119.) The Wallers' claim for relocation expenses was reduced, in part, because of the provisions of Wis. Stat. § 32.19(4) which limits recovery for the acquisition of "replacement housing" to \$25,000. (RR. 47, R-App. p. 118)

## ARGUMENT

### I.

#### Wis. Stat. § 32.06(5) Providing for the Commencement of a Challenge Action is the Only Way To Raise the Issue of Whether the Property Left In the Ownership of the Property Owner is an “Uneconomic Remnant”

ATC contends that if the Wallers wished to raise the issue of whether they were left with an uneconomic remnant following the acquisition of 45' utility easements on two sides of their triangular property, they should have raised the issue before the Condemnation Commission [Wis. Stat. § 32.06(8)] and, if necessary, raised the issue in an appeal to the Circuit Court pursuant to the provisions of Wis. Stat. § 32.06(10). ATC also suggests that as an option the Wallers could have commenced an inverse condemnation action under the provisions of Wis. Stat. § 32.10. ATC cites no authority, in Wisconsin or across the country, where an action regarding an uneconomic remnant was resolved in either a valuation proceeding or in an inverse condemnation action.

In advancing its contention that the Wallers should have simply proceeded to appeal the adequacy of the Award of Damages or commenced an inverse condemnation action, ATC disregarded the lucid disposition of this issue in *Waller v. ATC*, 322 Wis. 2d 255, 776 N.W. 2d 612 (2009) (*Waller I*) and in *Waller v. ATC*, 334 Wis. 2d 740, 799 N.W. 2d 487 (2011) (*Waller II*). At paragraph 14 in *Waller I* the Court said:

¶ 14 The Wallers are persuasive in their assertion that the two questions must be separated. As they observe, before compensation can be set, there must be a determination of what is

being taken. In *Arrowhead Farms, Inc. v. Dodge County*, 21 Wis. 2d 647, 651, 124 N.W.2d 631 (1963), the court explained that procedural issues must be resolved before an administrative body or a court calculates compensation. In *Rademann v. DOT*, 2002 WI App 59, ¶ 37, 252 Wis. 2d 191, 642 N.W.2d 600, we agreed and stated that, pursuant to WIS. STAT. § 32.06(5), all issues other than that of just compensation must be presented to the circuit court within forty days of receipt of the jurisdictional offer.

**\*263** This permits the court and the commission to “devote full attention” to the crucial issue of just compensation “without having the deliberation deflected into consideration of collateral procedural matters.” *Rademann*, 252 Wis. 2d 191, ¶ 38, 642 N.W.2d 600. These principles are reflected in the plain language of § 32.06(3m), which requires the condemnor to make a *concurrent* offer to purchase or condemn an uneconomic remnant. The legislature made it clear that the property owner must be told of the scope of the acquisition before the question of compensation is negotiated.

....

[5] ¶ 15 A property owner who is left with a substantially diminished parcel of unencumbered property must have the right to contest a condemnation that does not acknowledge an uneconomic remnant. Here, the Wallers are challenging the right to condemn the property as described by ATC in the jurisdictional offer. The only statute that provides the property owner with a forum for asserting such a right is WIS. STAT. § 32.06(5). The declaration of an uneconomic remnant triggers the condemnor’s duty to offer to acquire the remnant concurrently, giving the property owner the opportunity to consider the offer in its totality. See § 32.06(3m). Furthermore, the existence of an uneconomic remnant also implicates other property owner rights such as relocation benefits under WIS. STAT. § 32.19, which the property owner may then consider.

¶ 16 The declaration of an uneconomic remnant is not a meaningless exercise swallowed up in the compensation process, but a separate pursuit by a **\*264** property owner to protect his or her rights. The legislature created this statutory scheme to “provide[ ] an orderly method of resolving the disputes involved in the exercise of the eminent-domain power.” *Arrowhead Farms*, 21 Wis. 2d at 651, 124 N.W.2d 631. **\*\*617** Bringing an action to declare an uneconomic remnant is just the type of procedural

matter that is meant to be resolved prior to addressing the adequacy of compensation.

This ruling was re-affirmed by the Court of Appeals in *Waller II* on May 25, 2011. The failure of ATC to address these holdings is ample basis for affirming the Trial Court.

The contention that uneconomic remnant issues should be resolved in valuation proceedings belies a fundamental misunderstanding of what is involved in valuation proceedings. Wis. Stat. § 39.09(6g) provides as follows:

**(6g)** In the case of the taking of an easement, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property enumerated in sub. (6)(a) to (g) where shown to exist.

This statute provides that the Court or a jury in a valuation case must first determine the fair market value of the property before the taking and the fair market value of the property after the taking. These determinations, once made, do not reach the question of whether the property after taking has sustained “substantially impaired economic viability”.

The contention that “uneconomic remnant” claims should be litigated in inverse condemnation actions pursuant to the provisions of Wis. Stat. § 32.10 is even less sustainable and also belies a basic misunderstanding of what inverse condemnation actions are about. In *Howell Plaza, Inc. v. State Highway Commission*, 92 Wis.2d 74, 284 N.W.2d 887 (1979), the standard for recovery is

whether the condemnor has acquired all or substantially all of the beneficial use of the property. In the Waller circumstances, the Wallers did retain full ownership of a parcel of land, outside of the easement area, that had a value of approximately \$32,500; that value was allocated to a commercial use after taking. Both appraisers agreed the value of the residential improvements had been rendered totally obsolete or was totally destroyed; the Wallers were left with commercial property that had value, although the residential property they needed did not.

The Wallers were not eligible to make a claim under the inverse condemnation provisions of Wis. Stat. § 32.10 because they retained full ownership of  $\frac{3}{4}$  acre of land. It is that parcel that has sustained substantially impaired economic viability, and in this action under Wis. Stat. § 32.06(5) they ask ATC to acquire it as an “uneconomic remnant”. A property owner who has been left with an uneconomic remnant following the acquisition of a utility easement will not obtain a determination of his claim if he elects to appeal from the adequacy of the award of damages under Wis. Stat. § 32.06(10) (Appeal to the Circuit Court) or commences an inverse condemnation action under the provisions of Wis. Stat. § 32.10.

## II.

### An “Uneconomic Remnant” Under Wis. Stat. § 32.06(3m) Is a Parcel That, Following Taking, Has Sustained “Substantially Impaired Economic Viability”

ATC contends that the Waller property, after the taking of utility easements by ATC, is not an uneconomic remnant. In making this assertion, ATC challenges the Findings of Fact by Judge Carlson that the acquisition of the ATC easements caused the Waller property to sustain “substantially impaired economic viability”. This finding was supported by an abundance of evidence, including the admission by ATC’s own appraiser that the residential value of the improvements on the property were rendered “totally obsolete” and included in his calculation of damages \$7,500 to raze the residential improvements.

Findings of Fact by the Trial Court, supported by credible evidence, are not reviewable under the provisions of Wis. Stat. § 805.17(2).

Judge Carlson’s Conclusion of Law that the Waller property was an “uneconomic remnant” after the taking is subject to review; but that conclusion of law is compelled by the circumstances that the statutory standard, “substantially impaired economic viability” has been satisfied. An “uneconomic remnant” under Wis. Stat. § 32.06(3m) is a parcel that, following taking, has sustained “substantially impaired economic viability”.

ATC’s appeal on this issue is frivolous.

III.

Wis. Stat. § 32.28 Authorizes Payment of  
Litigation Expenses for Litigants Who Prevail  
In a Challenge to a Right to Take Action  
Commenced Pursuant to Wis. Stat. § 32.06(5)

ATC contends that the Wallers were not eligible for payment of litigation expenses.

The awarding of litigation expenses is mandated in successful challenge actions brought under the provisions of Wis. Stat. § 32.06(5). Wis. Stat. § 32.28(1) and (3) provide as follows:

**32.28 Costs. (1)** In this section, “litigation expenses” means the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court under this chapter.

...

**(3)** In lieu of costs under ch. 814, litigation expenses shall be awarded to the condemnee if:

...

(b) The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking.

The granting of litigation expenses by the Court of Appeals reflects a sound application of a statutory standard to uncontested facts.

IV.

The Wallers Were Displaced Persons  
Under Wis. Stat. § 32.19(2)(e)(a)  
Because of the Acquisition of Utility Easements  
By ATC.

ATC contends that the Wallers are not eligible for relocation benefits because they voluntarily moved from their property.

The record establishes that as early as the Spring of 2008 the Wallers conducted an exhaustive search of replacement property which was resolved by a purchase on March 12, 2009. Occupancy of the new property was delayed as a result of well problems and the necessity of improvements to obtain an occupancy permit. The Wallers eventually occupied their new home on August 15, 2009.

Despite the Wallers' obvious entitlement to relocation benefits, ATC declined to prepare a relocation benefit plan as required by Wis. Stat. § 32.25. The Wallers filed a claim with ATC for relocation benefits on December 15, 2008. That claim was denied. The Wallers then petitioned the Department of Commerce to review their eligibility for relocation benefits pursuant to Wis. Stat. § 32.26(5). After an exhaustive investigation by Mr. Jack Sanderson of the Department of Commerce, he determined on June 3, 2009 that the Wallers were displaced persons and entitled to relocation benefits under the provisions of Wis. Stat. § 32.19(2)(e)(a). Following a trial on January 5, 2012, Judge Carlson found that the Wallers were displaced persons and ordered judgment in favor of the Wallers for relocation expenses in the amount of \$28,161.92. R-47, R. App. 119

The award of relocation expenses is based on established facts and a clear statutory standard.

## CONCLUSION

The Wallers' challenge to the right of ATC to acquire utility easements unless and until it acquires the balance of their property as an "uneconomic remnant" was properly commenced pursuant to the clear language of Wis. Stat. § 32.06(5). That conclusion is supported by two disciplined decisions of the Court of Appeals.

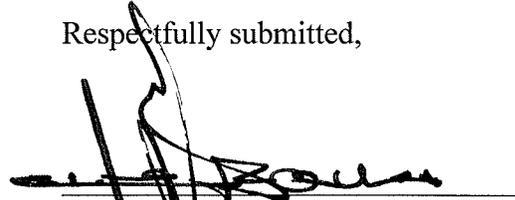
The conclusion of the Trial Court that the Wallers were left with an "uneconomic remnant" is supported by the agreement of the appraisers for both ATC and the Wallers that the value of the residential improvements were rendered "totally obsolete" and the ATC appraiser allocated \$7,500 of his \$82,000 determination of damages to raze those residential improvements.

Under these facts, the Wallers were clearly displaced persons and entitled to relocation benefits. The Findings of Fact of the Trial Court are non-reviewable because they are supported by unchallenged and unrebutted facts in the record. Wis. Stat. § 805.17(2).

This appeal is an unconscionable prolonging of this litigation that has involved protracted stress on an extremely vulnerable family. Sanctions are appropriate. The Judgments should be affirmed and reimbursement of litigation expenses under Wis. Stat. § 32.28 ordered.

Dated at Milwaukee, Wisconsin this 22<sup>nd</sup> day of February, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. Braun", written over a horizontal line. The signature is somewhat stylized and includes a vertical stroke that extends upwards and to the left.

Hugh R. Braun  
WI State Bar No. 1007324

Nicholas R. DiUlio  
WI State Bar No. 1042990

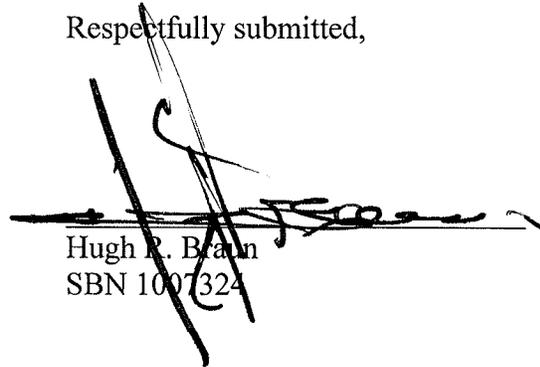
GODFREY, BRAUN & FRAZIER, LLP  
Sixteenth Floor  
735 North Water Street  
Milwaukee, WI 53202  
(414) 278-8500

BRIEF CERTIFICATION

I hereby certify pursuant to Wis. Stat. Rule §809.19(8)(c) the foregoing Brief was produced using proportional serif font conforming to the requirements of Wis. Stat. Rule §809.19(8). The length of the body of this Brief (Statement of the Case, Argument and Conclusion), as determined by the word processing system by which it was generated, is 3,840 words.

Dated this 25<sup>th</sup> day of February, 2012.

Respectfully submitted,



Hugh R. Braun  
SBN 1007324

BRIEF CERTIFICATION  
ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this Brief which complies with the requirement of Wis. Stat. § 809.19(12). I hereby certify that the electronic brief is identical in content and format to the printed form of the brief filed on February 22, 2013. A copy of this certificate has been served on the court and opposing parties as of this date.

Dated this 22<sup>nd</sup> day of February, 2013.

By:   
\_\_\_\_\_  
Nicholas R. DiUlio

STATE OF WISCONSIN  
IN THE SUPREME COURT

**RECEIVED**

**02-25-2013**

**CLERK OF SUPREME COURT  
OF WISCONSIN**

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Consolidated Appeal Nos. 2012AP840 and 2012AP805

---

Scott N. Waller and Lynnea S. Waller,  
Plaintiffs-Respondents,

2012AP000840

v.

American Transmission Co., LLC  
Defendant-Appellant.

Appeal No.

Appeal No. 2012AP805

Circuit Court Case  
No. 2008CV000520  
No. 2010CV691

---

On Bypass from the Court of Appeals, District II  
Appeal From Final Judgments of the Circuit Court  
Of Walworth County, the Honorable James L. Carlson, Presiding  
Circuit Court Case Nos. 208CV520 and 2010CV691

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**APPENDIX OF PLAINTIFFS-RESPONDENTS,  
SCOTT N. WALLER AND LYNNEA S. WALLER**

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INDEX TO APPENDIX

Walworth County Case No. 2008-CV-520

<u>Record No.</u>	<u>Description</u>	<u>Page</u>
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Walworth County Case No. 2010-CV-691

<u>Record No.</u>	<u>Description</u>	<u>Page</u>
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**JURISDICTIONAL OFFER**  
**Wis. Stat. § 32.06**

**By Certified Mail**

TO: Scott N. Waller  
Lynnea F. Waller  
6249 Mound Road  
Delevan, WI 53115

Anchor Bank, FSB  
25 West Main Street  
Madison, WI 53703

PLEASE TAKE NOTICE that this document is the Jurisdictional Offer of the American Transmission Company LLC, and its corporate manager, ATC Management Inc., whose address is N19 W23993 Ridgeview Pkwy. W., P.O. Box 47, Waukesha, Wisconsin 53187-0047 (collectively herein "ATC"), submitted to you in accordance with the provisions of Section 32.06(3), Wis. Stats., as follows:

1. That American Transmission Company LLC and ATC Management Inc. are electric transmission companies as defined in Section 196.485(1)(g) Wis. Stats, jointly constituting a public utility as defined in Section 196.01(5) Wis. Stats., and transact business as a single transmission company (hereinafter collectively referred to as "ATC").
2. That ATC owns and operates an electric transmission system located in Walworth County, Wisconsin, and other parts of the State of Wisconsin, which system delivers electric power from generating stations and elsewhere, to various points of delivery for ultimate distribution to consumers thereof.
3. That in order to provide adequate electric service to parts of Walworth County and elsewhere, ATC intends to install, construct, own and maintain an electric transmission line through a portion of the Town of Darien, Wisconsin and across a portion of the real estate of the Owner as hereinafter described.
4. Pursuant to Section 32.07(1) Wis. Statutes, the necessity of the taking of the "Easement Premises" has been determined by issuance of a certificate of public convenience and necessity.
5. That ATC, in good faith, intends to acquire an easement interest in and to a portion of the following described real estate and use it for utility purposes:

That the specific easement interest sought to be acquired with respect to the above described real estate is more particularly described in Exhibit A attached hereto and incorporated herein (herein the Easement Premises).

6. That ATC's proposed date of occupancy of the Easement Premises is April 12, 2008

7. That ATC hereby offers compensation for the Easement Premises in one lump sum of \$99,500.00, itemized as follows:

Acquisition of easement interest: Ninety nine thousand and five hundred dollars (\$99,500.00)

In the alternative, ATC offers compensation for the Easement Premises in annual payments of One Thousand Five Hundred Thirty and 77/100ths Dollars (\$1,530.77) payable on January 15th of each year.

8. That compensation for additional items of damage set forth in Section 32.19, Wis. Stats., maybe claimed under section 32.20, Wis. Stats. and will be paid if shown to exist.
9. That the Appraisal of the Easement Premises upon which ATC's Offer is based is available for inspection and copying by persons having an interest in the land sought to be acquired, from 9:00 a.m. to 3:00 p.m., weekdays at:

American Transmission Company LLC  
Real Estate Department  
2 Fen Oak Court  
Madison, WI 53718-8810

10. That the Owners have twenty (20) days from the date of the personal service of this Offer, if personally served, or 20 days from the date of postmark of the certified mail envelope transmitting this Offer, if transmitted by mail, or 20 days from the date of publication of this Offer, if published, in which to accept this Offer.
11. That if this Offer is accepted, Owner shall execute the acceptance clause below and deliver the same to the attention of Attorney Mark J. Steichen, Boardman Law Firm, P.O. Box 927, Madison, WI 53701-0927.
12. That if this Jurisdictional Offer is accepted, the transfer of the requisite interest in and to the Easement Premises shall be accomplished within 60 days after date of acceptance, including payment of the consideration stipulated in this Jurisdictional Offer, unless such time is extended by mutual written consent of the Owner and ATC.
13. That if this Offer is not accepted within said 20-day period, ATC may petition for a determination of just compensation by the Walworth County Condemnation Commissioners; and that either ATC or any other party hereto may appeal from the award of the County Condemnation Commissioners to the Circuit Court within 60 days as provided for in Section 32.06(10), Wis. Stats.
14. That if the Owner desires to contest the right of ATC to condemn the Easement Premises for any reason other than the amount of compensation offered, the Owners may within 40 days from the date of service of this Jurisdictional Offer, commence an action in the

Walworth County Circuit Court naming ATC as a defendant; and such action shall be the only manner in which any issue other than the amount of just compensation may be raised pertaining to the condemnation of the Easement Premises. The commencement of an action by the owner does not prevent ATC from filing the Petition for Determination of Just Compensation by the Walworth County Condemnation Commissioners.

Dated this 20<sup>th</sup> day of March, 2008.

AMERICAN TRANSMISSION COMPANY LLC a  
Wisconsin limited liability company  
By ATC Management Inc., its manager

By Teresa M. Kochaver  
Name: Teresa M. Kochaver  
Title: Manager, Real Estate

ACCEPTANCE/REJECTION

This Jurisdictional Offer is accepted/rejected (please, circle one) this \_\_\_\_\_ day of \_\_\_\_\_ 2008.

OWNER:

Name: \_\_\_\_\_  
Scott N. Waller Date

Name: \_\_\_\_\_  
Lynnea F. Waller Date

OWNER/MORTGAGEE:

Anchor Bank, FSB

By: \_\_\_\_\_  
Date: \_\_\_\_\_  
Title: \_\_\_\_\_

Return To:  
Mark J. Steichen  
Boardman Law Firm  
1 S. Pinckney Street, Ste 410  
P.O. Box 927  
Madison, WI 53701-0927

SCOTT N. WALLER and  
LYNNEA S. WALLER,

Plaintiffs,

Case No. 08-CV-520

v.

AMERICAN TRANSMISSION CO., LLC,

Defendant.

**FILED**  
CIRCUIT COURT

DEC 14 2011

CLERK OF COURTS - WALWORTH CO.  
BY ELISABETH YAZBEC

**FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

This matter came on for trial commencing on November 10 and November 14, 2011. Upon reviewing the testimony of the witnesses, the exhibits and hearing argument of counsel, the Court makes the following:

FINDINGS OF FACT

1. On March 20, 2008, American Transmission Co., LLC, (ATC), served the Wallers with a Jurisdictional Offer to acquire a forty-five foot utility easement along two sides of their triangular property at 6249 Mound Road, Delavan, Wisconsin. The Jurisdictional Offer in the amount of \$99,500 represented 76.53% of the \$130,000 appraised value of the property by ATC.

Exhibit 1.

2. Scott and Lynnea Waller are husband and wife and have owned property at 6249 Mound Road, Delavan, Wisconsin since 1989. The property includes 1.51 acres of land (65,775 square feet), a one family residence, site improvements, landscaping and out buildings. The property is zoned A-1 Agricultural. It has been used by the Wallers since its acquisition in 1989 as a residence, for hobby farming activities including raising chickens, turkeys and pasturing sheep.

3. The easements acquired by ATC were 45 feet in width along the east and north sides of the Waller triangular property covering .799 acres (34,804 square feet) and running for a distance of 291 feet along the north boundary of the property and 482 feet along the southeastern boundary for a total distance of 773 feet. The easement covered 52.91% of the lot. ATC acquired the easement to install a 138 KV high voltage electric transmission line. Exhibit 2, 3.

4. On March 14, 2008, Dave Davies, a representative of ATC, wrote to and met with the Wallers. The Wallers agreed to accept the offer provided ATC would buy the remaining property. Dave Davies agreed to buy the entire parcel but he conditioned that purchase on having the Wallers waive their relocation benefits under the provisions of Wis. Stat. § 32.19.

5. The easement authorized ATC to do the following:

“construct, install, operate, maintain, repair, replace, rebuild, remove, relocate, inspect and patrol a line of structures, comprised of wood, concrete, steel or of such material as Grantee may select, and wires, including associated appurtenances for the transmission of electric current, communication facilities and signals appurtenant thereto”

ATC was also granted the associated rights to:

1) Enter upon the easement strip for the purposes of exercising the rights conferred by this easement.

2) Construct, install, operate, maintain, repair, replace, rebuild, remove, relocate, inspect and patrol the above described facilities and other appurtenances that the Grantee deems necessary.

3) Trim, cut down and remove any or all brush, trees and overhanging branches now or hereafter existing on said easement strip.

4) Cut down and remove such trees now or hereafter existing on the property of the Landowner located outside of said easement strip which by falling might interfere with or endanger said line(s), together with the right, permission and authority to enter in a reasonable manner upon the property of the Landowner adjacent to said easement strip for such purpose. Exhibit 2.

5) Paragraph 5 of Exhibit A to the easement provided "the utility shall employ all reasonable measures to ensure that the landowners telephone and radio reception is not adversely affected by the high voltage transmission lines."

Pursuant to this authorization, ATC removed all of the brush and trees which constituted a sound barrier between the residence of the Wallers and Interstate 43. The easement did not contain a limitation on the number of lines that could be installed. Exhibit 2.

6. ATC retained Rolling & Co. In a report dated December 12, 2007, Mr. Rolling concluded that the acquisition of the easement would have an immediate negative effect on the residential appeal of the property noting that over one-half of the property will be under easement. Exhibit 6. The appraisal report contained the following comments:

"The subject will have major transmission lines along two of its three sides. The transmission lines will be within 60' of the house. A substantial part of the landscaping will have been lost. Our before analysis suggested a property which was already in transition from improved residential use to vacant industrial lot use. We believe the installation of the transmission line pole and the lines themselves brings this property to the tipping point from residential appeal toward light industrial appeal. It is more likely that the next buyer of the property will be an industrial developer rather than a residential user. We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land." Exhibit 5, 6.

7. Art Sullivan of Appraisal Group One prepared an appraisal report for the Wallers dated February 18, 2008. He concluded that after taking, the value of the residential improvements was destroyed and the value of the remaining property was \$15,500. Exhibit 7, 8. Both appraisers allocated as part of the damages, sustained as a result of the taking, an amount necessary to tear down the residential improvements. Both appraisers agreed that the highest and best use of the Waller property changed from rural residential to vacant industrial after taking.

8. Mr. Kielisch of Appraisal Group One prepared a Supplement to its 2008 Report, which concluded that the property remaining in the ownership of the Wallers after the taking of the easements sustained "substantially impaired economic viability." Exhibit 15.

9. Upon receipt of \$90,000 in January, 2009, the Wallers paid the mortgage on their Town of Delavan home and purchased a new home in the Town of Sharon on March 12, 2009. Such acquisition was done without relocation benefits. Because of septic and well problems at their new home in Sharon, the Wallers were not able to occupy the property until August 15, 2009.

10. After the high voltage transmission lines were installed and activated, the Wallers experienced interference with radio and television reception, the use of cell phones, their electricity meter and the speedometer in a motor vehicle.

11. Acting pursuant to Wis. Stat. § 32.19, the Wallers applied for relocation benefits. American Transmission Company denied the claim and the Wallers petitioned the Department of Commerce for review of the denial pursuant to Wis. Stat. § 32.26(5). On June 3, 2009, Jack Sanderson of the Department of Commerce advised ATC that he had visited the property and made a determination that as a result of the acquisition of the easements by ATC, the Wallers were displaced persons and entitled to relocation benefits pursuant to the provisions of Wis. Stat. § 32.19(2)(e). Mr. Sanderson's conclusions were confirmed by a letter from Atty. Joseph R. Thomas, Chief Counsel of the Department of Commerce, to ATC on September 1, 2009. Exhibits 9 and 10. Mr. Sanderson also found that the residence of the Wallers after the acquisition of utility easements by ATC did not meet the standards of "decent, safe and sanitary housing" established in Comm. 202.04 of the Wisconsin Administrative Code.

12. The Wallers have agreed with the ATC valuation of the property before taking at \$130,000. Exhibit 6. The Wallers also accept ATC's determination of damages as a result of

taking at \$99,500. They concede that the property remaining after ATC's acquisition of easements has a value of \$30,500.

13. The property remaining in the ownership of the Wallers following the acquisition of utility easements by ATC has sustained "substantially impaired economic viability," for the following reasons:

a) The Jurisdictional Offer dated March 20, 2008, set damage to their property at \$99,500 which constituted 76% of the \$130,000 agreed upon value of the Waller property.

b) Both appraisers, Kielisch for the Wallers and Rolling for ATC, agree that the value of the residential improvements have been made totally obsolete as a result of the taking, and that the Highest & Best Use of the property changed from residential to vacant industrial. Both appraisers made allowance in their determination of damage for the cost of demolition of the residential improvements.

c) Following installation and activation of the 138 kv high voltage transmission line, the Wallers experienced regular interference with radio, television and telephone reception which prompted concerns concerning the health and safety of the site for themselves, their three children, their six grandchildren and for anyone else who might purchase or occupy the property.

d) The removal of trees and shrubbery within the easement area substantially reduced the attractiveness of the site and eliminated the sound and site barrier between the home and I-43.

CONCLUSIONS OF LAW

Upon these Findings of Fact, the Court concludes:

1. Wisconsin Eminent Domain statutes are to be strictly construed in favor of the condemnee and against the condemnor. *Schroedel Corporation v. State Highway Commission*, 34 Wis.2d 32, 148 N.W.2d 691 (1967).
2. The property remaining in the ownership of the Wallers following the acquisition of utility easements by ATC is an "uneconomic remnant" as defined in Wis. Stat. § 32.06(3m).

Dated at Elkhorn, Wisconsin this 14 day of December 2011.

BY THE COURT:



The Honorable James L. Carlson  
Circuit Court Judge  
Circuit Court of Walworth County

SCOTT N. WALLER and  
LYNNEA S. WALLER,

DOCKETED 3/2/12 @ 1:47 PM  
comp A PH

Plaintiffs,

Case No. 08-CV-520

FILED  
CIRCUIT COURT

v.

MAR 01 2012

AMERICAN TRANSMISSION CO., LLC,

Defendant.

CLERK OF COURTS-WALWORTH CO.  
BY: PAT M. HAYES, DEPUTY CLERK

JUDGMENT

This matter came on for trial on November 10<sup>th</sup> and November 14<sup>th</sup>, 2011. The Court, having signed and filed its Findings of Fact and Conclusions of Law, and Order for Judgment, NOW THEREFORE, IS ORDERED:

Judgment is entered in favor of Scott N. Waller and Lynnea S. Waller and against American Transmission Co., LLC in the amount of \$47,509.72.

Upon receipt of these payments, the Wallers shall convey the property at 6249 Mound Road, Delavan, Wisconsin to ATC by Quit Claim Deed.

Dated at Elkhorn, Wisconsin this 1st day of March, 2012.

BY THE COURT:

*James L. Carlson*

Hon. James L. Carlson  
Circuit Court Judge  
Circuit Court of Walworth County

3-2-12 \$5.00 docketing fee received. PH

SCOTT N. WALLER and  
LYNNEA S. WALLER,

Plaintiffs,

Case No. 08-CV-520

v.

AMERICAN TRANSMISSION CO., LLC,

Defendant.

**FILED**  
CIRCUIT COURT

MAR 12 2012

CLERK OF COURTS - WALWORTH  
BY ELISABETH YAZBEG

**FINAL ORDER REGARDING LITIGATION EXPENSES**

Upon the Findings of Fact and Conclusions of Law Regarding Litigation Expenses,

IT IS ORDERED:

- American Transmission Co., LLC shall pay to the Wallers litigation expenses in the amount of ~~\$261,359.24~~ <sup>211,261.74</sup> as set forth in detail at the hearing on 1/24/12.

Dated at Elkhorn, Wisconsin this 9<sup>th</sup> day of ~~February~~ <sup>March</sup>, 2012.

BY THE COURT:

  
 Hon. James L. Carlson  
 Circuit Court Judge



MAILING & STREET ADDRESS: 2 FEN OAK COURT • MADISON, WI 53718-8810  
608.877.3600 • Toll Free: 866.899.3204 • FAX: 608.877.3602 • www.atclic.com

March 14, 2008

Mr. & Mrs. Scott N. Waller  
6249 Mound Road  
Delavan, WI 53115

RE: Easement Matter – Offer

Dear Mr. & Mrs. Waller:

On December 12, 2007, a proposal was presented to you for the purchase of an electric transmission line easement on your property at 6249 Mound Road, Delavan Wisconsin. The proposal amount of \$74,500 was based on an appraisal prepared by Rolling & Co. You did not accept that offer. You were invited to obtain a second opinion of value by an appraiser of your choice and you chose to have a second appraisal prepared by Appraisal Group One. Appraisal Group One's opinion of loss and damages for the electric line easement on your property was \$116,500.

In the interest of continued negotiations, American Transmission Company extends to you a revised offer for the electric transmission line easement in the amount of \$99,500.

You have five days to consider this proposal. If you choose to accept, we will schedule a closing at your convenience. If you do not accept this revised proposal, we will present you with a Jurisdictional Offer for your consideration.

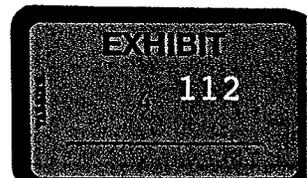
Please know it is American Transmission Company's desire to negotiate a reasonable settlement with you. If we are unable to do so, it will be necessary for ATC to continue acquisition under the guidelines of Chapter 32.06 of Wisconsin Statutes.

Sincerely,

Dave Davies

Contract Real Estate and Right-of-Way Representative for American Transmission Company  
Land Service Company  
222 N. Midvale Blvd.  
Madison, WI 53705  
Office: (608) 238-7300  
Cell: (608) 669-4775

*Offer to buy \$132,000 AD  
Property 3/14/08*



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1 Q. And it was informing you that shortly  
 2 the usage would go up to 138 kilovolts?  
 3 A. Correct.  
 4 Q. Do you know what the voltage was on the  
 5 transmission line that preexisted the new one?  
 6 A. I believe it was 60, but I'm not  
 7 positive.  
 8 Q. Did you ever do any investigation  
 9 before this power line went in about whether or  
 10 not the existing power line might be a health  
 11 hazard?  
 12 A. Everyone has electricity, and I'm sure  
 13 that in one form or another everything is a  
 14 health hazard to us. Our cell phones, electric  
 15 towers, if I went and stood under there forever,  
 16 something might happen. I don't know this for  
 17 fact, though, because I'm not an expert. All I  
 18 know is what the perception of the public is and  
 19 my perception, other people's perception.  
 20 Q. You mentioned a fairly common  
 21 perception involved cell phones. You're aware  
 22 that there are at least claims and there's been  
 23 some study about whether having a cell phone,  
 24 using it next to your ear might pose a health  
 25 risk?

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1 A. And I know some people say yes; some  
 2 people say no. And, you know, as a person you  
 3 can just do what you think is right because  
 4 there's a million opinions on everything out  
 5 there.  
 6 Q. Some people will feel it's important,  
 7 others won't?  
 8 A. Correct.  
 9 Q. Same with transmission lines, right,  
 10 some people will not think they're a health  
 11 hazard, others might?  
 12 A. In my experience, not one single person  
 13 has not said to us, oh, my gosh, I can't believe  
 14 all those wires, you have to get out of there.  
 15 I don't understand why a representative of the  
 16 ATC would come to us, tell us our land was  
 17 worthless and that no one would buy it if it  
 18 wasn't true. I would like to think they  
 19 wouldn't lie to us. What would their  
 20 motivation -- I mean, they would have no  
 21 motivation to purchase our property. It's no  
 22 good to them.  
 23 Q. Did you have any discussion with him  
 24 that ATC and other entities, other, you know,  
 25 government entities that condemn property

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1 sometimes will purchase an entire property to  
 2 just resolve the sale and then just sell off  
 3 what they don't need?  
 4 A. He didn't explain that to us at all.  
 5 Q. Was all of this information that you  
 6 say Mr. Davies gave you when he came out to meet  
 7 you, was any of that in writing?  
 8 A. I do have one paper. It was the offer  
 9 by the ATC, and then he wrote on the bottom in  
 10 his ink and initialed it and dated it, and  
 11 that's where he said, after we said, "No, we  
 12 don't feel good about the last offer. We want  
 13 to talk to an attorney." He said, "Okay. Well,  
 14 the ATC does not like to do this, but they will  
 15 buy your house and property. They realize how  
 16 severe it is. No one will buy it."  
 17 Ad then he went on about it being only  
 18 of value with all the stipulations to the man  
 19 next to us. And the first time he came out he  
 20 gave us this little booklet of our rights, and  
 21 we had to sign that we had received that and we  
 22 had read it over. And my husband said, "Well,  
 23 according to your booklet, then you need to  
 24 relocate us."  
 25 And he leaned back, he said, "That's

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1 never going to happen." And Scott said, "This  
 2 is the law." And he said, "I don't care. You  
 3 folks need to understand the ATC has unlimited  
 4 resources. If you try to take us to court, we  
 5 will drag this out for years and leave you  
 6 penniless." And we said, "Well, we need to talk  
 7 to an attorney." And he said, "When I get up  
 8 from this table, this offer is gone. You're on  
 9 your own."  
 10 Q. I'm going to have this marked as an  
 11 exhibit.  
 12 (Exhibit Number 9 was marked for  
 13 identification by the reporter.)  
 14 Q. I'm showing you what has been marked as  
 15 Deposition Exhibit 9. Is that the letter that  
 16 you're referring to?  
 17 A. Yes, it is.  
 18 Q. Now, you've described the conversation  
 19 that you had with Mr. Davies. Was there  
 20 anything else said by Mr. Davies during that  
 21 conversation other than what you've told us?  
 22 A. I don't believe so. Actually, he did,  
 23 he did leave our house, and then he came back  
 24 in, and he said he'd like to initial and date  
 25 it.

SUMMARY OF RELOCATION COSTS

January 19, 2012

1. Difference Between Old Home And New Home \$130,000 - \$177,500 Interest 4.95% (3/12/09 - 1/12/12) (34 mo.)	\$ 47,500.00 6,661.87
2. Home Inspection	230.00
3. Replacement of Dug Well (Illegal Well)	5,670.00
4. Cost of Loan (Settlement Charges to Borrower)	1,760.17
5. Mortgage Insurance 5/01/09 - 1/01/12 \$118.02 per month x 32 mo.	3,776.64
6. Self Move Comm 202.54 8 rooms -- \$1,050. 3 outbuildings -- \$300	1,350.00
TOTAL:	<u>\$ 66,948.68</u>

---

SCOTT N. WALLER AND  
LYNNEA S. WALLER,

Plaintiffs,

Case No.: 10-CV-691

v.

**FILED**  
CIRCUIT COURT

AMERICAN TRANSMISSION COMPANY, LLC,

FEB 15 2012

Defendant.

CLERK OF COURTS - WALWORTH CO.  
BY ELISABETH YAZBEK

---

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

---

This matter came on for trial commencing on January 25, 2012. Upon reviewing the testimony of the witnesses, the exhibits and hearing argument of counsel, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. On March 20, 2008 American Transmission Company, LLC, provided the Plaintiffs, Scott & Lynnea Waller, with a Jurisdictional Offer seeking to acquire two 45-foot utility easements along two sides of the Wallers' triangular property at 6249 Mound Road, Delavan, Wisconsin. The property includes 1.51 acres of land (65,775 square feet), a one-family residence, site improvements, landscaping, and outbuildings. The main building has a total of eight rooms, and there are three outbuildings on the property. The property is zoned A-1 Agricultural. It has been used by the Wallers since its acquisition in 1989 as a residence and for hobby farming activities. (Exhibit 2).

2. The easements acquired by ATC covered .799 acres or 34,804 square feet, 52.91% of the lot. ATC acquired the easements to install a 138-KV high voltage electric transmission line.

3. ATC retained Rolling & Co. In an appraisal report dated December 12, 2007 (Exhibit 2), Mr. Rolling concluded that the acquisition of the easement would have an immediate negative effect on the residential appeal of the property, noting that over one-half of the property will be under easement. The appraisal report continued with the following comments:

“The subject will have major transmission liens along two of its three sides. The transmission lines will be within 601 of the house. A substantial part of the landscaping will have been lost. Our before analysis suggested a property which was already in transition from improved residential use to vacant industrial lot use. We believe the installation of the transmission line pole and the lines themselves brings this property to the tipping point from residential appeal toward light industrial appeal. It is more likely that the next buyer of the property will be an industrial developer rather than a residential user. We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land.” (Exhibit 2, p. 18)

4. On March 12, 2009 the Wallers purchased a comparable replacement home in the Town of Sharon which meets the standards of Wis. Stat. § 32.19(2)(b).

5. The Wallers filed a relocation claim with ATC pursuant to the provisions of Wis. Stat. § 32.19(2)(e) on December 18, 2008, which was denied. In response to a Waller petition forwarded pursuant to the provisions of Wis. Stat. §32.26(5), Mr. Jack Sanderson of the Department of Commerce visited the Waller property on April 20, 2009 at 2:00 PM. Following the visit to the property, Mr. Jack Sanderson on June 3, 2009 determined that the Wallers were displaced persons and entitled to relocation benefits under Wis. Stat. § 32.19(2)(e) a. (Exhibit 14)

6. On September 10, 2009 the relocation plan was supplemented to reflect actual relocation costs incurred by the Wallers, which was further updated in January, 2012. (Exhibit 9).

7. The Wallers moved from their Delavan property to the Sharon property as a direct result of the acquisition of the easement for public purposes by ATC.

8. Upon the testimony of the parties and upon the documentary proof made part of the record, the Court finds that the Wallers have sustained the following costs in connection with the acquisition of relocation property:

1. Comparable Replacement Housing

a. Difference Between Old Home And New Home \$130,000 - \$177,500	\$ 47,500.00
b. Home Inspection	230.00
c. Replacement of Dug Well ( <del>Illegal Well</del> )	5,670.00
d. Cost of Loan (Settlement Charges to Borrower)	1,760.17
e. Mortgage Insurance 5/01/09 – 1/01/12 \$118.02 per month x 32 mo.	3776.64
<hr/>	
Statutory Cap- § 32.19(4)	\$25,000

2. Self Move- Comm 202.54 8 rooms -- \$1,050. 3 outbuildings -- \$300	<u>1,350.00</u>
--	-----------------

TOTAL: \$ 26,350.00

CONCLUSIONS OF LAW

Upon these Findings of Fact, the Court concludes:

1. That the Wallers are displaced persons under Wis. Stats. § 32.19(2)(e)1a. They have acquired comparable replacement property that complies with Wis. Stat. § 32.19(2)(b), and therefore are entitled to judgment for recovery of their relocation costs.

2. Due to Wis. Stat. § 32.19 (4)(a), the Wallers are limited to a maximum of \$25,000 to recover costs for obtaining a comparable replacement dwelling. This includes cost of replacing the well on the property.

3. In addition to the \$25,000 allowed, the Wallers are entitled to the cost of moving in the amount of \$1,350, based on Wis. Adm. Code Comm. §202.54..

4. The Wallers are entitled to judgment in the amount of \$26,350 for moving and finding a comparable replacement dwelling, ~~plus pre-judgment interest, for a total of 30,503.42;~~ *ok* plus taxable costs.

Dated at Elkhorn, Wisconsin this 15<sup>th</sup> day of February, 2012.

BY THE COURT:

  
\_\_\_\_\_  
Hon. James L. Carlson  
Circuit Court Judge, Walworth County

STATE OF WISCONSIN

CIRCUIT COURT

WALWORTH COUNTY

SCOTT N. WALLER and  
LYNNEA S. WALLER,

DOCKETED 2/29/12 @ 3:18P  
COMPA *EL*

Plaintiffs,

Case No. 2010-CV-691

**FILED**  
CIRCUIT COURT

v.

AMERICAN TRANSMISSION CO., LLC,

FEB 29 2012

Defendant.

CLERK OF COURTS - WALWORTH CO.  
BY ELISABETH YAZBEC

**JUDGMENT**

This matter came on for trial on January 25, 2012. The Court, having signed and filed its Findings of Fact and Conclusions of Law, Order for Judgment, and Bill of Costs,

NOW THEREFORE,

Judgment is entered in favor of Scott N. Waller and Lynnea S. Waller and against American Transmission Co., LLC in the amount of \$26,350.00, in addition to costs, pursuant to Wis. Stat. § 814.04, in the amount of 1,811.92., for a total of \$28,161.92.

Dated at Elkhorn, Wisconsin this 29<sup>th</sup> day of February, 2012.

*Elisabeth Yazbec*

Judgment Clerk

*Deputy*

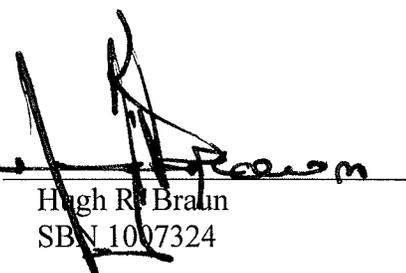
APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. Rule 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) relevant decisions of the Court of Appeals; (4) the findings or opinion of the trial court; and (5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22<sup>nd</sup> day of February, 2013.

By: \_\_\_\_\_

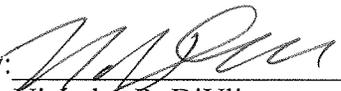
  
Hugh R. Braun  
SBN 1007324

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this Appendix which complies with the requirement of Wis. Stat. § 809.19(12). I hereby certify that the electronic brief is identical in content and format to the printed form of the brief filed on February 22, 2013. A copy of this certificate has been served on the court and opposing parties as of this date.

Dated this 22<sup>nd</sup> day of February, 2013.

By:   
\_\_\_\_\_  
Nicholas R. DiUlio

STATE OF WISCONSIN  
IN THE SUPREME COURT

**RECEIVED**

**03-14-2013**

**CLERK OF SUPREME COURT  
OF WISCONSIN**

Consolidated Appeal Nos. 2012AP805 and 2012AP840

---

SCOTT N. WALLER AND LYNNEA S. WALLER,

Plaintiffs-Respondents,

v.

AMERICAN TRANSMISSION COMPANY LLC,

Defendant-Appellant.

---

On Bypass from the Court of Appeals, District II  
Appeal from Final Judgments of the Circuit Court of  
Walworth County, the Hon. James L. Carlson Presiding,  
Circuit Court Case Nos. 2008CV520 and 2010CV691

---

**REPLY BRIEF OF  
AMERICAN TRANSMISSION COMPANY LLC**

---

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*Attorneys for American Transmission  
Co. LLC and its corporate manager,  
ATC Management Inc.*

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## INTRODUCTION

Taking private land for a public purpose with just compensation paid, a power granted by the state and federal constitutions, is essential for efficient government and economic development. The cases that help define that authority sometimes involve, in purely financial terms, “small” disputes. But they are not small to the property owner, who may have a home or farmland at stake, or to a municipality or utility that necessarily uses condemnation often and benefits (along with its customers and ratepayers) from clear rules and procedures.

Susette Kelo’s determination to hold on to her modest home in Connecticut led to one of the U.S. Supreme Court’s most important Fifth Amendment land use decisions. *Kelo v. City of New London*, 545 U.S. 1158 (2005). Here, in this dispute between homeowners and a utility, the amount “at issue” is less than \$80,000, by any account, and focused on an

easement. Yet the dispute’s importance to the statutory process for condemnation, especially in light of the two previous appellate decisions involving these parties and, already, a second uneconomic remnant case on an unrelated transmission line project, warrants this Court’s law-developing attention and the procedural clarity it should bring for the entire state.

### **REPLY ARGUMENT**

#### **I. 8341 MURPHY IS NOT DISTINGUISHABLE.**

The Wallers seek to distance themselves from the inevitable and untenable procedural impact of the precedent their cases have created. They deny that the Dane County Circuit Court’s orders in *American Transmission Company LLC v. 8341 Murphy, LLC*—freezing the condemnation process while an “uneconomic remnant” dispute proceeds—are a necessary outcome of *Waller I* and *II*. They claim that the result in *8341 Murphy* is “unusual,” Resp. Br. 1, and that

“[a] typical condemnee will not object to the acquisition of the easement for the amount of the Jurisdictional Offer if for some reason there is a delay in the trial on its claim that ATC must also acquire an uneconomic remnant.” *Id.* at 2. Not so. The result in *8341 Murphy* is the logical and inevitable conclusion to the Wallers’ position—a result that threatens to increase project costs and to delay needlessly public projects by denying condemnors possession.

The Wallers also claim that, in their case, “ATC was not delayed in acquiring an easement on the Waller property,” even though the record leaves no doubt that the Wallers did everything possible to ensure that the uneconomic remnant determination would not be streamlined into the valuation process. *See* Initial Br. 33. The Wallers refused to consent to try the uneconomic remnant claim in the valuation case and twice appealed and once filed a writ of mandamus to prevent the circuit court from doing just that.

More pertinent, however, the Wallers themselves did not have the “benefit” of the precedent they now have created, requiring the resolution of uneconomic remnant issues in a separate proceeding before valuation—or anything else—can occur. The *8341 Murphy* landowners do have the benefit of that precedent, as will every landowner, to bring an uneconomic remnant claim from now until this Court re-articulates the proper statutory procedure.

Still, the *8341 Murphy* case, of which this Court can at least take judicial notice, is not central to ATC’s arguments on appeal. It is but a concrete example of the inevitable (though perhaps unintended) procedural consequences of the Court of Appeals’ holdings in *Waller I* and *Waller II*. This Court can only reverse those procedural consequences—in clear conflict with the condemnation code—by reversing *Waller I* and *Waller II*. There is no other avenue for restoring reason and efficiency to the condemnation process.

## **II. ATC HAS NEVER THREATENED THE WALLERS.**

Throughout these cases' protracted history, rather than squarely address ATC's condemnation code-based arguments, the Wallers often have relied on hyperbole, inadmissible evidence, and misleading record citations to give their argument equitable appeal. Yet two separate trial courts have declined to admit that evidence. Because the Court is likely to hear these same misleading record citations at oral argument, this short reply addresses them.

In their "Statement of Facts," the Wallers repeat a familiar refrain: ATC threatened to bankrupt them through the pursuit of these condemnation proceedings. While the issue of intent has almost no bearing on the legal conclusions the Court will reach, ATC's motives are, and always have been, to obtain title to no more property than is necessary to effectuate a public purpose and to obtain a consistent

interpretation and application of the condemnation code. The repeated assertions that ATC has threatened to use or has used these proceedings to harass the Wallers, *see* Resp. Br. 7, and their calls for sanctions against ATC, *id.* at 21, are unfounded.

The Wallers allege that during the failed negotiations for a consensual acquisition of their property, a land acquisition agent for ATC threatened to “leave them penniless.” Resp. Br. 7. For that quotation, the Wallers cite R.146 and include in their appendix selected pages from a June 4, 2009 deposition of Lynnea Waller. These allegations have been continuously denied, and the Court should disregard these “record citations” and the emotional arguments premised on them.

Evidence of settlement negotiations for the consensual acquisition of property prior to a taking, including the amount of a jurisdictional offer, is inadmissible. *See* Initial Br. 67-69,

*citing* Wis. Stat. § 904.08; *Connor v. Michigan Wisconsin Pipe Line Co.*, 15 Wis. 2d 614, 624, 113 N.W.2d 121 (1962) (“there exists here an *even stronger basis* for a rule of evidence excluding, as privileged, statements by the parties in such compulsory [condemnation] negotiations”); *Herro v. DNR*, 67 Wis. 2d 407, 430-32, 227 N.W.2d 456 (1975).

The Wallers’ record citation for ATC’s alleged threat, R.146, does not even contain the deposition pages excerpted in their appendix (R.App.113). Worse, that record citation is to a record item in the *valuation* case, No. 08-CV-955.

Though the record of the valuation proceeding was incorporated into the record of the right-to-take case (No. 08-CV-520), *see* Initial Br. 21-22, the valuation verdict is not on appeal. It never has been.

More significantly, after extensive pre-trial argument in the valuation case, Judge Race granted ATC’s motion to exclude *all* argument or evidence relating to settlement offers

and negotiations for a voluntary acquisition of the property. *See* R.170, ¶ 2. Judge Carlson also ruled such evidence inadmissible in the right-to-take case, see R.304:31-34, although he inexplicably incorporated certain details of the pre-condemnation negotiations into his findings of fact. *See* Initial Br. 68-69. Mrs. Waller was present for and available to testify at all of the trials in these cases. (She testified in the valuation and uneconomic remnant trials, but not in the relocation expenses trial.) The “penniless” testimony does not appear in any of Mrs. Waller’s trial testimony—no doubt for several reasons but largely *because the trial courts excluded it.*

Yet, because the Wallers persisted in presenting inadmissible evidence of pre-condemnation settlement negotiations, ATC elected—in the relocation expenses trial—to address the “evidence” head-on, explicitly inquiring about the threats allegedly made by ATC’s land acquisition agent,

Dave Davies. Mr. Davies denied making such statements. RR.55:242-43. The Wallers did not rebut Mr. Davies' unequivocal testimony. The *only* evidence admitted at any of the three trials, therefore, is a denial under oath—the statements on which the Wallers rely throughout their response brief were never made.

The Wallers have not challenged (or even acknowledged) any of the various trial courts' discretionary evidentiary rulings that excluded the “penniless” testimony. They cannot now rely on that inadmissible evidence on appeal. Deposition testimony is to be used at trial under very limited circumstances, *see* Wis. Stat. § 804.07, and even then only “so far as admissible under the rules of evidence.” *Id.* at § 804.07(1). *See also* Wis. Stat. § 901.03(1)(b) (“[e]rror may not be predicated upon a ruling which ... excludes evidence unless a substantial right of the party is affected; and ...the substance of the evidence was made known to the judge by

offer...”). None of these circumstances apply; the Court should disregard the Wallers’ argument.

### **CONCLUSION**

For the foregoing reasons, and for those stated in ATC’s initial brief, ATC requests that the Court:

1. Conclude that there is no private right of action to bring uneconomic remnant claims—such claims are for just compensation and must be raised in valuation proceedings;
2. Reverse the judgment declaring the after-taking property an uneconomic remnant and remand the case with directions to enter judgment for ATC;
3. Reverse the order granting the Wallers litigation expenses and the judgment awarding the Wallers relocation benefits and remand both cases with directions to enter judgment for ATC—the Wallers are not displaced persons and they are not entitled to any relocation benefits.

Dated this 12th day of March, 2013.

GODFREY & KAHN, S.C.

By: *s/Bryan J. Cahill*

---

Katherine Stadler  
State Bar No. 1030775  
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*Attorneys for Defendant-Respondent,  
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**RULE 809.19(8)(D) CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) for a brief and appendix produced with a proportional serif font. The length of those portions of this brief referred to in s. 809.19(1)(d), (e), and (f) is 1,444 words.

*s/Bryan J. Cahill* \_\_\_\_\_

Bryan J. Cahill

State Bar No. 1055439

**ELECTRONIC FILING CERTIFICATION**

I hereby certify, pursuant to Wis. Stat. § 809.19(12)(f),  
that the text of the electronic copy of the brief is identical to  
the text of the paper copy of the brief.

*s/Bryan J. Cahill*

\_\_\_\_\_

Bryan J. Cahill

State Bar No. 1055439

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**03-25-2013**

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STATE OF WISCONSIN  
IN THE SUPREME COURT

**CLERK OF SUPREME COURT  
OF WISCONSIN**

Consolidated Appeal Nos. 2012AP805 and 2012AP840

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SCOTT N. WALLER AND LYNNEA S. WALLER,

Plaintiffs-Respondents,

v.

AMERICAN TRANSMISSION COMPANY LLC,

Defendant-Appellant.

---

On Bypass from the Court of Appeals, District II  
Appeal from Final Judgments of the Circuit Court of  
Walworth County, the Hon. James L. Carlson Presiding,  
Circuit Court Case Nos. 2008CV520 and 2010CV691

---

**WISCONSIN UTILITIES ASSOCIATION, INC.'S  
AMICUS BRIEF**

---

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## **INTRODUCTION**

This case implicates the provision of basic, indispensable utility services such as electricity, gas, and water—a quintessential public good at stake in the exercise of eminent domain. *See* 8-G14A Nichols on Eminent Domain § G14A.01 (noting that public utilities providing gas, electricity and water are “necessary for the maintenance of lives and occupations of the public”). The amicus Wisconsin Utilities Association (“WUA”) is an association of Wisconsin public utilities companies that construct, operate and maintain distribution systems for electricity, natural gas, and water throughout the state.<sup>1</sup>

Residents throughout Wisconsin depend on the WUA members for their utility services. To fulfill their responsibility to provide these important services, the WUA members must periodically employ the eminent domain process to obtain property necessary for the construction of new power lines, gas pipes, and water pipes. This Court’s

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<sup>1</sup> WUA members which are not parties to this suit include Alliant Energy; City Gas Company; Madison Gas & Electric Company d/b/a MG&E; Wisconsin Electric Power Company (d/b/a We Energies); Wisconsin Public Service Corp.; Northern States Power Company, a Wisconsin Corporation (d/b/a Xcel Energy); and Superior Water, Light and Power.

construction of the rights and procedures under Wisconsin's eminent domain statutes ("Chapter 32") not only affects the WUA members, it also affects their customers' interests in reasonably priced utility services and sufficient electric, gas, and water distribution infrastructure to support economic development and growth throughout Wisconsin.

For the following reasons, the WUA members urge the Court to conclude that a condemnee's claim that it has been left with an uneconomic remnant must be asserted in a valuation proceeding.

### **ARGUMENT**

#### **I. CHAPTER 32 PROVIDES CONDEMNNEES WITH COMPREHENSIVE PROTECTION, INCLUDING THE RIGHT TO CHALLENGE THE ADEQUACY OF COMPENSATION THROUGH A VALUATION PROCEEDING.**

This Court has previously recognized a need to construe Chapter 32 in favor of providing condemnees with procedural and substantive protections during the condemnation process. *See, e.g., Klemm v. Am. Transmission Co.*, 2011 WI 37, ¶ 76, 333 Wis. 2d 580, 798 N.W.2d 223. Importantly, however, this case does not require the Court to employ this general rule of construction because this case does not involve interpreting an ambiguous provision of

Chapter 32 or deciding whether to interpret it to provide condemnees with additional procedural or substantive rights not explicitly granted by the Legislature. Rather, the Legislature has already provided in Chapter 32 a comprehensive procedure by which condemnees who – like the Wallers – feel that they are left with an uneconomic remnant, can pursue that claim and obtain all of the relief to which they are entitled. The court of appeals misinterpreted the procedure created by the Legislature and allowed the Wallers to bring an action not authorized by Chapter 32. By so doing, the court of appeals created inefficiencies and added expense to the condemnation process, increases in costs that are eventually passed on to all utility ratepayers.

But more problematically, the court of appeals also created the potential for landowners to delay utilities from obtaining possession of the interest being condemned (whether an easement of a fee) until the uneconomic remnant issue asserted in a “right to take challenge” under Wis. Stat. § 32.06(5) is resolved. That outcome would have very significant adverse impacts. Currently, utilities can obtain possession of the needed property before valuation issues are resolved so that construction of the public improvement can

proceed while the amount of compensation due the condemnee is determined. If a landowner can now get all proceedings stayed until the uneconomic remnant action is decided, it may prevent utilities from obtaining possession and so delay needed public improvements. Such an outcome is not needed in order to protect the rights of condemnees who believe that after condemnation they will be left with an uneconomic remnant.

The United States and Wisconsin Constitutions require a public purpose and the payment of just compensation to permit condemnation. *See* U.S. Const. Amend. V; Wis. Const. Art. I, § 13. The Legislature created extensive procedural protections to guard these constitutional rights. *See Klemm*, 2011 WI 37, ¶ 37 (noting that Chapter 32 “provides comprehensive statutory procedures for condemnation”).

First, a condemnee who believes a condemnation was impermissible (because it was procedurally defective, lacked a public purpose, or exceeded the scope of the public purpose) is entitled to assert these challenges through a right-to-take proceeding. Wis. Stat. § 32.06(5) (establishing “right-to-take” claim); *see also Falkner v. Northern States Power*

*Co.*, 75 Wis. 2d 116, 132, 139, 248 N.W.2d 885 (1997) (condemnation must be “reasonably necessary, reasonably requisite and proper for the accomplishment of the public purpose for which the property is sought”); Wis. Stat. § 32.07 (establishing procedure for determining the necessity of a taking); Wis. Stat. § 32.12 (requiring that the necessity for a taking be determined before title can be perfected).

Second, a condemnee who accepts the propriety of the condemnation, but contests the adequacy of the compensation offered by the condemnor, is entitled to assert this challenge through a valuation proceeding. Wis. Stat. §§ 32.06(7)-(10).

Third, a condemnee who believes that their property interest was taken by the condemnor without any compensation is entitled to assert this challenge through an inverse condemnation proceeding. Wis. Stat. § 32.10.

By creating these three separate statutory procedures, the Legislature ensured that condemnees have appropriate mechanisms for addressing any issue they might wish to raise concerning an allegedly improper deprivation of their property rights through condemnation.

**II. CHAPTER 32 REQUIRES ALL VALUATION CLAIMS, INCLUDING NONECONOMIC REMNANT CLAIMS, TO BE RESOLVED IN A VALUATION PROCEEDING.**

The question before the Court is not whether condemnees have the right to insist that a condemnation is procedurally proper, that the full extent of a condemnation is justified by a public purpose, and that just compensation is paid. Rather, the Court must determine which of the three statutory procedures created to protect these rights—a right-to-take proceeding, a valuation proceeding, or an inverse condemnation proceeding—is the appropriate method for raising and resolving an uneconomic remnant claim.

Chapter 32 defines an uneconomic remnant as “the property remaining after a partial taking . . . of such size, shape or condition as to be of *little value or of substantially impaired economic viability*.” Wis. Stat. § 32.06(3m) (emphasis added). This statutory definition demonstrates that the merits of a condemnee’s uneconomic remnant claim hinge solely on the *value* and *economic viability* of the remaining property—questions of valuation. *See also, e.g., State ex rel. Sec’y of DOT v. Baynard*, Nos. 97C-10-045, 97C-10-046, 2001 Del. Super. LEXIS 71, at \*7 (Del. Super. Ct. Feb. 8,

2001) (factors relevant in determining whether residual property constitutes an uneconomic remnant include “value and utility”); *City of Lincoln v. Barringer*, 126 Cal. Rptr. 2d 178, 182 (Cal. Ct. App. 2002) (factors relevant in determining whether residual property constitutes an uneconomic remnant include “size, shape and condition” and resulting market value). Indeed, the gravamen of an uneconomic claim is that the condemnor failed to account for the full impact of the taking on the remaining property interests and that this failure requires an adjustment in the amount of compensation to be paid.

Several aspects of Chapter 32 compel the conclusion that an uneconomic remnant claim must be asserted and resolved within a valuation proceeding, not a right-to-take proceeding. As an initial matter, the Wisconsin statute providing for right-to-take proceedings explicitly excludes matters of compensation from the proceeding. Wis. Stat. § 32.06(5) (“When an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer for *any reason other than that the amount of compensation is inadequate*” the owner may bring a right-to-take action) (emphasis added); see *Klemm*, 2011 WI 37,

¶ 18 (“Statutory interpretation begins with the text of the statute.”). A condemnee asserting an uneconomic remnant claim is saying that the money offered for the interest taken by the condemnor is inadequate because the condemnor has effectively taken the entire value of the parcel, but only paid for part of it. The statutory language explicitly prohibits precisely this question from being asserted in a proceeding under § 32.06(5), but that is what the court of appeals commanded be done in this case. *Id.*

This statutory exclusion also makes practical sense for two reasons. First, the value and economic viability of the property remaining after condemnation are wholly unrelated to the issues properly within the scope of a right-to-take proceeding—whether the condemnation procedure was proper, whether there was a public purpose justifying the condemnation, and whether all property condemned was necessary for that public purpose. If the Court affirms the procedure followed in this case, a condemnee may maintain a right-to-take action despite making absolutely no challenge to the right to take their property. *E.g.*, R.111:15 (the Wallers conceded ATC’s right to take their property, and sought only to challenge the *amount of compensation* to be provided

based on the *value* of the alleged uneconomic remnant in the right-to-take proceeding). If the Wallers had contended that ATC took a wider right-of-way than was needed for the new transmission line, that issue could be raised in an action under § 32.06(5). But the Wallers did not make such an argument.

Second, Chapter 32 created another proceeding that provides a much more appropriate setting for addressing the value and economic viability of the property remaining after condemnation—the valuation proceeding. The purpose of a valuation proceeding is to calculate the value of the property interest condemned to ensure that the condemnee receives just compensation. *See Wis. Stat. §§ 32.06(7)-(10)*. This question requires consideration of the characteristics of both the property itself and the market in which it could be sold. *See Alsum v. Wis. DOT*, 2004 WI App 196, ¶ 19, 276 Wis. 2d 654, 689 N.W.2d 68 (evidence relevant to a valuation proceeding includes “property’s usability, character and the market in which the property would be sold . . .”). These questions mirror the *same* questions raised by an uneconomic remnant claim, which requires determining the value of the property remaining by looking to the characteristics of the property and the market in which it could be sold. *See Waller*

*v. Am. Transmission Co. LLC*, 2009 WI App 172, 322 Wis.2d 255, ¶ 13, 776 N.W.2d 612 (noting that the “question of the existence of an uneconomic remnant is difficult to separate from the determination of the value of the remnant. By its very name, an uneconomic remnant seems to require valuation.”). The nearly-perfect overlap between valuing the property taken and the property remaining leads to the logical conclusion that the Legislature intended that these questions be resolved once through the same valuation proceeding.

**III. CHAPTER 32 SHOULD BE CONSTRUED TO EFFECTUATE THE LEGISLATURE’S BALANCING OF PROTECTION FOR CONDEMNEDS AND PROMOTION OF THE PUBLIC GOOD.**

When the Wisconsin Legislature promulgates legislation, it weighs relevant competing interests and priorities. *See, e.g., Flynn v. Dep’t of Admin.*, 216 Wis. 2d 521, 539, 576 N.W.2d 245 (1998) (emphasizing that it is “the province of the legislature . . . to determine public policy”). One of the primary purposes underlying Chapter 32 is to provide condemnees with sufficient protections throughout the condemnation process. *See infra* at Part I. Importantly, however, protection of condemnees is not the only interest at stake during the exercise of eminent domain. Another

important purpose underlying Chapter 32 is to provide efficient, cost-effective condemnation proceedings to promote the public good. *See, e.g., Pulvermacher Enters., Inc. v. State, DOT*, 166 Wis. 2d 234, 241, 479 N.W.2d 217 (Ct. App. 1991) (emphasizing that the purpose of “provid[ing] an efficient, final resolution”). The core of Chapter 32 is the recognition that individual property interests must occasionally give way to the greater public good, even when condemnees might not voluntarily sell their property rights for this purpose. *See Falkner v. Northern States Power Co.*, 75 Wis. 2d 116, 128 (internal quotation marks and quoting citation omitted) (“The right to condemn . . . is often indispensable for the common good”). Efficiency and cost-effectiveness in the condemnation process are essential for the exercise of meaningful eminent domain rights.

For example, Wisconsin utilities such as the WUA members depend on efficient condemnation procedures to allow them to quickly construct new power lines, gas pipes, and water pipes to meet Wisconsin’s growing utility needs. Delays in securing the property rights necessary for such construction inevitably postpone the project’s completion and the delivery of these additional utility services, resulting in a

direct impact on Wisconsin residents. The financial expenses associated with the eminent domain process also directly impact Wisconsin residents, as the costs of doing business as a utility are largely passed on to customers through rates.

Here, the landowner's interest in receiving full compensation and the utility's interest in efficient, cost-effective condemnation procedures are not at odds. Chapter 32 has already provided a procedure – the valuation proceeding – that protects both interests. There was no need or reason for the court of appeals to authorize the landowners to take a different course. *See MBS-Certified Pub.*

*Accountants, LLC v. Wis. Bell, Inc.*, 2012 WI 15, ¶ 42, 338 Wis. 2d 647, 809 N.W.2d 857 (in interpreting a statute, a court should consider “the statute’s scope, context, and purpose”). The Court should specifically avoid adopting a procedure that is contrary to these underlying statutory purposes or that constructs additional rights beyond those provided by the Legislature. *See Pulvermacher Enters., Inc.*, 166 Wis. 2d at 241 (rejecting state’s argument about construction of Chapter 32 because it was “contrary to the regulatory scheme of the legislature, which is to provide an efficient, final resolution to the compensation question”);

*Klemm*, 2011 WI 37, ¶ 18 (“An interpretation that fulfills the purpose of the statute is favored over one that undermines the purpose.”).

**A. Resolution In A Valuation Proceeding Retains Comprehensive Protections For Condemnees While Promoting The Public’s Interest In Efficient, Cost-Effective Condemnation.**

Resolution of an uneconomic remnant claim within a valuation proceeding allows landowners to raise any issues they may have about being left with an uneconomic remnant and is consistent with the statutes. The Legislature provided in Wis. Stat. § 32.06(3m) that where there is an uneconomic remnant, the “condemnor shall offer” to acquire the remnant and “may acquire it by purchase or by condemnation if the owner consents.” By this language the Legislature required a condemnor to attempt to acquire any uneconomic remnant and gave landowners the option to accept or reject the condemnor’s offer. Friction might arise under two circumstances: a) the condemnor makes an offer to purchase an uneconomic remnant that the landowner rejects as inadequate; or b) the condemnor disagrees with the landowner that the property remaining after the partial taking is an uneconomic remnant. In either instance the landowner

can assert all rights – and receive full compensation – through a valuation proceeding where the landowner’s experts can demonstrate that the remaining property is indeed uneconomic and can opine on the amount of value that the landowner has lost.

In contrast, in a right-to-take proceeding under § 32.06(5), there is no provision for the award of damages and no right to a jury trial to determine just compensation. There is simply no reason for issues concerning uneconomic remnants to ever be raised in a right-to-take proceeding. Even if a landowner brought a challenge to a condemnation under § 32.06(5) on the grounds that an uneconomic remnant existed because the condemnor took a wider right-of-way than needed, the inquiry would be how wide an easement was needed for utility purposes, not whether a wider easement produced an uneconomic remnant. Whether an uneconomic remnant results from the taking goes only to how much the condemnor must pay, not to whether the condemnor has the right to take the property interest.

**B. Resolution In A Right-To-Take Proceeding Produces Inefficiency And Delay And Creates New Condemnee Rights Beyond Those Provided By The Legislature.**

By importing questions about value and economic viability into the right-to-take action (questions that were largely relitigated in the subsequent valuation proceeding), the procedure adopted by the Court of Appeals undermined one of the primary purposes of Wisconsin eminent domain statutes – to provide for efficient, cost-effective takings in support of the public good. The protracted, duplicative *Waller* cases highlight the extreme inefficiency, delay, and additional expenses created by resolving an uneconomic remnant claim in a right-to-take proceeding.<sup>2</sup>

In addition to producing inefficiency and delay, resolution of an uneconomic remnant claim in a right-to-take proceeding affirmatively creates *new rights* beyond those provided by the Legislature in Chapter 32. As noted by

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<sup>2</sup> A recent case further illustrates the procedural mischief created by the *Waller* cases. In *Am. Transmission Co. LLC v. 8341 Murphy, LLC*, No. 2012 CV 2766, the condemnation commission and circuit court indefinitely stayed valuation proceedings pending resolution of an uneconomic remnant claim in a right-to-take action pursuant to the *Waller* decisions. This procedure would further compound the delays and inefficiency inherent in resolving an uneconomic remnant claim in a right-to-take proceeding.

circuit court Judge Kennedy, permitting a condemnee to litigate an uneconomic remnant claim in a right-to-take proceeding affords the landowner “two kicks at the cat.” R.113:65. There is no statutory support for allowing a condemnee to challenge the value of compensation to be provided first through a right-to-take action and then again through a valuation proceeding. Chapter 32 provides one, and only one, proceeding in which a condemnee can dispute the amount of compensation to be paid—the valuation proceeding.

### **CONCLUSION**

This case does not require the Court to resolve a conflict between the rights of landowners subject to condemnation and the interests of the public in lower utility rates. There is no conflict here. The Legislature has already given landowners the right to seek reimbursement in a valuation proceeding when a partial taking results in an uneconomic remnant. Accordingly, the WUA urges the Court to hold that a landowner may not assert an uneconomic remnant claim in a right-to-take action.

Respectfully submitted this 25th day of March, 2013.

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I certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced using the following font:

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I hereby certify that the text of the e-brief is identical to the text of the paper brief.

Dated this 25th day of March, 2013.

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STATE OF WISCONSIN  
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OF WISCONSIN**

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Consolidated Appeal Nos. 2012AP840 and 2012AP805

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Scott N. Waller and Lynnea S. Waller,  
Plaintiffs-Respondents,

Appeal No. 2012AP000840  
Appeal No. 2012AP805

v.

American Transmission Co., LLC  
Defendant-Appellant.

Circuit Court Case  
No. 2008CV000520  
No. 2010CV691

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Appeal From A Final Judgment of the Circuit Court  
Of Walworth County, the Honorable James L. Carlson, Presiding  
Circuit Court Case Nos. 208CV520 and 2010CV691

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**RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX  
OF SCOTT N. WALLER AND LYNNEA S. WALLER,  
PLAINTIFFS-RESPONDENTS,  
TO THE NON-PARTY BRIEF OF WISCONSIN UTILITY ASSOCIATION, INC.  
IN SUPPORT OF DEFENDANT-APPELLANT  
AMERICAN TRANSMISSION CO., LLC.**

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## INTRODUCTION

The Wisconsin Utilities Association, Inc. (WUA) acknowledges that ATC is one of its members, and states that its membership also includes Alliant Energy (Wisconsin Power & Light Co.); City Gas Company; Madison Gas & Electric Company; Wisconsin Electric Power Company (d/b/a WE Energies); Wisconsin Public Service Corporation; Northern States Power Company, a Wisconsin Corporation (d/b/a Xcel Energy); and Superior Water, Light and Power.

The Wisconsin Utilities Association, Inc. does not acknowledge that Madison Gas & Electric Company, Wisconsin Electric Power Company, Wisconsin Power & Light Company, and Wisconsin Public Service Corporation are owners of American Transmission Company, LLC.<sup>1</sup> R. App. 103. The Wisconsin Utilities Association has only three other members: City Gas; Superior Water, Light and Power; and Dominion.

The Supreme Court is asked to consider whether the non-party brief of Wisconsin Utilities Association, Inc. (WUA) is being filed by an entity which is really a nonparty.

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<sup>1</sup> 2011 Annual Report of ATC (Supp. App. 105-107)

## ARGUMENT

### The Sole Remedy for a Property Owner Who Has Been Left With an Uneconomic Remnant Following a Partial Taking For an Easement is an Action Pursuant to the Provisions of Wis. Stat. § 32.06(5).

The Wisconsin Utilities Association contends that “there is no explicit statutory authority that says a landowner must assert an uneconomic remnant claim in a separate right-to-take action”.

In making that contention, the Wisconsin Utilities Association disregarded the language of Wis. Stat. § 32.06(5) which provides in relevant part as follows:

**(5) COURT ACTION TO CONTEST RIGHT OF CONDEMNATION.** When an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer for any reason other than the amount of compensation offered is inadequate, such owner may within (40) days from the date of personal service of the Jurisdictional Offer . . . commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant. Such action shall be the only manner in which any issue other than the amount of just compensation . . . may be raised pertaining to the condemnation of the property described in the jurisdictional offer. . . . The commencement of an action by an owner under this subsection shall not prevent a condemnor from filing a petition provided in sub. (7) and proceeding thereon. . . . (emphasis added)

In *Waller v. ATC (Waller I)*, 2009 WI App. 172, 322 Wis. 2d 255, 776 N.W.2d 612, and again in *Waller v. ATC (Waller II)*, 2011 WI App 91 ¶17, 334 Wis. 2d 740, 799 N.W.2d 487, the Court of Appeals approved the use by the Wallers of an action under Wis. Stat. § 32.06(5) to raise the issue of whether they had been left with an uneconomic remnant. ATC elected not to petition for review of either decision.

Wisconsin Utilities Association also contends that in an unrelated case, *Am. Transmission Co. LLC v. 8341 Murphy, LLC*, No. 2012 CV 2766, ATC was prevented

from acquiring a utility easement until after a full trial was conducted on the issue of whether the owner was left with an uneconomic remnant.

The record in the *8341 Murphy, LLC* case is not now before the court, and it cannot be determined why ATC was not permitted to proceed with the acquisition of the needed easement in view of the quoted language above that the commencement of a challenge action under Wis. Stat. § 32.06(5) shall not prevent the condemnor from filing the petition provided in (7) and proceeding thereon. Further, it is unclear why the trial court did not grant an immediate trial of the uneconomic remnant claim in the *8341 Murphy, LLC* case.

In *Waller*, ATC was given immediate possession of the property and permitted to proceed before the Condemnation Commission to obtain an award of damages which, when paid, transferred title to it for the desired easement.

In making its argument that uneconomic remnant claims cannot be raised in a right-to-take challenge under Wis. Stat. § 32.06(5), WUA does not address the unambiguous terms of Wis. Stat. § 32.06(5); nor does it address the comprehensive treatment of that issue by the Court of Appeals in two separate decisions.

In contending that an uneconomic remnant claim should be made in the valuation proceeding, WUA displays a fundamental misunderstanding of what happens in a valuation proceeding before the Condemnation Commission or before the circuit court. In those proceedings, the only issue which may be considered is the value of the property before taking and the value of the property after taking. This proposition is established in

the specific language of Wis. Stat. § 32.06(10), which provides in relevant part as follows:

**32.06(10) APPEAL TO CIRCUIT COURT.** Within 60 days after the date of filing of the commission's award either condemnor or owner may appeal to the circuit court by giving notice of appeal to the opposite party and to the clerk of the circuit court as provided in s. 32.05(10). The clerk shall thereupon enter the appeal as an action pending in said court with the condemnee as plaintiff and the condemnor as defendant. It shall thereupon proceed as an action in said court subject to all the provisions of law relating to actions brought therein; but the only issues to be tried shall be the question of title, if any, under ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor, and it shall have precedence over all other actions not then on trial. (emphasis added)

This identical language appears in Wis. Stat. § 32.05(10) and (11) relating to valuation proceedings under the "quick take" provisions for transportation cases..

Wis. Stat. § 32.05(10) provides as follows:

**(10) APPEAL FROM COMMISSION'S AWARD TO CIRCUIT COURT.** (A) Within 60 days after the date of filing of the commission's award, any party to the proceeding before the commission may appeal to the circuit court of the county wherein the property is located. . . . The sole issues to be tried shall be the questions of title, if any, under ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor. . . . (emphasis added)

Wis. Stat. § 32.05(11) provides as follows:

**(11) WAIVER OF HEARING BEFORE COMMISSION; APPEAL TO CIRCUIT COURT AND JURY.** . . . The sole issues to be tried shall be questions of title, if any, under ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor. . . . (emphasis added)

The procedure to be followed if easements are sought to be acquired is set out in Wis. Stat. § 32.09(6g) which provides as follows:

**(6g)** In the case of the taking of an easement, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the

date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property enumerated in sub. (6)(a) to (g) where shown to exist. (emphasis added)

Confirming the proposition that the circuit court does not have jurisdiction to determine a claim regarding an uneconomic remnant are the jury instructions in such cases. (Supp. App. p. 101-104) The only determination that a jury can make in a valuation proceeding is the value of the property before taking and the value of the property after taking. Those findings simply do not reach the issue of whether the property in the after condition is an “uneconomic remnant” under the provisions of Wis. Stat. § 32.06(3m), which provides as follows:

**(3m) DEFINITION.** In this section, “uneconomic remnant” means the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability. If acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

As the Court of Appeals has already determined in definitive rulings, a judge in valuation proceedings in the circuit court, sitting with or without a jury, does not have jurisdiction to make a determination whether, in the after condition, the property owner has been left with an “uneconomic remnant”.

WUA’s contention that the “uneconomic remnant” claim should be raised in an inverse condemnation action is also groundless. Wis. Stat. § 32.10 provides as follows:

**32.10 Condemnation proceedings instituted by property owner.** If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced. . . .

In this case, ATC has initiated a condemnation action and acquired a utility easement for high-voltage transmission lines which covered approximately half of the Waller property. The balance of the property has not been acquired, nor has it been occupied by ATC. The statutory language for inverse condemnation actions under Wis. Stat. § 32.10 does not authorize a claim that the balance of the property, not acquired in a partial taking case, be acquired as an “uneconomic” remnant

WUA has cited no language in the statute or any decided cases that support its contention that an “uneconomic remnant” claim can be raised in either a valuation proceeding or in an inverse condemnation action.

The Wallers Are Entitled to Recover  
Their Attorneys Fees Under the Provisions of  
Wis. Stat. § 32.28(3)(b).

Wisconsin Utilities Association offers no explanation as to why the Wallers, successful in a right-to-take action under Wis. Stat. § 32.06(5), should not be entitled to litigation expenses under the provisions of Wis. Stat. § 32.28(3)(b) as that statute clearly provides:

**(3)** In lieu of costs under ch. 814, litigation expenses shall be awarded to the condemnee if:

...

(b) The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking.

The trial court has ruled that the Wallers were left with an uneconomic remnant and ATC could not sustain its taking until the uneconomic remnant was also acquired.

(R. 266 – p. 6; R App. p. 108-109)

The Wallers Are Entitled to Relocation Benefits  
Pursuant to the Provisions of Wis. Stat. § 32.19(2)(e)(1) and b.

The entitlement of the Wallers to relocation expenses is a factual issue turning on whether or not they were “displaced persons” as a result of the taking of their property by ATAC. The Findings of Fact and Conclusions of Law signed by Judge Carlson on this issue are supported by compelling evidence in the record. (R-47, R. App. 114-118) The Department of commerce and the trial court found that the Wallers were “displaced persons” and concluded that they were entitled to relocation benefits. There was abundant evidence in the record to support that finding, including a determination by the ATC appraiser that the residential improvements on the Waller property had been rendered totally obsolete; the ATC appraiser allocated \$7,500 from his assessment of total damages for the demolition of those residential improvements. The Wallers were “displaced persons” as a matter of law.

## CONCLUSION

The principal focus of the Wisconsin Utility Association's brief is that property owners claiming that they have been left with an uneconomic remnant should not be permitted to pursue a remedy under the provisions of Wis. Stat. § 32.06(5) challenging the right of ATC to acquire property unless and until the entire property is acquired.

On the basis of the arguments made by the Wallers here and in their principal brief, and the definitive rulings of the Court of Appeals on this issue, the WUA contentions relating to the use of Wis. Stat. § 32.06(5) to pursue an "uneconomic remnant" claim are without any factual or legal basis.

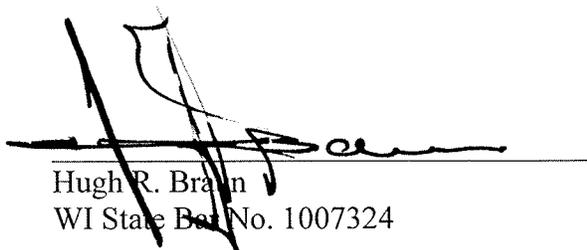
It appears that the principal concern of WUA is that in an unrelated case, *ATC v. 8341 Murphy, LLC*, 212 CV 2766, a challenge action under the provisions of Wis. Stat. § 32.06(5) has delayed ATC in acquiring the needed easement. This contention is curious because the statute provides specifically that the commencement of a challenge action shall not prevent a condemnor from filing a petition for assignment to the Condemnation Commission. Particularly relevant here is that, in the Waller case, ATC was permitted to proceed before the Condemnation Commission and acquire title, without objection from the Wallers.

Because ATC was permitted to proceed without delay or interruption to acquire the easement it sought, raising the issue of the validity of how the Wallers proceeded under Wis. Stat. § 32.06(5) is irrelevant. ATC was permitted to proceed without delay. While the Wallers were required to suffer through an unnecessary trial before the circuit court and were required to perfect two appeals to the Court of Appeals, the Wallers eventually obtained a court determination that the acquisition by ATC left them with an

“uneconomic remnant” and ATC was obliged to acquire the remnant and to relocate the Wallers. This appeal is about whether these judgments in favor of the Wallers should be affirmed.

Dated at Milwaukee, Wisconsin this 3<sup>rd</sup> day of April, 2013.

Respectfully submitted,



Hugh R. Braun  
WI State Bar No. 1007324

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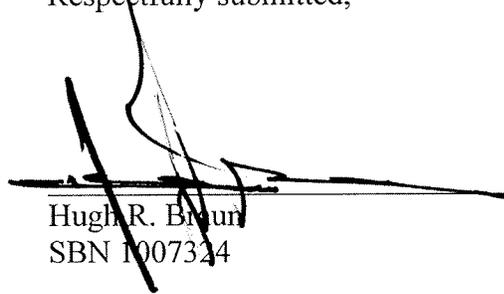
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BRIEF CERTIFICATION

I hereby certify pursuant to Wis. Stat. Rule §809.19(8)(c) the foregoing Brief was produced using proportional serif font conforming to the requirements of Wis. Stat. Rule §809.19(8). The length of the body of this Brief (Introduction, Argument, and Conclusion), as determined by the word processing system by which it was generated, is 2,257 words.

Dated this 3<sup>rd</sup> day of April, 2012.

Respectfully submitted,



Hugh R. Brown  
SBN 1007324

BRIEF CERTIFICATION  
ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this Brief which complies with the requirement of Wis. Stat. § 809.19(12). I hereby certify that the electronic brief is identical in content and format to the printed form of the brief filed on April 3, 2013. A copy of this certificate has been served on the court and opposing parties as of this date.

Dated this 3<sup>rd</sup> day of April, 2013.

By:   
\_\_\_\_\_  
Nicholas R. DiUlio

STATE OF WISCONSIN  
IN THE SUPREME COURT

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Consolidated Appeal Nos. 2012AP840 and 2012AP805

---

Scott N. Waller and Lynnea S. Waller,  
Plaintiffs-Respondents,

Appeal No. 2012AP000840  
Appeal No. 2012AP805

v.

American Transmission Co., LLC  
Defendant-Appellant.

Circuit Court Case  
No. 2008CV000520  
No. 2010CV691

---

On Bypass from the Court of Appeals, District II  
Appeal From Final Judgments of the Circuit Court  
Of Walworth County, the Honorable James L. Carlson, Presiding  
Circuit Court Case Nos. 208CV520 and 2010CV691

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**SUPPLEMENTAL APPENDIX OF PLAINTIFFS-RESPONDENTS,  
SCOTT N. WALLER AND LYNNEA S. WALLER**

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**8101 EMINENT DOMAIN: FAIR MARKET VALUE (PARTIAL TAKING)**

Question 1 of the Special Verdict asks "What was the fair market value of the entire property on (date of evaluation)?"

In answering this question, consider only the price for which the entire property would have sold on (date of evaluation) by an owner then willing, but not forced, to sell, to a buyer who was then willing and able, but not forced, to buy. Fair market value is not what the entire property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the owner or his or her unwillingness to sell the entire property.

You should consider the use to which the entire property was put by the owner, or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the entire property is the use to which the entire property could legally, physically and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation).

If you consider future uses, they must be so reasonably probable as to affect fair market value on (date of evaluation). They must not be merely possible uses based upon

speculation, theory or conjecture. You should consider every element that establishes the fair market value of the entire property.

Question 2 of the Special Verdict asks "What was the fair market value of the remaining property immediately after the partial taking on (date of evaluation) as if the public project was completed by (date of evaluation)?"

In answering this question, consider only the price for which the remaining property, with the public project completed, would have sold on (date of evaluation) by an owner then willing, but not forced to sell, to a buyer who was then willing and able, but not forced to buy. However, fair market value is not what the remaining property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the owner or his or her unwillingness to sell the remaining property.

You should consider the use to which the remaining property was put by the owner, or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use thus shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the remaining property is such use to which the remaining property could legally, physically and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). If you consider future uses, they must be so reasonably probable as to affect fair market value on

(date of evaluation). They must not be merely possible uses based upon speculation, theory or conjecture. You should consider every element that establishes the fair market value of the remaining property.

### SPECIAL VERDICT

Question 1: What was the fair market value of the entire property on (date of evaluation)? \$ \_\_\_\_\_

Question 2: What was the fair market value of the remaining property immediately after the partial taking on (date of evaluation) as if the public project was completed by (date of evaluation)? \$ \_\_\_\_\_

### COMMENT

This instruction and comment were approved in 2006. The comment was revised in 2009 and 2011.

Wis. Stat. § 32.09(6).

The definition of "fair market value" is taken from Arents v. ANR Pipeline Company, 2005 WI App. 61, 281 Wis. 2d 173, 189, 696 N.W. 2d 194 (Ct. App. 2005).

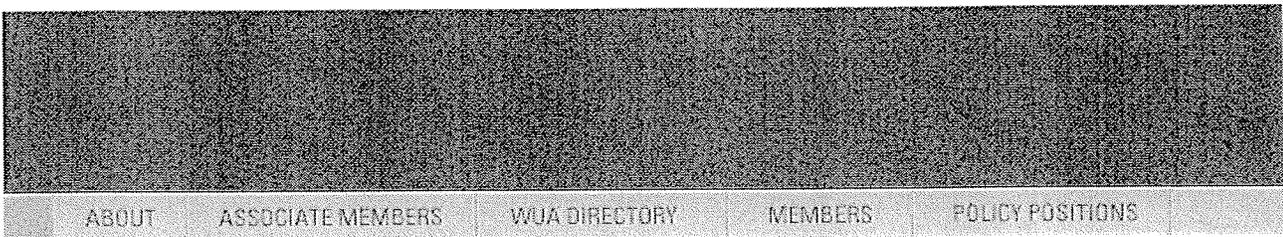
**Date of Evaluation.** Under s.32.09(1), the value of the subject property in eminent domain valuation litigation is to be determined as of the date of evaluation. Schey Enterprises, Inc. v. State, 52 Wis.2d 361, 190 N.W.2d 149 (1971). For a taking under Wis. Stat. § 32.05, the date of evaluation is the date the award is recorded in the register of deeds office, which is also the date of taking. For a taking under Wis. Stat. § 32.06, the date of evaluation is the date of filing the lis pendens.

**Value.** The principle that the trier of fact is to consider every element which would be considered by the buyer and the seller in the marketplace in setting the price for the subject property on the date of evaluation is found in Ken-Crete Products Company v. State Highway Commission, 24 Wis.2d 355, 359-360, 129 N.W.2d 130 (1964), Herro v. Department of Natural Resources, 67 Wis.2d 407, 420, 227 N.W.2d 456 (1974) and Clarmar Realty Company, Inc. v. Redevelopment Authority of the City of Milwaukee, 129 Wis. 2d 81, 91, 383 N.W.2d 890 (1986); see also 260 North 12<sup>th</sup> Street, LLC v. State of Wisconsin Dept of Transportation, 2011 WI 103, \_\_\_ Wis.2d \_\_\_, \_\_\_ N.W.2d \_\_\_ in which the court held that evidence of contamination and related remediation costs is admissible in eminent domain cases for valuing the property.

To determine appropriate compensation for the partial taking of property, the jury must determine the fair market value of the entire property on the date of evaluation and the fair market value of the remaining property on the date of evaluation, assuming completion of the public project. Calaway v. Brown County, 202 Wis. 2d 736, 553 N.W. 2d 809 (Ct. App. 1996).

**Unit Rule.** In a total taking, fair market value must be determined using the “unit rule.” Green Bay Broadcasting v. Redevelopment Authority, 116 Wis.2d 1, 342 N.W.2d 27 (1983); see also Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648.

For additional discussion of the unit rule, see Comment, Wis JI-Civil 8100.



**MEMBERS: American Transmission Company**



American Transmission Company LLC, headquartered in Pewaukee, Wisconsin, is the country's first multi-state, transmission-only company. ATC, with \$1.3 billion in assets, owns, operates, plans, monitors and maintains approximately 8,900 miles of transmission lines and 460 substations throughout portions of Wisconsin, Michigan's Upper Peninsula and Illinois.

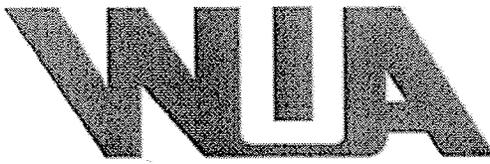
ATC has two system control centers, one at the Pewaukee corporate headquarters and one in Cottage Grove, Wisconsin. The company, of more than 400 employees, also has offices in DePere, Madison and Wausau, Wisconsin, Kingsford, Michigan and Washington, DC.

ATC provides non-discriminatory service to all customers, supporting effective competition in energy markets without favoring any market participant. Regulated by the Federal Energy Regulatory Commission for all rate terms and conditions of service, ATC is a member of the Midwest ISO regional transmission organization.

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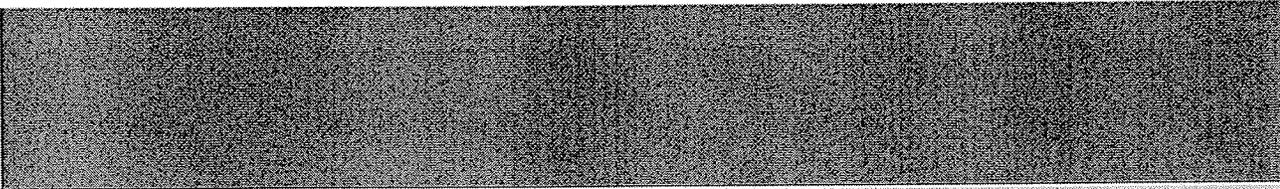
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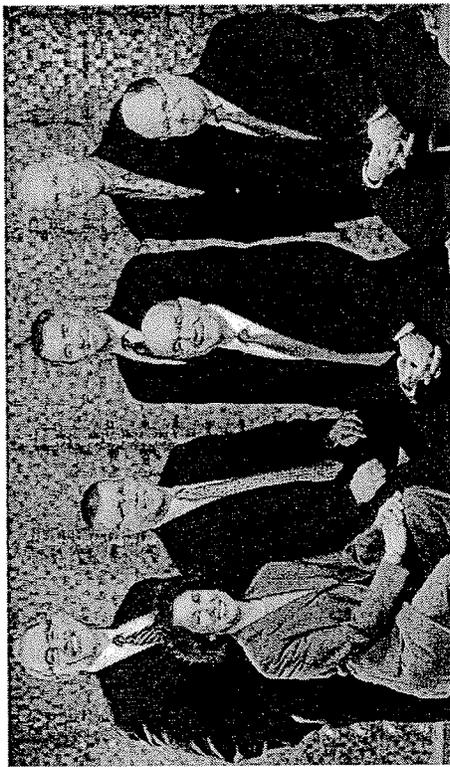
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# Leadership

## Executive team



LEFT TO RIGHT: **Daniel Sanford**, Acting General Counsel and Corporate Secretary | **Carol Chinn**, Vice President and Chief Operating Officer | **Mike Holbauer**, Vice President, Chief Financial Officer and Treasurer | **John Procarrio**, President, Chief Executive Officer and Chairman of the Board | **Nancy Saterfield**, Vice President, Public Affairs and Human Resources | **John Flynn**, Vice President, Strategic Planning and Business Development | **Mike Rowe**, Vice President, Construction and Asset Management

## Board of Directors



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American Transmission Co.



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**William Verratto**  
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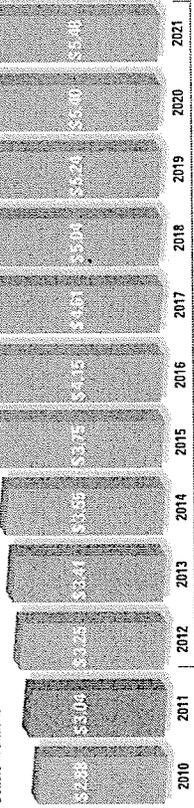
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Chairman, President and Chief Executive Officer  
United Gas of Utah, Co.



**Stephen Yanisch**  
President and Chief Executive Officer  
RSC Capital Market

## Investment in plant

(Net Property, Plant and Equipment)  
Dollars in Billions



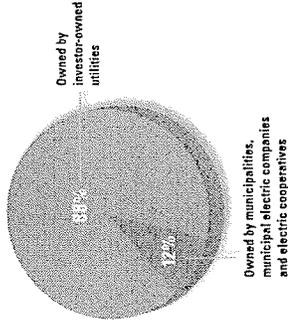
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## Ownership

ATC is a privately owned company. Utilities, municipalities, municipal electric companies and electric cooperatives from Wisconsin, Michigan, Minnesota and Illinois have an ownership stake in ATC.

- Adams-Columbia Electric Cooperative
- Alger-Delta Cooperative Electric Association
- City of Algoma
- Badger Power Marketing Authority
- Central Wisconsin Electric Cooperative
- Cloverland Electric Cooperative
- City of Columbus
- City of Kaukauna
- Madison Gas & Electric Co.
- Manitowish Public Utilities
- Marshfield Electric and Water Department
- City of Onoto Falls
- Ontonagon County Rural Electrification Association
- City of Plymouth
- Upper Peninsula Power Company
- Upper Peninsula Public Power Agency
- Wisconsin Electric Power Co.
- Wisconsin Power & Light Co.
- Wisconsin Public Service Corp.
- City of Wisconsin Rapids
- WPP Energy

## Ownership



## Corporate profile

ATC is a transmission-only electric utility. | Meeting peak demand of 13,271 megawatts. | Delivering 65,554 gigawatt hours of energy. Owner and operator of 9,440 miles of transmission line and 519 substations in 72 counties in four states: Wisconsin, Michigan, Minnesota and Illinois.

AMERICAN TRANSMISSION CO. | 2011 ANNUAL REPORT

## Debt ratings

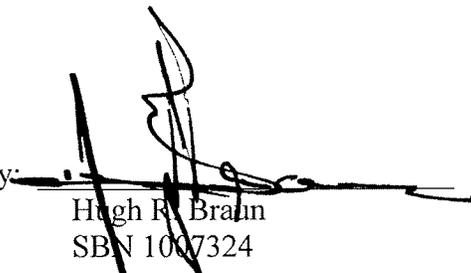
Commercial Paper	Fitch	Moody's	S&P
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		A1	A+

APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. Rule 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) relevant decisions of the Court of Appeals; (4) the findings or opinion of the trial court; and (5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 3<sup>rd</sup> day of April, 2013.

By: 

Hugh R. Braun  
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I have submitted an electronic copy of this Appendix which complies with the requirement of Wis. Stat. § 809.19(12). I hereby certify that the electronic Appendix is identical in content and format to the printed form of the Appendix filed on April 3, 2013. A copy of this certificate has been served on the court and opposing parties as of this date.

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By:   
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Nicholas R. DiUlio

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DISTRICT II

Consolidated Appeal Nos. 2012AP805 and 2012AP840

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SCOTT N. WALLER AND LYNNEA S. WALLER,

Plaintiffs-Respondents,

v.

AMERICAN TRANSMISSION COMPANY LLC,

Defendant-Appellant.

---

Appeal from Final Judgments of the Circuit Court of  
Walworth County, the Hon. James L. Carlson Presiding,  
Circuit Court Case Nos. 2008CV520 and 2010CV691

---

**INITIAL BRIEF OF  
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---

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## INTRODUCTION

The court of appeals has seen these litigants before and, not incidentally, the tangled procedural web of Chapter 32 of the Wisconsin Statutes. Three times, this court has issued decisions or orders concerning the procedure when a landowner alleges that an otherwise constitutional taking (here a utility easement) will leave an uneconomic remnant under Wis. Stat. § 32.06(3m).<sup>1</sup> The latest result in the circuit court shows that the procedure remains flawed—both impractical and unjust.

When the first circuit court judge to hear the case, Robert J. Kennedy, dismissed these claims in November 2008, the court recognized that resolving an uneconomic remnant dispute in a Wis. Stat. § 32.06(5) right-to-take challenge would give the landowner “two kicks at the cat.”

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<sup>1</sup> The supreme court has not reviewed any of these decisions. Their publication and precedential impact, however, necessarily affect condemnation proceedings across the state.

The subsequent history of this case confirmed Judge Kennedy's prescient concerns: the landowners have had multiple opportunities, spread across three judges, to make their case.

This case has seen at least five evidentiary hearings. Scott Waller testified in all five; Lynnea Waller testified in two; Kurt Kielisch—the Wallers' appraiser—testified in four; and John Rolling—ATC's appraiser—in three. The testimony and exhibits at these hearings have been largely duplicative, but unanimous in at least one respect: the Wallers' property retains significant monetary value. Yet these condemnation proceedings—given statutory priority over “all matters not on trial”—have persisted for more than four years.

None of this was necessary. None of this is authorized by statute. The condemnation statutes fully protect landowners without the new remedy fashioned by the

previous appellate decisions in this case. Negotiations between a landowner and condemnor proceed sequentially: Before a jurisdictional offer, a condemnor must negotiate to purchase the property. Wis. Stat. § 32.06(2a). As part of negotiations, a condemnor “shall” offer to acquire any uneconomic remnant. Wis. Stat. § 32.06(3m). If negotiations fail, the condemnor initiates condemnation by making a jurisdictional offer for only that portion of a landowner’s property that is necessary for a public purpose. Wis. Stat. § 32.06(3). Compelled acquisition of the entire property under the uneconomic-remnant provision necessarily becomes unavailable once the condemnor makes the jurisdictional offer. *See* Wis. Stat. § 32.06(3m).

Here, ATC complied with the statutory procedures. Once negotiations failed and once the landowners rejected ATC’s offer to acquire the entire property, the landowners were fully protected by the existing statutory procedures. If

they believed they were offered too little compensation, their remedy was to raise this challenge in a valuation proceeding. *See* Wis. Stat. § 32.06(7)–(10). Scott and Lynnea Waller (the “Waller”) did this. And if they believed the condemnor took property without paying any compensation, their remedy was to bring an inverse condemnation action. Wis. Stat. § 32.10. They did not do this. They should not now be permitted to either collaterally attack the judgment in the valuation proceeding or to backdoor what should have been an inverse condemnation claim into a new cause of action within the already exhaustive right-to-take procedures.

Both a condemnation commission and a jury heard the Wallers’ complaints about the impact of the public project on their property. Both rejected the Wallers’ contention that ATC offered them too little—ATC’s jurisdictional offer exceeded both the condemnation commission award and the jury verdict. Moreover, the Wallers themselves

acknowledged, at the contested hearing on litigation expenses, that they cannot meet the standard to prove inverse condemnation. Through these cases, therefore, the Wallers have attempted to graft a third procedure and remedy onto the condemnation statutes by bringing an uneconomic remnant challenge in a right-to-take action. The court of appeals should have rejected such a legislative endeavor in the first instance. It did not then, but the court can still do so now to prevent landowners from getting two, three, and even four kicks at the cat.<sup>2</sup>

Setting aside the procedural tangle resulting in inconsistent results in different fora, the circuit court erred in concluding that the Wallers have been left with an uneconomic remnant. The most recent remand instructed the

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<sup>2</sup> The very length and complexity of this litigation make perhaps the most compelling argument for revisiting *Waller I* and *Waller II*—now in the context of not just what could happen if a procedure were followed or ignored but what did, in fact, happen.

circuit court to once again determine whether the Wallers' property was an uneconomic remnant but omitted guidance on the proper construction of the uneconomic remnant statute. Left to develop its own construction, the circuit court finally applied an incorrect—and legally unsupportable—subjective standard. Moreover, the circuit court committed serial evidentiary errors, each of which alone would require yet another trial.

Thankfully for all, a sixth evidentiary hearing is unnecessary because, *as a matter of law* and accepting all the facts found by the circuit court that survive the clearly erroneous standard of review, the landowners' property retains substantial value and economic viability—it is not an uneconomic remnant. The final judgment in the right-to-take case should therefore be reversed.

The circuit court also erred by awarding the landowners their litigation expenses—including attorneys'

fees that far eclipse the value of the property at issue— purportedly under Wis. Stat. § 32.28(3)(b) (2009-10). That statute authorizes fee shifting in a successful right-to-take case. Yet, as the Wallers readily concede, they never challenged ATC’s right to condemn their property. Under the plain language of this statute, the Wallers cannot recover litigation expenses, and the order awarding them litigation expenses should also be reversed.

Finally, in a separate case now consolidated for appeal, the circuit court erred in awarding relocation benefits. The Wallers’ house remains a useable, livable residential dwelling to this day. ATC’s taking of the easement did not touch or otherwise physically alter the Wallers’ house or make it legally or practically impossible for them to live there— though they elected to abandon the premises. The Wallers have not been constructively displaced. They moved voluntarily. Under these circumstances, the Wallers are not

displaced under Wis. Stat. § 32.19(2)(e), and the judgment in the relocation benefits case should be reversed as well.

### **ISSUES PRESENTED FOR REVIEW**

1. Did the circuit court properly interpret and apply the uneconomic remnant statute, Wis. Stat. § 32.06(3m)?

*Circuit court answered:* Yes, implicitly.

2. How must a landowner raise a claim that a condemnor has taken too little property, leaving the landowner with an uneconomic remnant: In a valuation proceeding, in an inverse condemnation action, or in a right-to-take action?

*Court of Appeals in Waller I and Waller II answered:*

A landowner must bring an uneconomic remnant claim in a right-to-take action under Wis. Stat. § 32.06(5).

3. May a landowner recover litigation expenses under Wis. Stat. § 32.28(3)(b), or any other statute, for

obtaining a judicial ruling that the property that remains after a taking is an uneconomic remnant?

*Circuit court answered:* Yes.

4. ATC condemned a transmission-line easement on the Wallers' property that did not physically or legally require the Wallers to move. Are the Wallers nonetheless displaced, entitling them to relocation benefits when they moved because of unsubstantiated and subjective concerns about the effect of the transmission line on their health?

*Circuit court answered:* Yes.

#### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

ATC requests oral argument and publication. This appeal presents several issues of first impression, including the proper interpretation and procedural application of the uneconomic remnant statute. In addition, this court will determine whether a landowner can recover litigation

expenses after a court declares property an uneconomic remnant and whether a person is “displaced” and entitled to relocation benefits when choosing to relocate—also questions of first impression.

### **STANDARD OF REVIEW**

This case presents questions of statutory interpretation and the application of statutes to fact. The circuit court’s conclusion that the property is not an uneconomic remnant must be reviewed under a two-part standard.

The circuit court’s findings of fact will be upheld unless clearly erroneous. *Mentzel v. Oshkosh*, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988). However, “the interpretation of the statutes and the application of the statutes to undisputed facts” are determined independently of the circuit court. *Klemm v. Am. Transmission Co. LLC*, 2011 WI 37, ¶ 17, 333 Wis. 2d 580, 798 N.W.2d 223; *Waller v. Am. Transmission Co. LLC*, 2009 WI App 172, ¶ 10, 322 Wis. 2d

255, 776 N.W.2d 612 (“*Waller I*”). Indeed, whether facts established at trial show that a condemnor has deprived a landowner “of all, or substantially all, of the beneficial use of one’s property .... is a question of law” that an appellate court reviews *de novo*. *Howell Plaza, Inc. v. State Highway Comm’n*, 92 Wis. 2d 74, 80, 284 N.W.2d 887 (1979) (“*Howell II*”); *but see Waller v. Am. Transmission Co. LLC*, 2011 WI App 91, ¶ 15, 334 Wis. 2d 740, 799 N.W.2d 487 (“*Waller II*”).

## STATUTES AT ISSUE

### **Wis. Stat. § 32.06(3m)**

In this section, “uneconomic remnant” means the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability. If acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

### **Wis. Stat. § 32.28(3)(b)**

In lieu of costs under ch. 814, litigation expenses shall be awarded to the condemnee if:

...

(b) The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking; ....

### STATEMENT OF FACTS

These appeals originate from administrative proceedings before the Public Service Commission of Wisconsin (“PSCW”) and the Wisconsin Department of Natural Resources (“DNR”). Before ATC can undertake work on most high voltage transmission line projects—including the one that ultimately affected the Wallers’ property—both the PSCW and the DNR must review and approve all aspects of the project. RR.55:201, 203-07; RR.43, Ex.660.<sup>3</sup> *See also* Wis. Stat. § 196.491(3) (requiring the PSCW to issue a certificate of public convenience and

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<sup>3</sup> The designation “R. :\_” refers to the record in the right-to-take case (No. 12-AP-840). The designation “RR. :\_” refers to the record in the relocation case (No. 12-AP-805). In both citations, the number before the colon identifies the record number of the document and the number after the colon identifies the page number. The designation “App. \_\_\_” refers to the page number of the appendix that accompanies this brief.

necessity before construction of certain high voltage transmission lines may begin).

As part of its exhaustive regulatory approval process, the PSCW considered the safety and public health implications of the proposed transmission line, including the line's distance from houses and other buildings (RR.55:171-75; *see also* RR.43, Ex.613) and the associated electromagnetic fields ("EMFs") at various distances from the transmission line. RR.55:175-76, 181; *see also* RR.43, Ex.627:18-28. The transmission line itself and all structures along the route complied with every applicable national and state electrical and safety code, including those defining safe distances from a dwelling. RR.55:175.

The PSCW has authority to require a utility to alter a proposed transmission-line route to accommodate individual landowners and potential hardships. RR.55:175, 212-18.

Scott Waller testified about his concerns before the PSCW,

but the agency did not require ATC to alter the route along the Wallers' property. On March 30, 2006, the PSCW issued a certificate of public convenience and necessity ("CPCN") to ATC to construct the transmission line that would, in part, cross the edges of the Wallers' property. RR.43, Ex.660. In doing so, the PSCW necessarily found that the transmission line would promote the reliability of the electrical grid and that it would "not have undue adverse impacts on," among other things, "public health and welfare." RR.43, Ex.660:2, 3. *See also* Wis. Stat. § 196.491(3)(d).

Following the route approved by the PSCW, and after offering the Wallers the option of having the transmission line along just a single side of their property (R.304:64-65), ATC acquired a 45-foot-wide easement along two sides of the Wallers' property. *E.g.*, R.259, Ex.201. The Wallers own a house with several small outbuildings on a 1.5-acre triangular-shaped parcel of land in the Town of Delavan.

R.266:1, App.1; R.304:9. Their property is bounded to the east by Interstate 43, to the north by Mound Road, and to the west by a vacant lot in the City of Delavan industrial park.

R.304:61-62.

The area around the Wallers' Mound Road home has changed dramatically since they bought the property more than 20 years ago and ATC's taking of the easement in 2008.

R.304:9, 59. In 1989, they bought a rural farmette surrounded by agricultural land. R.304:59. At the time the Wallers purchased the property, a 69-kilovolt transmission line was already present along Mound Road. R.304:59.

Though their parcel was small, it maintained agricultural zoning. R.304:95. By 2008, the surrounding properties to the west (a vacant lot with a large warehouse just beyond it) and the north (a retention pond) had become part of the City of Delavan industrial park. R.304:60-61; R.259, Exs.234, 235.

By contrast, the Wallers' property itself did not change much. Before the 2008 taking, the Wallers' property was *already* burdened by a transmission line and a 20-foot-wide transmission-line easement along Mound Road. R.304:59. After the taking, ATC upgraded the existing transmission line—present since before the Wallers purchased the property—and added a transmission line along the Interstate 43 side of the Wallers' property, placing a single pole in the northeast corner of the property, adjacent to the overpass of the interstate and Mound Road. *E.g.*, R.259, Exs.201, 217:17.

Before the taking, the Wallers' property was subject to highway setbacks that restricted structures on both the Mound Road and interstate sides of the property—altogether encumbering more than 47 percent of the lot. R.296:20, *see* R.259, Ex.201. Along Interstate 43, the setback extends 50 feet into the Wallers' property—deeper than ATC's

45-foot easement rights. R.259, Ex.201. Along Mound Road, the setback extends 25 feet into the Wallers' property. *Id.* ATC's 2008 easement along Mound Road added an additional 20 feet to the pre-existing transmission line easement and highway setback strip on the Mound Road side of the property. R.296:21.

Though the Wallers were not happy with the new line, the Wallers confirmed that the transmission lines did not have a big effect on the property's use. R.304:58. Indeed, the Wallers continued living in their Mound Road home until August 15, 2009, nearly one year after the upgraded transmission line was energized at 69 kilovolts and more than four months after the line was fully energized at 138 kilovolts. R.304:44-45; R.296:181. They could have continued to live there, *see* R.304:58 (confirming that the house was in good condition), but they testified that

uncertainty about alleged health risks from transmission lines led them to move to a much more rural property. R.304:42.

The project did require the removal of some tall, deciduous trees on the northeast corner of the Wallers' property and four deciduous trees along Interstate 43.

R.304:63. Although the loss of trees increased the traffic noise from the interstate, trees and bushes still encircle the residence. R.304:63; R.259, Ex.236, 240 (photographs). In consultation with ATC, the Wallers chose this location, rather than having the transmission line run along only the west side of their property. R.304:64-65.

Further, the Wallers testified that after the transmission line was energized, their television and radio reception worsened, and they had "intermittent problem[s]" with the use of cell phones, the electric meter in their house, the speedometer in their car, and one instance of flashing headlights. R.304:47-48, 84-85. However, other than

possible interference with television and radio reception—which the Wallers never reported to ATC—none of these occurrences can be independently verified or explained by the presence of transmission lines. R.296:172-73; RR.55:57. Moreover, licensed professional engineers testified that there should be no interference with reception when transmission lines operate properly and that if a problem were to arise, ATC would and could address it. R.296:178.

Though living in the house was—and is—still one possible use of the property, the appraisers agreed that the highest and best use of the property as of the date of the taking had shifted to light industrial use. R.304:95; R.297:60. To a buyer seeking light industrial property, both appraisers agreed that the residential improvements contributed negative value—logically, since they would have to be removed to allow for most industrial uses. R.304:99; R.297:60. The appraisers treated the residential improvements as “obsolete”

solely for purposes of their highest-and-best-use valuations. R.304:95; R.298:79-80, 145-46. However, John Rolling stated, as ATC's expert, that the residential improvements nonetheless contribute value for certain commercial and light industrial uses. R.298:61.

Notwithstanding the shift in highest and best use, the property retains its full utility as a residence. The best evidence of this: the Wallers continued living there until August 2009. R.304:58; R.298:59, 84; *see also* R.298:60; R.113:12-13 (the Wallers' appraiser, Kurt Kielisch, confirmed that the Wallers' house is still livable and usable as a residence). John Rolling, for ATC, stated:

You can sell this house as a residence to somebody else. You could rent this place to somebody else as a residence. It is just that we believe that there was more value in the property now as vacant industrial than as residential. It does not mean that you cannot do or continue the [residential] use.

R.298:71; *see also id.* at 84, 145 ("That is a property where people could go on living in it just as they had before"). The

residential improvements contribute to the value of the property for residential uses and for some interim commercial uses. *See* R.298:61, 71.

### **STATEMENT OF THE CASE**

In 2008, ATC condemned an easement on the Wallers' property. Three lawsuits followed.

- The Wallers filed a right-to-take action (Case No. 08-CV-520—the “right-to-take case”) under Wis. Stat. § 32.06(5), claiming their property after the taking would be an uneconomic remnant.
- ATC filed condemnation proceedings to determine just compensation under Wis. Stat. § 32.06(7), ultimately assigned Case No. 08-CV-955—the “valuation case”—after the Wallers appealed the condemnation commission's award.
- The Wallers filed a relocation benefits case under Wis. Stat. § 32.20 (Case No. 10-CV-691—the “relocation case”).

These consolidated appeals arise out of final judgments and orders entered in the right-to-take case and the relocation case. The appeals also implicate the valuation case, though

neither party appealed the jury verdict in Case No. 08-CV-955, assigning \$38,000 in value to the property after the taking of the easement. *See* R.187. To date, this verdict and the resulting judgment have not been appealed or vacated.

After negotiations to purchase either the easement or the entire property failed, ATC made the Wallers a jurisdictional offer of \$99,500 on March 20, 2008. R.259, Ex.1; R.304:79 (receiving Exhibit 1 “for purposes of the record”). ATC sought to acquire a 45-foot wide utility easement on two sides of the Wallers’ triangular-shaped property. *E.g.*, R.259, Ex.201. The easement was necessary to construct and upgrade an existing transmission line, erected before the Wallers ever purchased the property. *See* R.304:59. The Wallers rejected ATC’s offer.

On April 25, 2008, the Wallers filed a right-to-take challenge under § 32.06(5), alleging that the taking would

render their property “valueless,” leaving them with an uneconomic remnant. R.1:4. Days later, ATC filed its petition to determine just compensation under Wis. Stat. § 32.06(7)–(10).

On June 11, 2008, the Walworth County Condemnation Commission (“Commission”) conducted the statutorily required site visit and received evidence of the property’s before- and after-taking value pursuant to Wis. Stat. § 32.08. *See* R.51, Exs.10-11. At the Commission hearing, the Wallers’ appraiser, Kurt Kielisch, said that the taking would leave the Wallers with an uneconomic remnant. R.51, Ex.10:14-15. The Commission disagreed, valuing the Wallers’ property after the taking at \$40,000. R.47. The Wallers appealed the Commission’s award. R.119.

***The Circuit Court’s First Uneconomic Remnant Decision***

The right-to-take case and the valuation case proceeded on parallel tracks—both, ultimately, before Judge

John R. Race in Walworth County.<sup>4</sup> On October 15, 2008, the circuit court (Judge Robert J. Kennedy) held a final pretrial conference in the right-to-take case, R.112, and, on November 5, 2008, it dismissed the right-to-take case for the first time. R.113:68; R.53. The court held that an uneconomic remnant claim must be decided in a valuation proceeding, not in a separate right-to-take action. R.113:65-66. Otherwise, the court concluded, a landowner would “get two kicks at the cat....” R.113:65. The Wallers appealed the dismissal.<sup>5</sup>

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<sup>4</sup> Three judges have issued decisions, presiding over final judgments in these cases: the Hons. John R. Race, Robert J. Kennedy, and James L. Carlson.

<sup>5</sup> While the right-to-take case was on appeal, the valuation case moved toward trial. On August 17, 2009, the Wallers moved the court of appeals to stay the valuation trial scheduled for September 8, 2009, in light of the pending right-to-take appeal. *See Waller v. Am. Transmission Co. LLC*, No. 09-AP-411 (Sept. 2, 2009) (slip op.). The court of appeals denied the stay motion. *Id.* Nevertheless, the valuation trial was postponed because another case occupied the number one trial position, and the circuit court conducted that trial despite the statutory directive that condemnation proceedings “shall have precedence ....” Wis. Stat. § 32.06(10).

***Waller I: The Court of Appeals' First Decision***

On October 28, 2009, the court of appeals reversed the circuit court's dismissal and ordered the circuit court "to make a determination whether ATC's taking creates an uneconomic remnant" in the right-to-take case. *Waller I*, 322 Wis. 2d 255, ¶ 17. The court reasoned that "an action to declare an uneconomic remnant is just the type of procedural matter that is meant to be resolved prior to addressing the adequacy of compensation." *Id.*, ¶ 16.

***Post-Remand Proceedings: The Valuation Trial***

On remand, the circuit court recognized that the valuation inquiry was an indispensable and, in effect, indivisible part of the uneconomic-remnant analysis. In the interest of judicial economy, it decided that: (1) the jury in the valuation case would establish the property's value before and after the taking of the easement; (2) the court in the right-to-take case would decide the uneconomic remnant

issue, taking into account the evidence from the valuation trial; and (3) the court in the valuation case would set the amount of compensation. R.76.

The Wallers responded to the scheduling order by filing a writ of mandamus in the court of appeals, challenging the circuit court's proposed procedure. The court of appeals denied the writ. *Waller v. Circuit Court for Walworth County*, No. 10-AP-543-W (Mar. 17, 2010) (slip op.). The circuit court then held a three-day jury trial in the valuation case. R.205-207.

The jury heard the Wallers' testimony about their use of the property before and after the taking. *See, e.g.*, R.205:206-208, 238. It heard all of the comparable sales information, including the competing testimony of the Wallers' appraiser, Kurt Kielisch, and ATC's appraiser, John Rolling. R.206:6-88, 117-98 (testimony of Kielisch and Rolling). Kielisch stated that the after-taking value was

\$15,500; Rolling valued the remainder at \$48,000.

R.206:37, 122.

The jury returned a verdict valuing the property before the taking at \$132,000 and after the taking at \$38,000. R.187. The jury award of \$94,000 was less than ATC's jurisdictional offer of \$99,500. The Wallers did not appeal the valuation jury verdict. It stands to this day.

***The Circuit Court's Second Uneconomic Remnant Decision***

After the jury trial in the valuation case, the circuit court (Judge John R. Race) incorporated the record and verdict from the jury trial into the right-to-take record, concluding that the Wallers' remaining property is *not* an uneconomic remnant. R.208:41.

The court made the following findings of fact:

- The Wallers lived in their house for nearly a year after ATC condemned the easements. R.208:13.

- The Wallers’ house is “up to date,” allowing people to live comfortably. R.208:14, 16, 32.
- The Wallers’ property remains of sufficient size to allow its meaningful use. R.208:21 (determining that the remaining property is not such that “there was nothing a person could do with it”); *see also* R.208:29, 41 (listing potential uses of the property after the taking).
- The improvements on the Wallers’ property had substantial value after the taking. R.208:11, 15, 27-28 (rejecting the Wallers’ statement that the value of the improvements has been “destroyed”); *see* R.208:14, 41-42.

Based on these findings and the jury verdict that the after-taking value of the property is \$38,000, the circuit court held that the Wallers’ property was not an uneconomic remnant under Wis. Stat. § 32.06(3m): it retained substantial value and economic utility after the taking. R.208:8-10, 12-16, 29-32, 40-42. The circuit court dismissed the case, R.103, and the Wallers appealed. R.105.

***Waller II: The Court of Appeals' Second Decision***

On May 25, 2011, the court of appeals again reversed the circuit court. *Waller II*, 334 Wis. 2d 740. This time, the court held that a “circuit court must first hold an evidentiary hearing under section 32.06(5) to determine whether the remaining parcel is an uneconomic remnant.” *Id.*, ¶ 2. Only after making that determination may a court determine just compensation. *Id.* The court of appeals then remanded the case for an evidentiary hearing, directing: “If the circuit court finds that the Wallers’ property is an uneconomic remnant, the jury’s just compensation verdict is vacated.” *Id.*, ¶ 17.

***Post-Remand Proceedings: The Circuit Court’s Third Uneconomic Remnant Decision***

The circuit court conducted a two-day trial in the right-to-take case on November 10 and 14, 2011. R.296, 298, 304. All of the witnesses who testified previously in the three-day valuation trial, except one, testified in the right-to-take trial. *Compare* R.205, 206 *with* R.296, 298, 304.

The evidence and testimony were almost entirely cumulative of evidence presented in earlier hearings. At the conclusion of this trial, the court (Judge James L. Carlson) ruled—contrary to the prior two circuit court rulings—that the Wallers’ remaining property was an uneconomic remnant. R.298:212-23, App.10-21. The court did not, however, vacate the earlier valuation verdict or conduct new proceedings to determine value.

***Hearing on Litigation Expenses***

On January 26 and February 1, 2012, the circuit court held a hearing to determine the reasonableness and necessity of the Wallers’ claimed litigation expenses. The Wallers sought \$298,026.74 (more than seven times the additional compensation they sought) in litigation expenses. At the hearing, no witness testified that the litigation expenses were “reasonable” and “necessary to prepare for or participate in actual or anticipated proceedings before the condemnation

commissioners ... or any court.” *See* Wis. Stat. § 32.28(1).

Indeed, the Wallers did not call a single witness in support of their fee demand. Nor did the Wallers proffer an affidavit stating that the litigation expenses were reasonable and necessary. *See* R.274.

Over ATC’s objection that the Wallers had not met their burdens of proof or persuasion, R.299:10, App.32, the circuit court shifted the burden to ATC to disprove facts not in evidence and considered ATC’s objections to specific litigation expenses requested by the Wallers. *See generally* R.299 and R.300. ATC offered expert testimony from Attorney Don Murn that the Wallers’ litigation expenses were neither reasonable nor necessary. R.300:82-112. Throughout the two-day hearing, the court ruled upon ATC’s specific objections, R.299 and R.300, ultimately awarding the Wallers \$211,261.74 in litigation expenses. R.286, App.8.

After the uneconomic remnant trial on November 10 and 14, 2011, and after the litigation-expense hearing on January 26 and February 1, 2012, the court entered a final judgment against ATC on March 2, 2012. R.283, App.7. The judgment declared the Wallers' remaining property an uneconomic remnant and required ATC to pay \$47,509.72 to acquire the entire property. *Id.* On March 12, 2012, the court entered the final order awarding the Wallers their litigation expenses. R.286, App.8.

ATC timely filed this appeal; the Wallers did not cross-appeal.

***The Relocation Benefits Case***

On January 25, 2012, the circuit court held a one-day trial in the relocation benefits case. RR.55. Much of the testimony and evidence were cumulative of that presented

during the November 2011 right-to-take trial and the March 2010 valuation trial.<sup>6</sup>

At the end of the relocation trial, the circuit court held that the Wallers were displaced persons because the taking of the transmission-line easement left them “with a property that was [not] suitable for a dwelling.” RR.55:332, App.130. The court rejected the argument that to qualify as a displaced person, a landowner must be compelled to move because of physical or legal requirements that make it impossible to continue using the property as a residence. RR.55:337, App.137. Accordingly, the court entered judgment against ATC, awarding the Wallers \$26,350.00 in relocation benefits plus costs. RR.50, App.125.

ATC timely filed this appeal and, again, the Wallers did not cross-appeal. The right-to-take and relocation cases

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<sup>6</sup> Any additional facts pertinent to the issues presented on appeal are set forth above or will be presented, as necessary, in the argument that follows.

were consolidated for appeal on ATC's motion. *See* Court of Appeals Order (May 1, 2012).

## **ARGUMENT**

### **I. THE WALLERS' PROPERTY IS NOT AN UNECONOMIC REMNANT.**

The circuit court declared the Wallers' remaining property an uneconomic remnant and, in a right-to-take case, assigned a valuation to the property without receiving comparable-sales evidence, contrary to the statutory right to a jury trial to determine just compensation. *See* Wis. Stat. § 32.06(10). Both the procedure used to reach this conclusion, and the substantive declaration that the property is an uneconomic remnant itself, were in error.

#### **A. Judicial Review Of ATC's Uneconomic Remnant Determination Is Narrow: ATC's Conclusion Should Be Upheld Because There Is No Fraud, Bad Faith, Or Gross Abuse Of Discretion.**

Before reaching the substance of the uneconomic remnant question, this court must make a threshold

determination: What decision is subject to appellate review—the circuit court’s decision that the remainder is an uneconomic remnant or ATC’s decision that the remainder is not? The answer dramatically impacts the standard of review.

A claim that property is an uneconomic remnant—assuming for now that a landowner can bring such a claim—addresses the scope of a taking. Accordingly, this court should narrowly review ATC’s initial condemnation decision under the standard set forth in *Falkner v. Northern States Power Co.*, 75 Wis. 2d 116, 139, 248 N.W.2d 885 (1977). That case and its progeny hold that a condemnor is obligated to both determine the necessity of a taking and to take as little property as possible to achieve a legitimate public purpose. *Id.* at 139.

This means that a condemnor cannot condemn a whole parcel when taking an easement will do. ATC followed *Falkner* when it determined the amount of property necessary

to the public purpose and when it issued its jurisdictional offer.

As a matter of law, the evidence presented at trial is insufficient to overturn ATC's determination that the Wallers' entire property was not needed for public use. The federal and state constitutions expressly preclude ATC from condemning any part of the Wallers' property that is not necessary for a public purpose. *See* U.S. Const. amend. V; Wis. Const. art. I, § 13. A condemnor cannot take more property than "is reasonably necessary" to a project. *Czarnik v. Sampson Enters.*, 46 Wis. 2d 541, 547, 175 N.W.2d 487 (1970); *see also* *Mitton v. Wis. DOT*, 184 Wis. 2d 738, 748, 516 N.W.2d 709 (1994) ("no more property can be taken than the public use requires") (quoting *Falkner*, 75 Wis. 2d at 139).

Condemnors have tremendous discretion to determine the extent of a taking. *See Falkner*, 75 Wis. 2d at 142 (the

condemnor “has a large measure of discretion in determining the area and estate of land it needs”). The judicial standard of review should reflect that:

[T]he *scope of [judicial] review is narrow*. Our decisions establish that a court will not disturb a determination of necessity in the absence of fraud, bad faith or gross abuse of discretion; the determination of the necessity of taking will be upheld if there is reasonable ground to support it.

*Id.* at 132 (emphasis added).

This general rule reflects a primary concern of condemnation law: ensuring that landowners retain the greatest possible estate and receive just compensation for the diminished value of their estate. *See Czarnik*, 46 Wis. 2d at 547. The uneconomic remnant statute, Wis. Stat. § 32.06(3m), is an exception to the rule. While it permits a condemnor to take more than is necessary for a project, the statute precludes a condemnor from doing so—in the name of moderation—unless the landowner will be left with *practically* nothing. As an exception to the constitutional

protection afforded individual property rights, however, the statute must be interpreted narrowly.

A condemnor's decision on the proper scope of a taking prevails—unless the condemnor has committed fraud, acted in bad faith, or grossly abused its discretion. *Mitton*, 184 Wis. 2d at 745 (quoting *Falkner*, 75 Wis. 2d at 135). As long as “reasonable grounds” underlie the extent of the taking, the condemnor's decision stands. *Id.*; *see also Watson v. Three Lakes*, 95 Wis. 2d 349, 355, 290 N.W.2d 520 (Ct. App. 1980) (“The extent of the taking is a legislative question” subject to “very narrow” judicial review.).

The *Falkner* standard controls a condemnor's determination of the property that can be taken and should apply to uneconomic remnant determinations—landowners should not be allowed to force condemnors to purchase more property than is necessary for a public project unless the effect on the additional property rises to the level of inverse

condemnation.<sup>7</sup> See *Westrick v. Approval of Bond of Peoples Natural Gas Co.*, 520 A.2d 963, 965-66 (Pa. Commw. Ct. 1987) (rejecting a landowner’s claim that the gas-pipeline

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<sup>7</sup> Granting deference to condemnors to determine whether property is an uneconomic remnant is consistent with federal law and other states’ laws. Federal law expressly defines an uneconomic remnant as “a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner’s property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.” 42 U.S.C. § 4651(9); accord 23 C.F.R. § 710.105(b); 49 C.F.R. § 24.2(a)(27) (2011).

Under this statute, a landowner has no right to judicial review of a federal agency’s determination that property is or is not an uneconomic remnant. *Nall Motors, Inc. v. Iowa City*, 410 F. Supp. 111, 115 (S.D. Iowa 1975) (citing *Barnhart v. Brinegar*, 362 F. Supp. 464 (W.D. Mo. 1973)), *aff’d* 533 F.2d 381 (8th Cir. 1976).

Likewise, under Oklahoma law, condemnors have the right—by a statute substantially similar to Wis. Stat. § 32.06(3m)—to acquire uneconomic remnants.

If the acquisition of only part of the property would leave its owner with an uneconomic remnant, *an offer to acquire that remnant shall be made*. For the purposes of this section, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the property of the owner which has little or no value or utility to the owner.

Okla. Stat. tit. 27 § 13(9) (emphasis added). Under this statute, “a landowner has no right “to challenge [the condemnor’s] determination that the remaining property is an ‘uneconomic remnant.’” *State ex rel. DOT v. Evans*, 241 P.3d 273, 276 (Okla. 2010). A landowner in Oklahoma, therefore, cannot compel a condemnor to buy property that she believes is an uneconomic remnant. See *id.* at 274-75.

condemnor should be forced to acquire his entire property in fee, rather than just an easement, because the landowner failed to prove an abuse of power).

The Wallers complaint in this action makes no allegation of fraud, bad faith, or abuse of discretion by ATC, and they presented no evidence of this. To the contrary, an independent appraiser hired by ATC concluded that the property retained a value of \$48,000 after the taking (R.259, Ex.217A) and that while its highest and best use was light industrial, it nonetheless retained value as a residential property with an entirely functional and habitable house. R.298:59, 70-71, 84. The jury's verdict in the valuation case, valuing the property at \$38,000 after the taking, independently confirms that ATC had reasonable grounds to conclude that the after-taking property retained substantial value and economic utility.

ATC properly determined that only an easement was necessary for the construction of the transmission line on the Wallers' property. Nonetheless, ATC offered to acquire the entire property. The Wallers, as is their right under Wis. Stat. § 32.06(3m), did not consent. Once they refused, ATC made the only jurisdictional offer allowed by statute and the constitution—ATC offered to acquire the easement, the only property rights necessary to the public use. The circuit court should have upheld ATC's determination under the "reasonable ground" standard, and it should have dismissed the Wallers' right-to-take challenge.

**B. The Circuit Court Erred: The Wallers' Remaining Property Is Not An Uneconomic Remnant.**

The circuit court wrongly interpreted and applied the statutory uneconomic remnant standard. Moreover, the court considered extraneous and improper facts, allegations, and argument instead of the relevant trial evidence. These errors

individually and cumulatively require that the circuit court's declaration that the property is an uneconomic remnant be reversed.

**1. The circuit court applied the wrong standard.**

The circuit court's analysis incorporated at least two incorrect legal standards. First, the court examined the value and utility of the residence not objectively but subjectively *to the Wallers*. The court stated:

What they had left ... rendered their property of little value, particularly as a residence, no value probably as a residence unless *they wanted to live and they did not want to live with this type of risk* [from EMFs] in their living arrangements there.

R.298:219-20 (emphasis added), App.17-18. But the statute does not define an uneconomic remnant with respect to the perceived usefulness of the property to an individual landowner. *See* Wis. Stat. § 32.06(3m). The standard is objective; like the standard for assessing fair market value, it

assumes a reasonably well-informed hypothetical buyer or landowner.

It is particularly clear that section 32.06(3m) uses an objective standard when compared to the federal uneconomic remnant statute and those of some other states, which explicitly define an uneconomic remnant as property with “little or no value or utility *to the owner.*” *E.g.*, 42 U.S.C. § 4651(9) (emphasis added); *accord* Del. Code Ann. tit. 29 § 9505(9) (2012); Me. Rev. Stat. Ann. tit. 23, § 154-C (2012). Wisconsin’s statute contains no qualifier. The circuit court misapplied the Wisconsin statutory definition of an uneconomic remnant because it focused almost exclusively on the Wallers’ own subjective view of their property.

Second, the circuit court wrongly framed the uneconomic-remnant analysis as requiring an evaluation of (1) “the fairest thing to do”; and (2) whether it would have been more “economical” for ATC to have offered to acquire

the remnant (which, in fact, ATC did do) rather than both parties incur attorney's fees to litigate the scope of the taking. R.298:221-22, App.19-20. ("It would be economical for all parties if the offer had been made here. I was shocked by the amount of fees on both sides that have been incurred here, and it would have been simple to make an offer [to acquire the remnant] and let them make their determination of what to do").

These proceedings have been protracted and complex; the fees substantial by any measure. Yet, the statute does not allow this sort of consideration. The focus remains on the value and use of the property. *See* Wis. Stat. § 32.06(3m) (the size, shape, or condition of the remaining property must leave it with "little value or substantially impaired economic viability"); *compare* 2A Julius L. Sackman, *Nichols on Eminent Domain* §7.06[6][b] (Rev. 3d ed. 2011). A condemnor cannot take more property than necessary for the

public use under an uneconomic remnant theory just because it is economically expedient for the condemnor. *See* 2A *Nichols on Eminent Domain* § 7.06[6][b][i], [iii] (“Economic remnants are those that are of the economic advantage of the condemnor to take.”).

Without express statutory authorization, acquisition of a remnant because it is the least expensive alternative to the condemnor is not permitted. *See id.* at § 7.06[6][b][iii]; *see also Nelson Drainage Dist. v. Filippis*, 436 N.W.2d 682, 685-86 (Mich. Ct. App. 1989) (per curiam) (concluding that Michigan’s substantially similar uneconomic remnant statute did not allow the condemnor to acquire a remnant just because it was economically beneficial), *abrogated on other grounds by City of Novi v. Robert Adell Children’s Funded Trust*, 701 N.W.2d 144, 149 n.4 (Mich. 2005). Here, the statutory definition in section 32.06(3m) forecloses the circuit court’s cost-balancing analysis.

Moreover, it is especially improper for the court to take into account the parties' legal fees because there was no evidence of them at the time of its decision. The court's sole source of information about the Wallers' legal fees would have been the multitude of letters to the court from the Wallers' attorney that make repeated reference to fees.<sup>8</sup> There is no evidence of ATC's legal expenses in the record.

The court further explained: “[I]n all fairness to these people, the costs to the ... defendant I don't think would have been that great compared to [the costs] incurred by not making the offer.” R.298:221-22, App.19-20. Under the circuit court's flawed construction of Wis. Stat. § 32.06(3m), therefore, the property that remains after a partial taking is an uneconomic remnant if the acquisition costs will likely be less

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<sup>8</sup> Of course, the Wallers expect ATC to pay their legal fees and costs, though that remains an issue on appeal. *See infra* Argument Section III. At the time of the circuit court's uneconomic-remnant ruling, however, the Wallers had yet not submitted their claimed legal expenses.

than the costs to litigate the parties' dispute or if the perceived burden on the condemnor was less than that of the landowner. But that is not the statutory standard.

The statutory analysis must be limited to the objective value and economic viability of the property, not a retrospective analysis of the potential cost savings to the condemnor. The circuit court's results-driven approach rewrites the statute and creates an untenable legal standard for uneconomic remnant determinations in light of the constitutional requirement that takings must be as narrow as possible, with discretion delegated to the condemning authority. Without this discretion, litigation is inevitable: landowners, intent on extracting higher settlements, can and will argue that a condemnor is threatening to take too much or too little. Either way, the result is more litigation: a right-to-take action in addition to a separate valuation proceeding.

**2. The circuit court’s declaration is based on clearly erroneous fact-finding.**

The circuit court relied upon lay-witness Jack Sanderson’s opinion that the after-taking property was not “safe” and “decent” as evidence that the property was an uneconomic remnant. R.298:220, App.18; R.266:4, App.4. Sanderson, however, did not offer any competent evidence.

According to Sanderson—an employee of the Wisconsin Department of Commerce at the time—the house was not decent because the property’s highest and best use had changed from residential to light industrial.

Q. .... So whose definition of decent and safe were you using?

A. Two appraisals which both rendered it as non-residential, not decent. How many of us want to live on an industrial lot? Do you?

...

Q. Okay. Remind me where in those [appraisal] reports the appraiser talks about the home not being decent or safe?

- A. They did not use those words. The words they used were that they had been rendered light industrial. *I took the authority vested in the job function that I had, made the conclusion that if [the highest and best use] is no longer residential, it is not decent.*

R.296:111-12 (emphasis added).

Sanderson flatly concluded that the change in highest and best use, alone, means that the property is “not suitable for habitation anymore.” R.296:80. Contrary to Sanderson’s testimony, neither appraisal states this. *See generally* R.259, Exs.8, 217, App.80-120. Nor is Sanderson an appraiser; he lacks any professional certification to make land use determinations. R.296:96-98. But even an appraiser’s opinion of a property’s highest and best use would have no bearing on whether the property is habitable. Indeed, the Wallers’ appraiser, Kurt Kielisch, agreed with the circuit court’s question: the house was “still a livable house” and usable as a residence after the taking. R.113:12-13.

According to Sanderson, the house was unsafe based on his discussions with the Wallers about EMFs.

R.296:80-81.

Q: The basis of your finding on safety is what again?

A: There was a lot of *conversation* about electromagnetic force.

R.296:81 (emphasis added). In reaching this conclusion, Sanderson disregarded: scientific evidence; the national and state electrical safety codes; and the PSCW's pre-approval of the transmission line project, which placed a handful of houses in *closer* proximity to the transmission line than the Wallers' house. *E.g.*, RR.43, Ex.613:1. Sanderson conceded that he was not familiar with the National Electrical Safety Code or the Wisconsin Electric Safety Code and that he was unaware that the PSCW administers Wis. Admin. Code ch. PSC 114. That regulation specifies, of course, the safe

distances between houses and transmission lines.

RR.55:137-38.

Henry Reynolds, a licensed professional engineer and ATC's technical expert on EMFs, testified—in an offer of proof—that there were stronger EMFs on the Wallers' property *before* the taking than those produced by the transmission line *after* the taking. R.296:163-64. Moreover, Reynolds confirmed that the EMFs from many common household appliances exceeded those from the transmission line, R.296:168, and were comparable to the EMFs in his own bedroom at his own house. R.296:168-69. Finally, Dale Quinn, another licensed professional engineer (RR.55:163), confirmed that the transmission line on the Wallers' property complied with all national and state electric safety codes. RR.55:164-66.

Cross-examination of Mr. Sanderson left no doubt that his opinions were not based on any experience evaluating

decent, safe, and sanitary housing (*see* R.296:109), and that his opinions were not based on any legal standard in the administrative code or, for that matter, anywhere.

R.296:109-13. The circuit court's explicit reliance on Sanderson's testimony was clearly erroneous, undermining the uneconomic-remnant declaration as a factual, not to mention legal, matter. *See infra* Argument Section IV at 101-03.

**3. The circuit court improperly used the jurisdictional offer, not the jury verdict, as the remnant's value.**

The circuit court used ATC's own jurisdictional offer as evidence of the remnant's value. R.266:4-5, App.4-5 (deeming the jurisdictional offer "ATC's determination of damages"). In doing so, the court committed two errors.

First, it disregarded the jury's verdict that the before-taking value of the property was \$132,000 and the

after-taking value of the property was \$38,000.<sup>9</sup> R.187. Yet this court's mandate in *Waller II* was clear: the jury verdict stands for purposes of determining the value of the remnant. 322 Wis. 2d 255, ¶ 17. Only if the circuit court were to conclude on remand that the remainder is an uneconomic remnant could the valuation verdict be vacated. *See id.* Up to that point, issue preclusion required the court to accept the jury's before- and after-taking valuations. *See Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶ 17, 281 Wis. 2d 448, 699 N.W.2d 54. The circuit court did not do this.

Instead, the circuit court wrongly relied on the jurisdictional offer as conclusive evidence of the property's value. In doing so, the court committed its second error. A jurisdictional offer marks the culmination of settlement efforts by a condemnor to negotiate a voluntary purchase of

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<sup>9</sup> The legislature has conferred by statute the right to a jury trial to determine just compensation. Wis. Stat. § 32.06(10).

property and avoid litigation. It is an offer to compromise subject to Wis. Stat. § 904.08 and not, therefore, admissible.

The Wisconsin Supreme Court has held that the policy underlying section 904.08—to encourage settlement and avoid litigation—applies to condemnation negotiations. In *Connor v. Michigan Wisconsin Pipe Line Co.*, the court held that negotiations in the context of condemnation—including jurisdictional offers—are privileged and not admissible to prove liability or damages:

Thus, the legislature, recognizing the public policy which encourages the settlement of controversies without resort to litigation, has made an attempt at negotiation compulsory in the field of eminent domain. Because of this, there exists here an *even stronger basis* for a rule of evidence excluding, as privileged, statements by the parties in such compulsory negotiations ....

15 Wis. 2d 614, 624, 113 N.W.2d 121 (1962) (emphasis added). The court confirmed the inadmissibility of negotiations between a landowner and condemnor in *Herro v. DNR*, 67 Wis. 2d 407, 430-32, 227 N.W.2d 456 (1975).

The circuit court ostensibly agreed that the content of ATC's jurisdictional offer was inadmissible. R.304:39. Inexplicably, however, the court then relied extensively upon the amount of the jurisdictional offer in its findings of fact (R.266:1,4-5, App.1, 4-5) and its bench ruling that the Wallers' after-taking property is an uneconomic remnant. R.298:214. These errors, producing a result that is inconsistent with the jury verdict, require reversal and, at a minimum, remand for a new trial.

**4. The circuit court made findings of fact based on evidence either inadmissible or not admitted at trial.**

The circuit court made findings of fact based on stricken testimony, and it relied on exhibits never admitted into evidence. In its oral ruling, the court stated:

[I]t was testified to by Wallers, that during that negotiation process prior to the jurisdictional offer being made, that Dave Davies on behalf of the defendant did on March 14th, 2008 write and meet with Wallers, Exhibit 4, and the Wallers agreed to accept the offer provided by ATC that they buy the remaining property.

R.298:216, App.14. Similarly, the court made findings of fact about a conversation between the Wallers and Davies, after it had stricken that very testimony. R.266:2, ¶ 4, App.2.

No admitted evidence supports the circuit court's findings. The court itself struck Scott Wallers' testimony about the conversation with Davies. *See* R.304:34-35 (objection and motion to strike) and R.304:37 (granting the motion to exclude the testimony). Likewise, Exhibit 4—referenced and incorporated in the circuit court's ruling—was marked but neither offered nor received into evidence. *See* R.304:27 (exhibit marked and objected to) and R.304:79 (exhibit not offered). Based on these rulings, ATC did not call Dave Davies as a witness to correct the mis-statements by Scott Waller because those statements were never in evidence.

For the court to make findings of fact based on stricken testimony and evidence not admitted fundamentally undermines the adversarial process and the integrity of the court’s decision-making. *Cf. Taylor v. Illinois*, 484 U.S. 400, 410-11 (1988) (“The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent’s case.”). It is inexplicable. More importantly, it is reversible error.

**C. The Wallers’ Property Is Not An Uneconomic Remnant Under Wis. Stat. § 32.06(3m).**

No published Wisconsin appellate case—other than the prior opinions in *Waller*—even refers to the definition of the term “uneconomic remnant” in Wis. Stat. § 32.06(3m). The statute defines an uneconomic remnant as property of

“such size, shape or condition as to be of little value or of substantially impaired economic viability.” Adopted in 1978, the plain language of the statute and its legislative history, as well as case law from other jurisdictions and inverse-condemnation cases, establish that the Wallers’ property does not meet the definition of an uneconomic remnant: The remaining property has more than “little value” and it has continued practical utility as a residence and for light industrial uses.

**1. The legislative history and case law from other jurisdictions support the conclusion that the Wallers’ property is not an uneconomic remnant.**

Wisconsin Stat. § 32.06(3m) and the identical provision in section 32.05(3m) became law more than

30 years ago.<sup>10</sup> *See* 1977 Wis. Ch. 440, §§ 3, 5. The legislative drafting file discloses that these statutory sections were “based on” section 208 of the Uniform Eminent Domain Code (“Uniform Law”). App.161. Indeed, section 32.06(3m) mirrors the definition of an uneconomic remnant in the Uniform Law, except that—as the result of an unexplained, handwritten addition—it substitutes the phrase “substantially impaired economic viability” for a much longer explanatory

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<sup>10</sup> Although the texts of Wis. Stat. §§ 32.05(3m) and 32.06(3m) are identical, their effects are not. The landowner in a “quick take” section 32.05 proceeding can control the timing and sequence in which right-to-take and valuation proceedings are filed. *See* Wis. Stat. § 32.05(5), (7), (9). This is because the condemnor determines the award of compensation and receives title to the property upon payment of this “basic award.” *See* Wis. Stat. § 32.05(7). Under the “quick take” procedure, therefore, the condemnee alone determines if and when a valuation proceeding will occur. *See* Wis. Stat. § 32.05(9)(a). Under the “quick take” procedure, condemnees are, in most cases, able to delay challenging the compensation paid until after a court decides any right-to-take challenge. *See* Wis. Stat. § 32.05(5) and (9) (the right-to-take challenge must be filed within 40 days of the jurisdictional offer; the valuation challenge may be brought any time within two years of the date of taking). By contrast, the condemnor must initiate valuation proceedings under Wis. Stat. § 32.06(7) to obtain title. Accordingly, simultaneous proceedings—and the inefficiencies presented by this appeal—are more likely to occur in condemnations that proceed under section 32.06.

provision in the Uniform Law. It appears the substitution was intended to allow condemners to acquire landlocked remnants. *See* Special Committee on Eminent Domain, “Summary of Proceedings,” at 5 (Sept. 9, 1977), *reproduced at* App.170. This makes sense: the utility of a property a landowner cannot access has been “substantially impaired.”

In its entirety, the Uniform Law defines an uneconomic remnant as:

a remainder following a partial taking of property, of such size, shape, or condition as to be of little value or that gives rise to a substantial risk that the condemner will be required to pay in compensation for the part taken an amount substantially equivalent to the amount that would be required to be paid if it and the remainder were taken as a whole.

National Conference of Commissioners on Uniform State Laws, Uniform Eminent Domain Code § 208(b) (1975), *reproduced at* App.164.

The Comment to the Uniform Law explains that a condemner must offer to acquire a remnant when the

“acquisition would not be likely to increase total costs appreciably.” App.165. The fiscal estimate that accompanied 1977 Wisconsin Chapter 440 is consistent with this comment to the Uniform Law. That estimate states that the purchase of uneconomic remnants may increase property acquisition costs but that “the increased costs should be minimal.” App.162.

The legislative history confirms that the legislature intended “uneconomic remnants” to be defined by the condemnor (not by the landowner) based on the after-taking value of the remnant and, consequently, the additional cost to the condemnor to acquire the remnant. The cost to ATC to acquire the Wallers’ remaining property would have been \$38,000. R.187. This is not “minimal”—by any definition. Indeed, it is more than 40 percent of the just compensation amount for the easement (\$94,000) found by the jury in the valuation trial.

By any standard, a 40 percent cost increase is appreciable and cannot be characterized as minimal, of “little value,” or not viable economically. Accordingly, it contravenes the statute’s plain language and legislative intent to conclude that the Wallers’ remaining property is an uneconomic remnant. It is not even close to meeting the statutory definition.

A comparison of the before- and after-taking values of the Wallers’ property with those in cases from other jurisdictions reinforces the conclusion that the property cannot meet the statutory definition of an uneconomic remnant.

Most uneconomic remnant cases, not surprisingly, arise when the taking of a piece of a parcel effectively “orphans” the remaining property. *See, e.g., People ex rel. Dep’t of Public Works v. Superior Ct.*, 436 P.2d 342, 343-44 (Cal. 1968) (landlocked parcel). The only reported appellate

opinion on whether the taking of an *easement*, rather than a segment of real property, gives rise to an uneconomic remnant is *Lake Oswego v. Babson*, 776 P.2d 870 (Or. Ct. App. 1989). After the condemnor acquired two easements across the landowner's property for storm water drainage facilities, the trial court held that the remaining property was an uneconomic remnant because it was valueless, requiring the condemnor to acquire the remnant as well. *Id.* at 871-72. The easements consumed 53 percent of one of the landowner's lots and 56 percent of the other lot. *See id.* at 871.

The court of appeals reversed, concluding that the remaining property did *not* meet Oregon's definition of uneconomic remnant, a definition similar to that in Wis. Stat. § 32.06(3m). *See id.* at 872-73 (applying the following definition of uneconomic remnant: “A remaining part of land, after a partial acquisition, that is of little or no utility or

value to the owner.’”) (quoting 23 C.F.R. § 710.104(g) (1985)).

The Oregon court rested its decision—that the property was not an uneconomic remnant—on the fact that single-family homes existed on the remaining property.

[T]he property remaining after the taking includes not only the fee interests in the land that will be subject to the easements, but also the portions of the property that are not subject to the easements. ***In view of the fact that the tax lots are zoned for residential development and are currently developed with existing homes, they are not valueless.***

*Id.* at 873 (emphasis added). Similarly, a court in another case held that a 1.85-acre remnant after a taking of 2.91 acres to construct a water reservoir did not leave an uneconomic remnant because the remaining property could still be used as a lot for a single-family dwelling. *Spotsylvania County v. Mineral Springs Homeowners Ass’n*, No. CL02-391, 2003 WL 21904116, at \*3 (Va. Cir. Ct. July 18, 2003).

Just as in *Lake Oswego*, the Wallers' property contains a single-family residence that can be sold, according to John Rolling, ATC's expert, for an amount at least comparable to the jury's after-taking valuation. R.298:71; *see also* R.259, Ex.217A. The testimony of Scott Waller himself and his expert, Kurt Kielisch, was consistent: the Wallers lived there for nearly a year after the taking, and the property retained its utility as a residence. R.304:58; R.113:12-13.

Both experts testified that the property's highest and best use is light industrial. R.304:95; R.298:59. Yet even considering the evidence of the cost to raze the structures on the Wallers' property and the cost to connect to municipal utilities, *see* R.259, Ex.217:10, App.89, the jury assigned the property an after-taking value of \$38,000. R.187. Surely, it must have concluded, implicitly or explicitly, that the property is economically viable and of some value, not insignificant.

Other cases provide useful examples of the comparative ratios between before- and after-taking valuations that are necessary to support a finding that a remainder is an uneconomic remnant. For instance, in *State Highway Commissioner v. Buck*, a New Jersey court held that the remaining property was an uneconomic remnant where the before-taking value was \$46,000 and the after-taking value was only \$1,000. 226 A.2d 840, 841-42 (N.J. Super. Ct. App. Div. 1967) (uneconomic remnant created when “the cost of acquisition to the State [of the portion needed for the highway improvement] will be practically equivalent to the total value of the whole parcel of land”). By contrast, a Delaware court in *State Highway Department v. 9.88 Acres of Land* held that remaining property was not an uneconomic remnant, even though landlocked, because it retained an after-taking value of \$100-\$200 an acre. 253 A.2d 509,

511-12 (Del. 1969) (requiring land to be “practically worthless” to be an uneconomic remnant).

Finally, in *New Mexico ex rel. New Mexico State Highway Department v. United States*, the state condemned the landowner’s 15.5-acre property, using about 4.1 acres to construct Interstate 40, replacing Route 66. 665 F.2d 1023, 1025 (Ct. Cl. 1981). The highway department claimed that the unused 11.4 acres was an uneconomic remnant and that the Federal Highway Administration had to share the acquisition costs for the 11.4 acres. *Id.* at 1026.

The United States Court of Claims applied the definition of uneconomic remnant in 23 C.F.R. § 710.104(g): “[a] remaining part of land, after a partial acquisition, that is of little or no utility or value to the owner.” *Id.* (quoting 23 C.F.R. § 710.104(g) (1975)). It concluded that the 11.4 acres was not an uneconomic remnant. Despite the landowners’ opinion that the remaining property was “of little

or no utility or value[,]” despite a before-taking value of \$111,194.50, and despite the owner-friendly language of the regulation—the court held that, in part, the property’s after-taking fair market value of \$23,500 meant it was not an uneconomic remnant. *Id.* at 1026, 1028-29. Even there, it was not the landowners’ subjective assessment of their property that mattered—it was the marketplace’s assessment.

The ratio between the before- and after-taking values of the Wallers’ property is greater than that in *New Mexico*. There, the after-taking value was about 21 percent of the before-taking value; here, the after-taking value is nearly 29 percent of the before-taking value. The Wallers have already been justly compensated for this decreased valuation.

The Wallers’ property is not an uneconomic remnant; it is not of “little value” and its economic viability is not substantially impaired. The jury assigned the Wallers’ remaining property a fair market value of \$38,000, a

considerable amount in light of the value of the easements.

The Wallers' property retains substantial value and has viable economic uses for light industry *and* as a residence.

Accordingly, it cannot meet the statutory definition of an uneconomic remnant.

**2. The statutory definition of an uneconomic remnant is analogous to the standard for inverse condemnation.**

A landowner, through an uneconomic remnant challenge, seeks greater compensation by compelling a condemnor to acquire more property than the condemnor has deemed necessary. This parallels inverse condemnation, where a landowner seeks compensation because a condemnor has effectively taken property, through possession or legal restraint, that “deprives the owner of all, or substantially all, of the beneficial use of his property.” *E-L Enters. v.*

*Milwaukee Metro. Sewerage Dist.*, 2010 WI 58, ¶ 37 & n.24,

326 Wis. 2d 82, 785 N.W.2d 409. Thus, to succeed on an inverse condemnation claim, a property owner must show that the alleged condemner has placed a restriction on the property that “‘practically or substantially renders the land useless for all reasonable purposes’ . . . .” *Howell Plaza, Inc. v. State Highway Comm’n*, 66 Wis. 2d 720, 726, 226 N.W.2d 185 (1975) (“*Howell I*”) (quoting *Just v. Marinette County*, 56 Wis. 2d 7, 15, 201 N.W.2d 761 (1972)).

Under *Howell I*, to state a claim for inverse condemnation, property owners must allege that the condemner’s actions have deprived them “of all, or substantially all, of the beneficial use of their property.” *Id.* at 728. Subsequent appellate decisions equate the “beneficial use” of property with the “economically viable” use of property. See, e.g., *Howell II*, 92 Wis. 2d at 86 (discussing *Penn Cent. Transp. Co. v. N.Y.*, 438 U.S. 104, 138 n.36 (1978)); *Mentzel*, 146 Wis. 2d at 810-11 (using

interchangeably the terms “all beneficial use” and “all viable economic use”).

Wisconsin case law is consistent with the U.S. Supreme Court’s inverse condemnation cases. *E.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992) (inverse condemnation requires that the owner be denied all “economically viable use of his land”). Accordingly, a landowner must prove that the condemnor has rendered her property substantially useless for all reasonable purposes to succeed on an inverse condemnation claim.

The inverse-condemnation standard informs the construction of the statutory definition of an uneconomic remnant. Indeed, the Wallers alleged that the partial taking of the easement left their residential improvements “valueless.” R.1:4, ¶ 6. The evidence shows, however, that the Wallers cannot meet the standard for inverse condemnation and, correspondingly, for an uneconomic remnant. The jury

concluded the Wallers' property retained substantial value after the easements, and the evidence shows that the property remains useful for several reasonable purposes. Moreover, the Wallers conceded that they cannot meet the standard for inverse condemnation. R.300:116-19.

The substantive similarity between inverse condemnation and uneconomic remnant claims is persuasive. So is the use of nearly identical language in the uneconomic remnant statute ("substantially impaired economic viability") and the inverse condemnation cases (deprived of "all viable economic use" or "substantially all of the beneficial use"). The Wallers failed to prove their uneconomic remnant claim.

**II. AN UNECONOMIC REMNANT CLAIM MUST BE RAISED IN A VALUATION PROCEEDING OR, ALTERNATIVELY, THROUGH AN INVERSE CONDEMNATION ACTION.**

Throughout these proceedings, ATC has advocated for an efficient, practical, and unitary procedure for resolving

uneconomic remnant claims. The procedure followed here cannot be described that way. To “secure the just, speedy and inexpensive determination of every action and proceeding,” Wis. Stat. § 801.01(2), future disputes over uneconomic remnants should be resolved in valuation proceedings or, alternatively, through inverse condemnation actions. *Cf. TFJ Nominee Trust v. Wis. DOT*, 2001 WI App 116, ¶¶ 22-26, 244 Wis. 2d 242, 629 N.W.2d 57. They are, at their core, questions of value, not questions about the right to take. That distinction is integral to the statutory framework of Chapter 32.

In *TFJ Nominee Trust*, the landowner brought a right-to-take challenge under Wis. Stat. § 32.05(5), claiming that the condemnor either: (1) failed to include the access rights allegedly affected by a taking in the jurisdictional offer, or (2) wrongly assigned no value to the loss of access rights. *Id.*, ¶ 23. The court of appeals held that a right-to-take

challenge was not the proper forum. *Id.*, ¶ 26. The landowner should have filed an inverse condemnation action if the condemnor failed to condemn the proper “bundle of rights” or, alternatively, the landowner should have challenged the compensation award in a valuation proceeding to seek additional damages for the access rights it believed were ignored. *Id.*, ¶¶ 25-26.

The Wallers’ position is like that of the landowner in *TFJ Nominee Trust*. The Wallers claim that either ATC: (1) failed initially to include the Wallers’ entire property in the jurisdictional offer, or (2) failed to account for the full extent of the easement’s impact on the after-taking property. The first argument belongs in an inverse condemnation action, and the second argument should have been raised and addressed in the valuation proceeding—as it was. “In any event the remedy is not to challenge the right to condemn” the transmission line easement. *See id.*, ¶ 26.

The protracted procedural history of the ATC-Waller cases amply demonstrates that after a landowner rejects an offer to acquire a remnant, speedy and efficient resolution of an uneconomic remnant dispute must occur in valuation proceedings or, alternatively, in inverse condemnation actions—not in right-to-take actions. Under no circumstances should circuit courts conduct multiple proceedings that all use the same evidence.

**A. Disputes Over Uneconomic Remnants Should Be Resolved In Valuation Proceedings.**

Uneconomic remnant determinations should be made in valuation proceedings, not right-to-take challenges. Both logic and the text of Wis. Stat. § 32.06 suggest that uneconomic remnant determinations take place within the valuation process. So does the cause of judicial efficiency.

The statutory definition of an uneconomic remnant confirms that disputes over remnants are at their core

valuation questions. Section 32.06(3m) defines an uneconomic remnant as “the property remaining after a partial taking of property, if the property remaining is of such *size, shape or condition* as to be of *little value* or substantially impaired *economic viability*.” (Emphases added.) The relevant factors, therefore, are: the size, shape, and condition of the property and its value before and after the taking. Here, the jury in the valuation case determined the value of the property: \$38,000 after the taking. R.187. In reaching that decision, the jury heard all of the relevant evidence regarding the property’s size, shape, and condition, as well as evidence of the real estate market and the Wallers’ personal preferences. Indeed, evidence of a “property’s usability, character and the market in which the property would be sold” is an indispensable part of valuation proceedings. *See Alsum v. Wis. DOT*, 2004 WI App 196, ¶ 19, 276 Wis. 2d 654, 689 N.W.2d 68.

The exact evidence heard by the jury in the valuation case is at the core of the uneconomic remnant determination. Accordingly, such determinations should be decided in the statutory proceedings for deciding just compensation, Wis. Stat. § 32.06(7)–(10). Procedurally, this protects landowner’s rights and ensures judicial efficiency because—precisely as the court of appeals recognized—

The confusion here stems from the fact that the question of the existence of an uneconomic remnant is difficult to separate from the determination of the value of the remnant. By its very name, an uneconomic remnant seems to require valuation.

*Waller I*, 322 Wis. 2d 255, ¶ 13. In fact, the separation is not just “difficult,” it is impossible because the same facts and evidence underlie both questions.

Beyond just the definition of an uneconomic remnant, Wis. Stat. § 32.06(7) and (8) require the condemnation commission to “immediately” value the property taken as long as the condemnor has the right to take any portion of it.

If the petitioner is entitled to condemn the property *or any portion of it*, the judge *immediately* shall assign the matter to the chairperson of the county condemnation commissioners for hearing under s. 32.08.

Wis. Stat. § 32.06(7) (emphases added). The condemnation commission then conducts a hearing pursuant to Wis. Stat. §§ 32.06(8) and 32.08, after which it files an award “specifying therein the property or interests therein taken and the compensation allowed the owner ....” Wis. Stat. § 32.06(8); *see also* Wis. Stat. § 32.08(6)(b) (“the commission shall make a written award specifying therein the property taken and the compensation”). Throughout these cases, the Wallers have never disputed ATC’s right to take. *E.g.*, R.111:15. The statutes, therefore, required that the valuation proceedings go forward, without interruption, before the condemnation commission and, if necessary, the circuit court.

Finally, section 32.06(5) reinforces the conclusion that uneconomic remnant disputes should be resolved in valuation

proceedings. Valuation proceedings and right-to-take challenges proceed simultaneously. *Falkner*, 75 Wis. 2d at 120. A right-to-take challenge brought under § 32.06(5) cannot stay valuation:

The commencement of an action by an owner under this subsection [§ 32.06(5)] *shall not prevent a condemnor from filing the petition provided for in sub. (7) and proceeding thereon. Nothing in this subsection shall be construed ... to prevent the condemnor from proceeding with condemnation during the pendency of the action to contest the right to condemn.*

Wis. Stat. § 32.06(5) (emphasis added).

Contrary to this statutory language, the court of appeals in *Waller I* and *Waller II* held, in effect, that right-to-take actions must stay valuation proceedings any time a landowner raises an uneconomic remnant challenge.

*Waller II*, 334 Wis. 2d 740, ¶ 16; *Waller I*, 322 Wis. 2d 255, ¶ 16. Not only is this procedure contrary to the plain statutory language, it is inefficient and duplicative.

From the start of these proceedings, ATC has sought—  
unsuccessfully to date—resolution of the Wallers’  
uneconomic remnant challenge in a single proceeding. At a  
hearing on August 11, 2008, ATC’s attorney offered:

I’ll stipulate that the issue of whether or not there is a  
remnant and whether ATC is required to buy the whole  
property, those are all valuation issues, and I will not  
raise an objection in the valuation case to those issues  
being raised.

R.111:24.

ATC’s position has been consistent with appellate case  
law—other than *Waller I* and *Waller II*. For example, in  
*Falkner* the supreme court emphasized judicial economy:

Brief note may be taken of the existence of an additional  
potential problem resulting from the dual proceedings  
created by Statute (the owner’s action under  
sec. 32.06(5) and the condemnation proceedings under  
sec. 32.06(7)). Duplication of effort and expense may  
result if separate trials are held. We see no objection to  
consolidation of the two proceedings for trial, as was  
done at the case at bar, provided the identities of the two  
proceedings are preserved.

75 Wis. 2d at 135 n.9. Consistent with *Falkner*, ATC long  
has sought to resolve the uneconomic remnant dispute within

the valuation proceeding—a procedure ultimately implemented by Judge John R. Race. The view of ATC and Judge Race did not prevail, and the result has been multiple evidentiary hearings and trials replete with repetitive testimony and evidence, contradictory and inconsistent conclusions, and still no legally sustainable result.

In *Pulvermacher Enterprises v. Wisconsin DOT*, the court of appeals held that an adverse possession claim could be tried in a valuation proceeding because it affected just compensation. 166 Wis. 2d 234, 239-41, 479 N.W.2d 217 (Ct. App. 1991). Even though adverse possession is not typically part of a trial to determine valuation in condemnation, the court held it should be part of the valuation proceedings because the legislature intended the “regulatory scheme” of Chapter 32 “to provide an efficient, final resolution to the compensation question.” *Id.* at 241.

The analysis in *Pulvermacher Enterprises* applies here. Just as adverse possession inexorably affected title and valuation in that case, uneconomic remnant determinations will *always* affect title to the property and the amount of just compensation to be awarded. Efficient resolution of uneconomic remnant disputes requires that they be tried in valuation proceedings.

Inexplicably, however, the Wallers' counsel consistently has rejected this approach, launching a four-year litigation trajectory, including this, the parties' fifth foray into the appellate process. This court should correct the procedural uncertainty left by *Waller I* and *Waller II*, reinstating the efficiency and judicial economy of the condemnation process prescribed in the statutes and precedent by confirming that uneconomic remnant disputes should be resolved in valuation proceedings.

**B. Alternatively, Uneconomic Remnant Disputes Should Be Resolved Through Inverse Condemnation Actions.**

If the court continues to disagree that uneconomic remnant disputes should be resolved in valuation proceedings, then the substantive similarity of uneconomic remnant and inverse condemnation claims provides an opportunity for uneconomic remnant disputes to be resolved through inverse condemnation actions.

The court of appeals decision in *Wikel v. Wisconsin DOT* confirms that landowners in the Wallers' position may bring an inverse condemnation action pursuant to Wis. Stat. § 32.10 after a condemner initiates condemnation and pays just compensation for a partial taking. 2001 WI App 214, ¶ 3, 247 Wis. 2d 626, 635 N.W.2d 213. In *Wikel*, the landowner brought an inverse-condemnation action after accepting compensation for a partial taking, alleging that the DOT had caused structural damage to her house, "rendering it

‘uninhabitable and unsaleable,’ and resulting in a ‘total, permanent taking’ without just compensation.” *Id.*, ¶ 4. The appellate court reversed the dismissal of the landowner’s claim, holding that she was entitled to an opportunity to prove her inverse condemnation claim. *Id.*, ¶ 17.

If, indeed, uneconomic remnant disputes cannot be resolved in valuation proceedings, then the Wallers, and any other landowner claiming an uneconomic remnant, can and should follow the procedure in *Wikel*. They should bring an inverse condemnation action for the remainder of the property. Creating an entirely separate procedural track within the right-to-take framework not only produces needless duplication and inefficiency, it results in the very real risk—realized here—of contradictory results that require even more litigation.

The purpose of the condemnation statutes is to expeditiously transfer title to condemned property for a public

use and then to ensure that the compensation offered is legally adequate. Including the uneconomic remnant determination in the valuation process or, alternatively, in the inverse condemnation action preserves landowners' rights without needlessly impeding the Chapter 32 process.

### **III. THE STATUTES DO NOT AUTHORIZE LITIGATION EXPENSES FOR A LANDOWNER ON AN UNECONOMIC REMNANT CLAIM.**

The circuit court awarded the Wallers litigation expenses in the right-to-take case under Wis. Stat. § 32.28(3)(b).<sup>11</sup> R.299:37-44, App.59-66. The court concluded ATC did not have a right to condemn *any* of the property unless it acquired the *entire* property and that ATC did not negotiate in good faith. R.299:43, App.65 (relying on

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<sup>11</sup> The Wallers' claim to litigation expenses depends exclusively on Wis. Stat. § 32.28(3)(b). Paragraph (a) cannot apply because ATC has not abandoned the condemnation proceedings. Paragraph (c) cannot apply because the Wallers did not bring an inverse condemnation action under Wis. Stat. § 32.10. And paragraphs (d)–(i) cannot apply because ATC's jurisdictional offer exceeded both the condemnation commission award and the jury verdict and because the Wallers concede that they cannot recover litigation expenses under these paragraphs. R.301:25.

*Warehouse II, LLC v. Wis. DOT*, 2006 WI 62, 291 Wis. 2d 80, 715 N.W.2d 213).

The circuit court erred for two reasons: (1) the Wallers never met their threshold burden to show the reasonableness and necessity of the expenses; and (2) uneconomic remnant challenges do not qualify under section 32.28(3)(b) and, therefore, there is no statutory basis for the Wallers to recover litigation expenses.<sup>12</sup>

**A. The Wallers Failed To Meet Their Burden Of Proof.**

A party seeking attorney's fees always bears the burden of proof that the requested fees are reasonable.

*Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶ 34, 275 Wis. 2d 1, 683 N.W.2d 58; *Standard Theatres, Inc. v.*

*Wis. DOT*, 118 Wis. 2d 730, 748, 349 N.W.2d 661 (1984). A

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<sup>12</sup> Even though the Wallers initiated a right-to-take action, they acknowledge that they do not contest ATC's right to take. For example, at an August 11, 2008 hearing, the Wallers acknowledged: "Now, we are not challenging in this case their right to take." R.111:15; *accord id.* at 20 ("we are not challenging their right to take").

party meets its burden when it submits affidavits from qualified attorneys that the fees are reasonable. *Standard Theatres*, 118 Wis. 2d at 748. Here, the Wallers failed to even try to meet their burden. The Wallers offered no testimony or even an affidavit from their own counsel stating that the requested litigation expenses were reasonable and necessary. *See* R.274. On this basis alone, the Wallers' request for litigation expenses should be denied in its entirety.

**B. No Statutory Basis Exists For The Award Of Litigation Expenses.**

Even if the court overlooks the Wallers failure to meet their burden of proof, there is no statutory basis for an award of litigation expenses: the circuit court's determination that ATC failed to negotiate in good faith was clearly erroneous.

Litigation expenses are not part of just compensation. *W.H. Pugh Coal Co. v. State*, 157 Wis. 2d 620, 634-35, 460 N.W.2d 787 (Ct. App. 1990). Absent express statutory

authorization, attorney's fees cannot be shifted to a condemnor or, for that matter under the American Rule, to any party. *Wieczorek v. Franklin*, 82 Wis. 2d 19, 23, 260 N.W.2d 650 (1978). Here, the circuit court awarded the Wallers litigation expenses under Wis. Stat. § 32.28(3)(b): “The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking ....” The court erred because the right to take was never at issue and because ATC negotiated in good faith. Section 32.28(3)(b), therefore, cannot apply in this case.

The circuit court attempted to equate this case with the facts in *Warehouse II*. However, the condemnor in *Warehouse II* did not contest its failure to negotiate in good faith before making the jurisdictional offer. 291 Wis. 2d 80, ¶ 1. Here, by contrast, the Wallers' complaint does not allege or even suggest bad faith negotiations.

*Warehouse II* provides no guidance on good-faith negotiation. An earlier decision, *Herro v. Natural Resources Board*, sets out the parameters of good-faith negotiation:

Prolonged negotiations are likewise unnecessary; compliance with the statutory requirement is had when the negotiations have proceeded sufficiently to demonstrate that agreement is impossible. Such impossibility to agree does not mean impossibility to agree upon *any* price, no matter how large, but impossibility due either to the owner's unwillingness to sell at any price or to sell only at a price which the condemnor deems excessive.... *If it becomes apparent that no agreement can be made at a price satisfactory to the condemnor, the effort to agree may be dropped.*

53 Wis. 2d 157, 172, 192 N.W.2d 104 (1971) (emphasis added).

Here, ATC fulfilled its obligation to negotiate in good faith.

- On October 8, 2007, ATC offered to acquire the easement for \$49,000. RR.55:235-36.
- Next, ATC offered to acquire the easement for \$84,600. RR.55:237.
- On March 14, 2008, after receiving the Wallers' appraisal, ATC offered to acquire the easement for \$99,500. RR.55:240-41, 249-50.

Alternatively, ATC offered to acquire the entire property for \$132,000—the full amount of the Wallers’ appraisal—and that it would pay no more than this, including no relocation benefits. *Id.* at 241-42, 246-27.

- The Wallers declined ATC’s March 14 offer, and ATC served the jurisdictional offer on March 20, 2008. *See* R.266, App.1-2.

These facts show, as a matter of law, that ATC negotiated in good faith. Although *Herro* does not require prolonged negotiations, ATC negotiated with the Wallers over six months. During that time, ATC repeatedly increased its offer, taking into consideration additional information, the cost of litigation, its own appraisal, and the Wallers’ appraisal. Ultimately, ATC offered to pay \$132,000, no more. Only after the Wallers refused to sell at a price that ATC determined reasonable, *see* RR.55:246 (payment of \$132,000 was ATC’s “final offer”), did ATC file the jurisdictional offer to condemn the easement—the only property needed to serve the public purpose of constructing,

maintaining, and operating the transmission line. In sum, ATC negotiated in good faith with the Wallers, but the Wallers were only willing to sell “at a price which in the condemnor’s judgment is excessive.” *Herro*, 53 Wis. 2d at 173.

Throughout these proceedings, ATC has fulfilled its statutory obligations. When the Wallers declined ATC’s offer to purchase the entire property, thereby satisfying Wis. Stat. § 32.06(3m), ATC made the only jurisdictional offer permitted by the state and federal constitutions. Accordingly, ATC had the right to condemn the Wallers’ property at all relevant times. The Wallers cannot, therefore, recover litigation expenses under Wis. Stat. § 32.28(3)(b).

**C. Awarding Litigation Expenses For Uneconomic Remnant Claims Does Not Advance The Purposes of Wis. Stat. § 32.28(3).**

The jury awarded the Wallers just compensation for the taking of their property—\$94,000. R.187. According to

the jury, the after-taking property has a value of \$38,000. *See id.* The Wallers are free to do with it as they please. Here, they chose to abandon the property and not to list it for sale. R.304:69. The purposes of shifting litigation expenses under Wis. Stat. § 32.28(3) are to make the landowner whole and to discourage condemnors from short-changing landowners. *Warehouse II*, 291 Wis. 2d 80, ¶ 22.

Neither purpose is advanced in this case. ATC offered to purchase the entire property for \$132,000 or just the easement for \$99,500. This is more than the just compensation awarded by the condemnation commission (\$90,000) and by the jury (\$94,000). In short, ATC offered the Wallers more than the full value of the easement. They need not be “made whole” for litigating these cases because ATC’s jurisdictional offer would have made them more than whole. Under these facts, the Wallers must bear the risk and

expense of their decision to continue litigating these cases,  
not ATC.

**IV. THE WALLERS ARE NOT ENTITLED TO  
RELOCATION BENEFITS BECAUSE THEY  
MOVED VOLUNTARILY.**

To qualify as displaced, a person must move from  
property “as a direct result” of notice that she will be forced  
from the property or because she is actually forced to move.

*See* Wis. Stat. § 32.19(2)(e);<sup>13</sup> Wis. Admin. Code

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<sup>13</sup> Wisconsin Stat. § 32.19(2)(e) states:

1. “Displaced person” means, except as provided in subd. 2, any person who moves from real property or who moves his or her personal property from real property:
  - a. As a direct result of a written notice of intent to acquire or the acquisition of the real property, in whole or in part or subsequent to the issuance of a jurisdictional offer under this subchapter, for public purposes; or
  - b. As a direct result of rehabilitation, demolition or other displacing activity, as determined by the department of commerce, if the person is a tenant-occupant of dwelling, business or farm operation and the displacement is permanent.

§ Comm. 202.01(14);<sup>14</sup> *cf. Milwaukee v. Roadster LLC*, 2003 WI App 131, ¶¶ 13, 18, 265 Wis. 2d 518, 666 N.W.2d 524 (concluding that the lessee was a “displaced person” where it was “*forced to give up its leasehold interest*” and “*forced to relocate*”) (emphasis added). The circuit court’s conclusion that the Wallers—whose house has always remained untouched by the taking and who were not required to move by anyone—are displaced is an unprecedented expansion of the law of relocation benefits without any statutory or administrative basis.

**First**, relocation benefits are paid only to “displaced persons.” *See* Wis. Stat. § 32.19(1), (3). “Displace” means “[t]o move or shift from the usual place or position, especially to force to leave a homeland ....” *American Heritage*

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<sup>14</sup> The Wisconsin Department of Commerce no longer exists. Responsibility for administering the relocation regulations passed, by law, to the Department of Administration. 2011 Wis. Act 32. Accordingly, the “Relocation Assistance” chapter of the administrative code is now available at Wis. Admin. Code ch. DOA 92.

*Dictionary* 521 (4th ed. 2006). The Wallers were not forced to leave their home. Indeed, it is beyond dispute that they lived in their house for about one year after the upgraded transmission line was installed. Nothing—save their own subjective desire to live elsewhere—prevents the Wallers from living there to this day.

Scott Waller's own testimony confirmed that the Wallers chose to move—they were not forced to do so. Since 1989, the Wallers lived with a 69-kilovolt transmission line on their property, directly in front of their house, without any health concerns. RR.55:40. In February 2005, one year *before* the Wallers learned of the new transmission-line project, they listed their house for sale. RR.55:37. They wanted to move. They wanted a larger, more rural property to expand their gardens and agricultural activities—before they even learned of the transmission-line upgrade. RR.55:37.

The house they moved to has precisely the features they wanted: it has twice as many acres and it is in the country away from any highway or industrial park. RR.55:79-80. The Wallers moved because they wanted a home with more acreage and because they preferred no longer to live along Interstate 43 in the midst of an industrial park directly across from a retention pond. These were the reasons the Wallers moved. They are understandable, but they do not amount to forced displacement.

At trial, Scott Waller stated that the decision to move was made when they received John Rolling's appraisal. RR.55:56; *see also id.* at 25-26. Their testimony reveals that their decision was based on a misunderstanding of highest and best use and this passage from Rolling's appraisal:

We believe the installation of the [single] transmission line pole and the lines themselves brings this property to the tipping point from residential appeal toward light industrial appeal. It is more likely that the next buyer of this property will be an industrial developer rather than a residential user. We conclude that the residential

improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land.

R.259, Ex. 217:18, App.97. Rolling explained the meaning of obsolescence in appraisals, R.298:79-82; the Wallers' testimony reveals they simply misunderstood. Displaced status cannot be the result of a misunderstanding of an appraisal term of art.

The fact that, over nearly two decades, the area surrounding the Wallers' property evolved from agricultural use to an industrial park does not mean that the addition of a transmission line on a second side of their property somehow forced the Wallers to move. Nor does it mean that their house was uninhabitable. It was not—by any objective building code or other pertinent standard.

The Wallers also claim that the transmission lines interfered with their radio and television reception, their car, and their electric meter. To the extent this is offered as a

reason they moved, it is pretext.<sup>15</sup> Scott Waller conceded that they did not experience any of these alleged occurrences until *after* they had decided to move. RR.55:56-57. The Wallers’ response to these alleged difficulties—many either not mentioned in, or properly excluded from, the valuation trial—is telling. The Wallers knew that ATC was obligated under Wis. Stat. § 182.017(7)(g) to address any problems with radio or television reception, yet they never informed ATC of any reception or other issues. RR.55:57.

**Second**, the statutory definition of a displaced person requires the person to have moved from real property “[a]s a direct result of ... the acquisition of the real property ....”

---

<sup>15</sup> Alliant Energy’s project manager for the upgrade of its electric meters to wireless technology, R.55:152-53, stated that the changes to the electric meter at the Wallers’ house resulted from Alliant Energy’s business-wide technology plan. RR.55:160. Moreover, he stated that he and Alliant Energy are unaware of electrical transmission or distribution lines causing *any* interference with electric meters. RR.55:159.

Dale Quinn, a professional engineer for ATC (RR.55:163), confirmed that it is not scientifically plausible that transmission lines could somehow interfere with the speedometer or headlights of a car. RR.55:184, 186.

Wis. Stat. § 32.19(2)(e)1.a. Here, however, ATC's condemnation of the transmission-line easement and the construction and operation of the upgraded transmission line did not directly cause the Wallers to move. They could have continued living there indefinitely but for their personal preferences.

It stretches the meaning of "direct result" too far if a person can be displaced because of unfounded concerns about transmission lines or a pre-existing desire to move to the country. Here, it was not the transmission line that prompted the Wallers to move. The PSCW concluded that the transmission line would "not have a significant effect on the human environment" and would "not have undue adverse impacts on ... public health[.]" RR.43, Ex.660:3. This dispels any suggestion that the transmission line itself somehow caused or required the Wallers to move.

**Third**, the second part of the definition of a displaced person reveals a legislative intent to limit relocation benefits to people for whom condemnation makes continued use or occupancy of their property physically or legally impossible. *See, e.g.*, Wis. Stat. § 32.19(2)(e)1.b. (a person is displaced because of rehabilitation or demolition of his property). Both rehabilitation and demolition physically prevent a person from using her property, forcing a move. That is not true of the Wallers' choice to move.

**Fourth**, the relocation statutes as a whole reflect an assumption that a displaced person cannot physically live in her dwelling. For example, the legislature defines a “[c]omparable dwelling” as “one which, when compared with *the dwelling being taken*, is substantially equal ...” Wis. Stat. § 32.19(2)(b) (emphasis added). Similarly, the statutes require that a “relocation assistance service plan ... [a]ssure that a person *shall not be required to move from a dwelling*

unless the person has had a reasonable opportunity to relocate to a comparable dwelling.” Wis. Stat. § 32.25(2)(i) (emphasis added). Finally, Wis. Stat. § 32.20 defines the statute of limitations for a relocation claim based on when “the condemnor takes physical possession of the entire property acquired ....” Here, the Wallers house was not taken or physically altered, and they were not required to move. The Wallers do not meet the definition of a displaced person.

**Fifth**, the circuit court suggested in its ruling that the Wallers are displaced because their house was not suitable for a dwelling, giving weight to the testimony of Jack Sanderson in reaching this conclusion. RR.55:332, App.130; R.299:4. There is no basis in fact or law for the court’s conclusion.

Wisconsin Admin. Code § Comm. 202.04(2) defines a safe, decent, and sanitary dwelling. The Wallers’ Mound Road property fully meets this definition. Jack Sanderson’s opinion that the Wallers’ property was not decent or safe is

meaningless. *See supra* Argument § I.B.2. Sanderson’s testimony should have been excluded, as ATC requested in a motion *in limine*. RR.35.

Furthermore, Sanderson’s testimony about the condition of the Wallers’ property was not entitled to any weight or deference for these additional reasons:

- Sanderson acknowledged that he is not a building inspector, RR.55:113, and that he and the Department of Commerce “do not do a lot of work in this area ....” *See* R.296:78, 109. Indeed, other than the Waller property, Sanderson has conducted only one other site visit of a property subject to condemnation. R.296:104.
- Sanderson formed his opinion without viewing the property in the before-condition; rather, he based it on numerous *ex parte* communications with the Wallers and their attorney. RR.55:128, 138 (confirming more than 30 telephone calls with the Wallers’ attorney); *see also* R.296:74. Moreover, Sanderson reached his conclusions as part of an “informal review” and without a formal administrative hearing or process by the agency for which he worked. R.296:140-41.

- Legal counsel within the Department of Commerce itself disagreed with Sanderson’s opinion. The Acting Chief Legal Counsel of the agency testified that Sanderson lacked the authority to decide whether the Wallers were displaced and that his conclusion that the Wallers were displaced was wrong. R.296:131-32, 133, 138 (“It was not [C]ommerce’s authority to decide whether or not they were displaced.”); *see also* R.259, Ex.251 (Commerce has “not been granted the power to unilaterally decide” whether a person is displaced and that is a question that is “far from settled”).

For all these reasons, the circuit court’s sole reliance on the testimony of Jack Sanderson and its conclusion that the Wallers’ house was uninhabitable are clearly erroneous.

**Finally**, if the Wallers are displaced because they moved after ATC acquired a transmission line easement on their property, then every person who owns property subject to a transmission-line condemnation can claim to be displaced at any time within two years “after the condemnor takes *physical possession of the entire property acquired*,” Wis.

Stat. § 32.20 (emphasis added)—if they choose to move.

That cannot be the standard for defining a displaced person under state law. *See Falkner*, 75 Wis. 2d at 140-41.

As the supreme court held in *Falkner*, the standard for the “quantum of estate taken” cannot depend on the whims, desires, and feelings of each landowner whose property rights are being condemned. *Id.* Rather, the condemnor’s determination of the scope of the taking must be upheld in the absence of “fraud, bad faith, or gross abuse of discretion.” *Id.* at 135.

Just as the scope of a taking cannot be determined by the landowners’ subjective preferences, displacement cannot depend on that person’s idiosyncrasies. If it did, transmission line project costs would be wildly unpredictable and not susceptible to meaningful estimation. Further, public utilities would find themselves owning wide swaths of property throughout the state—with no possible public use for the land

and the attendant burdens of owning unoccupied, abandoned land.

Whether a person is displaced must depend on an objective standard, not the subjective preferences of a landowner. For someone to be displaced, the test must be: Was the person forced to leave his or her dwelling because of a physical or regulatory restriction that precluded him or her from continuing to live there? The Wallers do not meet this standard. They are not displaced persons.

### **CONCLUSION**

For the foregoing reasons, ATC requests that the court:

(1) reverse the judgment declaring the after-taking property an uneconomic remnant and remand the case with directions to the circuit court to enter judgment for ATC, declaring that the property is not an uneconomic remnant;

(2) reverse the order granting the Wallers litigation expenses; and

(3) reverse the judgment declaring the Wallers displaced persons and awarding them relocation benefits and remand the case with directions to the circuit court to enter judgment in favor of ATC—the Wallers are not displaced persons and they are not entitled to any relocation benefits.

Dated this 6th day of July, 2012.

GODFREY & KAHN, S.C.

By: *s/Bryan J. Cahill*

---

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State Bar No. 1030775  
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**RULE 809.19(8)(D) CERTIFICATION**

I hereby certify that, subject to the accompanying motion for leave to file an over-length brief, this brief and accompanying appendix conform to the rule contained in s. 809.19(8)(b) for a brief and appendix produced with a proportional serif font. The length of those portions of this brief referred to in s. 809.19(1)(d), (e), and (f) is 15,811 words.

*s/Bryan J. Cahill*

---

Bryan J. Cahill  
State Bar No. 1055439

**ELECTRONIC FILING CERTIFICATION**

I hereby certify, pursuant to Wis. Stat. § 809.19(12)(f),  
that the text of the electronic copy of the brief is identical to  
the text of the paper copy of the brief.

*s/Bryan J. Cahill*

---

Bryan J. Cahill

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## **APPENDIX CERTIFICATION**

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

*s/Bryan J. Cahill*

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Bryan J. Cahill  
State Bar No. 1055439

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FILED  
MAY 17 2013  
COURT OF APPEALS

WISCONSIN COURT OF APPEALS  
DISTRICT II

Consolidated Appeal Nos. 2012AP805 and 2012AP840

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SCOTT N. WALLER AND LYNNEA S. WALLER,

Plaintiffs-Respondents,

v.

AMERICAN TRANSMISSION COMPANY LLC,

Defendant-Appellant.

---

Appeal from Final Judgments of the Circuit Court of  
Walworth County, the Hon. James L. Carlson Presiding,  
Circuit Court Case Nos. 2008CV520 and 2010CV691

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**APPENDIX TO THE INITIAL BRIEF OF  
AMERICAN TRANSMISSION COMPANY LLC**

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*Attorneys for American Transmission  
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ATC Management Inc.*

## INDEX TO APPENDIX

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SCOTT N. WALLER and  
LYNNEA S. WALLER,

Plaintiffs,

Case No. 08-CV-520

v.

AMERICAN TRANSMISSION CO., LLC,

Defendant.

**FILED**  
CIRCUIT COURT

DEC 14 2011

CLERK OF COURTS - WALWORTH CO.  
BY ELISABETH YAZBEC

**FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

This matter came on for trial commencing on November 10 and November 14, 2011. Upon reviewing the testimony of the witnesses, the exhibits and hearing argument of counsel, the Court makes the following:

FINDINGS OF FACT

1. On March 20, 2008, American Transmission Co., LLC, (ATC), served the Wallers with a Jurisdictional Offer to acquire a forty-five foot utility easement along two sides of their triangular property at 6249 Mound Road, Delavan, Wisconsin. The Jurisdictional Offer in the amount of \$99,500 represented 76.53% of the \$130,000 appraised value of the property by ATC. Exhibit 1.
2. Scott and Lynnea Waller are husband and wife and have owned property at 6249 Mound Road, Delavan, Wisconsin since 1989. The property includes 1.51 acres of land (65,775 square feet), a one family residence, site improvements, landscaping and out buildings. The property is zoned A-1 Agricultural. It has been used by the Wallers since its acquisition in 1989 as a residence, for hobby farming activities including raising chickens, turkeys and pasturing sheep.

3. The easements acquired by ATC were 45 feet in width along the east and north sides of the Waller triangular property covering .799 acres (34,804 square feet) and running for a distance of 291 feet along the north boundary of the property and 482 feet along the southeastern boundary for a total distance of 773 feet. The easement covered 52.91% of the lot. ATC acquired the easement to install a 138 KV high voltage electric transmission line. Exhibit 2, 3.

4. On March 14, 2008, Dave Davies, a representative of ATC, wrote to and met with the Wallers. The Wallers agreed to accept the offer provided ATC would buy the remaining property. Dave Davies agreed to buy the entire parcel but he conditioned that purchase on having the Wallers waive their relocation benefits under the provisions of Wis. Stat. § 32.19.

5. The easement authorized ATC to do the following:

“construct, install, operate, maintain, repair, replace, rebuild, remove, relocate, inspect and patrol a line of structures, comprised of wood, concrete, steel or of such material as Grantee may select, and wires, including associated appurtenances for the transmission of electric current, communication facilities and signals appurtenant thereto”

ATC was also granted the associated rights to:

1) Enter upon the easement strip for the purposes of exercising the rights conferred by this easement.

2) Construct, install, operate, maintain, repair, replace, rebuild, remove, relocate, inspect and patrol the above described facilities and other appurtenances that the Grantee deems necessary.

3) Trim, cut down and remove any or all brush, trees and overhanging branches now or hereafter existing on said easement strip.

4) Cut down and remove such trees now or hereafter existing on the property of the Landowner located outside of said easement strip which by falling might interfere with or endanger said line(s), together with the right, permission and authority to enter in a reasonable manner upon the property of the Landowner adjacent to said easement strip for such purpose. Exhibit 2.

5) Paragraph 5 of Exhibit A to the easement provided “the utility shall employ all reasonable measures to ensure that the landowners telephone and radio reception is not adversely affected by the high voltage transmission lines.”

Pursuant to this authorization, ATC removed all of the brush and trees which constituted a sound barrier between the residence of the Wallers and Interstate 43. The easement did not contain a limitation on the number of lines that could be installed. Exhibit 2.

6. ATC retained Rolling & Co. In a report dated December 12, 2007, Mr. Rolling concluded that the acquisition of the easement would have an immediate negative effect on the residential appeal of the property noting that over one-half of the property will be under easement. Exhibit 6. The appraisal report contained the following comments:

“The subject will have major transmission lines along two of its three sides. The transmission lines will be within 60’ of the house. A substantial part of the landscaping will have been lost. Our before analysis suggested a property which was already in transition from improved residential use to vacant industrial lot use. We believe the installation of the transmission line pole and the lines themselves brings this property to the tipping point from residential appeal toward light industrial appeal. It is more likely that the next buyer of the property will be an industrial developer rather than a residential user. We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land.”  
Exhibit 5, 6.

7. Art Sullivan of Appraisal Group One prepared an appraisal report for the Wallers dated February 18, 2008. He concluded that after taking, the value of the residential improvements was destroyed and the value of the remaining property was \$15,500. Exhibit 7, 8. Both appraisers allocated as part of the damages, sustained as a result of the taking, an amount necessary to tear down the residential improvements. Both appraisers agreed that the highest and best use of the Waller property changed from rural residential to vacant industrial after taking.

8. Mr. Kielisch of Appraisal Group One prepared a Supplement to its 2008 Report, which concluded that the property remaining in the ownership of the Wallers after the taking of the easements sustained "substantially impaired economic viability." Exhibit 15.
9. Upon receipt of \$90,000 in January, 2009, the Wallers paid the mortgage on their Town of Delavan home and purchased a new home in the Town of Sharon on March 12, 2009. Such acquisition was done without relocation benefits. Because of septic and well problems at their new home in Sharon, the Wallers were not able to occupy the property until August 15, 2009.
10. After the high voltage transmission lines were installed and activated, the Wallers experienced interference with radio and television reception, the use of cell phones, their electricity meter and the speedometer in a motor vehicle.
11. Acting pursuant to Wis. Stat. § 32.19, the Wallers applied for relocation benefits. American Transmission Company denied the claim and the Wallers petitioned the Department of Commerce for review of the denial pursuant to Wis. Stat. § 32.26(5). On June 3, 2009, Jack Sanderson of the Department of Commerce advised ATC that he had visited the property and made a determination that as a result of the acquisition of the easements by ATC, the Wallers were displaced persons and entitled to relocation benefits pursuant to the provisions of Wis. Stat. § 32.19(2)(e). Mr. Sanderson's conclusions were confirmed by a letter from Atty. Joseph R. Thomas, Chief Counsel of the Department of Commerce, to ATC on September 1, 2009. Exhibits 9 and 10. Mr. Sanderson also found that the residence of the Wallers after the acquisition of utility easements by ATC did not meet the standards of "decent, safe and sanitary housing" established in Comm. 202.04 of the Wisconsin Administrative Code.
12. The Wallers have agreed with the ATC valuation of the property before taking at \$130,000. Exhibit 6. The Wallers also accept ATC's determination of damages as a result of

taking at \$99,500. They concede that the property remaining after ATC's acquisition of easements has a value of \$30,500.

13. The property remaining in the ownership of the Wallers following the acquisition of utility easements by ATC has sustained "substantially impaired economic viability," for the following reasons:

a) The Jurisdictional Offer dated March 20, 2008, set damage to their property at \$99,500 which constituted 76% of the \$130,000 agreed upon value of the Waller property.

b) Both appraisers, Kielisch for the Wallers and Rolling for ATC, agree that the value of the residential improvements have been made totally obsolete as a result of the taking, and that the Highest & Best Use of the property changed from residential to vacant industrial. Both appraisers made allowance in their determination of damage for the cost of demolition of the residential improvements.

c) Following installation and activation of the 138 kv high voltage transmission line, the Wallers experienced regular interference with radio, television and telephone reception which prompted concerns concerning the health and safety of the site for themselves, their three children, their six grandchildren and for anyone else who might purchase or occupy the property.

d) The removal of trees and shrubbery within the easement area substantially reduced the attractiveness of the site and eliminated the sound and site barrier between the home and I-43.

CONCLUSIONS OF LAW

Upon these Findings of Fact, the Court concludes:

1. Wisconsin Eminent Domain statutes are to be strictly construed in favor of the condemnee and against the condemnor. *Schroedel Corporation v. State Highway Commission*, 34 Wis.2d 32, 148 N.W.2d 691 (1967).
2. The property remaining in the ownership of the Wallers following the acquisition of utility easements by ATC is an "uneconomic remnant" as defined in Wis. Stat. § 32.06(3m).

Dated at Elkhorn, Wisconsin this 14 day of December 2011.

BY THE COURT:



The Honorable James L. Carlson  
Circuit Court Judge  
Circuit Court of Walworth County

STATE OF WISCONSIN

CIRCUIT COURT

WALWORTH COUNTY

SCOTT N. WALLER and  
LYNNEA S. WALLER,

Plaintiffs,

v.

AMERICAN TRANSMISSION CO., LLC,

Defendant.

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Case No. 08-CV-520

FILED  
CIRCUIT COURT

MAR 01 2012

CLERK OF COURTS-WALWORTH CO.  
BY: PAT M. HAYES, DEPUTY CLERK

**JUDGMENT**

This matter came on for trial on November 10<sup>th</sup> and November 14<sup>th</sup>, 2011. The Court, having signed and filed its Findings of Fact and Conclusions of Law, and Order for Judgment, NOW THEREFORE, IS ORDERED:

Judgment is entered in favor of Scott N. Waller and Lynnea S. Waller and against American Transmission Co., LLC in the amount of \$47,509.72.

Upon receipt of these payments, the Wallers shall convey the property at 6249 Mound Road, Delavan, Wisconsin to ATC by Quit Claim Deed.

Dated at Elkhorn, Wisconsin this 1st day of March, 2012.

BY THE COURT:

*James L. Carlson*

Hon. James L. Carlson  
Circuit Court Judge  
Circuit Court of Walworth County

3-2-12 \$5.00 docketing fee received. PH

STATE OF WISCONSIN

CIRCUIT COURT

WALWORTH COUNTY

SCOTT N. WALLER and  
LYNNEA S. WALLER,

Plaintiffs,

Case No. 08-CV-520

v.

AMERICAN TRANSMISSION CO., LLC,

Defendant.

**FILED**  
CIRCUIT COURT

MAR 12 2012

CLERK OF COURTS - WALWORTH  
BY ELISABETH YAZBEK

**FINAL ORDER REGARDING LITIGATION EXPENSES**

Upon the Findings of Fact and Conclusions of Law Regarding Litigation Expenses,

IT IS ORDERED:

- American Transmission Co., LLC shall pay to the Wallers litigation expenses in the amount of ~~\$263,339.74~~ <sup>211,261.74 as set forth in detail at the hearing on 1/24/12</sup>.

Dated at Elkhorn, Wisconsin this 9<sup>th</sup> day of ~~February~~ <sup>March</sup>, 2012.

BY THE COURT:



Hon. James L. Carlson  
Circuit Court Judge

1 STATE OF WISCONSIN Circuit Court WALWORTH COUNTY

2 -----

3 SCOTT N. WALLER, et al.,

4 Plaintiffs,

5 v. CASE NO: 2008CV520

6 AMERICAN TRANSMISSION CO., LLC,

7 Defendant.

8 -----

9 Transcript of Court Trial (Day 2)

10 Before the Honorable James L. Carlson

11 Circuit Court Branch II

12 November 14, 2011

13 Elkhorn, WI

14 APPEARANCES:

15 On behalf of the Plaintiff:

16 Hugh R. Braun and Nicholas DiUlio

17 Godfrey, Braun & Frazier, LLP

18 735 North Water Street, Sixteenth Floor

19 Milwaukee, WI 53202-4188

20 On behalf of the Defendant:

21 Bryan J. Cahill and Katherine Stadler

22 Godfrey & Kahn, S.C.

23 P.O. Box 2719

24 Madison, WI 53701-2719

25 REPORTED BY: LORI L. OTTO, RPR.

1 Finally, there has never been a case in  
2 which an independent representative from the  
3 Department of Commerce said that the  
4 property that they were left with did not  
5 meet the decent, safe and sanitary standards  
6 of the Administrative Code, and that they  
7 found that these people were indeed  
8 displaced persons. The only thing that was  
9 raised is that the Department of Commerce  
10 decided that it would not take action on its  
11 own to do this and suggests that they lacked  
12 authority to enforce their conclusions.

13 But in any event, these matters,  
14 Your Honor, make this case very, very  
15 distinctive, and there has been no real  
16 attempt to suggest that this kind of  
17 pervasive taking does not constitute leaving  
18 the Wallers with an uneconomic remnant or  
19 leaving the Wallers with property that has  
20 not sustained substantial impairment and  
21 economic viability.

22 MR. BRAUN: Thank you.

23 THE COURT: Well, the Court believes  
24 that this is a case which is unique with  
25 respect to the fact that we have a statute

1 for which there has been little precedence  
2 offered obviously. Going back to the 1970's  
3 under 32.06(3m) which is a part of -- or  
4 follows between sub (3), the jurisdictional  
5 offer and subs (4) and (5), the Court action  
6 to contest the right of the condemnors, and  
7 is unique in the fact that it is a pretty  
8 unique piece of property in its shape and in  
9 the fact that it has a number of  
10 encumbrances for highway and high power  
11 lines.

12 The Court has mentioned briefly  
13 beforehand that the remnant statutes,  
14 uneconomic remnant were originally cases  
15 where there was an absolute taking of the  
16 property, and there was -- left a little bit  
17 of the property where there was no access.  
18 There have been cases where it had  
19 uneconomic remnant I think has been as big  
20 as 80 acres over years there has been case  
21 law.

22 I think that this case is unique in  
23 the fact that we have these high power lines  
24 on both sides of a triangular lot of a house  
25 that is -- what is the term again? It is

1 not an unconditional -- it is -- could not  
2 be rebuilt anyway, if it was taken down or  
3 destroyed, and the fact is that it has had a  
4 very large -- as indicated by counsel for  
5 the plaintiff, invasion of the plaintiff's  
6 rights to use this property as a residence.  
7 Their choice is to either remain there with  
8 the conditions as they are and with the  
9 limitations that are problematic to them or  
10 to move.

11 I think they have proven their --  
12 they met their burden of proof to show that  
13 this is an uneconomic remnant, and I base  
14 that on a number of factors and adopt the  
15 findings of fact that in March 2008 American  
16 Transmission Company, LLC, ATC, served the  
17 Wallers with the jurisdictional offer to  
18 acquire a 45-foot utility easement along two  
19 sides of their triangular property at 6249  
20 Mound Road in Delavan, Wisconsin, and that  
21 the jurisdictional offer was in the amount  
22 of 99,500. And that is shown by Exhibit 1.

23 The defendant in this matter  
24 obviously had not under 32.06(3m) determined  
25 that it went -- it was an uneconomic remnant

1 because they did not make any offer to  
2 acquire the remnant currently under the  
3 jurisdictional offer. This gives them the  
4 opportunity to do that and give the  
5 landowner the right to object to it. In  
6 other words, owner must consent to the  
7 taking of the uneconomic remnant. They then  
8 brought this court action to determine.

9       The Wallers are husband and wife.  
10 They have owned their property since 1989,  
11 1.51 acres of land. It is A-1-family  
12 residence, site improvements, landscaping  
13 and out buildings. It is zoned A-1  
14 agricultural in the Town of Delavan, just  
15 outside city on two sides, maybe on all  
16 sides, I don't know, on two sides anyway.  
17 And they have used it since its acquisition  
18 in 1989 as a residence for hobby farming  
19 activities as they have testified.

20       The easement acquired by ATC was 45  
21 feet in width of the Waller triangular  
22 property, .799 acres, and running for a  
23 distance of 773 feet. The easement covered  
24 52.91 percent of the lot, and it was  
25 acquired to install 138 KV high-voltage

1 transmission lines, Exhibits 2 and 3.

2 I think I'm going to make the  
3 finding here that you listed as number 4,  
4 although it has been objected to, it is a  
5 fact, and it was testified to by Wallers,  
6 that during that negotiation process prior  
7 to the jurisdictional offer being made, that  
8 Dave Davies on behalf of the defendant did  
9 on March 14th, 2008 write and meet with the  
10 Wallers, Exhibit 4, and the Wallers agreed  
11 to accept the offer provided by ATC that  
12 they buy the remaining property. However,  
13 it was to be continued on their denying of  
14 any relocation benefits under 32.19.

15 I will adopt the finding of fact as  
16 to the -- what the easement says in  
17 paragraph 5. I also adopt the finding as to  
18 Rolling & Company's report, particularly the  
19 part that he concludes or we conclude that  
20 the residential improvements were rendered  
21 totally obsolete. Highest and best use  
22 changes from improved residential to vacant  
23 industrial land Exhibits 5 and 6. I think  
24 that obviously also is followed by Kielisch,  
25 in other words, he agrees with that also.

1 That actually means, I think it is a fact  
2 for the Court to determine, consider in  
3 determining whether this is a remnant. Even  
4 though it is simply an easement and not  
5 taking of -- an absolute taking, it is a  
6 substantial taking of those easement rights  
7 -- areas.

8 And the next paragraph as to the  
9 appraisal from group one, we have the  
10 various different appraisals as to what the  
11 actual value of the remnant is, significant  
12 differences, I do think that, you know, IT  
13 was stated that Mr. Kielisch should not be  
14 giving a recommendation on the issue of the  
15 substantially impaired economic viability.  
16 It is a legal determination that has to be  
17 made by the condemnor, and it may be a legal  
18 determination, but it is also partially as  
19 to the values of the land and property. It  
20 is a mixed ball. I think he studied it as  
21 well as anybody has. So I actually consider  
22 his testimony of some weight.

23 The Wallers, again, objected to the  
24 affect this taking had on the shrubbery, on  
25 the aesthetics of the property, the sound

1 barriers they had. They objected to it on  
2 the grounds that their concerns for physical  
3 health based upon magnetic, excuse me, I'm  
4 not finding the term referenced in your  
5 argument, what is it again?

6 MR. BRAUN: EMF, electronic magnetic  
7 field.

8 THE COURT: Living under the wires,  
9 I'm not sure, and then they testified as to  
10 the affects it had on various things like  
11 their television, their radios, their  
12 vehicles, and there were a couple other  
13 matters.

14 On the other side you could say,  
15 well, there was opinions that this fear or  
16 this type of thing is not possible. Then on  
17 the other hand, there was nothing directly  
18 brought up by the defendants to show that  
19 they had made any type of testing of the --  
20 of the area and the interference.

21 What they brought in were studies  
22 done, that there is no -- that -- studies  
23 from other areas. And then again, simply  
24 the presence of the wires, their health  
25 concerns, the appearance of the area, and

1 the fact that that counsel used the word  
2 destroyed, but I believe the wording is  
3 obsolete, there were calculated into the  
4 offers demolition costs to demolish the  
5 house. That may be the issue -- the issue  
6 of the -- explain the difference of the tax,  
7 the matter is still pending.

8 And I also think it is just the loss  
9 of the highest and best use, the dream  
10 farmhouse basically could be occupied under  
11 those conditions or you could try to sell it  
12 to somebody else for diminished price. But  
13 we know that basically you have lost the  
14 highest and best use of the house that you  
15 wanted. You can never sell it for any gain.  
16 So, I think that in and of itself is a very  
17 large factor here.

18 What they had left is simply no  
19 longer using the terms of the statute now,  
20 because of its size, it's shape, and the  
21 conditions of these high voltage wires  
22 adding to the -- otherwise added to the  
23 other limitations rendered their property of  
24 little value, particularly as a residence,  
25 no value probably as a residence unless they

1 wanted to live and they did not want to live  
2 with this type of risk in their living  
3 arrangements there.

4 I accept the definitions that  
5 counsel raised are simply the simple  
6 dictionary definitions of substantial  
7 impairment, large impairment here to their  
8 life as a residence, that it was no longer  
9 viable as a residence, still have to pay  
10 \$800 of taxes on the property, etc., etc.,  
11 if they continue to live there. And they  
12 are not going to -- it is likely to be a  
13 difficult -- it is likely to be difficult to  
14 sell the property for what it was worth.

15 The department that has the  
16 jurisdiction of this matter determined that  
17 they were entitled to relocation benefits  
18 based on the criteria of that, which is, was  
19 it safe, was it decent. I think those would  
20 be the two factors that would likely -- the  
21 other one being unsanitary. I don't think  
22 that unsanitary, I don't think that would  
23 qualify for the determination. But it was  
24 made and confirmed by the people in charge  
25 of that area.

1           It is of little weight in this  
2 Court's decision, and I have also cited the  
3 fact that on the national level, the  
4 formation of the -- I will try -- of an  
5 economic remnant law. We have a statute  
6 here, but it was primarily generated by case  
7 law and it considered the -- the conditional  
8 -- pardon me, constitutional right of  
9 taking, and the balance of alternative  
10 takings where it would simply be the fairest  
11 thing to do.

12           It would be economical for all  
13 parties if the offer had been made here. I  
14 was shocked by the amount of fees on both  
15 sides that have been incurred here, and it  
16 would have been simple to make an offer and  
17 let them make their determination of what to  
18 do, and I think they made -- I am sure they  
19 did not feel it was an uneconomic remnant,  
20 but I think this was proven by the facts,  
21 and I'm satisfied that it was proven.

22           For those reasons, I think that was  
23 -- that has been cited as I mentioned in  
24 Nichols as one of the reasons for making the  
25 offer, that in all fairness to these people,

1 the costs to the parties defendant I don't  
2 think would have been that great compared to  
3 incurred by not making the offer.

4 And under these circumstances as I  
5 found them, they obviously disagree or do  
6 not find them that way, but I think the  
7 other ground as I have indicated where it  
8 was applied, I realize they were  
9 distinguished by the fact that in some cases  
10 they are supported by a case law, in fact,  
11 was -- they had better definition in their  
12 statutes, for taking in high voltage cases  
13 and also in levy cases, but those are the  
14 cases where -- an easement case where there  
15 was authority for finding of uneconomic  
16 remnant based upon concern for the value of  
17 the property after a levy goes in or those  
18 high voltage wires go in and the effect it  
19 has on property value.

20 I realize there is property -- there  
21 were proofs here. There was a lot of proof.  
22 I don't know what the circumstances of those  
23 areas were, showing lines and houses built  
24 under them or near them. I have to  
25 determine based upon the very unique and

1 limited circumstance of this case as to,  
2 again, the size, shape, the impact it has  
3 had on the residential life there of the  
4 parties, and I do find it applicable in this  
5 case.

6 If you would, prepare the findings  
7 of fact, conclusions of law consistent with  
8 this and judgment.

9 MR. BRAUN: I will do that, Your  
10 Honor. Thank you.

11 THE COURT: Okay. Court is in  
12 recess. Adopt your conclusion of law also.

13 MR. BRAUN: I will put that in.

14 (Hearing concluded at 4:38 p.m.)

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1 STATE OF WISCONSIN )  
2 CERTIFICATE  
3 COUNTY OF WALWORTH )

4 I, Lori L. Otto, Official Court  
5 Reporter, do hereby certify that the  
6 attached transcript is a true and correct  
7 copy of the testimony taken and the  
8 proceedings had in the above-entitled  
9 matter; that I have compared the same with  
10 the original stenographic notes taken by me  
11 at the time of said proceedings, and that it  
12 is a true copy of those notes and the whole  
13 thereof.

14 Dated this 25th day of November,  
15 2011.

16  
17 \_\_\_\_\_  
18 Lori L. Otto  
19 Official Court Reporter  
20 Circuit Court, Branch II  
21  
22  
23  
24  
25

1 STATE OF WISCONSIN Circuit Court WALWORTH COUNTY  
2 -----  
3 SCOTT N. WALLER, et al.,  
4 Plaintiffs,  
5 v. CASE NO: 2008CV520  
6 AMERICAN TRANSMISSION CO., LLC,  
7 Defendant.  
8 -----  
9 Transcript of Hearing on Litigation expenses  
10 Before the Honorable James L. Carlson  
11 Circuit Court Branch II  
12 January 26, 2012  
13 Elkhorn, WI  
14 APPEARANCES:  
15 On behalf of the Plaintiff:  
16 Hugh R. Braun and Nicholas DiUlio  
17 Godfrey, Braun & Frazier, LLP  
18 735 North Water Street, Sixteenth Floor  
19 Milwaukee, WI 53202-4188  
20 On behalf of the Defendant:  
21 Bryan J. Cahill  
22 Godfrey & Kahn, S.C.  
23 P.O. Box 2719  
24 Madison, WI 53701-2719  
25 REPORTED BY: LORI L. OTTO, RPR.

1 THE COURT: Good morning. Be  
2 seated. Thank you. The matter before the  
3 Court again is both files, 520 -- no, just  
4 520.

5 MR. BRAUN: Just 520.

6 THE COURT: Regarding award of what  
7 we call litigation expenses. This is in the  
8 Waller vs. American Transmission Co.  
9 Appearances again for the record.

10 MR. BRAUN: Your Honor, for the  
11 plaintiff, Hugh R. Braun and Nicholas  
12 DiUlio. The plaintiffs are also present in  
13 court.

14 MR. CAHILL: Good morning, Your  
15 Honor, Bryan Cahill of Godfrey & Kahn  
16 appears on behalf of American Transmission  
17 Co., LLC, and with me at counsel table is  
18 Katherine Anderson of American Transmission  
19 Co.

20 THE COURT: One second. Sorry.  
21 Basically both parties have -- well, what --  
22 first of all, your request for actual  
23 attorney fees and costs were outlined in an  
24 exhibit. Now that is marked as what in this  
25 proceeding? Is it marked as an exhibit?

1           What do you intend to do there, mark it or  
2           testify or what -- how are you going to do  
3           this, present your request for --

4           MR. BRAUN: I would just identify  
5           the documents, Your Honor, that were  
6           submitted. If you want them marked as  
7           exhibits, we can do that.

8           THE COURT: Yeah, now I know the  
9           case law says they do not have -- the Court,  
10          can have a hearing, but this is so complex  
11          that it needs a hearing, and I think we  
12          should have the matters marked because there  
13          are various issues here about your  
14          entitlement.

15          MR. BRAUN: Right. Your Honor, do  
16          you want me to proceed on the record then?

17          THE COURT: Yes, I do, but I do want  
18          something marked. I was hoping you would  
19          have --

20          MR. BRAUN: It is all together, Your  
21          Honor, and I have the documents on which we  
22          rely now marked successively as exhibits.

23          THE COURT: Okay.

24          MR. BRAUN: Exhibit 1.

25          THE CLERK: This is 1. Let me make

1 a note.

2 THE COURT: I don't mean to throw a  
3 wrench into things here. Are you ready to  
4 go?

5 MR. BRAUN: Yes.

6 THE COURT: I did forget to comment  
7 in making my decision that a consideration  
8 of the evidence and the opinion of --

9 MR. CAHILL: Is this in the  
10 relocation or the --

11 THE COURT: That was in the decision  
12 last night.

13 MR. CAHILL: Okay. So we're -- so  
14 we're talking 691.

15 THE COURT: I did want to comment  
16 that I considered obviously the evidence of  
17 Jack Sanderson, his opinions, his role with  
18 the department, and the affirmation of his  
19 superior, Attorney Thomas, as evidence. It  
20 was not rebutted by Ms. -- I know she could  
21 not be here, but she felt maybe it was  
22 beyond their power to make this ruling.

23 But I think they clearly have a duty  
24 to look into these matters and try to  
25 negotiate a settlement in these types of

1 cases, and they felt it was a displaced  
2 person, and they felt they were entitled to  
3 the assistance of ATC in finding a  
4 comparable home.

5 Now, the other attorney, Attorney  
6 Varialle, sort of made a comment, well, it's  
7 hardly a settled matter. It has to be  
8 adjudicated by a judge. True, if they don't  
9 mediate a settlement, and it would be true  
10 for an appeal because the Court of Appeals  
11 would look at this anew and from their own  
12 point of view as would a Supreme Court in  
13 making a decision.

14 It's, you could say, hardly a  
15 settled issue. But I don't think that that  
16 in any way said that these were not  
17 displaced persons. I don't have anybody  
18 saying that, or I don't have anybody saying  
19 they are not entitled to relocation  
20 benefits.

21 I wanted to put that on the record  
22 because I did not comment on that in making  
23 my decision. And it went back to that  
24 packet of information I gave you at the very  
25 beginning of the trial about what does this

1           -- what does this uneconomic remnant mean by  
2           our legislature.  It's not well defined.

3                         And the fact that I looked at other  
4           courts that have granted -- I'm getting back  
5           into the other case more, but the finding  
6           that it was an uneconomic remnant, however  
7           -- the fact that I'm trying to get at is  
8           that in awarding the power of condemnation,  
9           condemnation power, on the other hand the  
10          persons who are affected by that taking are  
11          entitled to be made whole, and it's supposed  
12          to be done as soon as possible and by  
13          negotiation, and I simply did not have any  
14          -- the weight of the evidence would include  
15          this testimony, and I have already commented  
16          I did not find anybody on the other side  
17          giving an opinion otherwise.

18                         So now we move into the litigation  
19          expense case, however you're going to  
20          present it.

21                         MR. BRAUN:  Your Honor, there has  
22          been a motion to recover litigation expenses  
23          in this case.  The Court has received  
24          documentation in advance of this hearing  
25          regarding that subject.  I would now like to

1 proceed and mark as exhibits those documents  
2 that are relevant to the allowance of  
3 litigation expenses.

4 And if I may just read them into the  
5 record, first is an affidavit of Hugh R.  
6 Braun dated November 22nd, 2011 and filed  
7 with the Court on November 28th, 2011. That  
8 document has been marked Exhibit 1. Copies  
9 of these materials have been given to  
10 counsel oppose in the course of  
11 correspondence but not today.

12 The second item is a document filed  
13 with the Court on December 14th, 2011. It  
14 is a submission of the itemized billings of  
15 Godfrey, Braun & Frazier in this case  
16 through November 15th, 2011, and that  
17 document is marked Exhibit 2.

18 There is an affidavit of Scott N.  
19 Waller regarding interim payments that he  
20 received from ATC and related detail. That  
21 document is dated November 22nd, 2011.

22 THE COURT: What?

23 MR. BRAUN: November 22nd, 2011.

24 THE COURT: Okay, received from ATC  
25 did you say?

1                   MR. BRAUN: Right, and it is marked  
2 Exhibit 3.

3                   THE COURT: Okay.

4                   MR. BRAUN: Then there is an updated  
5 affidavit of litigation expenses signed on  
6 January, 23rd, 2012 by Hugh R. Brown. That  
7 document is marked Exhibit 4. Then there is  
8 an affidavit of Barbara Pieper who is the  
9 billing specialist of Godfrey Braun &  
10 Frazier, and it has been marked Exhibit 5.

11                   Exhibit 6 is a proposed order for  
12 judgment granting judgment to the Wallers in  
13 connection with their claim that -- and the  
14 Court's ruling that ATC must acquire their  
15 property and the amount that has been  
16 determined that ATC must pay the Wallers for  
17 that transfer is \$47,509.72. That is marked  
18 as Exhibit 6. And it is a proposed order  
19 for judgment.

20                   And then finally Exhibit 7 is a  
21 proposed judgment granting judgment to the  
22 Wallers for \$47,509.72, and judgment to the  
23 Wallers for recovery of litigation expenses  
24 in the amount of \$298,124.74. And I offer  
25 these marked documents to the Court in

1 support of the motion --

2 THE COURT: Okay.

3 MR. BRAUN: -- for judgment.

4 THE COURT: They will be received as  
5 part of the hearing for purposes of this  
6 hearing.

7 MR. CAHILL: Your Honor, I would  
8 object in terms of hearsay, foundation.  
9 Much of this, especially the property taxes  
10 and -- or the affidavit of Mr. Waller was  
11 not in evidence at trial. It should have  
12 been evidence at trial in November. It was  
13 not.

14 THE COURT: Well, I think the Court  
15 says that you can have a hearing or not have  
16 a hearing, and they are submitted in this  
17 fashion to the Clerk of Courts in every case  
18 just about.

19 MR. BRAUN: Yup, Your Honor, the  
20 only document he may be referring to is the  
21 affidavit of Scott Waller, and all that is  
22 is a collection of excerpts from court  
23 documents, so there is nothing hearsay about  
24 that at all.

25 THE COURT: I'm not exactly sure. I

1 don't know, and then you're representing  
2 this to the Court as an attorney as your  
3 bill, so I'll certainly receive them for  
4 purposes of making determination. Now, how  
5 do you want to proceed then?

6 MR. CAHILL: Well --

7 THE COURT: I know you have an  
8 extensive brief attacking various -- I'm not  
9 exactly sure what his theories are of  
10 offering.

11 MR. CAHILL: I don't know either,  
12 and I think that Mr. Braun has the burden of  
13 proof here to prove the reasonableness and  
14 necessity of his fees. He has not done that  
15 so far. He has no statement of testimony,  
16 not in his affidavit, nothing that says  
17 these fees are reasonable and necessary. He  
18 has merely said, here are my bills, and  
19 especially in light of the objection and  
20 other factual questions related to his  
21 billings, he has not met his burden.

22 THE COURT: Let's sort of -- you  
23 have made an objection. I think that should  
24 at least be put on the record. Okay. The  
25 issue would be -- the first one -- apart

1 from the costs that they may be asking for,  
2 the issue is whether they are entitled to  
3 litigation fees. Those are defined  
4 specifically in Chapter 32.28 in what  
5 circumstances -- let's just say, those are  
6 his fees, and those are his billings, and  
7 the fee shifting -- the fee shifting statute  
8 is the issue which one applies, and there  
9 are stated in his rebuttal -- you're  
10 obviously saying that the award that you  
11 received was not under any of the  
12 subsections of subsection (3), and  
13 entitlement to attorney fees because the  
14 offer by ATC was greater than that awarded,  
15 so what is your theory of having them pay it  
16 I guess?

17 MR. BRAUN: Your Honor, our position  
18 is based on the language of 32.28 and the  
19 provisions of 32.06 sub (5).

20 THE COURT: 32.06(5)?

21 MR. BRAUN: Right, if you note that  
22 statute 32.06(5), the heading reads, court  
23 action to contest right of condemnation. In  
24 April --

25 THE COURT: Hold it, hold it, hold

1 it, 32.06(5)?

2 MR. BRAUN: 32.06(5).

3 THE COURT: Court action to contest  
4 right of condemnation.

5 MR. BRAUN: Right. If references  
6 made to the summons and complaint in this  
7 case, that statute was cited as the basis  
8 for this proceeding. And the underlying  
9 theory was that ATC could not proceed in the  
10 acquisition of this property unless and  
11 until it acquired the uneconomic remnant.

12 There was negotiation initially in  
13 April that could have been resolved at that  
14 time. It would have obligated ATC to in  
15 addition to its jurisdictional offer of  
16 90,000 -- excuse me, 95,500. It would have  
17 obligated them to -- excuse me, I think the  
18 award was \$99,500. It would have obligated  
19 them to pay \$30,500 for the property, and  
20 the case would have been over. Instead ATC  
21 decided --

22 MR. CAHILL: Your Honor, if he's  
23 going to get into testimony, I think he  
24 needs to --

25 THE COURT: He is giving me his

1 legal argument. I'm asking him what his  
2 theory of recovery is.

3 MR. CAHILL: Okay.

4 THE COURT: 99,5 is what they put  
5 up.

6 MR. BRAUN: Right.

7 THE COURT: Or offered, but you say  
8 they owe you for the remnant which is -- did  
9 you say --

10 MR. BRAUN: \$30,500 based upon an  
11 agreed valuation of \$130,000.

12 THE COURT: Okay.

13 MR. BRAUN: But ATC declined to do  
14 that, and as a result, it was necessary for  
15 the Wallers to commence this action pursuant  
16 to 32.06(5) challenging their right to  
17 proceed with this condemnation unless and  
18 until they acquired the uneconomic remnant.

19 Now, that action and the history of  
20 that action you're familiar with. Judge  
21 Kennedy dismissed the action. It was  
22 appealed to the Court of Appeals.

23 THE COURT: He dismissed it without  
24 any evidence or anything. How did --  
25 refresh my memory.

1                   MR. BRAUN: There was a hearing on  
2 May 22nd of 2008. And he declined to review  
3 the case, and in November they set it off  
4 and adjourned it, and there were a number of  
5 interim hearings, but eventually in November  
6 of 2008 it was dismissed.

7                   THE COURT: For what reason?

8                   MR. BRAUN: On the ground that --

9                   THE COURT: Should I get it out to  
10 make sure?

11                   MR. BRAUN: It would be probably the  
12 best source of the information would be  
13 the --

14                   THE COURT: Kennedy decision.

15                   MR. BRAUN: Excuse me?

16                   THE COURT: The Kennedy decision?

17                   MR. BRAUN: Well, I think the best  
18 source of the information would be the  
19 decision of the Court of Appeals.

20                   THE COURT: Oh, the Court of Appeals  
21 on October -- we had those out at one time.

22                   MR. BRAUN: October 26th of --

23                   THE COURT: Let me tell you what my  
24 -- in a nutshell, I have Kennedy's decision  
25 here, and I have the Court of Appeals

1 decision. What was said -- what I think  
2 puts it in a nutshell is Kennedy said at the  
3 beginning of the transcript, the Court  
4 action to contest the right of condemnation  
5 is one of the rights of condemnation. He  
6 made no ruling on uneconomic remnant because  
7 that is a compensation issue that will be  
8 ruled on later, and that was reversed by the  
9 Court of appeals, but that is why he  
10 dismissed it.

11 MR. CAHILL: Right, he allowed  
12 evidence.

13 THE COURT: Yeah.

14 MR. CAHILL: And basically he even  
15 asked questions to assure himself that the  
16 house was livable. It was useful. Nothing  
17 prohibited the Wallers from living there.  
18 He asked the Wallers what evidence you have  
19 besides what sounds like valuation evidence,  
20 Mr. and Mrs. Waller and Mr. Kielisch. And  
21 after hearing what they were going to offer,  
22 he said, you can't do this under sub (5).

23 THE COURT: Right. And then Judge  
24 Race basically went right ahead and had a  
25 jury trial to determine compensation and

1           then ruled this was not an uneconomic  
2           remnant because it was worth \$30,000;  
3           basically isn't that what happened?

4                       MR. CAHILL: His -- Judge Race's  
5           decision was much more nuance. The Court of  
6           Appeals said he relied exclusively on the  
7           valuation, but in the course of his oral  
8           ruling, he cited all the things that this  
9           property could be used for, the fact it was  
10          still a useful house, that people would find  
11          it attractive, which is why we said, we  
12          think that record is enough to carry the  
13          day, and we didn't need that hearing in  
14          November.

15                      THE COURT: Okay. But the essence  
16          is, the Court of Appeals in the second  
17          action said they should not have proceeded  
18          on the JO -- the appeal of the JO or  
19          whatever you want to call that. You should  
20          have determined whether this was a remnant  
21          and should have taken it pursuant to the  
22          statute.

23                      MR. BRAUN: Right.

24                      THE COURT: I think that clarifies  
25          that. So you're saying your entitlement to

1 all of these fees goes to that foundation?

2 MR. BRAUN: Yes, Your Honor.

3 THE COURT: How about the rule that  
4 you cannot get attorney fees before the JO?  
5 There is a rule -- there is a case that says  
6 you cannot get any attorney fees before the  
7 jurisdictional offer.

8 MR. BRAUN: Well, in this case I  
9 don't know that that is a problem because  
10 the JO was dated March 20th of 2008. My  
11 first retention I think was --

12 THE COURT: Say that date again, the  
13 JO.

14 MR. BRAUN: The jurisdictional offer  
15 was dated March 20th, 2008, and I was  
16 retained sometime in March I believe -- I  
17 don't have that with me, but retained  
18 sometime in March, and then this action --  
19 negotiation with ATC and then this action  
20 was commenced on April 25th of 2008, so  
21 there were no -- I don't believe there were  
22 any fees charged before the jurisdictional  
23 offer. I'm unfamiliar with the rule that --

24 THE COURT: There is case law that  
25 says you cannot do that, and it says it

1 applies to any type of action. I forget  
2 which case that was. It is in the footnote  
3 right here under cost.

4 MR. CAHILL: There are a number of  
5 cases that hold that fees are not  
6 recoverable before the jurisdictional offer.

7 THE COURT: But I don't know if  
8 there is anything in your bill that goes pre  
9 that date. Let's just see here. Well, I  
10 think you're probably right. It looks like  
11 everything you're billing for is in 2011 --  
12 well, here is some from 2009.

13 MR. BRAUN: I think the billings  
14 started in 2008, Your Honor.

15 MR. CAHILL: Your Honor, if I may,  
16 this may -- this -- we have the bills in  
17 chronological order.

18 THE COURT: Okay.

19 MR. CAHILL: With the exception of  
20 the most recent ones. It has been marked as  
21 Exhibit 513.

22 THE COURT: 513.

23 MR. CAHILL: Yeah, and that is just  
24 attorney fees, not the costs.

25 THE COURT: Right. Right. Okay.

1 Well, I'm going to accept that for the  
2 record because it would clarify the issue I  
3 just raised. Yeah, I see. Yeah, here they  
4 are. 3-28 is the first one. I find that in  
5 your exhibit also.

6 MR. BRAUN: Right.

7 THE COURT: So everything he has  
8 billed is post.

9 MR. BRAUN: Jurisdictional offer.

10 THE COURT: Post jurisdictional  
11 offer. Okay, so that is not a problem. And  
12 are you relying on statutory authority, case  
13 law?

14 MR. BRAUN: With reference to the  
15 claim itself, Your Honor, the --

16 THE COURT: Your entitlement under  
17 32.08, the one that says when there is a  
18 challenge to the taking.

19 MR. BRAUN: Right. This was a  
20 challenge action. Court of Appeals affirmed  
21 that on two different rulings, so then the  
22 question is whether 32.28 applies, and what  
23 we're relying on are the provisions of 32.28  
24 sub (3)(b).

25 THE COURT: 32.28.

1                   MR. BRAUN: The Court determines  
2                   that the condemnor does not have the right  
3                   to condemn part or all of the property  
4                   described in the jurisdictional offer or  
5                   there is no necessity for its taking. And  
6                   what we established in this case after two  
7                   appeals to the Court of Appeals was that ATC  
8                   could not proceed with the acquisition of  
9                   this property unless and until they acquired  
10                  the uneconomic remnant.

11                  THE COURT: Okay. This is not  
12                  particularly covered by (b) though, is it?  
13                  You're saying it is covered by (b)?

14                  MR. BRAUN: Oh, yes, indeed.

15                  THE COURT: The Court determines  
16                  that the condemnor does not have the right  
17                  to condemn. That never was contested, part  
18                  or all of the property described in the JO,  
19                  or that there is no necessity for the  
20                  taking. That is when they say you cannot  
21                  take my property.

22                  MR. BRAUN: That is not involved.  
23                  We talked about that yesterday. We never  
24                  challenged legally the right to take the  
25                  property.

1           THE COURT: I think quite honestly  
2           it's -- I think I would rule that 32.28,  
3           that statute does not cover your theory. I  
4           don't think it does. However, the case law  
5           seems to say the only thing I think you got  
6           to go on is the Warehouse II vs. Department  
7           of Transportation case, 291 Wis. 2d 80. It  
8           would be in my opinion something completely  
9           not determined in the past. I don't think  
10          that is covered by that -- those statutes,  
11          the statute 32.28.

12                 But the Warehouse case says it was  
13          -- well, it was really a decision where they  
14          failed to negotiate, failed to negotiate and  
15          Justice Roggensack said that was a  
16          jurisdictional defect and said that -- and  
17          cited various cases that that failure  
18          entitled the attorneys to actual attorney  
19          fees.

20                 Justice Abrahamson just did not feel  
21          that that was correct interpretation of the  
22          law, but you have stated, if I'm  
23          understanding you, you're stating you think  
24          that sub (b) covers it. I don't think it  
25          does unless I'm not understanding what your

1 argument is because Judge Kennedy even said  
2 that, you know, there is no contest.

3 And you said it over and over again,  
4 we're not contesting the right that they  
5 have to condemn, so that is the first part  
6 of it. And the second part of it is, or  
7 that there is no necessity for its taking.  
8 You did not argue that. You said they  
9 should take the whole thing.

10 MR. BRAUN: Right, our argument was  
11 that they had no right to condemn this  
12 property up until they took the entire  
13 property. It is -- this case was commenced.  
14 That is why I cited 32.06(5). Your Honor,  
15 the heading of that section is court action  
16 to contest right of condemnation.

17 THE COURT: Yeah, it does.

18 MR. BRAUN: That is what that  
19 section is about.

20 THE COURT: Hold it. Hold it. Hold  
21 it. That is what you -- well, you cited  
22 that statute, but you were actually -- well,  
23 okay. You were proceeding under (3m). Let  
24 me just see, I know that is right in your  
25 pleading.

1                   MR. BRAUN: (3m) defines what an  
2 uneconomic remnant is.

3                   THE COURT: Right.

4                   MR. BRAUN: But the nature of the  
5 action, Your Honor --

6                   THE COURT: Let me read number 5.

7                   MR. BRAUN: Right.

8                   THE COURT: And basically the Court  
9 of Appeals found that that subsection  
10 covered this case.

11                   MR. BRAUN: Yes. That this was a  
12 challenge action to the right of the  
13 condemnor to proceed unless and until they  
14 acquire the whole property.

15                   THE COURT: Yeah, I think that's the  
16 theory.

17                   MR. CAHILL: Now we understand the  
18 theory. Okay. A couple things, first,  
19 32.06(5) doesn't control the meaning of  
20 32.28 necessarily. You have to look at the  
21 language of (3)(b). There the language is,  
22 did the condemnor, did ATC, have the right  
23 to condemn part or all of the property  
24 described in the jurisdictional offer.  
25 Absolutely they did. That has never been

1 challenged by Mr. Braun.

2 In fact, at a hearing back in August  
3 of 2008 Mr. Braun said, in this case, this  
4 is a case in which we are not challenging  
5 their right to take. The only reason we're  
6 in that statute is because the statute says  
7 the only way you can enforce (3m) is under  
8 this provision. This is really not a  
9 challenge action. You can't get there under  
10 (3) (b).

11 And Warehouse II does not get you  
12 there either. Warehouse II recognizes a  
13 distinction between technical and  
14 jurisdictional defects. Here looking at  
15 (3m), the condemnor has to offer to acquire  
16 the remnant concurrently. ATC never thought  
17 this was an uneconomic remnant. ATC did,  
18 however, offer to acquire the entire  
19 property before the jurisdictional offer was  
20 made. That statute does not bar them from  
21 proceeding.

22 THE COURT: No, it says so right in  
23 the statute.

24 MR. CAHILL: Right.

25 THE COURT: You can go ahead with

1 your condemnation under sub (7).

2 MR. CAHILL: Right. And the Court  
3 of Appeals holding was also more narrow for  
4 another reason in Warehouse II. There they  
5 said, if you look at 32.06(5), it says that  
6 a challenge action under this subsection  
7 cannot prohibit or stop a valuation  
8 proceeding under 7 and 10 from going  
9 forward.

10 THE COURT: Right.

11 MR. CAHILL: That was all the Court  
12 of Appeals decision said. It did not say,  
13 ATC, you do not have the right to proceed.  
14 It's, procedurally in the courts, this is  
15 how you do it.

16 THE COURT: I will say in Warehouse  
17 II -- let me just check that. Wisconsin  
18 Statutes 32.05 sub (5) uses terms identical  
19 to that of 32.28 sub (3)(b). We do not have  
20 that in this case.

21 I'm looking at the decision in  
22 Warehouse II, paragraph 24, well, I don't  
23 know. I guess that's the whole issue. This  
24 is an actual right to condemn. They don't  
25 have the right -- but then they said they

1 can go ahead and condemn.

2 MR. BRAUN: They can go ahead and  
3 acquire while this action is going on. I  
4 have not read the Warehouse II case, but I  
5 have some familiarity with that. That was a  
6 case in which the condemnor failed to  
7 negotiate.

8 THE COURT: Yes, the Highway  
9 Department.

10 MR. BRAUN: Right, and they started  
11 an action under 32.05 sub (5) which is the  
12 equivalent of 32.06(5) which is equivalent  
13 of 32.06(5).

14 MR. BRAUN: And the Court ruled that  
15 was a jurisdictional defect, and they could  
16 challenge that; and if they challenged it  
17 successfully, they were entitled to attorney  
18 fees under 32.28. In this case we have a  
19 much more dramatic violation of the statutes  
20 when ATC refused to acquire the balance of  
21 this property, and so we started the action.

22 And after two dismissals, the Court  
23 of Appeals said on two separate occasions  
24 that this is a valid challenge action; and  
25 as a valid challenge action, the plaintiffs

1 are entitled to recover their attorney fees.

2 I can't imagine how we would  
3 distinguish this from a case where a  
4 condemnor failed to negotiate. This is much  
5 more serious business, and as it turned out,  
6 the refusal of ATC for no reason at all  
7 refused to acquire this property and provide  
8 relocation benefits --

9 THE COURT: Yeah, well, see, that  
10 was the reason I was bringing up this fact  
11 that we are in an area of uncertainty yet  
12 because the Court of Appeals said, if the  
13 Court found there was a remnant, that would  
14 void the condemnation proceeding, the  
15 jurisdictional -- so we do not have finality  
16 here yet.

17 MR. BRAUN: What?

18 THE COURT: We do not have finality  
19 yet.

20 MR. BRAUN: No, I think in the --

21 THE COURT: That I was raising  
22 yesterday right when you were making your  
23 final argument there or was -- I don't  
24 remember when I raised it; but I said, we  
25 have what the Court of Appeals told us to do

1 was to have this hearing and said basically,  
2 if the Court found that it was a remnant, it  
3 would void the jurisdictional offer. It  
4 would reopen it I should say.

5 MR. CAHILL: It would vacate the  
6 jury verdict.

7 THE COURT: The jury verdict.

8 MR. BRAUN: No.

9 THE COURT: But the verdict -- then  
10 there was a judgment.

11 MR. BRAUN: No, but I think the  
12 Court of Appeals was simply recognizing that  
13 that jury trial should have never proceeded.  
14 It was totally improper. What those  
15 decisions of the Court of Appeals said, we  
16 must go back to March 20th of 2008.

17 THE COURT: I know. That is what  
18 you should have done.

19 MR. BRAUN: That was the trial we  
20 conducted here on November 11th and 14th.  
21 We went back to March 20th of 2008, and the  
22 question was, did they have -- could they  
23 proceed with this condemnation unless and  
24 until they acquired the uneconomic remnant.  
25 And there has been a determination that they

1 had -- they had to acquire the uneconomic  
2 remnant. If that had been done, if that  
3 trial had occurred as it should have in  
4 March, there would never have been a hearing  
5 before the Condemnation Commission, and  
6 there never would have been a hearing before  
7 the Circuit Court jury.

8 I think that is all the Court of  
9 Appeals is saying, and we protested  
10 vigorously to being required to go through a  
11 jury trial, but Judge Race said no --

12 THE COURT: I know all of that. The  
13 question is, pursuant to their mandate, the  
14 verdict is open. She wanted to brief what  
15 we do now. She said yesterday -- not you,  
16 but the other attorney said, let's brief  
17 what happens now about the actual taking.  
18 Vacating the jury verdict, that -- vacates  
19 the judgment that is based on the verdict,  
20 and we do not have one.

21 MR. BRAUN: That is totally  
22 irrelevant.

23 THE COURT: Irrelevant?

24 MR. BRAUN: The jury verdict is  
25 totally irrelevant, I agree with the Court

1 of Appeals. It should never have happened.  
2 What should have happened --

3 THE COURT: What are you suggesting  
4 we do then with respect to the taking?

5 MR. BRAUN: Your Honor, the order  
6 for judgment directs that ATC acquire this  
7 entire property.

8 THE COURT: Okay. And the authority  
9 of the Court to do that would be sub (3m)  
10 because that is what it says.

11 MR. BRAUN: 32.06 sub (5) that they  
12 may not proceed -- right, until they do the  
13 (3m) acquisition.

14 THE COURT: But then you have the  
15 ambiguous language, if the Court so finds it  
16 is a remnant, they shall offer to acquire,  
17 which they did. And they can acquire either  
18 by purchase or by condemnation.

19 MR. BRAUN: Well, they did not  
20 really offer to acquire it, Your Honor.  
21 They offered to acquire it subject to waiver  
22 of condemnation.

23 MR. CAHILL: There is no evidence of  
24 that.

25 MR. BRAUN: Yes, there is.

1                   MR. CAHILL: The only of that came  
2                   in yesterday with Mr. Davies whose testimony  
3                   was un rebutted, never asked for a waiver.  
4                   Never asked them to relinquish their rights.  
5                   There is no evidence to the contrary.

6                   MR. BRAUN: Well, Your Honor, when  
7                   the action was started on April -- if they  
8                   were willing to acquire the property, in  
9                   negotiations with me, why didn't they say,  
10                  Mr. Braun, we will buy it; and they said,  
11                  no, they would not buy it. And they did not  
12                  buy it, and we made repeated requests that  
13                  they buy it in the course of this agonizing  
14                  litigation, and they refused to do it.

15                  Finally in this trial on November  
16                  11th and 14th, it was decided they had an  
17                  obligation to acquire it, and now we're  
18                  looking for a judgment directing that they  
19                  acquire that property. I mean, they went,  
20                  carried these poor Wallers through agonizing  
21                  litigation. Why didn't they just come  
22                  forward and say, hey, we will buy it, but  
23                  they did not do that. And for that reason,  
24                  they are obligated to assume these  
25                  litigation expense. It was their conduct

1           that caused this to happen.

2                       THE COURT:  Yeah.

3                       MR. CAHILL:  I strongly disagree  
4           with that.  The offer was made four years  
5           ago.  The conduct that has protracted this  
6           litigation has been in lit -- has been the  
7           litigation strategy of Mr. Braun.  The offer  
8           was made in March of 2008 to purchase the  
9           entire property.  It could have been done  
10          with there.

11                      THE COURT:  How can you argue  
12          against that theory?

13                      MR. BRAUN:  The theory is it was  
14          clearly conditional, and they made it clear  
15          to the Wallers.  If they would have not  
16          required that as a condition, they would  
17          have accepted it, absolutely.  That is the  
18          only reason it was not accepted.  And, Your  
19          Honor, for them to do what they did in this  
20          case is a serious violation of the  
21          Administrative Code.

22                      Now, that is another separate  
23          question that I think the Department of  
24          Administration will take up subsequently,  
25          but to offer to buy the property on a

1 condition is a violation of the  
2 Administrative Code, serious violation. But  
3 in any event, the Wallers' objective here  
4 was to have them acquire the whole property  
5 and that offer --

6 THE COURT: They would have had  
7 technically, unless they put language in the  
8 offer, still the right to bring this action  
9 within two years, right? They could have  
10 bought the property and still brought the  
11 action within two years.

12 MR. BRAUN: No, no.

13 THE COURT: You have two years to  
14 make -- I think you do, the relocation  
15 benefits. You have a two-year statute on  
16 that, could have sold the property, the  
17 whole thing for 130.

18 MR. CAHILL: 132.

19 THE COURT: 132, they got the whole  
20 property, your people have the money, they  
21 still have a right to make -- they still  
22 have the right to bring the action in two  
23 years unless there was some kind of language  
24 in there. I don't have that. I don't have  
25 that evidence.

1                   MR. BRAUN: Well, the language --  
2 first of all, the Wallers testified that the  
3 condition is they would have to waive  
4 relocation benefits, and in the notations --

5                   THE COURT: Now, they said  
6 Mr. Davies said something different.

7                   MR. BRAUN: Dave Davies said there  
8 would be no relocation benefits.

9                   THE COURT: We will not pay  
10 relocation fees. Well, we can force them to  
11 do that, take them to trial.

12                   MR. BRAUN: Well, all right.

13                   MR. CAHILL: And even if there were  
14 language requesting a waiver, and there is  
15 not, if that was contrary to statute and  
16 regulations, it would be void and  
17 ineffective; and, again, as Your Honor  
18 pointed out, the proper forum for this was a  
19 relocation challenge or claim for relocation  
20 benefits. That waiver would have never  
21 stood up, and we would have been left with  
22 one proceeding, what happened yesterday, are  
23 the Wallers entitled to relocation benefits,  
24 and if so, how much. That is all this case  
25 ever was about and all it ever should have

1           been about.

2                   THE COURT:  Apart from that, there  
3           is case law they are entitled to costs and  
4           fees for an appeal I believe.  That is the  
5           Narloch case.

6                   MR. CAHILL:  And that is dependent  
7           upon showing that you meet one of the  
8           criteria in 32.28 sub (3).

9                   THE COURT:  Narloch was about a  
10          right to take I believe.

11                   MR. CAHILL:  Right.

12                   THE COURT:  They won.  They said,  
13          no, you cannot take --

14                   MR. CAHILL:  The condemnor  
15          challenged it on appeal; and as part of it,  
16          they said, we do not have to pay your  
17          attorney fees for the appeal, and the Court  
18          said, no, you do under 32.28 sub (1).  It  
19          says, you've got to pay fees necessary to  
20          prepare for or participate in proceedings  
21          before any Court.  That includes the Court  
22          of Appeals.  That was a narrow issue.  It is  
23          not what is before the Court today.

24                   THE COURT:  Well, let me just take  
25          another look at Warehouse II.  As I'm coming

1 down to the fact that basically unless that  
2 would be a right under this case, an  
3 extension of that theory, I just do not see  
4 it as being statutorily allowed, the fee  
5 shift.

6 MR. BRAUN: Well, in Warehouse II --

7 THE COURT: Let me re-read Warehouse  
8 II.

9 MR. BRAUN: All right.

10 THE COURT: Do you have the case?

11 MR. BRAUN: I don't have it in front  
12 of me. I'm very concerned about this, Your  
13 Honor, I thought this was a routine  
14 proceeding.

15 THE COURT: No, no, it is not.

16 MR. BRAUN: We went to the Court of  
17 Appeals twice, and they affirmed what we are  
18 doing here. If they wanted to estop that  
19 litigation, they would have come to us and  
20 said, fine, we'll buy it, and we'll provide  
21 relocation benefits. The case would have  
22 been over.

23 THE COURT: The only thing I'm  
24 saying now -- I'm not denying that. The  
25 theory is whether this is a shift -- a

1 shifting of the fees.

2 MR. BRAUN: Right.

3 THE COURT: That is the issue and  
4 whether it is prescribed by statute or case  
5 law. I'll take a look at Warehouse II one  
6 more time.

7 (A break was had.)

8 THE COURT: I'm simply going to read  
9 down the analysis of the Court in Warehouse  
10 II vs. The Department of Transportation, 291  
11 Wis. 2d 80. I have also reviewed that case  
12 and any cases that have come out of it  
13 afterward. There is no substantial  
14 departures from that case. It has been  
15 cited for at least one case after that.

16 The analysis, this starts out as  
17 follows: By analysis of 32.28 sub (3) sub  
18 (b) is a fee shifting statute when we  
19 examine the context -- well, first of all,  
20 yeah, okay. When we examine the context in  
21 which the legislature placed 32.28 sub (3)  
22 sub (b), we can better ascertain the meaning  
23 of the right to condemn in 32.28 sub (1).

24 Basically the fee shifting had been  
25 apart of 32.05 was deleted, and then they

1           made a separate statute 32.28. And 32.28  
2           sub (1) states, I'm at page 95 of the  
3           Wisconsin Reports. In this section  
4           litigation expenses means the sum of the  
5           costs, disbursements, and expenses including  
6           reasonable attorney, appraisal and  
7           engineering fees necessary to prepare for or  
8           participate in actual or anticipated  
9           proceedings before the condemnation  
10          commissioners, board of assessment or, and I  
11          highlight, any Court under this chapter.

12                 It sets out a more expansive list of  
13           expenses that a condemnee could incur than  
14           those listed in 32.28 sub (2) which states,  
15           except as provided in sub (3), costs shall  
16           be allowed under Chapter 814 in any action  
17           brought under this chapter. If the amount  
18           of just compensation found by the Court or  
19           commissioners of condemnation exceeds the  
20           jurisdictional offer or the highest  
21           written offer prior to the jurisdictional  
22           offer, the condemnee shall be deemed the  
23           successful party under 814.02 sub (2).

24                 Wisconsin Statute Section 32.28 sub  
25           (2) permits only the actual costs under 814;

1           however, paragraphs (a) through (i) of 32.28  
2           lists circumstances when the general rule of  
3           awarding 814 costs to the prevailing party  
4           is not applied, and the litigation expenses  
5           set out in 32.28 sub (1) are awarded.

6                       The occasion where the property  
7           owner is awarded more expenses incurred in  
8           the contesting inaction taken by the  
9           condemnor are all directed at actions that  
10          have significantly shortchanged the property  
11          owner in some respect. For example, (3)(d)  
12          through (i) has to do with getting  
13          shortchanged from compensation when the  
14          condemnor offer is too low.

15                      Then it goes on, paragraph (3)(b) is  
16          part of that legislative decision to fee  
17          shift, but it sets out circumstances that  
18          trigger a fee shifting, quotes, in more  
19          general terms. For example, when the Court  
20          concludes that the condemnor lacks the right  
21          to condemn or that there is no, quotes,  
22          "necessity for its taking", end quotes.

23                      These paragraphs of subsection (3)  
24          level the playing field by shifting the  
25          obligation to pay expenses that may have

1           been unnecessary if the condemnor had  
2           shouldered its responsibility properly. The  
3           right to condemn that is at issue here,  
4           talking about that case, also used in  
5           Wisconsin Statute Section 32.05 sub (5) and  
6           32.06(5). There the legislature established  
7           claims for relief when the condemnor does  
8           not have the right to condemn.

9                     And skipping over to page 98,  
10           Section 32.05 sub (5) uses terms identical  
11           to that of Wisconsin Statutes 32.28 sub (3)  
12           sub (b), regarding the right to condemn,  
13           i.e., the right of the condemnor to condemn  
14           the property described in the jurisdictional  
15           offer. It permits a condemnee to challenge  
16           that statutory right for reasons other than  
17           the offer of inadequate compensation.

18                     The general statement, skipping  
19           down, for any reason other than must be read  
20           to exclude from claims that may be brought  
21           under 32.05 sub (5). Those claims described  
22           in paragraphs sub (d) sub (3) through (i),  
23           in other words, the award, that leaves  
24           paragraph (3)(a), abandonment in paragraph  
25           (3)(b), the lack of the, quotes, "right to

1 condemn". That could fall within the claims  
2 permitted by 32.05 sub (5). Knowing the  
3 parallel wording in 32.05 sub (5) and under  
4 32.28 sub (3) sub (b), this right appears to  
5 be a statutory right that cannot be invoked  
6 without jurisdiction.

7 Then the justice went into the  
8 history, it sheds further light on whether  
9 Wisconsin Statute Section 32.28 sub (3) sub  
10 (b) provides litigation expenses when the  
11 jurisdictional offer is invalid due to  
12 failure to negotiate in good faith prior to  
13 issuing it. The legislative history,  
14 particularly in regard to the 1977 revision  
15 to Chapter 32, demonstrates that one of the  
16 legislative purposes in that revision was to  
17 increase the types of circumstances in which  
18 condemnees would receive litigation  
19 expenses, and then it talks about the moving  
20 from one section and creating a new section  
21 about whether you can get those kind of  
22 litigation expenses. And it also notes that  
23 it had been discretionary and now was a  
24 mandate.

25 Reading from page 101, the 1977

1 amendment demonstrates the legislative  
2 policy choice to encourage condemners to  
3 take seriously commencing a condemnation  
4 action to make fair jurisdictional offers  
5 and to carefully follow the condemnation  
6 statutes. We had previously recognized  
7 these policies, and then they cite the Bee  
8 Frank case, the Standard Theatres, Inc.  
9 case, noting from the Bee Frank case --  
10 well, Standard Theatres specifically dealt  
11 with attorney fees. Its holding is clearly  
12 applicable to other litigation expenses  
13 enumerated in Section 32.28 sub (1)  
14 Wisconsin Stats.

15 In permitting recovery of litigation  
16 expenses, the legislature sought to provide  
17 the condemnee with just compensation by  
18 ensuring that he or she would not be able  
19 force to use part of the award to pay for  
20 litigation expenses after successful appeal.  
21 We conclude that the overall purpose of the  
22 1977 amendment was to provide more specific  
23 and concrete opportunity to recover  
24 litigation expenses for condemnees with  
25 legitimate challenges to the actions of

1           condemnors.

2                   And at paragraph 34 of the decision  
3           on page 104, therefore, we conclude that  
4           Wisconsin Stats. 32.28 sub (3) sub (b),  
5           applies when the jurisdiction -- condemnor's  
6           jurisdictional offer to purchase was not  
7           made after good-faith negotiations. So we  
8           have a twofold intent behind the statute.

9                   And I am going to decide that under  
10          the wording of the statute and the Court of  
11          Appeals has decided that this was a  
12          proceeding under sub (5) and sub (3), it is  
13          just a definition really, (3m), is such a  
14          proceeding covered by (3)(b). I determine  
15          it falls within all of the aspects of the  
16          case decided, and in Warehouse II, the case  
17          decided in Warehouse II by failing to  
18          resolve the issue of the uneconomic remnant  
19          prior to and to negotiate in good faith. I  
20          make that finding, they did not negotiate in  
21          good faith.

22                   I know there is a discrepancy of  
23          what happened. But I find that they did not  
24          make it conditional -- unconditionally --  
25          they did not make it conditional

1           unconditionally. This did obviously allow  
2           the condemnors -- or condemnees to receive  
3           more than had been offered. They also had  
4           to be compensated for the remnant. I can't  
5           help but feel that was the legislative  
6           intent all the way back into the '70s, that  
7           this type of a proceeding had to be taken  
8           care of and falls within the gambit of the  
9           broad interpretation of 32.06(5) and it's  
10          partner 32.28 sub (3) sub (b).

11                   And then I think I just have to go  
12           over any other objections as to the amounts  
13           here.

14                   MR. CAHILL: Your Honor, if I may be  
15           heard on that, on Warehouse II.

16                   THE COURT: Yes.

17                   MR. CAHILL: Warehouse II requires  
18           there to be a procedural defect, a failure  
19           to comply with some statutory obligation.  
20           In Warehouse II, the DOT failed to negotiate  
21           at all with the landowner. There was no  
22           negotiation, they simply submitted the  
23           jurisdictional offer. The Court said that  
24           was a jurisdictional defect because they did  
25           not negotiate at all.

1                   Where is the defect of any kind,  
2                   jurisdictional, technical or other, there is  
3                   none? ATC complied with sub (3m). As Your  
4                   Honor pointed out in the pretrial back in I  
5                   think November or October, there is a  
6                   significant portion of (3m), and it is that  
7                   last clause which states, if acquisition of  
8                   only part of a property would leave its  
9                   owner with an uneconomic remnant, the  
10                  condemnor shall offer to acquire the remnant  
11                  concurrently and may acquire by purchase or  
12                  by condemnation if the owner consents.

13                  ATC gave them two alternatives.  
14                  They could acquire the easement, or they  
15                  could acquire the entire property for  
16                  \$132,000. They offered to acquire the  
17                  entire property even though -- because  
18                  Waller's did not consent, we could not go  
19                  forward under condemnation -- we could not  
20                  go forward to condemn the entire property.  
21                  (3m) forbids that.

22                  The only thing we had left to do was  
23                  to submit a jurisdictional offer. There is  
24                  nothing in 32.06, no procedural requirement  
25                  that ATC did not comply with like there was

1 in the Warehouse case.

2 THE COURT: May I ask, is there any  
3 paperwork, or is this all he said, she said  
4 type of situation?

5 MR. CAHILL: We have the written  
6 offer. It is in evidence.

7 THE COURT: Okay.

8 MR. CAHILL: From Dave Davies.

9 THE COURT: Let's make that clear.

10 MR. CAHILL: What is that?

11 THE COURT: Let's make it clear as  
12 we can as far as what the record is.

13 MR. CAHILL: It is in the 691  
14 action. It is trial Exhibit 624 page 3 of  
15 that three-page exhibit. This is Dave  
16 Davies contact diary.

17 THE COURT: Okay. Okay. This is --  
18 this was a verbal offer in other words.

19 MR. CAHILL: No, there is also a  
20 written offer. Can I see the exhibit list?

21 THE CLERK: From yesterday?

22 MR. CAHILL: Yes. I can't recall  
23 which one it was.

24 THE COURT: That is okay. Just find  
25 it. Did you have any other exhibits that

1           you want to forward on the issue of the  
2           offer?

3                     MR. BRAUN:  Excuse me, Your Honor,  
4           are you asking me?

5                     THE COURT:  Yeah, I'm asking you.  
6           One second.  They gave me a copy of 624 and  
7           643, the notes regarding the discussions of  
8           Dave Davies and the Wallers as was  
9           introduced into the record yesterday and  
10          643, a letter to the Wallers dated March 14,  
11          2008.  That would have been the  
12          jurisdictional offer like you said.

13                    MR. CAHILL:  The jurisdictional  
14          offer was the 20th.  This proceeded.  So  
15          they offered to acquire the entire property  
16          before the jurisdictional offer was made  
17          which is what (3m) requires.  Without the  
18          Waller's consent to the offer, we could not  
19          condemn the entire property.  We could not  
20          take the entire property without their  
21          consent.

22                    And as Exhibit 624 clearly shows,  
23          and it's not he said, she said.  It is  
24          contemporaneous record, business record,  
25          admitted into evidence --

1                   THE COURT: Okay. But this is a  
2                   letter regarding your offer, proposal of  
3                   74,5. This does not have anything to do  
4                   with the remnant, does it?

5                   MR. CAHILL: Yes, it does.

6                   THE COURT: Okay, tell me how.

7                   MR. CAHILL: Exhibit --

8                   THE COURT: Then there is something  
9                   written, offer to buy.

10                  MR. CAHILL: Offer to buy property,  
11                  132. That was full a -- that was set by the  
12                  Waller appraisal, Appraisal Group One.

13                  THE COURT: And you say, our desire  
14                  is to negotiate a reasonable settlement.  
15                  Okay. Now, you have made some bold  
16                  statements or some rather -- that this  
17                  clearly was conditionable. What is your  
18                  hard proof of that?

19                  MR. BRAUN: It is the testimony of  
20                  the Wallers.

21                  THE COURT: Okay. Nothing in the  
22                  way of a letter to them or back and forth?

23                  MR. BRAUN: No, but it is supported  
24                  by diary of American Transmission Dave  
25                  Davies in which he states he offered

1 132,000. ATC would not pay any relocation  
2 expenses.

3 MR. CAHILL: A failure to agree on  
4 price, there is case law to this effect. A  
5 failure to agree on price in negotiation  
6 stage does not mean you negotiate in bad  
7 faith. At some point condemnor and  
8 landowner can get to the point where they  
9 cannot reach agreement. That does not mean  
10 there was lack of good-faith negotiation,  
11 and I can provide the Court the authority,  
12 the cite to that authority later today. I  
13 just do not have it with me now. That is  
14 what happened here. They got to a point  
15 where they could not agree on price. We  
16 fulfilled every obligation in 32.06.

17 THE COURT: What happened was, what  
18 the Court of Appeals said is they do not  
19 have jurisdiction to do that.

20 MR. CAHILL: The Court of Appeals --  
21 there is a subtle distinction there. The  
22 Court of Appeals decision did not address  
23 the right of ATC to take. The Court of  
24 Appeals was concerned with the order of  
25 proceedings.

1 THE COURT: Yeah.

2 MR. CAHILL: And between the  
3 valuation hearing and the right to take  
4 action, it concerned a procedural issue in  
5 the Circuit Court.

6 THE COURT: It says, you can go  
7 ahead, but once there is an action, they  
8 said you have not taken care of that first.  
9 You have to take care --

10 MR. CAHILL: You resolve that  
11 procedural issue first, but it did not say  
12 or address --

13 THE COURT: In fact, it said you do  
14 not have jurisdiction to go ahead until that  
15 matter was resolved. That is what they  
16 said. That is what they said, that was a  
17 jurisdictional defect. It would set aside  
18 the jury verdict and would have to tell --  
19 that is what they said, and that is where it  
20 is located in the statute.

21 MR. CAHILL: But I'm asking what  
22 is --

23 THE COURT: You're saying that was  
24 not bad faith -- you're saying that it was  
25 not bad faith, you were going along and the

1 judges went along with you is you what  
2 you're saying.

3 MR. CAHILL: Two things, one, the  
4 Court of -- there is no statutory procedure  
5 that anyone has identified that ATC did not  
6 comply with and two --

7 THE COURT: Yeah, the statutory  
8 thing you did not go along with was to take  
9 care of the remnant first.

10 MR. CAHILL: But we could not. We  
11 needed the consent of the Wallers to do so.  
12 They refuse the offered.

13 THE COURT: Yes, you could. It says  
14 right there, you can do it -- condemn it or  
15 do it by purchase.

16 MR. CAHILL: If the owner consents.

17 THE COURT: Right.

18 MR. CAHILL: They did not consent,  
19 and what ATC has to be very careful of, is  
20 the Supreme Court decision in Mitten  
21 (phonetic), and Mitten (phonetic) says, a  
22 condemnor cannot take too much property. It  
23 cannot take more than is necessary. It does  
24 not have the right to do so.

25 THE COURT: But --

1                   MR. CAHILL: That is what happened  
2 here, because it is an uneconomic remnant  
3 case.

4                   THE COURT: How can you say that  
5 when they were saying it was a remnant?

6                   MR. CAHILL: But an uneconomic  
7 remnant case is different than an inverse  
8 condemnation action.

9                   THE COURT: I'm not saying it is an  
10 inverse condemnation action. I'm saying it  
11 is statutory procedure regarding remnant.

12                   MR. CAHILL: And they are distinct,  
13 and the distinction is that inverse  
14 condemnation requires the landowner to show  
15 something higher, a greater interference  
16 with their land than an uneconomic remnant.  
17 And for an uneconomic remnant, because of  
18 the decision the owner has to obtain consent  
19 to the taking before they can exercise its  
20 condemnation powers to acquire the whole, by  
21 refusing ATC's offer to acquire the whole  
22 for 132, ATC could go no further in invoking  
23 its condemnation powers to acquire the whole  
24 property.

25                   When they said no, the only thing

1           ATC could do was to proceed with a  
2           jurisdictional offer for the amount  
3           necessary for the taking, the easement. We  
4           were left with no other alternative once  
5           they said no to the offer of the entire  
6           property.

7                   MR. BRAUN: Judge, what he is saying  
8           is inconsistent with what happened here.  
9           The fact is that ATC did offer to purchase  
10          this entire property but required of the  
11          Waller's a waiver of their relocation  
12          benefits; and on the basis of those facts,  
13          we commenced this action to compel to  
14          acquire the uneconomic remnant.

15                   THE COURT: When were you retained?

16                   MR. BRAUN: I was retained it  
17          appears in early March of 2008.

18                   MR. DIULIO: No, March 28th.

19                   MR. BRAUN: March 28th. Well, there  
20          is a retention letter, but I think it was  
21          early March. My first entry of service was  
22          March 28th of 2008.

23                   THE COURT: Okay. I was going to  
24          say, they sent this to your client, not to  
25          you.

1                   MR. CAHILL: He was not represented  
2                   at the time.

3                   MR. BRAUN: I did not represent them  
4                   at the time of that letter, that is correct.

5                   THE COURT: That is what I was  
6                   getting at.

7                   MR. BRAUN: And their statement  
8                   under oath is that they would have accepted  
9                   this, but the condition was that they waive  
10                  their relocation rights. That is confirmed  
11                  in the diary of Dave Davies on 3-14-08.

12                  THE COURT: I just wanted -- it is  
13                  your argument. I want to make sure all the  
14                  pieces of paper are identified that have to  
15                  do with this, and apparently this is it.

16                  MR. BRAUN: Sure. That is all I  
17                  want because, Your Honor, on the basis of  
18                  these facts, we had to start the action. As  
19                  soon as we started an action to compel them  
20                  to acquire this property, why didn't they  
21                  consent to judgment? I -- so their  
22                  position that --

23                  THE COURT: These are further  
24                  arguments.

25                  MR. BRAUN: Right, okay.

1                   THE COURT: But I have sort of made  
2 my decision. I think I started out by  
3 saying -- when was the complaint filed  
4 again?

5                   THE CLERK: In the 520 case, judge?

6                   THE COURT: No, no. Yeah, the 520  
7 case.

8                   MR. DIULIO: April 25th of 2009  
9 (sic).

10                  THE COURT: April 25th.

11                  MR. DIULIO: April 25th of 2008, not  
12 9.

13                  MR. CAHILL: I would also refer the  
14 Court to the decision in Kauer vs. Wisconsin  
15 Department of Transportation, 329 Wis. 2d  
16 713, specifically paragraphs 13 and 14. It  
17 is a Court of Appeals decision subsequent to  
18 Warehouse II. And it discusses the  
19 distinction between jurisdictional and  
20 technical defects, and the condemnor was  
21 alleged not to have provided a property  
22 owner with documents informing them of their  
23 rights.

24                  The Court of Appeals in that  
25 decision said, that was not a jurisdictional

1 defect in the procedure, we do not give that  
2 argument much weight, particularly because  
3 the Kauers were not prejudiced by it. They  
4 retained counsel. They did not give up any  
5 rights.

6 And then it goes on to say, there  
7 has to be some statutory procedure that the  
8 condemnor did not comply with before you  
9 find --

10 THE COURT: Well, I've identified  
11 the statutes. I'm saying they have not  
12 complied, and the Court of Appeals has  
13 identified those statutes.

14 MR. CAHILL: What statute? I'm not  
15 clear.

16 THE COURT: The statute, I'm -- I  
17 just said what they were, 05 sub (6) and 28  
18 sub (3) (b).

19 MR. CAHILL: What is the procedure  
20 in 06 that they did not comply with?

21 THE COURT: They did not resolve the  
22 question of the remnant first. It is clear.  
23 I mean, that is the decision I made. That  
24 is the decision I made. Let me just check.  
25 Okay, so I think what remains is I do have

1 to go through the precise billing and  
2 determine what, if any, should be reduced or  
3 taken out or whatever.

4 MR. CAHILL: Your Honor, there are a  
5 number of issues raised that would remain to  
6 be resolved. One is, understanding that  
7 Your Honor has ruled that (3)(b) applies,  
8 the issue of whether the Wallers are  
9 entitled to litigation expenses for work  
10 done in cases other than the 520 challenge  
11 action.

12 THE COURT: All right.

13 MR. CAHILL: That is a fact -- a  
14 factually complex decision.

15 MR. BRAUN: This is something we  
16 agree on. The action for relocation  
17 benefits does not have a fee transfer  
18 provision which is applicable at least in  
19 our judgment, so there are no -- there are  
20 -- when the relocation action was started,  
21 we started a new file in our office, and all  
22 of the charges in the relocation action were  
23 put in that file. You will find some  
24 reference in the present billing in this 520  
25 case to contacts with the Department of

## APPRAISAL REPORT

**PROPERTY OWNER:** Scott N. and Lynnea S. Waller  
**PROPERTY ADDRESS:** 6249 Mound Road Delavan, WI 53115  
**OWNER ADDRESS:** Same  
**PHONE:** (262) 728-2950

**SIZE AND TYPE OF PROPERTY:** This is a 1.5 +/- acre tract of land improved with a residential home and three outbuildings. The property is currently being used for residential purposes, but has short-to-mid-term potential to be developed for industrial use within the City of Delavan.

### FIVE YEAR SALES HISTORY

DOCUMENT #	GRANTOR	GRANTEE	SALE DATE	PRICE
181986	Hansen	Waller	Aug.14, 1989	\$53,900

**PRESENT USE:** Residential  
**ZONING:** A-1 Agricultural

### HIGHEST AND BEST USE

**BEFORE:** Improved Single Family Residential  
**AFTER:** Industrial Lot

### AREA AND INTEREST TO BE ACQUIRED

Two electric transmission line easements. One is 45 feet in width along the easterly boundary of the subject property and contiguous to the westerly right-of-way margin of Interstate Highway 43. The second is along the North 45 feet of the parcel. We estimate total easement area at 34,821 square feet or 0.799 acres.

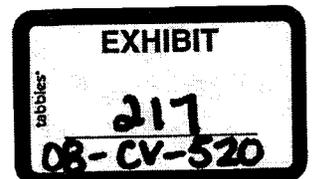
### APPRAISED VALUES

<b>BEFORE:</b>	\$130,000
<b>AFTER:</b>	<u>\$ 55,500</u>
<b>LOSSES/DAMAGES:</b>	\$ 74,500

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*PROJECT:*  
Delavan – Darien Electric Reliability Project

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## ASSIGNMENT CONDITIONS

**PURPOSE:** This report is being prepared for American Transmission Company (ATC), the intended user, to estimate market value to be used in the determination of just compensation for the acquisition of real property interests for a transmission line project. A copy of the report will be given to the property owner as a consequence of disclosure requirements of Statute 32.06 and the owner has the option of having their appraisal prepared. The purpose of this appraisal is to estimate compensation due the owner for the acquisition of property and property rights, as indicated above. This shall be done in accordance with the provisions of Sections 32.09 Wisconsin Statutes, which states that compensation shall be based on market value.

**JURISDICTIONAL EXCEPTION:** This appraisal is done under the Jurisdictional Exception Rule of USPAP. The appraiser must comply with the overriding authority of State and Federal laws, rules and regulations including the Uniform Relocation and Real Property Acquisitions Policies Act of 1970 as amended, 49 Code of Federal Regulations (CFR) Part 24.103 and Wisconsin Statutes 32.09. The Jurisdictional Exception Rule allows law or public policy to supersede USPAP rules where these conflict.

The market value definition is amended as per provision of Section 32.09 Wisconsin Statutes. 32.09 (5) (b) states, Any increase or decrease in fair market value of real property prior to the date of evaluation caused by the public improvement for which the property is acquired, or by the likelihood that the property would be acquired for such improvement, other than physical deterioration within reasonable control of the property owner, may not be taken into account in determining just compensation for the property.

**DEFINITION OF MARKET VALUE:** Market value is defined as the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeable, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. Buyer and seller are typically motivated;
2. Both parties are well informed or well advised, and acting in what they consider their best interests;
3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto;
5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

DEFINITION SOURCE: Federal Register, Vol. 55, No. 163, August 22, 1990, pp. 34228-29.

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**REAL ESTATE APPRAISED:** The subject of this appraisal is the property known as The Waller residence located at 6249 Mound Road, Delavan, WI 53115.

**INTEREST APPRAISED:** The real property interest appraised here is fee simple unencumbered.

**EFFECTIVE DATE OF APPRAISAL:** The effective date of the appraisal is the date of our property inspection, November 16, 2007.

**DATE APPRAISAL REPORT SIGNED:** December 12, 2007.

**SCOPE OF APPRAISAL:** The research and analysis leading to the estimate of market value was performed during November and December, 2007. The work included the following steps.

- Physical inspection of the subject property.
- Review of documents relating to property history.
- Review of regulations (zoning, etc.) pertaining to use and construction.
- Identification of neighboring land uses.
- Determination of highest and best use of the land as if vacant and of the property as improved.
- Consideration of the approaches to value that are applicable and necessary for credible valuation.
- Identification and analysis of comparable sales leading to an indication of market value in the before condition.
- Consideration of easement impacts on the land.
- Reconciliation of results to a final estimate of market value before and after easement.

**APPRAISER COMPETENCY:** The Uniform Standards of Professional Appraisal Practice requires that:

Prior to accepting an assignment or entering into an agreement to perform any assignment, an appraiser must properly identify the problem to be addressed and have the knowledge and experience to complete the assignment competently; or alternatively, must:

1. disclose the lack of knowledge and/or experience to the client before accepting the assignment;
2. take all necessary or appropriate steps to complete the assignment competently; and
3. describe the lack of knowledge and/or experience and the steps taken to complete the assignment competently in the report.

Source: USPAP, 2006 Edition, Competency Rule, p. 11.

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The subject property is located in Walworth County, Wisconsin which lies within our normal trade area. The appraisal problem involves impact of an easement. Both John Rolling and Michael Robertson have worked with such valuation problems previously.

**CLASSIFICATION OF APPRAISAL REPORT TYPE:** This appraisal report is a "summary appraisal report" under the meaning of the Uniform Standards of Professional Appraisal Practice. Such a report summarizes the research process, data considered, and reasoning involved in the estimate of value. Realistically, no report format can be an exhaustive presentation of all the data and reasoning leading to the appraiser's conclusion of value. The summary report format is designed to convey the items of major significance.

**LIMITING CONDITIONS:** The appraisal is made with the following assumptions:

1. The legal description furnished is assumed to be correct.
2. No responsibility is assumed for matters legal in character, nor is any opinion rendered herein as to title which is assumed to be good and marketable. It is assumed that the property is free and clear of liens and encumbrances, and under responsible ownership and management on the appraisal date.
3. Certain data used in compiling this report was furnished by sources which we considered reliable. We do not guarantee the correctness of such data, although as far as is reasonably possible, the data had been checked and is believed to be correct.
4. It is assumed that surveys and/or plats furnished to or acquired by the appraiser and used in the making of this report are correct. We have not made a land survey or caused one to be made and, therefore, assume no responsibility for their accuracy. Any sketches included in this report are to assist the reader in visualizing the property and are not guaranteed to be to scale.
5. We assume that there are no hidden or unapparent conditions of the property, subsoil or structures, which would render it more or less valuable. We assume no responsibility for such conditions, or for engineering which might be required to discover such factors.
6. Unless otherwise specified in this report, the existence of hazardous materials, which may or may not be present on the property, was not observed during my inspection of this property. We have no knowledge of the existence of such materials on or in the property. We are not qualified to detect such substances. The client is urged to retain a professional who has such expertise. The value estimate expressed herein is predicated upon the assumption that there is no such material on or in the property. We reserve the right to revise the estimate of value should subsequent investigation prove the contrary.

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## CERTIFICATE OF APPRAISERS

To the best of our knowledge and belief, the statements contained in this appraisal report are true and the information upon which the opinions expressed herein are based is correct, subject to the limiting conditions herein set forth:

This appraisal has been made in conformity with appropriate Wisconsin Statutes, Regulations, Policies and Procedures applicable to the appraisal of right of way. To the best of our knowledge, no portion of the value assigned to this property consists of items which are non-compensable under Wisconsin laws.

The statements contained in this report are true and correct. The reported analysis, opinions and conclusions are limited only by the reported assumptions and limiting conditions, and are our personal, impartial and unbiased professional analyses, opinions and conclusions. We have no present or prospective interest in the property that is the subject of this report, and we have no personal interest or bias with respect to the property that is the subject of this report or to the parties involved with this assignment.

Neither our compensation nor our employment are contingent upon the reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stimulated result, or the occurrence of a subsequent event directly related to the intended use of the appraisal. Any decrease or increase in the market value of the real property prior to the date of valuation caused by the public improvement for which this property is to be acquired or by the likelihood that this property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, was disregarded in determining compensation for this property.

Our analyses, opinions and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice and the "Relocation Assistance and Real Property Acquisition Policy Act of 1970".

No one provided significant real property appraisal assistance to us in making this report. We have not revealed the findings and results of this appraisal to anyone other than the proper officials of the acquiring agency, and will not do so until authorized by said officials, or until we may be required to do so by due process of law, or until we are released from this obligation by having publicly testified as to such findings.

We have not given consideration to nor included in this appraisal any relocation assistance benefits.

On November 16, 2007, John Rolling met with Scott and Lynnea Waller at the subject property. John Rolling inspected the subject on November 16, 2007 accompanied by Scott Waller. Michael Robertson subsequently made an exterior inspection of the property from the roadside. Michael Robertson made field inspections of the sales relied upon in making this appraisal.

It is our opinion that as of November 16, 2007 the total loss in market value to the property herein described is:

**\$74,500**

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John D. Rolling, WI CGA # 127  
Date Signed: December 12, 2007

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Michael J. Robertson, WI CRA #336  
Date Signed: December 12, 2007

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## DESCRIPTIVE DATA

**CONSTRUCTION PROJECT:** American Transmission Company (ATC) will construct a 138 kV overhead electrical transmission line from the Southwest Delavan Substation to the Bristol Substation.

**AREA AND NEIGHBORHOOD ANALYSIS:** The subject property is located in south-central Wisconsin in the Town of Delavan, Walworth County, Wisconsin. The subject is located near the urban communities of Delavan and Elkhorn, with populations of about 8400 and 8900 respectively. The nearest major city is Janesville, WI located about 15 miles to the west. Manufacturing is the largest single economic sector in Walworth County (about 22% of total employment), followed by leisure and hospitality (about 19%), education and health care (about 18%), and by trade, transportation and utilities (about 17%). Per capita personal income (2004 figures) was \$29,089 or about 90% of the statewide average.

The subject is located just southwest of the physical intersection of Mound road and I-43. Development due to the expansion and growth of the city of Delavan is approaching this intersection. Lands south and east of I-43 have been identified in the City of Delavan's Planned Land Use Map as having potential for planned mixed Use development. Lands to the north of Mound road have been identified as having potential for light industrial development. This will be discussed in more detail later in this report.

**LARGER PARCEL AND SUBJECT PROPERTY:** The "larger parcel" concept as used in eminent domain practice refers to the land that may be somehow involved or affected by the acquisition. It is the whole from which the acquisition area or acquired interest is the part. The three criteria for defining a larger parcel are: 1) continuity of ownership; 2) physical contiguity; and 3) continuity of use (present use or highest/best use).

Mr. and Mrs. Waller own a total of 1.509 acres in a single tax parcel, used as their residence. This is a triangular parcel located northwest of I-43 and south of Mound Road. The Wallers do not own any other land within the subject's general area. This parcel has therefore been defined as the "larger parcel" for purposes of this report.

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**LEGAL DESCRIPTION:** The parcel of land located in the North ½ of the Northeast ¼ of Section 16, T2N, R16E, Walworth County, Wisconsin, described as follows:

Commencing at the North ¼ corner of said Section 16, thence N 88° 29' 50" E along the North line of said N ½ of the NE ¼, 561.00 feet to the Northeast corner of the East 63 acres of said N ½ of the NE ¼, as shown by the existing fence line and the place of beginning, thence continue N 88° 29' 50" E along the North line of said N ½ of the NE ¼ 291.50 feet, thence S 1° 30' 10" E 33.00 feet to the Northwestern line of relocated State Trunk Highway No. 15, thence S 35° 30' 34" W along said Northwestern line 482.30 feet to the Westerly line of the aforementioned East 63 acres of said N ½ of the NE ¼ as fenced, thence N 1° 39' 58" W 418.08 feet to the place of beginning.

Said lands comprise approximately 1.509 acres. There is no survey of this land that we are aware of. The total acreage has been determined by using tax records and scaling distances on maps.

**ASSESSMENT & TAX DATA:**

**Tax Year 2006**

<u>Parcel ID</u>	<u>Land Assessment</u>	<u>Improvements Assessment</u>	<u>Total Assessment</u>
FD 1600001C	\$29,300	\$55,000	\$84,300

**SCOPE OF INSPECTION:** John Rolling met with Scott Waller and inspected the property with him. John Rolling inspected the grounds, the site improvements and the interior of the dwelling. He did not inspect the interior of the sheds on the property. Michael Robertson has performed an exterior inspection of the property from Mound Road. John Rolling and Michael Robertson took photographs of the property.

**SALES HISTORY:** The Wallers acquired the subject property on 8-15-1989 from Harry and Diane Hansen and have occupied the property since then. There have been no sales since 1989 and the subject has not been listed for sale.

**LAND:** The land which we have defined as the "larger parcel" earlier in this report is a triangular-shaped parcel, bounded on the North by Mound Road and by I-43 on the Southeast. The Westerly property line is 291.50' from the northeast corner where Mound Road and I-43 effectively meet. Topography is fairly level. Predominant soils are Plano, McHenry and St. Charles silt loams—all considered generally suitable for construction.

Cover is lawn with and landscaping. Cover is generally open.

**BUILDING IMPROVEMENTS:** The subject property is improved with a 2-story house and three (3) outbuildings. The main portion of the subject house appears to be in excess of 100 years old, with multiple additions of younger vintage. The floorplan of the house is comprised of 1080 sf on the 1<sup>st</sup> floor and 280 sf on the 2<sup>nd</sup> floor. There are two bedrooms on the 1<sup>st</sup> floor and a 3<sup>rd</sup> bedroom comprising all of the 2<sup>nd</sup> floor. There is a single bathroom located on the 1<sup>st</sup> floor. The exterior of the house appears to be asbestos slate tiles. The roofing appears to be asphalt shingle and was replaced in 1994. The furnace is FWA and was

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replaced in 1996. There did not appear to be ductwork extending up to the 2<sup>nd</sup> floor, so it is assumed that heat is simply “gravity-fed” to this level. The furnace is fed by LP from a tank located on the property.

**OTHER IMPROVEMENTS:** There are three (3) outbuildings located behind the house from Mound Road. The largest outbuilding is 240 sf with red wood siding and a concrete floor. The medium-sized outbuilding is 8’ x 16’ totaling 128 sf and has blue wood siding. The smaller outbuilding is oldest, comprising of unpainted wood siding. It is 10’ x 10’ square. All of the outbuildings have good utility.

The subject is also improved with a well and a mound septic system. There is a chainlink fence line running along the border between I-43 and the subject property. There is also a gravel driveway into the property from Mound Road.

The subject property has both above average and mature landscaping which includes several fruit bearing trees located within the proposed easements strips.

**ZONING:** The subject is under the jurisdiction of the Town of Delavan and this property is zoned A-1, according to Walworth County records. Land zoned A-1 in Walworth County is considered prime agricultural land. A-1 zoning allows one dwelling unit per 35 acres in Walworth County. As the subject’s size is only 1.5 acres, this is a non-conforming parcel.

The subject is bounded by lands within Delavan city limits. The subject could be easily annexed into the City upon the owner’s request. It should be noted that the City of Delavan’s “Planned Land Use Map” shows the subject property to be located in an area identified as “manufacturing use”. A copy of that map is contained in the exhibit section of this report.

**EXISTING EASEMENTS:** None known or obvious.

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## ANALYSIS AND CONCLUSIONS

**HIGHEST AND BEST USE:** A property's highest and best use is that use or range of uses that is/are legally permissible, physically possible, financially feasible and which produce(s) the highest net return on investment. Highest and best use may or may not be the property's current use. Also, the highest and best use of the "land as if vacant" may not be the same as the highest and best use "as improved". This is exactly the scenario we find ourselves in with the subject property.

### As If a Vacant Site

The subject property is currently zoned A-1 agriculture and is in residential use – which is permitted under this ordinance. The physical characteristics of the site are suitable for this residential use.

However, while much of the land in this general neighborhood had been in agricultural use up until recently, the prime area to the north of Mound Road – directly across from the subject site – has recently been annexed by the city and added to the industrial park that extends south and west of the subject. This shift in surroundings creates some short-term pressures on the property which will impact its highest-and-best use. Note also the difference in use between the City of Delavan's Existing Land Use Map, which shows the subject site as a lonely plot of residential use between light manufacturing and rural / agricultural uses – and the Planned Land Use Map, which envisions the subject site as being part of a light manufacturing area. While the subject site is still considered part of the Delavan Township, its location in the path of growth and its isolation against the I-43 overpass suggest that it is likely to be annexed in the short term.

If the subject can be considered "transitional" from agriculture to light industrial uses, there remains the question of how soon the subject might become ready for development. At this time, the subject remains outside the urban service district, while the property to its immediate west is part of the City of Delavan. Water and sewer are not on the subject but are available at Mound Road. Extension of these services onto the subject would be eminently feasible. These factors, coupled with the intense development of the land north of Mound Road, suggest that the subject's site is transitioning from residential to industrial.

### As Improved

The next question in highest and best use analysis is the extent to which the improvements continue to add value over and above land value. Improvements typically account for most of the overall value where these are consistent with highest and best use of the land. Improvements add no value where the value of the site "as if" in its highest and best use is higher than value of the improved property as measured by other improved properties on more suitable sites. An "interim use" condition pertains where the highest and best use of the land is clearly changing (as in our subject's case) but where improvements continue to add at least some, though gradually diminishing, value. An interim situation continues until: a) the land value increases; and/or b) improvements continue to depreciate. At the balance point, demolition of the improvements and redevelopment of the site is indicated.

The subject's improvements are well over 100 years old. While in above-average condition for their age, these improvements exhibit significant functional obsolescence—add-on construction, one bathroom located on the ground floor only, gravity heat to the second floor. Still, the house, outbuildings and site

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improvements do furnish acceptable utility to the residential user. Our review of comparable sales suggests that there are buyers in the local market for this type of property.

### Overall Conclusion of Highest and Best Use

Our analysis, involving a comparison of land values for vacant industrial sites vs. values for similar improved residential properties, leads us to believe that in the before condition, the improved residential use may be an interim use, but that the improvements do continue to add value over that of the land as if vacant.

## VALUATION

**APPROACHES TO VALUE:** The three traditional approaches to value are summarized below:

**SALES COMPARISON APPROACH:** In this method the appraiser obtains from the market place a number of sales of property comparable to the subject. The appraiser then verifies the terms and conditions of sale and the sales price of properties with a party to the transaction. After analysis and adjustment, these sales are utilized to arrive at a range of value for the subject. It is from within this range that the appraiser arrives at a value for the subject property. When comparable sales are available, the market approach is considered to be the best indicator of value because it represents the actions of buyers and sellers in the marketplace.

**COST APPROACH:** In some instances an appraiser may use this approach to arrive at a value for the improvements on the subject property. In this approach the appraiser utilizes current costs of reproduction or replacement for the improvements. Depreciation is applied to this price to arrive at an in-place value for the subject improvements. The value of the land is then added from the market approach.

**INCOME APPROACH:** This approach uses the assumption that there is a relationship between the amount of income a property will earn and the future value of that property. The appraiser uses the anticipated net income of the subject and processes it into a value for the subject. This process uses a capitalization rate including such factors as risk, time and interest on the capital investment and recapture of the depreciating asset.

**THE APPRAISAL PROBLEM:** In the case of an easement taking, Wisconsin law requires that just compensation be based on the difference in the property's value "before" and "after" the acquisition of the easement.

In the before condition, the subject is an improved residential property. It is necessary to value the property overall but also to value the land as if vacant. The sales comparison approach to value is normally considered the best approach for valuing older improved residences and it is also the best approach when valuing land. In the after condition, we are valuing land only.

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The cost approach was not used. It has limited applicability for the residential property given the age of the improvements and it does not apply to vacant land. The income approach is not useful since the subject is an owner-occupied residence, and this has limited usefulness for land valuation, generally in situations where land is leased—not the case in the subject’s market.

**IMPROVED RESIDENTIAL SALES:** We used three recent sales of residential properties purchased during 2007 as indicative of the subject property’s current residential value. Detailed sale data sheets for each sale can be found in the “Exhibits” section located in the rear of this report. An adjustment grid which reflects the various residential factors considered by the market is located on the following page.

**SALES COMPARISON:** In order to arrive at an estimated range of value for the subject property the following comparison between the subject and sale is used. In this columnar grid the sales are compared to the subject. When the subject is superior to the sale in a given area a plus (+) adjustment is used in the grid. Conversely, when the subject is inferior to the sale in a given area, a minus (-) adjustment is used.

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**SALES COMPARISON GRID**

	Subject Property	Comp #1	ADJUSTMENTS	Comp #2	ADJUSTMENTS	Comp #3	ADJUSTMENTS
Address	6249 Mound Road Delavan, WI	W9653 Clinton St. Darien, WI 5 miles		1416 Blodgett Lane Delavan, WI 2 miles		2604 S. Hwy O Delavan, WI 3 miles	
Proximity				\$137,900 7/27/2007		\$149,000 9/21/2007	
Sales Price		\$142,000 2/8/2007					
Date of Sale	11/16/2007						
Location	Suburban	Suburban	equal	Urban	equal	Suburban	equal
Site Size	1.509 ac.	1.20 ac.	equal	.5 ac. +/-	\$27,600	.5 ac. +/-	\$30,000
View	Highway, Industrial	Average	-\$7,000	Good	-\$7,000	Average	-\$7,500
Design & Appeal	2-story w/ additions	1.5 story	equal	2-story	equal	Bi-Level	equal
Age	100 yrs. +	Newer	-\$7,000	Newer	-\$7,000	15 years +/-	-\$15,000
Condition	in=avg. / out=fair	in=avg. / out=fair	equal	in=avg. / out=avg.	-\$14,000	in=avg. / out=avg.	-\$15,000
GLA	1360 sf	1400 sf +/-	equal	1600 sf +/-	-\$5,000	1400 sf +/-	equal
Room Count	7.3.1	7.3.1	equal	7.4.1	equal	6.3.2	-\$2,500
Basement	Partial unfinished	Full unfinished	equal	Partial w/ out entry only	\$7,000	na	adj. above
Functional Utility	avg.	avg.	equal	avg.	equal	avg.	equal
Garage	none	3 car detached	-\$5,000	2 car attached	-\$3,500	none	equal
Porch / Patio / Deck	3 sm. Outbldgs.	shed	\$4,000	none	\$5,000	none	\$5,000
Landscaping	Mature & Varied	similar	equal	Mature & less	\$7,000	wooded lot	-\$7,500
City Utilities	well & septic	well & septic	equal	well & sewer	-\$7,000	well & sewer	-\$7,500
Net Adjustments			-15000		\$3,100		-\$20,000
Adjusted Sales Price			\$127,000		\$141,000		\$129,000

Final Value Estimate = \$130,000

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TIME ADJUSTMENT:

The dates of the improved sales used in this report range from February to September 2007. The dates of the industrial / development land sales (used later in this report occur through 2005 and 2006). During that earlier period and up to present, appreciation in land values had outpaced general inflation, say at about 8% per year. Since early 2007, however, the real estate market has slowed significantly, showing flattening prices. With few transactions taking place, it is difficult to measure changes in property values either positive or negative. We are calling the appreciation rate for 2007 at 0% and applying this rate to sales within 2007. For older sales used, we are using an average of a 8% rate to adjust older sales prices up to January 1<sup>st</sup> of 2007.

LOCATION:

The subject lies in an area that has been evolving into light industrial uses over the past decade and this evolution appears to be accelerating. The subject neighborhood is also been in an area that can be characterized as a fringe neighborhood – caught between the City of Delavan and Township influences. The comparables were selected due to their exposure to these factors. Comparable #1 is a 1.2 acre residential property located southwest of Darien. It is exposed to this fringe factor to a somewhat lesser degree, but is also exposed to commercial activity across the street. Comparable #3 is located south of Delavan in a mixed use neighborhood.

SITE SIZE:

The principle of diminishing returns holds that the greater the number of units, the lower the unit price. Sale 1 is not much smaller than the subject, so needs no adjustment. The other sales are considerably smaller parcels and are adjusted + accordingly.

URBAN SERVICES:

The subject has not yet been annexed into the City of Delevan and has not been added to the urban service district. Annexation and the provision of services are prime determinants of timeline to development. Sale #1, like the subject has both a well and septic system. Sale #2 has a well but is connected to public sewer. Sale #3 also has a well and is connected to public sewer.

VIEW AMENITY:

The residential use here suggests that a residential view amenity would be more highly valued than one influenced by commercial / industrial neighbors. In this case the subject's surroundings – the industrial park west of the subject and its addition now going in across Mound Road as well as the influence from the I-43 overpass indicate negative adjustments to the comparables, which have more residential surroundings.

AGE & CONDITION:

The subject house is in excess of 100 years old in its original structure with multiple later additions added to it over time. While this complicates assigning a single age to a property, factoring in condition of the improvements helps us make comparisons to other sales. The interior of the subject was well maintained and deemed in above-average condition for its overall age – as were the comparables. The subject's exterior condition was deemed to be in below average condition and thus inferior to the comparables.

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OUTBUILDINGS:

The subject property has three (3) outbuildings of various sizes. One of them – the red wood-sided, small barn is in good condition. As a group these outbuildings were deemed to contribute \$5,000 in value to the overall value of the improvements.

**ADDITIONAL MARKET EVIDENCE CONSIDERED:** The three sales discussed above are considered the best indicators of value for the subject. We did, however, give some consideration to other local sales involving residential properties. One in particular commands our attention.

- 815 Michigan Street, Delavan, WI was sold for \$100,000 on 9-28-2007. This property is within the city service district and thus has public water and sewer. This property is located adjacent to a commercial district within the city and is exposed to similar traffic and other influences as the subject. This property sold for a considerable discount from its listing price of \$124,900 – having been listed for about one month. This discount is due in part to poor condition as well as location.

**CONCLUSION OF VALUE BEFORE ACQUISITION**

The sales, after the adjustments have been applied, range in value from \$127,000 to \$141,000. It is our opinion, based on our analysis of the sales, that the before value of the subject property is \$130,000 for the residential improvements.

**Improved Residential Property = \$130,000**

**ALLOCATION OF VALUE – LAND & IMPROVEMENTS**

Given the differing highest and best uses we have with this property, we thought it best to consider value of the land and value of the improved land as separate problems. Part of the solution to these problems is an allocation of the value between land and improvements. To do this we must consider the value of the land as if vacant.

In order to arrive at an estimated range of value for the subject property’s land, we considered two sales and a nearby listing as the best market evidence of land value. The two sales were time adjusted by 8% to January 1<sup>st</sup>. The 3<sup>rd</sup> – a listing – was not time adjusted. The following comparisons between the subject and sale are used. Other sales were reviewed, but the amount and number of adjustments required limited their value as comparables. They do however suggest that these three properties are the most similar and well within the overall range of value indicated.

The 1<sup>st</sup> sale considered is located on Bauer Parkway (Tax ID #XAY 00002). It is southwest of the subject by about 2 miles, located off of Geneva Street. It is slightly less than an acre in size and the area is

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predominantly commercial in uses. This location is considered superior to the subject and its smaller size requires an upward adjustment. The net adjusted price-per-square-foot is \$2.01 – say \$2.00 even.

The 2<sup>nd</sup> sale is located on Walworth Street in the village of Darien, which is located 3 miles southwest of Delavan and 5 ½ miles from the subject property. This comparable is just over twice the size of the subject, which requires an upward adjust. This comparable is also located in a growing commercial / industrial area, very similar to the subject. The net adjusted price-per-square-foot is \$.99 – say \$1.00 even.

The 3<sup>rd</sup> comparable is a listing located on Hobbs Drive in Delavan very near the subject property's location on Mound Road. This parcel is 9.88 acres and thus requires a large upward adjustment for size. Given that this is a listing rather than a closed sale and closing prices generally are struck below listing prices, we would apply a 10% downward adjustment for this. The resulting adjusted net price-per-square-foot is then \$1.12 – say \$1.10.

In reconciling these three market samples the most weight has been given to comparable #2 and the second most weight to comparable #3. Comparable #1 adds support due to its similar size and location in a competing business park in Delavan. When considering the sales and the listing, the suggested price-per-square-foot for land in this commercial / light industrial area is \$1.15 pre square foot or say \$50,000 per acre. The subject parcel is 1.509 acres. The subject parcel's value is therefore estimated at \$75,450 – or say \$75,500 rounded.

The land value allocation then is detailed in the chart below:

Total Value of Property	\$130,000
Value of Land	\$ 75,500
Value of Improvements	\$ 54,500

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## AFTER CONDITION ANALYSIS

**RIGHTS TO BE ACQUIRED:** ATC proposes to acquire overhead electric transmission easements over and across that part of the subject's north boundary lying along Mound Road and also down the southwest boundary lying contiguous to the I-43 right-of-way. Easement Area A's length is estimated at 291.5' and the width of the easement is 45', so total easement area is estimated at 13,117.5 square feet or 0.301 acres. Easement Area B is a distance estimated at 482.3' and a width of the easement is 45', so the total easement area is estimated at 21,703.5 square feet or .498 acres. The combined easement area is estimated at 34,821 square feet or .799 acres.

Language taken from the proposed easements describing the terms of the easements is as follows:

The Grantee is also granted the associated necessary rights to:

- 1) Enter upon the easement strip for the purposes of exercising the rights conferred by this easement.
- 2) Construct, install, operate, maintain, repair, replace, rebuild, remove, relocate, inspect and patrol the above described facilities and other appurtenances that the Grantee deems necessary.
- 3) Trim, cut down and remove any or all brush, trees and overhanging branches now or hereafter existing on said easement strip.
- 4) Cut down and remove such trees now or hereafter existing on the property of the Landowner located outside of said easement strip which by falling might interfere with or endanger said line(s), together with the right, permission and authority to enter in a reasonable manner upon the property of the Landowner adjacent to said easement strip for such purpose.

The Grantee shall pay a reasonable sum for all damages to property, crops, fences, livestock, lawns, roads, fields and field tile (other than trees trimmed or cut down and removed), caused by the construction, maintenance, replacement or removal of said facilities.

Landowner, for itself, its successors and assigns, agrees that it will not locate any dwelling or mobile home intended for residential occupancy within the limits of the easement strip. Landowner, for itself, its successors and assigns, further agrees that within the limits of the easement strip it will not construct, install or erect any structures or fixtures, including but not limited to swimming pools, construct any non-residential type buildings or store any inflammable goods or products, plant trees or shrubs, place water, sewer or drainage facilities, or change the grade more than one (1) foot without first securing the prior written consent of the Grantee.

A copy of the complete easement is attached hereto.

There will be one pole situated upon the subject property, to be located at the subject's northeast corner. This pole will not exceed 100 feet in height above the ground. The pole will support a 138kV electrical transmission line configuration that is comprised of three conductor wires and one static wire. The pole will also support the local electrical distribution lines (underbuild).

The land within the proposed easement area is considered landscaped yard. There are assorted fruit trees and shrubbery growing up on the property boundaries within the proposed easement areas. In

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the after condition (once the easement and the transmission line facility is in place) American Transmission Company will have the right to remove the existing trees and bushes and to keep the easement area free of said growth. The land contained within the easement strip can still be used by the land owner in a way that is consistent with the terms of the easement.

**OWNER'S CONCERNS:** The Wallers particularly regret the loss of landscaping here. Several mature deciduous trees will be lost, including one maple toward the northwest corner, two more maples along the east boundary line plus about 11 sizeable trees toward the northeast corner. There are several fruit trees that lie within the eastern easement strip that have heights approaching the maximum 20' height permitted under the easement—these are likely to be lost soon, if not immediately. There is also a clump of lilac trees that may be in jeopardy within a few years.

**JUDGEMENT OF EASEMENT EFFECTS:** We have analyzed the effect of the easement and the property rights of both the easement holder and the underlying property owner. The parties will have distinct rights to utilize the real estate within the easement strips. The utility will have an easement, enabling them to keep the easement strips void of any objects or growths that would interfere with the transmission line. The property owner will have the surface rights essentially to utilize the easement strips for low landscaping and other uses consistent with the terms of the ATC easements.

We believe there will be an immediate negative effect on residential appeal. Over one half of the property will be under easement. The subject will have major transmission lines along two of its three sides. The transmission lines will be within 60' of the house. A substantial part of the landscaping will have been lost. Our before analysis suggested a property which was already in transition from improved residential use to vacant industrial lot use. We believe the installation of the transmission line pole and the lines themselves brings this property to the tipping point from residential appeal toward light industrial appeal. It is more likely that the next buyer of this property will be an industrial developer rather than a residential user. We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land.

Now we need to consider the impacts of the easement(s) on the utility of the industrial land itself. As to buildable area, we note that the east side of the property, adjacent to I-43, is already under building setbacks for a 50' width per WisDOT regulations. The electric transmission line's 45'-wide easement strip sets no additional constraint with respect to structures but it does set some constraints regarding landscaping or yard lighting. The normal street setback on the north or Mound Road line is 25', so the 45' easement does create additional building constraints as well as landscape and lighting constraints. Parking, storage and low greenspace uses would be permitted within both easement strips.

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## VALUE AFTER ACQUISITION

We estimate the diminution in value to the property owner of the land in the easement strip to be 50% of its fee value. We conclude no damages to land outside the easement area. There is no value to the improvements.

### CONCLUSION OF VACANT LAND VALUE - AFTER ACQUISITION

Unencumbered Land	0.710 Acres @ \$50,000/acre	=	\$ 35,500
ATC HVTL Easement A	0.498 Acres @ \$25,000/Acre	=	\$ 12,450
ATC HVTL Easement B	0.301 Acres @ \$25,000/Acre	=	<u>\$ 7,525</u>
Total After Value			\$ 55,475
Rounded To			\$ 55,500

### TOTAL DAMAGES

BEFORE PROPERTY VALUE	\$130,000
AFTER LAND VALUE	\$ 55,500
LOSS IN PROPERTY VALUE	\$ 74,500
TOTAL DAMAGES	\$ 74,500

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PROJECT:  
Delavan – Darien Electric Reliability Project

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PARCEL  
Scott & Lynnea Waller  
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QUALIFICATIONS OF THE APPRAISER

**JOHN D. ROLLING, Ph.D.**

Rolling & Co. LLC  
Real Estate Appraisals and Consulting  
222 N. Midvale Boulevard, Suite 26  
Madison, WI 53705  
(608) 231-2120 FAX: 231-2155

APPRAISAL EXPERTISE

Experience includes fee appraisal and review assignments in commercial, residential, and agricultural property. Areas of special expertise are partial interests and public acquisitions.

EMPLOYMENT HISTORY

1998-Present	Director of Appraisals. ACSG Inc., Naperville, IL (concurrent)
1997-Present	Principal. Rolling & Co. LLC Madison, WI.
1994-1997	Independent Fee Appraiser d/b/a J. D. Rolling Appraisals. Madison, WI.
1990-1994	Senior Appraiser. Perion & Associates Inc. Madison, WI.
1984-1990	Chief Appraiser. Verex Assurance Inc. Madison, WI.
1981-1984	Appraiser/Consultant. The Alexander Company. Madison, WI.

LICENSES & CERTIFICATIONS

Wisconsin Certified General Appraiser #127  
Iowa General Real Property Appraiser, Certificate #CGO2027  
Minnesota Certified General Real Property Appraiser #20195203

MEMBERSHIPS

Senior Member (SR/WA) International Right-of-Way Association  
(IRWA Wisconsin Chapter Professional of the Year 2004)  
National Association of Realtors  
American Society of Farm Managers & Rural Appraisers (candidate)

TEACHING CREDENTIALS

Active Instructor for IRWA Appraisal Courses 401,403  
Appraisal Qualifications Board Certified Instructor for Uniform Standards of Professional Appraisal Practice Courses  
Instructor, Madison Area Technical College

EDUCATION

College Degrees	Ph.D. University of Wisconsin-Madison, 1979 M.A. University of Wisconsin-Madison, 1974 B.A. Wayne State University, 1972
Appraisal Courses & Seminars	Numerous courses and seminars through International Right of Way Association, Society of Real Estate Appraisers and Appraisal Institute, National Highway Institute, University of Wisconsin Center for Urban Land Economics Research, etc. since 1981.

PARTIAL LIST OF CLIENTS

Wisconsin Department of Transportation  
Wisconsin Department of Natural Resources  
Wisconsin Department of Justice

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PROJECT:  
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Cities of Madison, Wausau, Janesville, Beloit, Sun Prairie.  
Counties of Dane, Marathon, Fond du Lac  
American Transmission Company

**MICHAEL J. ROBERTSON, CMB**

**QUALIFICATIONS**

**EXPERIENCE**

1999 - 2007: Sales Manager for Wells Fargo Wholesale Mortgage Lending branch office located in Madison, WI. Directed sales and operations within this location and the sales effort in the Minneapolis, MN territory.

1991 - 1999: Partner / Fee Appraiser with Robertson, Rolling & Co. headquartered in Madison, WI with a state-wide service area. Expertise in residential, commercial and agricultural properties – with emphasis in partial interests and public acquisitions.

**TEACHING CREDENTIALS**

2007: Instructor for Madison Area Technical College R/E Appraisal I Course

**EDUCATION**

University of Wisconsin - Oshkosh, WI – 1979

B.S. - Economics

University of Wisconsin - Madison, WI

Real Estate 415 – Valuation of Real Estate

The Appraisal Institute

Course 101 – Principles of the Appraisal of Real Property

Course 102 – Applied Residential Valuation

Course 201 – Income Valuation Principles

Course – USPAP

Seminar – Scope of Work

Seminar – Appraisal Consulting

Seminar – Discounted Cash-Flow Analysis

Seminar – Appraisal Report Writing

International Right-of-Way Association

Course 401 – Appraisal of Partial Acquisitions

**PROFESSIONAL AFFILIATION AND LICENSURE**

Certified Residential Appraiser – WI (#336)

Certified Mortgage Banker (CMB)

Member of International Right-of-Way Association

**Rolling & Co.**

*PROJECT:*

Delavan – Darien Electric Reliability Project

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*PARCEL*

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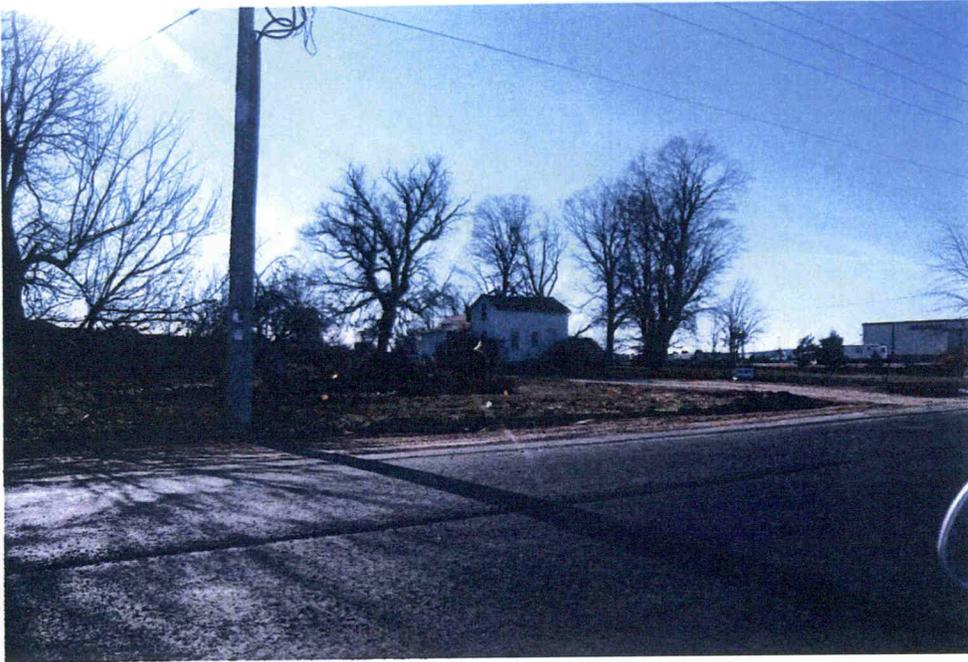
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*PROJECT:*  
Delavan – Darien Electric Reliability Project

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**SUBJECT PHOTOS**



Subject from NE corner toward SW.



House Front View.

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*PROJECT:*  
Delavan – Darien Electric Reliability Project

*PAGE 1*

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Scott & Lynnea Waller

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**SUBJECT PHOTOS**



View from Mound Road toward SE.



From NW corner toward SE.

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PAGE 2

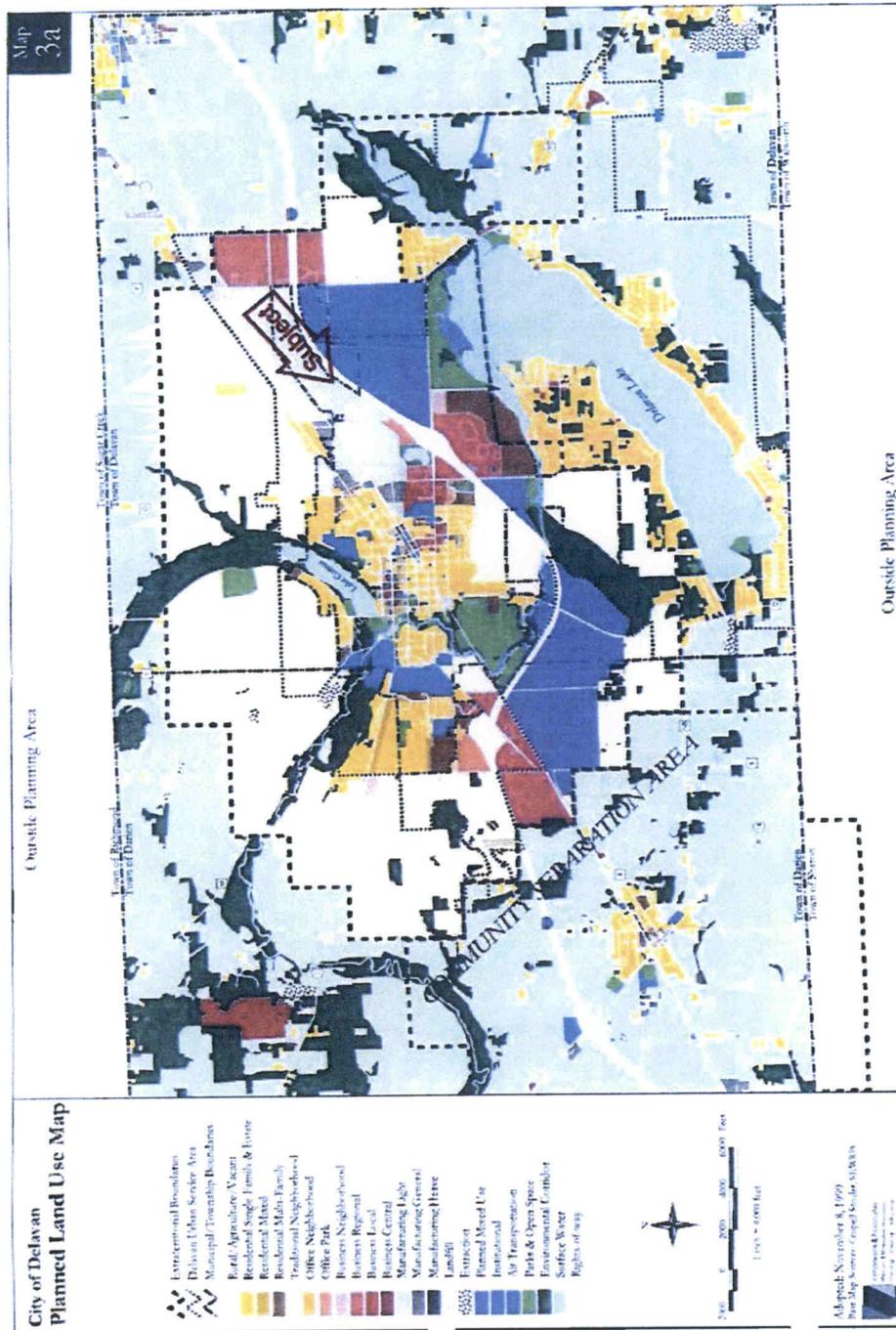
PROJECT:  
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Scott & Lynnea Waller

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# LAND USE PLAN



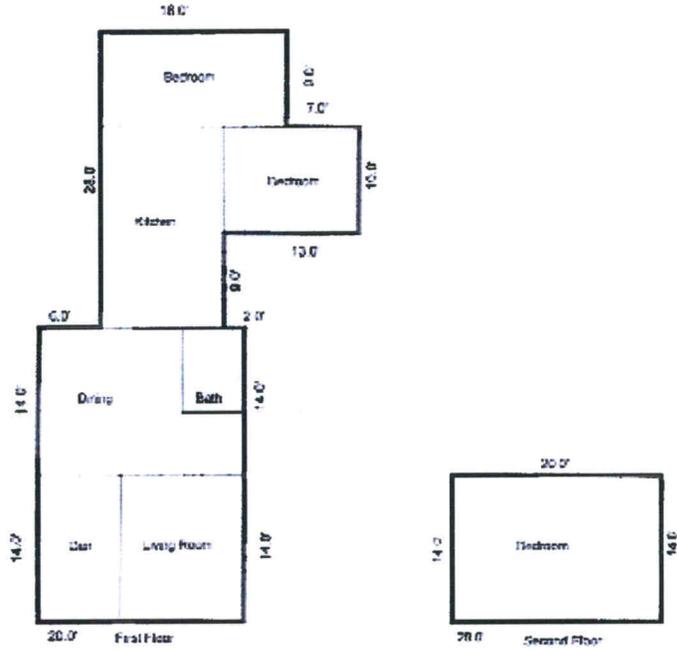
## Rolling & Co.

PAGE 4

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Scott & Lynnea Waller

# FLOOR PLAN



AREA CALCULATIONS SUMMARY			
Code	Description	Net Size	Net Totals
GLAL	First Floor	1080.0	
	Second Floor	280.0	1360.0
Net LIVABLE Area		(Rounded)	1360

LIVING AREA BREAKDOWN		
	Breakdown	Subtotals
First Floor		
	10.0 x 25.0	250.0
	9.0 x 18.0	162.0
	9.0 x 12.0	108.0
	14.0 x 20.0	280.0
	14.0 x 20.0	280.0
Second Floor		
	14.0 x 20.0	280.0
6 Items		(Rounded) 1360

4 Co.

AREA SOFTWARE 800-856-0658

Apr 11 2010 10:49:02

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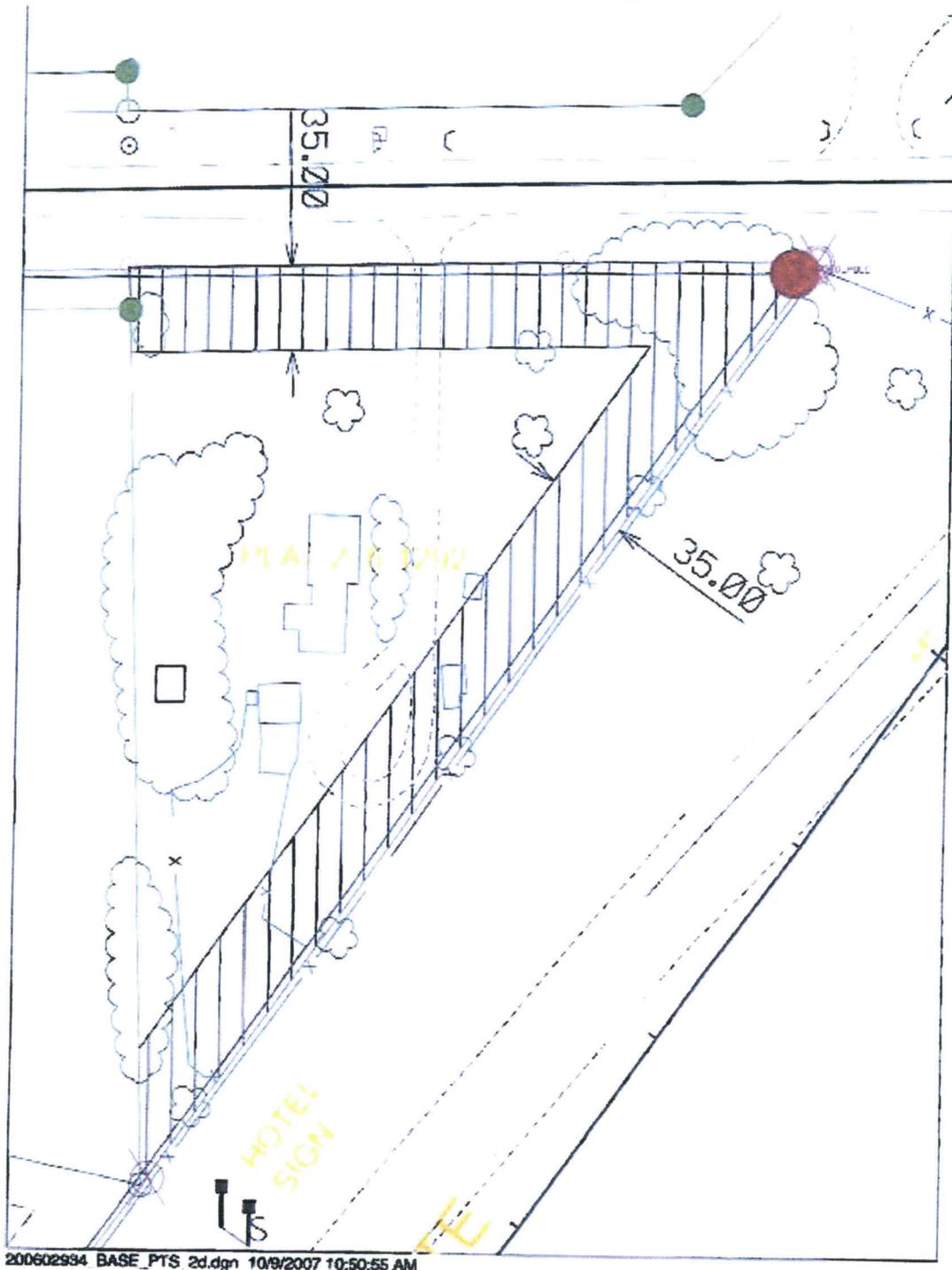
PAGE 5

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Scott & Lynnea Waller



**EASEMENT SKETCH**



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**PROJECT:**  
Delavan – Darien Electric Reliability Project

PAGE 7

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Scott & Lynnea Waller

Document Number

**ELECTRIC TRANSMISSION LINE EASEMENT  
CERTIFICATE OF COMPENSATION  
NOTICE OF RIGHT OF APPEAL  
Wis. Stat. Sec. 182.017(7)**

The undersigned Grantor(s) **Scott N. Waller and Lynnea S. Waller** (hereinafter called the "Landowner"), in consideration of the sum of one dollar (\$1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, does hereby grant, convey and warrant unto **American Transmission Company LLC**, a Wisconsin limited liability company, (hereinafter called the "Grantee"), its successors, assigns, licensees and manager, the perpetual right and easement to construct, install, operate, maintain, repair, replace, rebuild, remove, relocate, inspect and patrol a line of structures, comprised of wood, concrete, steel or of such material as Grantee may select, and wires, including associated appurtenances for the transmission of electric current, communication facilities and signals appurtenant thereto, upon, in, over and across property owned by the Landowner in the City of Delavan, County of Walworth, State of Wisconsin, described as follows:

Record this document with the Register of Deeds

A parcel of land located in the North One-half (N1/2) of the Northeast Quarter (NE1/4) of Section 16, Township 2 North, Range 16 East, Walworth County, Wisconsin, described as follows:

Name and Return Address:  
**American Transmission Company LLC  
Attn: Real Estate Department  
2 Fen Oak Court  
Madison, WI 53818-8310**

Commencing at the North 1/4 corner of said Section 16, thence N 88° 29' 50" E along the North line of said N 1/2 of the NE 1/4, 561.00 feet to the Northwest corner of the East 63 acres of said N 1/2 of the NE 1/4, as shown by the existing fence line and the place of beginning, thence continue N 88° 29' 50" E along the North line of said N 1/2 of the NE 1/4 291.50 feet, thence S 1° 30' 10" E 33.00 feet to the Northwest line of relocated State Trunk Highway No. 15, thence S 35° 30' 34" W along said Northwest line 482.30 feet to the West line of the aforementioned East 63 acres of said N 1/2 of the NE 1/4 as fenced, thence N 1° 39' 58" W 418.08 feet to the place of beginning.

Parcel Identification Number(s)  
FD 1600001C

The Landowner grants two easement areas, described as follows:

**Easement Area A:** The Easterly 45 feet of the above described parcel, adjacent and contiguous to the Westly right-of-way margin of Interstate Highway 43, as highway now exists.

**Easement Area B:** The North 45 feet of the above described parcel.

The easement has the following specifications:

**EASEMENT STRIP:**

Length - 773.80 feet

Width - 45 feet

**TRANSMISSION STRUCTURES:**

Type - Steel Pole

Number - Two

Maximum height above existing ground level - 100 feet

**TRANSMISSION LINES:**

Maximum nominal voltage - 138 kV

Number of circuits - One

Number of conductors - Three

Number of static wires - One

Minimum height above existing landscape (ground level) 20.5 feet

**Distribution Facilities:**

The right, permission and authority is also granted to Grantee to construct, operate, maintain and replace other electric lines (pertaining to electrical "distribution" current) consisting of wires and cables on said transmission line structure(s) and additional poles, crossarms, transformers and other equipment appurtenant thereto, upon, over, across, under and within said easement strip.

The Grantee is also granted the associated necessary rights to:

- 1) Enter upon the easement strip for the purposes of exercising the rights conferred by this easement.
- 2) Construct, install, operate, maintain, repair, replace, rebuild, remove, relocate, inspect and patrol the above described facilities and other appurtenances that the Grantee deems necessary.
- 3) Trim, cut down and remove any or all brush, trees and overhanging branches now or hereafter existing on said easement strip.
- 4) Cut down and remove such trees now or hereafter existing on the property of the Landowner located outside of said easement strip which by falling might interfere with or endanger said line(s), together with the right, permission

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PROJECT:

Delavan - Darien Electric Reliability Project

PARCEL

Scott & Lynnea Waller

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and authority to enter in a reasonable manner upon the property of the Landowner adjacent to said easement strip for such purpose.

The Grantee shall pay a reasonable sum for all damages to property, crops, fences, livestock, lawns, roads, fields and field tile (other than trees trimmed or cut down and removed), caused by the construction, maintenance, replacement or removal of said facilities.

Landowner, for itself, its successors and assigns, agrees that it will not locate any dwelling or mobile home intended for residential occupancy within the limits of the easement strip. Landowner, for itself, its successors and assigns, further agrees that within the limits of the easement strip it will not construct, install or erect any structures or fixtures, including but not limited to swimming pools, construct any non-residential type buildings or store any inflammable goods or products, plant trees or shrubs, place water, sewer or drainage facilities, or change the grade more than one (1) foot without first securing the prior written consent of the Grantee.

The parties hereto do hereby agree to the terms and conditions set forth in Exhibit "A", "B" and "C", attached hereto and incorporated herein. The term "utility" on said Exhibit "A" shall mean Grantee.

This agreement is binding upon the heirs, successors and assigns of the parties hereto, and shall run with the lands described herein.

As provided by PSC 113, the Landowner shall have a minimum period of five days to examine materials approved or provided by the Public Service Commission of Wisconsin describing the Landowner's rights and options in the easement negotiating process. The Landowner hereby voluntarily waives the five-day review period, or acknowledges that they have had at least five (5) days to review such materials.

Landowner warrants and represents that Landowner has good title to the property described herein, free and clear from all liens and encumbrances, except: a mortgage to AnchorBank, fsb dated July 15, 2003 and recorded in the office of the Register of Deeds for Walworth County, Wisconsin on July 25, 2003 as Document No. 567179 and a mortgage to AnchorBank,fsb dated April 9, 2004 and recorded in the office of the Register of Deeds for Walworth County, Wisconsin on April 19, 2004 as Document No. 599989.

The Landowner hereby accepts a lump sum payment in consideration of the grant of this easement.

WITNESS the signature(s) of the Landowner this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_(SEAL)  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_(SEAL)  
Scott N. Waller

\_\_\_\_\_(SEAL)  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_(SEAL)  
Lynnea S. Waller

Landowner

**ACKNOWLEDGEMENT**

STATE OF WISCONSIN     )  
  ) 55  
COUNTY OF WALWORTH    )

Personally came before me this \_\_\_\_\_ day of \_\_\_\_\_, 2007, the above named Scott N. Waller and Lynnea S. Waller to me known to be the person(s) who executed the foregoing instrument and acknowledged the same.

\_\_\_\_\_  
Signature of Notary

\_\_\_\_\_  
Printed Name of Notary

Notary Public, State of Wisconsin

My Commission expires (is) \_\_\_\_\_

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PROJECT:  
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PARCEL  
Scott & Lynnea Waller

App. 110

**EXHIBIT "A"**  
**[WI Sta. 182.017(7)]**

In constructing and maintaining high-voltage transmission lines on the property covered by the easement, the utility shall:

- a) If excavation is necessary, ensure that the topsoil is stripped, piled and replaced upon completion of the operation.
- b) Restore to its original condition any slope, terrace, or waterway, which is disturbed by the construction or maintenance.
- c) Insofar as is practicable and when the landowner requests, schedule any construction work in an area used for agricultural production at times when the ground is frozen in order to prevent or reduce soil compaction.
- d) Clear all debris and remove all stones and rocks resulting from construction activity upon completion of construction.
- e) Satisfactorily repair to its original condition any fence damaged as a result of construction or maintenance operations. If cutting a fence is necessary, a temporary gate shall be installed. Any such gate shall be left in place at the landowner's request.
- f) Repair any drainage tile line within the easement damaged by such construction or maintenance.
- g) Pay for any crop damage caused by such construction or maintenance.
- h) Supply and install any necessary grounding of a landowner's fences, machinery or buildings.

The utility shall control weeds and brush around the transmission line facilities. No herbicidal chemicals may be used for weed and brush control without the express written consent of the landowner. If weed and brush control is undertaken by the landowner under an agreement with the utility, the landowner shall receive from the utility a reasonable amount for such services.

The Landowner shall be afforded a reasonable time prior to commencement of construction to harvest any trees located within the easement boundaries, and if the Landowner fails to do so, the Landowner shall nevertheless retain title to all trees cut by the utility.

The Landowner shall not be responsible for any injury to persons or property caused by the design, construction or upkeep of the high-voltage transmission lines or towers.

The utility shall employ all reasonable measures to ensure that the landowner's television and radio reception is not adversely affected by the high-voltage transmission lines.

The utility may not use any lands beyond the boundaries of the easement for any purpose, including ingress to and egress from the right-of-way, without the written consent of the landowner.

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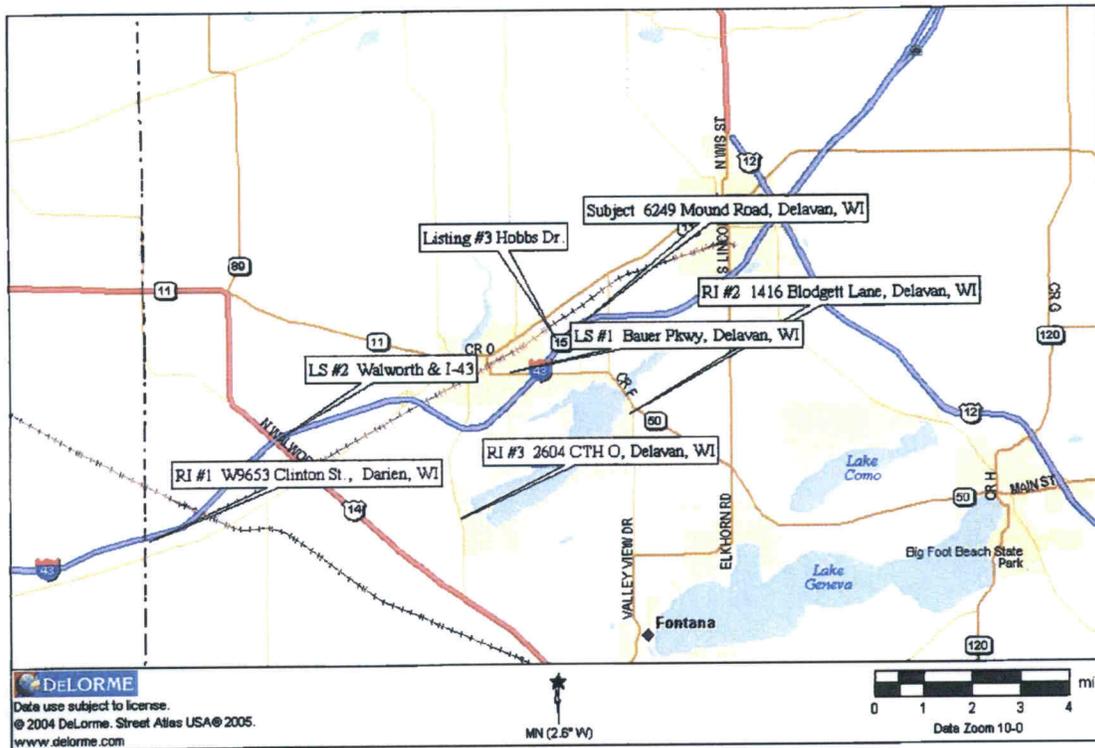
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Scott & Lynnea Waller

App. 111

# MAP OF COMPARABLE SALES



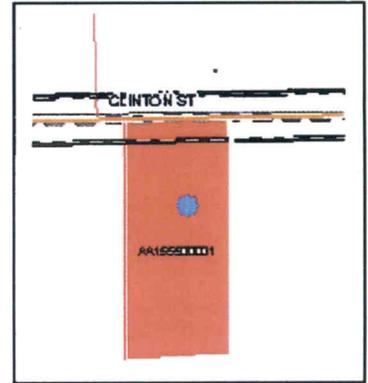
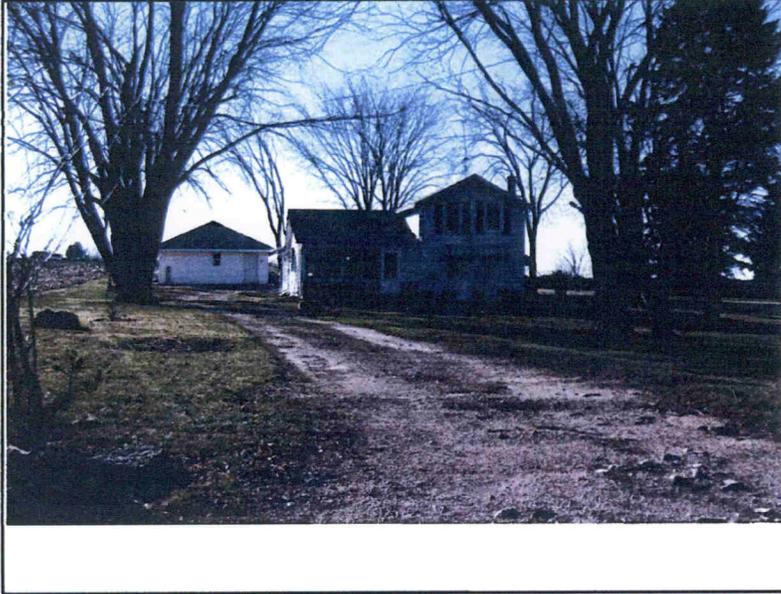
RI = Residential Improved  
 LS = Land Sales

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PROJECT:  
 Delavan – Darien Electric Reliability Project

PARCEL  
 Scott & Lynnea Waller



<b>PROPERTY TYPE:</b>	Residential
<b>LOCATION:</b>	W9653 Clinton St., Darien, WI 53114
<b>TAX ID:</b>	AA 155500001
<b>SALE DATE:</b>	2-8-2007
<b>SALE PRICE:</b>	\$142,000
<b>SELLER:</b>	George W. Kidd Trust
<b>BUYER:</b>	Loftus, Michael J. & Carmin, Karen J.
<b>CONVEYANCE:</b>	Deed
<b>DOCUMENT #:</b>	000700959
<b>SALE CONDITIONS:</b>	NA
<b>VERIFICATION:</b>	Verified by Mike Robertson from public records
<b>ZONING:</b>	A5
<b>PARCEL SIZE:</b>	1.20 acres
<b>IMPROVEMENTS:</b>	1.5 story house

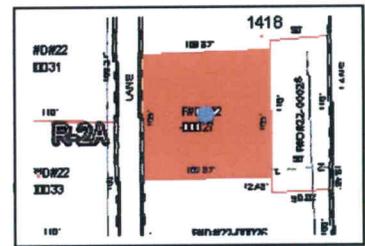
**COMMENTS:** This is a suburban / rural residential property located just outside of Darien, WI. The property has a 3-car detached garage and nice, mature landscaping. Private well and septic. Estimate age is 60-100 years. Estimated square footage is 1300-1500 SF.

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**PROJECT:**  
Delavan – Darien Electric Reliability Project

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**PARCEL**  
Scott & Lynnea Waller



**PROPERTY TYPE:** Residential  
**LOCATION:** 1416 Blodgett Lane Delavan, WI 53115  
**TAX ID:** FD2200027  
**SALE DATE:** 7-27-2007  
**SALE PRICE:** \$137,900  
**SELLER:** Bank of New York Trustee  
**BUYER:** Mahar, Patrick J.  
**CONVEYANCE:** Deed  
**DOCUMENT #:** 000715030  
**SALE CONDITIONS:** NA  
**VERIFICATION:** Verified by Mike Robertson from public records

**ZONING:** R2  
**PARCEL SIZE:** .25 acres  
**IMPROVEMENTS:** 2 story house

**COMMENTS:** Small suburban residential lot with a 4-bedroom 2-story house and 2-car garage. This property is currently listed for-sale-by-owner and appears to have been heavily rehabbed between the above sale and this listing. Property has a well and is connected to municipal sewer. The home has 1600 SF. Property was sold "as is" – purchased from the Lender who took it back from foreclosure.

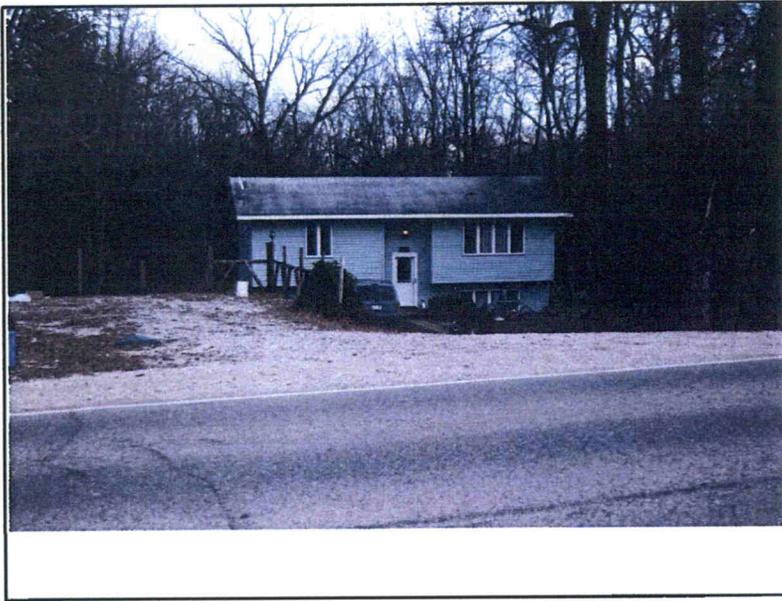
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**PROJECT:**  
Delavan – Darien Electric Reliability Project

PAGE 13

**PARCEL**  
Scott & Lynnea Waller

REFERENCE #: IR3



PROPERTY TYPE: Residential  
LOCATION: 2604 CTH O Delavan, WI 53115  
TAX ID: FD 3100005B3  
SALE DATE: 9-21-2007  
SALE PRICE: \$149,000  
SELLER: Roeker, Timothy A.  
BUYER: Huwiler, Richard C.  
CONVEYANCE: Land Contract  
DOCUMENT #: 000719832  
SALE CONDITIONS: NA  
VERIFICATION: Verified by Mike Robertson from public records

ZONING: R2  
PARCEL SIZE: .50 acres  
IMPROVEMENTS: Split-Level house

COMMENTS: This is a residential property located south of Delavan proper on CTH O. The house is estimated to be between 11-20 years old and is a bi-level or split-level design. There are 3 bedrooms and 1 large master bathroom. The site is approximately 3/4 wooded and there is a gravel driveway and no garage. The site is also improved with a private well and municipal sewer.

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## LAND SALE 1



**PROPERTY TYPE:** Commercial  
**ADDRESS:** Bauer Parkway, Delavan, WI  
**LOCATION:** Just off of Geneva Street on Bauer Parkway  
**TAX ID:** XAY 00002  
**MUNICIPALITY:** City of Delavan  
**SALE DATE:** November 25, 2005  
**SALE PRICE:** \$165,000  
**SIZE:** 40,160 sq. ft.  
**UNIT PRICE:** \$4.11 per Square Foot  
**SELLER:** Willemsen, Rodger & Donna  
**BUYER:** Burberry Wisconsin III LLC  
**ZONING:** Commercial  
**UTILITIES:** All urban services type utilities available  
**VERIFIED:** Verified by Bob Herald from Public records.  
**REMARKS:** This is a 1~ acre site on Bauer Parkway, just off of Geneva Street. It is in an area of mixed commercial properties that include a hotel and a car wash.

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**PROJECT:**  
Delavan – Darien Electric Reliability Project

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## LAND SALE 2



**PROPERTY TYPE:** Commercial  
**ADDRESS:** I43 & N. Walworth Street, Darien, WI  
**LOCATION:** Located on the SE quadrant of the intersection of I43 & STH 14  
**TAX ID:** QA 387700001  
**MUNICIPALITY:** Village of Darien  
**SALE DATE:** Dec. 14, 2005  
**SALE PRICE:** \$100,025  
**SIZE:** 4 acres  
**UNIT PRICE:** \$25,000 per acre  
**SELLER:** Pelishek, Gerald W. & Elizabeth E.  
**BUYER:** Loch Real Estate Corporation  
**ZONING:** Comm  
**UTILITIES:** ?  
**VERIFIED:** Verified by Bob Herald from Public records.  
**REMARKS:** This is a 3 ½ + acre commercial property with frontage and visibility along I43 and STH 14 on the north edge of the Village of Darien. This is in the commercial/industrial of the Village of Darien. It is improved with streets, sewer and water. The zoning allows for both large and small commercial and light industrial that is consistent with the accepted land uses for the Village of Darien.

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**PARCEL**  
Scott & Lynnea Waller

App. 117

## Land Listing



**PROPERTY TYPE:** Commercial/Industrial  
**ADDRESS:** Hobbs Drive, Delavan, WI  
**LOCATION:** Located in the City of Delavan's industrial park near Mound Rd & I43 intersection  
**TAX ID:** XA321700002  
**MUNICIPALITY:** City of Delavan  
**SALE DATE:** Current Listing  
**ASKING PRICE:** \$370,000  
**SIZE:** 9.88 acres  
**UNIT PRICE:** \$0.86 per square foot  
**SELLER:** Stock Lumber, Inc.  
**BUYER:** N/A  
**ZONING:** Manufacturing General  
**UTILITIES:** Municipal Sewer and Water  
**VERIFIED:** Verified by Bob Herald from Public records and Realtor Jerry Kroupa.  
**REMARKS:** This is a 10~acre parcel of land located in the City of Delavan's industrial park. The land is owned by Stock Lumber Company, whose facilities in Delavan are located next door to this land. This parcel is considered as surplus to Stock Lumber and they therefore have put it up on the market. As with all properties in the industrial park it is serviced with all typical urban utilities including city sewer and water.

## Rolling & Co.

**PROJECT:**  
Delavan – Darien Electric Reliability Project

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**PARCEL**  
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**JOHN D. ROLLING, Ph.D.**  
Rolling & Co. LLC  
Real Estate Appraisals and Consulting  
222 N. Midvale Boulevard, Suite 26  
Madison, WI 53705  
(608) 231-2120 FAX: 231-2155

**APPRAISAL EXPERTISE**

Experience includes fee appraisal and review assignments in commercial, residential, and agricultural property. Areas of special expertise are partial interests and public acquisitions.

**EMPLOYMENT HISTORY**

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1990-1994 Senior Appraiser. Perion & Associates Inc. Madison, WI.  
1984-1990 Chief Appraiser. Verex Assurance Inc. Madison, WI.  
1981-1984 Appraiser/Consultant. The Alexander Company. Madison, WI.

**LICENSES & CERTIFICATIONS**

Wisconsin Certified General Appraiser #127  
Iowa General Real Property Appraiser, Certificate #CGO2027  
Minnesota Certified General Real Property Appraiser #20195203

**MEMBERSHIPS**

Senior Member (SR/WA) International Right-of-Way Association  
(IRWA Wisconsin Chapter Professional of the Year 2004)  
National Association of Realtors  
American Society of Farm Managers & Rural Appraisers (candidate)

**TEACHING CREDENTIALS**

Active Instructor for IRWA Appraisal Courses 401,403  
Appraisal Qualifications Board Certified Instructor for Uniform Standards of Professional Appraisal Practice Courses  
Instructor, Madison Area Technical College

**EDUCATION**

College Ph.D. University of Wisconsin-Madison, 1979  
Degrees M.A. University of Wisconsin-Madison, 1974  
B.A. Wayne State University, 1972  
Appraisal Numerous courses and seminars through International Right of Way  
Courses & Association, Society of Real Estate Appraisers and Appraisal Institute,  
Seminars National Highway Institute, University of Wisconsin Center for Urban Land Economics  
Research, etc. since 1981.

**PARTIAL LIST OF CLIENTS**

Wisconsin Department of Transportation  
Wisconsin Department of Natural Resources  
Wisconsin Department of Justice  
Cities of Madison, Wausau, Janesville, Beloit, Sun Prairie.  
Counties of Dane, Marathon, Fond du Lac  
American Transmission Company

**Rolling & Co.**

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PROJECT:  
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PARCEL  
Scott & Lynnea Waller

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**MICHAEL J. ROBERTSON, CMB**

**QUALIFICATIONS**

**EXPERIENCE**

1999 - 2007: Sales Manager for Wells Fargo Wholesale Mortgage Lending branch office located in Madison, WI. Directed sales and operations within this location and the sales effort in the Minneapolis, MN territory.

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B.S. - Economics

University of Wisconsin - Madison, WI  
Real Estate 415 – Valuation of Real Estate

The Appraisal Institute  
Course 101 – Principles of the Appraisal of Real Property  
Course 102 – Applied Residential Valuation  
Course 201 – Income Valuation Principles  
Course – USPAP  
Seminar – Scope of Work  
Seminar – Appraisal Consulting  
Seminar – Discounted Cash-Flow Analysis  
Seminar – Appraisal Report Writing

International Right-of-Way Association  
Course 401 – Appraisal of Partial Acquisitions

**PROFESSIONAL AFFILIATION AND LICENSURE**

Certified Residential Appraiser – WI (#336)  
Certified Mortgage Banker (CMB)  
Member of International Right-of-Way Association

**Rolling & Co.**

PAGE 19

PROJECT:  
Delavan – Darien Electric Reliability Project

PARCEL  
Scott & Lynnea Waller

App. 120

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 2

WALWORTH COUNTY

---

SCOTT N. WALLER AND  
LYNNEA S. WALLER,

Plaintiffs,

Case No.: 10-CV-691

v.

**FILED**  
CIRCUIT COURT

AMERICAN TRANSMISSION COMPANY, LLC,

FEB 15 2012

Defendant.

CLERK OF COURTS - WALWORTH CO.  
BY ELISABETH YARBEG

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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This matter came on for trial commencing on January 25, 2012. Upon reviewing the testimony of the witnesses, the exhibits and hearing argument of counsel, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. On March 20, 2008 American Transmission Company, LLC, provided the Plaintiffs, Scott & Lynnea Waller, with a Jurisdictional Offer seeking to acquire two 45-foot utility easements along two sides of the Wallers' triangular property at 6249 Mound Road, Delavan, Wisconsin. The property includes 1.51 acres of land (65,775 square feet), a one-family residence, site improvements, landscaping, and outbuildings. The main building has a total of eight rooms, and there are three outbuildings on the property. The property is zoned A-1 Agricultural. It has been used by the Wallers since its acquisition in 1989 as a residence and for hobby farming activities. (Exhibit 2).

2. The easements acquired by ATC covered .799 acres or 34,804 square feet, 52.91% of the lot. ATC acquired the easements to install a 138-KV high voltage electric transmission line.

3. ATC retained Rolling & Co. In an appraisal report dated December 12, 2007 (Exhibit 2), Mr. Rolling concluded that the acquisition of the easement would have an immediate negative effect on the residential appeal of the property, noting that over one-half of the property will be under easement. The appraisal report continued with the following comments:

“The subject will have major transmission liens along two of its three sides. The transmission lines will be within 601 of the house. A substantial part of the landscaping will have been lost. Our before analysis suggested a property which was already in transition from improved residential use to vacant industrial lot use. We believe the installation of the transmission line pole and the lines themselves brings this property to the tipping point from residential appeal toward light industrial appeal. It is more likely that the next buyer of the property will be an industrial developer rather than a residential user. We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land.” (Exhibit 2, p. 18)

4. On March 12, 2009 the Wallers purchased a comparable replacement home in the Town of Sharon which meets the standards of Wis. Stat. § 32.19(2)(b).

5. The Wallers filed a relocation claim with ATC pursuant to the provisions of Wis. Stat. § 32.19(2)(e) on December 18, 2008, which was denied. In response to a Waller petition forwarded pursuant to the provisions of Wis. Stat. §32.26(5), Mr. Jack Sanderson of the Department of Commerce visited the Waller property on April 20, 2009 at 2:00 PM. Following the visit to the property, Mr. Jack Sanderson on June 3, 2009 determined that the Wallers were displaced persons and entitled to relocation benefits under Wis. Stat. § 32.19(2)(e) a. (Exhibit 14)

6. On September 10, 2009 the relocation plan was supplemented to reflect actual relocation costs incurred by the Wallers, which was further updated in January, 2012. (Exhibit 9).

7. The Wallers moved from their Delavan property to the Sharon property as a direct result of the acquisition of the easement for public purposes by ATC.

8. Upon the testimony of the parties and upon the documentary proof made part of the record, the Court finds that the Wallers have sustained the following costs in connection with the acquisition of relocation property:

1. Comparable Replacement Housing

a. Difference Between Old Home And New Home \$130,000 - \$177,500	\$ 47,500.00
b. Home Inspection	230.00
c. Replacement of Dug Well ( <del>Illegal Well</del> ) <i>gde</i>	5,670.00
d. Cost of Loan (Settlement Charges to Borrower)	1,760.17
e. Mortgage Insurance 5/01/09 – 1/01/12 \$118.02 per month x 32 mo.	3776.64
<hr/>	
Statutory Cap- § 32.19(4)	\$25,000

2. Self Move- Comm 202.54 8 rooms -- \$1,050. 3 outbuildings -- \$300	<u>1,350.00</u>
--	-----------------

TOTAL: \$ 26,350.00

CONCLUSIONS OF LAW

Upon these Findings of Fact, the Court concludes:

1. That the Wallers are displaced persons under Wis. Stats. § 32.19(2)(e)1a. They have acquired comparable replacement property that complies with Wis. Stat. § 32.19(2)(b), and therefore are entitled to judgment for recovery of their relocation costs.

2. Due to Wis. Stat. § 32.19 (4)(a), the Wallers are limited to a maximum of \$25,000 to recover costs for obtaining a comparable replacement dwelling. This includes cost of replacing the well on the property.

3. In addition to the \$25,000 allowed, the Wallers are entitled to the cost of moving in the amount of \$1,350, based on Wis. Adm. Code Comm. §202.54..

4. The Wallers are entitled to judgment in the amount of \$26,350 for moving and finding a comparable replacement dwelling, ~~plus pre-judgment interest, for a total of 30,503.42,~~ *OK* plus taxable costs.

Dated at Elkhorn, Wisconsin this 15<sup>th</sup> day of February, 2012.

BY THE COURT:

  
\_\_\_\_\_  
Hon. James L. Carlson  
Circuit Court Judge, Walworth County

STATE OF WISCONSIN                      CIRCUIT COURT                      WALWORTH COUNTY

SCOTT N. WALLER and  
LYNNEA S. WALLER,

DOCKETED 2/29/12 @ 3:18P  
COMPA                      E

Plaintiffs,

Case No. 2010-CV-691

**FILED**  
CIRCUIT COURT

v.

AMERICAN TRANSMISSION CO., LLC,

FEB 29 2012

Defendant.

CLERK OF COURTS - WALWORTH CO.  
BY ELISABETH YAZBEC

**JUDGMENT**

This matter came on for trial on January 25, 2012. The Court, having signed and filed its Findings of Fact and Conclusions of Law, Order for Judgment, and Bill of Costs, NOW THEREFORE,

Judgment is entered in favor of Scott N. Waller and Lynnea S. Waller and against American Transmission Co., LLC in the amount of \$26,350.00, in addition to costs, pursuant to Wis. Stat. § 814.04, in the amount of 1,811.92., for a total of \$28,161.92.

Dated at Elkhorn, Wisconsin this 29<sup>th</sup> day of February, 2012.

*Elisabeth Yazbec*

Judgment Clerk

*Deputy*

1 STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

2 -----

3 SCOTT N. WALLER, et al.,

4 Plaintiffs,

5 v. CASE NO: 2010CV691

6 AMERICAN TRANSMISSION CO., LLC,

7 Defendant.

8 -----

9 Transcript of Court Trial  
10 Before the Honorable James L. Carlson  
11 Circuit Court Branch II

12 January 25, 2012

13 Elkhorn, WI

14 APPEARANCES:

15 On behalf of the Plaintiff:  
16 Hugh R. Braun and Nicholas DiUlio  
17 Godfrey, Braun & Frazier, LLP  
18 735 North Water Street, Sixteenth Floor  
19 Milwaukee, WI 53202-4188

20 On behalf of the Defendant:  
21 Bryan J. Cahill  
22 Godfrey & Kahn, S.C.  
23 P.O. Box 2719  
24 Madison, WI 53701-2719

25 REPORTED BY: LORI L. OTTO, RPR.

1 kind of procedure. But further, Your Honor,  
2 how could they challenge the action that was  
3 taken by the Wallers on April 25th of 2008  
4 claiming this was an uneconomic remnant?  
5 That procedure was specifically approved by  
6 the Court of appeals on two different  
7 occasions. So that, indeed, is the right  
8 method of proceeding.

9 Your Honor, I think overall, these  
10 three issues can be easily resolved. Number  
11 one, the parties are displaced persons.  
12 Number two, the comparable property they  
13 selected was reasonable, and the amounts they  
14 claim in the relocation claim are reasonable  
15 and justified by extensive evidence. I ask  
16 you to sign finally granting the Wallers  
17 their full entitlement under the statute.

18 THE COURT: This matter 10CV691 was  
19 commenced by a complaint. Apparently it was  
20 filed, service was filed May 14th, 2010,  
21 answer filed June 1st, 2010. The matter was  
22 originally set for a jury trial. Then there  
23 is just a long void in the file. There is  
24 nothing that happened until August 17th of  
25 2011.

1                   Scheduling dates were set out. We  
2 had a conference back in December discussing  
3 08CV520. Well, we had a hearing regarding  
4 that matter. And then this followed shortly  
5 thereafter.

6                   The plaintiff has I believe, set  
7 forth the issues the Court has to make a  
8 determination of, and I believe they were  
9 addressed by the defendant. First of all,  
10 are the Wallers displaced persons under 32.19  
11 sub (2) sub (e) sub 1 a. Two, are the  
12 Wallers entitled to relocation benefits, what  
13 amount? They claim that amount set forth in  
14 their Exhibit 5, also the issue of whether  
15 this is comparable property under 32.19 sub  
16 (2) sub (b), and whether the \$25,000 limit  
17 applies, 32.19 sub (4), is it applicable?

18                   Again, ATC argues the cap when they  
19 have failed to provide relocation plans.  
20 They have also argued sub (c), replacement  
21 housing, additional payment if comparable  
22 dwelling is not available between the  
23 monetary limits established. They may exceed  
24 the monetary limit and make payments  
25 necessary to provide comparable dwelling.

1           On the other hand, ATC begins by  
2           arguing that the Wallers are not displaced  
3           persons, that they moved voluntarily. There  
4           was quite a bit in the brief that really did  
5           not come up in the pleadings here or trial  
6           about their -- well, there was some evidence  
7           that they -- that they did put their property  
8           up for sale prior to -- two years prior to  
9           this matter with ATC. But I think the  
10          evidence is clear, and I will find that they  
11          moved as a result and as a cause of the -- at  
12          least their search for moving began when they  
13          received appraisals, particularly the  
14          appraisal from American Transmission Co.,  
15          showing that the value of their property as a  
16          residence was virtually -- the property was,  
17          I forget the word, obsolete or something like  
18          that as a residence. That began their  
19          process of looking for a comparable property.

20                 I don't believe at all that they  
21                 moved voluntarily, but they moved as a  
22                 consequence of the condemnation process of  
23                 the easement for the transmission lines and  
24                 the effect that that had on their property.

25                         I have in the other proceeding

1 determined, and I affirm those findings, that  
2 this left them with an uneconomic remnant,  
3 one that could not be used -- as I went in  
4 detail, I'm not going to go through it again  
5 -- with a property that was suitable for a  
6 dwelling.

7 I determine that by the weight of the  
8 evidence. I have the direct testimony of  
9 Mr. Waller. I also have their consistent  
10 behaviors in declaring it to be an uneconomic  
11 remnant and around that time, the time of the  
12 -- the time of the appraisals making a  
13 request of the Department of Commerce to  
14 intervene and requesting their assistance. A  
15 complete void and absence of any action by  
16 ATC other than the negotiations by Mr. Dave  
17 Davies to negotiate a settlement which was  
18 unsuccessful.

19 They did not at any time come up with  
20 a relocation plan nor did they assist in  
21 finding comparable housing. I have read the  
22 Statutes 196.491 which is referred to  
23 directly in the condemnation statutes 32.06  
24 sub (1), determination and necessities of  
25 taking, the necessity of the taking shall be

1 determined as provided in Section 32.07. And  
2 32.07 is the statutes necessity determination  
3 of, one, a certificate of public convenience  
4 and necessity issued under 196.491 sub (3)  
5 shall constitute the determination of the  
6 necessity of the taking for any land or  
7 interest described in the certificate. And I  
8 have read through the statutes; and I, you  
9 know, the witness and the statutes comply  
10 here.

11 It's a balancing act between the  
12 needs of the public for electricity and the  
13 environment and the public safety. I did not  
14 see that as it is an avenue for people to be  
15 instructed or educated about what is  
16 happening. They have a voice and Mr. -- the  
17 Wallers did use the public hearings to  
18 protest, but I don't believe that in any way  
19 takes away from their ability in the eminent  
20 domain statutes to find that their property  
21 is an uneconomic remnant or to obtain  
22 benefits which are referred to in the  
23 statutes as additional items payable, 32.19.

24 I don't know, no one really commented  
25 about 32.075, use after condemnation. In

1       this section, a public utility has the  
2       meaning under 196.01(5) -- has the meaning  
3       under 196.01(5). Well, anyway, sub (2) is  
4       whenever the Public Service Commission has  
5       made a finding either with or without a  
6       hearing that it is reasonably certain that it  
7       will be necessary for a public utility to  
8       acquire land or interests therein for the  
9       purpose of the conveyance of telegraph and  
10      telephone messages or the production,  
11      transformation or transmission of electric  
12      energy for the public, etc. It shall not be  
13      necessary that the particular parcel or  
14      parcels of land be described.

15               Then it goes down at the bottom of  
16      that, the public utility files its petition  
17      under Section 32.06. It shall specify, and  
18      it says, notwithstanding the completion of  
19      the condemnation proceedings and the payment  
20      of the awards made under this subchapter.  
21      The owner may continue to use the land until  
22      such time as the public utility constructs  
23      its facilities thereon.

24               And it refers to either the taking by  
25      way of absolute taking or otherwise. Sub

1 (6g), in the case of the taking of an  
2 easement -- that is under 32.09, rules  
3 governing determination of just compensation  
4 and (6r) and sub (7), in addition to the  
5 amounts of compensation paid pursuant to sub  
6 (6), owner shall be paid for the items  
7 provided for in Section 32.19, if shown to  
8 exist and in the manner described in 32.20.

9 As I've indicated in the other  
10 proceedings, and I re-emphasize, to the  
11 argument that this is bad precedence so it  
12 costs more money because everyone will want  
13 to move when there is a wire going by, this  
14 is a unique situation. I believe it is the  
15 Falkner case, 75 Wis. 2d 116, is  
16 distinguishable. This required a  
17 determination of a remnant, very unusual  
18 circumstances, the size, shape, occupancy of  
19 the air above by transmission lines, to the  
20 various factors that the Court cited, and I  
21 think it is a stand-alone case for the most  
22 part as far as a remnant case goes where  
23 there is no actual taking of the land, very  
24 specific to the facts of this case in fact.  
25 It was made by the Court in 08CV520.

1                   Wow, there is absolutely a \$25,000  
2                   maximum or cap under 32.19 sub (4) the  
3                   finding on displaced person if I did not  
4                   actually mention it is as defined by 32.19  
5                   sub (e) 1 means, except as provided under sub  
6                   (2), any person who moves from real property  
7                   or who moves his or her personal property  
8                   from real property; a, as a direct result of  
9                   written notice or intent to acquire, or the  
10                  acquisition of the real property in whole or  
11                  in part or subsequent to the issuance of a  
12                  jurisdictional offer under this subchapter.

13                  Again, I believe I mentioned I  
14                  thought and feel that was proven by the  
15                  weight of the evidence. I really did not  
16                  hear any objection to the first one that is  
17                  covered under here under sub (3), relocation  
18                  benefits are moving expenses actual which  
19                  they have moved away from. I heard no  
20                  argument that they were not entitled to the  
21                  optional fixed payments under (b), so I will  
22                  grant those as set forth in the evidence.

23                  Then the replacement housing is the  
24                  next item. In addition to the amount  
25                  authorized in this subchapter, the condemnor

1 shall make a payment not to exceed 25,000 and  
2 number one which says the amount, if any,  
3 which when added to the acquisition payment  
4 equals the reasonable cost of comparable  
5 replacement dwelling available on the private  
6 market as determined. Then it says by  
7 condemnor which we did not have, we did not  
8 have here. We did not have such a  
9 determination by the condemnor.

10 I did not agree with the argument  
11 that there must be a showing as argued by  
12 defense that use or occupancy of the property  
13 physically or legally impossible citing 32.19  
14 sub (2) sub (e)1 b. And there is some  
15 arguments here about, I don't believe they  
16 are applicable, a displaced person does not  
17 include -- they said they were covered by a  
18 person who voluntarily retains their right of  
19 use or occupancy of real property for life.  
20 Or another exception, that the Wallers  
21 initially occupied the Mound property after  
22 ATC acquired the easement.

23 I think we have to consider the fact  
24 that it was an appeal that intervened, and  
25 that they also had other problems in actually

1 moving at the time into new property. And  
2 then they go into the argument that this is  
3 not a comparable property.

4 As far as I can tell from the  
5 evidence that it is comparable property. It  
6 was Ag. It was more similar to the type of  
7 place that they had, call it a farmette or  
8 whatever, agricultural zoning on the  
9 outskirts of a town, Delavan being a larger  
10 city than Sullivan -- not Sullivan but  
11 Sharon, there being other residences in the  
12 area. It was a slightly larger piece of  
13 property. You might call it double the size  
14 when you say it is 1.5 acres to 3, but it did  
15 have an outbuilding for animals or other  
16 things like that.

17 It was, I think, 47,5 higher in  
18 value. Really all the parties defendant do  
19 is rely on some real estate listings. The  
20 plaintiffs basically answered each one of the  
21 cross-examination questions regarding why  
22 they did not feel it was comparable or  
23 whatever. That is all they have to hang on  
24 is that cross-examination. They did not have  
25 -- they did not have -- they did not provide,

1 as they were supposed to under the statute I  
2 feel, assistance in obtaining such comparable  
3 property. So I'm left with the fact that the  
4 only real evidence that I have is this is  
5 substantially comparable property.

6 So what I'm going to do here is I'm  
7 going to rule now that I'm clear that the  
8 essence is -- and you want to brief it more  
9 -- my intention is they would really in my  
10 opinion have either the choice of retaining  
11 that other property and selling the remnant  
12 or forcing them to pay 30,000. That is what  
13 you want the Court to do. That is what I'm  
14 going to do, and I think the statute is clear  
15 that they are entitled to 25 in addition to  
16 that. And that is the limit of their  
17 recovery. I don't know if you -- you did not  
18 really respond to the fact that they argued  
19 that other incidental expenses, interest and  
20 that, I don't know.

21 MR. BRAUN: I think they are  
22 separately itemized under 32.19, the home  
23 inspection --

24 THE COURT: The home inspection.

25 MR. BRAUN: Closing costs are

1 separate from --

2 THE COURT: They claimed it was  
3 covered under the cap. I don't know if I  
4 heard a response to that.

5 MR. BRAUN: Our position is they are  
6 not covered under the cap. The cap is only  
7 on the cost differential, and these other  
8 specific items are allowable.

9 MS. STADLER: Judge, I would refer  
10 you to page 8 of our trial brief. Under item  
11 B it has a Wisconsin Administrative Code  
12 Section 202.68 sub (9) and 202.70 sub (6), it  
13 is the \$25,000 cap includes incidental  
14 expenses, and that second statute I gave you  
15 defines incidental expenses as including  
16 settlement charges and inspection costs.

17 THE COURT: Well, 202.70(6) is  
18 limited to 180 days owner or something like  
19 that. Let me just look at it. And I think  
20 202 applies to a non-profit.

21 MS. STADLER: It is just context for  
22 the determination of what was contemplated by  
23 that cap which would be included. We're not  
24 contending they are 180 days resident or  
25 non-profit.

1 THE COURT: And what are you relying  
2 on to say you're entitled to it, because it  
3 is not included under the statute.

4 MR. BRAUN: I think it is included --  
5 the -- it is included under 32.19.

6 THE COURT: Specifically -- show me.  
7 I'm looking at the statute. I think he had  
8 an updated one, too. You have an updated one  
9 from number 7?

10 MR. DIULIO: Exhibit 9 is the updated  
11 one.

12 THE COURT: I'm going to rule for  
13 purposes of my determination also that -- the  
14 well, you have to have a well to make it  
15 comparable property, but it's just part of  
16 that cap I think. I don't know how else you  
17 can argue that, so I'm not going to order  
18 that as an additional pay. The home  
19 inspection of 230, I think I already -- the  
20 interest.

21 MR. BRAUN: Your Honor, I'm referring  
22 to 32.195.

23 THE COURT: 32.15, sub (5) you mean?

24 MR. BRAUN: No, just 32.195 and it  
25 says, in addition to amounts otherwise

1 authorized by the subchapter, the condemnor,  
2 so this is in addition.

3 THE COURT: Excuse me, I don't  
4 believe I was ever referred to it or I did  
5 not -- it looked like I have not gone over  
6 that.

7 MR. BRAUN: And the additional  
8 expenses, home inspection we claim,  
9 replacement of the well, the cost of the loan  
10 and the mortgage insurance are all additional  
11 -- all reasonable and necessary expenses  
12 incurred, and we say recording fees, transfer  
13 fees, and similar expense incidental to  
14 conveying such property.

15 MR. CAHILL: If I may, Your Honor,  
16 while that says those amounts recoverable, it  
17 does not answer the question of whether they  
18 are subject to the cap of \$25,000. For that  
19 answer you have to look at 32.19(4) a 3. Sub  
20 (a) is, you cannot exceed the 25,000, the  
21 last clause of sub (a) is, such payment  
22 includes the following, and you get to  
23 paragraph 3, reasonable incidental fees,  
24 commissions, discounts, surveying costs,  
25 title evidence costs, and other closing costs

1 incurred in the purchase of replacement  
2 housing but not including prepaid expenses.

3 THE COURT: I'm afraid that is under  
4 the mobile home, is not considered to be  
5 structural condition of the mobile home,  
6 there is no adequate or available replacement  
7 sites.

8 MR. CAHILL: (1m) is the mobile home  
9 provision, (2) and (3) are applicable to  
10 everything.

11 THE COURT: Well, the sub cap is  
12 under 4 a, okay. You may be right. 4 a 1,  
13 1m, then under 1m there is an a, b and c.

14 MR. BRAUN: Your Honor, I don't mean  
15 to interrupt you here, but 32.19 sub (4)  
16 pretty clear on there, it says in addition to  
17 amounts otherwise authorized by this  
18 subchapter, the condemnor shall make a  
19 payment not to exceed \$25,000 to any  
20 displaced persons who is displaced from a  
21 dwelling actually owned and occupied. So our  
22 contention has been, if you apply the 25,000  
23 at all, it is limited only to the cost  
24 differential.

25 All other items which are identified

1 in 32.195 are allowable in addition to the  
2 25,000. And that would include home  
3 inspection. We would argue --

4 THE COURT: I think the wording there  
5 4 a, such payments includes only the  
6 following, the amount, if any, which when  
7 added to the acquisition payment, equals the  
8 reasonable costs of a comparable replacement  
9 dwelling; two, the amount of increased  
10 interest expenses and other debt; three,  
11 reasonable incidental fees, commissions  
12 discounts, surveying costs. I think I have  
13 to agree with that. That's -- that is only  
14 one way to read that I believe. Such payment  
15 includes only the following, then 1m, of  
16 course, is the one applicable only to mobile  
17 homes. But, 1, 2, 3, and then it goes into  
18 another ag, limitation.

19 MR. BRAUN: I'm not sure, judge, I  
20 follow you because 4 a provides in addition  
21 to amounts otherwise.

22 THE COURT: The bottom of that very  
23 paragraph says, such payment of 25,000, I'm  
24 sure that refers to includes only the  
25 following, 1, 1m if it is a mobile home, 2,

1 3.

2 MR. BRAUN: Yeah, which is the  
3 differential costs. The amount of any --  
4 which when added to acquisition payment  
5 equals the reasonable costs of --

6 THE COURT: Then it goes on to 2 and  
7 3 on the next page.

8 MR. BRAUN: The amount of increased  
9 interest expenses and other debt service  
10 costs.

11 THE COURT: And reasonable incidental  
12 fees, commissions discounts, those are  
13 included in the 25,000, so the only way you  
14 get around that is to show me it is not  
15 those. But it does not include prepaid  
16 expenses. I don't know what that means.

17 MR. CAHILL: That is like taxes or if  
18 they make you escrow your hazard insurance or  
19 something like that because you do not get --  
20 that is not part of relocation benefits  
21 because it is something you have to incur  
22 anyway.

23 THE COURT: Okay, so those would be  
24 excluded from that.

25 MR. CAHILL: Yes.

1           THE COURT: I guess I'm really  
2           rejecting it would be possible for the Court  
3           to find this was something the Court should  
4           order under additional payment if comparable  
5           dwelling. Well, I have to -- I can't say it  
6           is necessary to provide exactly what they  
7           have, so I just do not feel I can make that  
8           finding here based on the fact that --

9           MR. BRAUN: We have already concluded  
10          that what they acquired was comparable  
11          replacement property, and I think what is  
12          contemplated here is that the basis of our  
13          argument is that --

14          THE COURT: It says necessary, should  
15          be paid to make it necessary to provide a  
16          comparable dwelling. Right, and what  
17          happened here was that ATC had an absolute  
18          obligation to provide comparable replacement  
19          property, and if they did not do that, they  
20          would have been charged.

21          And as it turned out, now we're doing  
22          this in non-typical circumstances. We are  
23          doing this long after the fact; but as long  
24          as they have not been able to come up with a  
25          comparable replacement property worth less

1           than \$177,500, they have -- they have  
2           conceded that that is comparable replacement  
3           property, than -- the only reason for that  
4           section of the statute is to permit them to  
5           add to 25,000 so that the underlying  
6           obligation to provide comparable replacement  
7           property can be satisfied.

8                         That is really what happened here.  
9           Otherwise why would sub (c) be there? It  
10          confirms implicitly that ATC had an absolute  
11          obligation to provide comparable replacement  
12          property.

13                        They were not able to do that at the  
14          130 level. The number now as being received  
15          as comparable is 177,500, so they simply have  
16          to go beyond that.

17                        MR. CAHILL: The legislature rejected  
18          that and legislature history research we  
19          provided in conjunction with the pretrial  
20          brief. The statute initially he provide  
21          shall pay more. The legislature rejected  
22          that, and the current statute merely  
23          provides, may exceed the monetary limits. At  
24          one point in the drafting history for this  
25          statute, the statute provides, shall exceed

1           monetary limits.

2                   MR. BRAUN: I have not seen that.

3                   MR. CAHILL: That was provided as an  
4 attachment.

5                   THE COURT: It was in his brief. I  
6 saw that. And I think it is discretionary,  
7 and I am -- I've cut it off as far as I've  
8 gone as far as the payments. I believe I  
9 guess the home inspection is found to be an  
10 incidental expense, well, subject to the cap.  
11 Cost of the loan is an incidental expense, is  
12 that what you argued?

13                   MR. BRAUN: Right.

14                   MR. CAHILL: It is under 2 or 3. It  
15 is increased interest expense or incidental  
16 fee.

17                   THE COURT: Mortgage insurance, the  
18 only one I'm allowing is a self move. I  
19 believe in addition to that mortgage  
20 insurance, is that covered?

21                   MR. CAHILL: I believe it would be an  
22 increased interest expense or other debt  
23 service cost.

24                   THE COURT: I think so.

25                   MR. BRAUN: Your Honor, the

1 difficulty was, had ATC provided relocation  
2 benefits, that would have been a new mortgage  
3 without any mortgage insurance. I mean, that  
4 is the cruel deprivation of their entitlement  
5 here.

6 THE COURT: Hold it. Hold it. If  
7 they would have provided, there would have  
8 been no mortgage, what makes you say that?

9 MR. BRAUN: There would have been a  
10 mortgage but no requirement for mortgage  
11 insurance because they did not pay --

12 THE COURT: I see.

13 MR. BRAUN: Relocation benefits and  
14 because they did not purchase the remnant,  
15 the mortgage -- this was 177,000 --

16 THE COURT: What is the proof on this  
17 now? Where is the line of proof?

18 MR. CAHILL: It is just argument.

19 MR. BRAUN: The mortgage -- it is in  
20 the record. The purchase price of this  
21 property was \$177,500, and the I think loan  
22 was --

23 THE COURT: 168.

24 MR. BRAUN: 168,000. That is because  
25 they did not have a 10 percent equity, they

1 had to pay mortgage insurance.

2 MR. CAHILL: But there was the 94,000  
3 payment before they could purchase. That is  
4 what they were waiting on.

5 THE COURT: I never heard the proof  
6 on that. I was sort of waiting on it. You  
7 may assume that went to pay the mortgage.

8 MR. BRAUN: Pay the old mortgage.

9 THE COURT: But you never had proof  
10 on that.

11 MR. CAHILL: Right.

12 THE COURT: I never heard that. I  
13 was wondering for that was just to pay the  
14 old mortgage. If it did, then, of course, I  
15 can see where they had to come up with  
16 168,000, is where the money went.

17 MR. BRAUN: They did not have a 10  
18 percent downpayment, so they had to pick up  
19 mortgage insurance, and since the date of  
20 this transaction, that is \$3,776.74. And,  
21 you know, it is an extra cost.

22 THE COURT: It is a conclusion that  
23 is sort of abstract as far as, you know, it  
24 was cruel to them or they would have been  
25 able to -- or whatever, this is what they

1           decided to do. They could have rejected that  
2           property when the well and the septic system  
3           was not working.

4                   MR. BRAUN: It all falls back to the  
5           fact that ATC did not provide comparable  
6           replacement property.

7                   THE COURT: Well, that is true.  
8           That's true. But that is the Court's  
9           decision. We have to argue tomorrow the  
10          final judgment form and your litigation  
11          expense that you're requesting.

12                   MR. BRAUN: Right.

13                   MR. CAHILL: What time, Your Honor?

14                   THE COURT: Whenever you want to  
15          start. We have it at 8:30.

16                   MR. CAHILL: Can we start a little  
17          later?

18                   THE COURT: How about 9? I have  
19          other things in the afternoon unfortunately.  
20          I do have another day, two days if that is --  
21          I've got tomorrow morning, but I also have  
22          another day.

23                   THE CLERK: Next week.

24                   THE COURT: Another date next week if  
25          you think it will take more than the morning.

1 Are you ready to go tomorrow morning? I  
2 would rather do that, but I would say --

3 MR. BRAUN: Fine, Your Honor.

4 THE COURT: I would just say 9  
5 o'clock.

6 MR. CAHILL: Given we did not have a  
7 chance to take a deposition, I can't  
8 represent to the Court it will take only a  
9 morning.

10 THE COURT: Well, if we have to go  
11 over, I will try to find something else for  
12 you. And I do have time relatively soon like  
13 I said in the next week or two. You're going  
14 to have to do findings of fact, conclusions  
15 of law and judgment.

16 MR. BRAUN: I will do that.

17 THE COURT: Those will be submitted  
18 under the traditional five-day rule.

19 MR. CAHILL: Right.

20 MR. BRAUN: Right.

21 THE COURT: And specifically tomorrow  
22 we will go into the litigation expenses.

23 MR. CAHILL: Beginning at 9 a.m.?

24 THE COURT: 9 a.m.

25 (Hearing concluded at 6:30 p.m.)

1 STATE OF WISCONSIN )  
2 COUNTY OF WALWORTH ) C E R T I F I C A T E

3 I, Lori L. Otto, Official Court  
4 Reporter, do hereby certify that the attached  
5 transcript is a true and correct copy of the  
6 testimony taken and the proceedings had in  
7 the above-entitled matter; that I have  
8 compared the same with the original  
9 stenographic notes taken by me at the time of  
10 said proceedings, and that it is a true copy  
11 of those notes and the whole thereof.

12 Dated this 7th day of February,  
13 2012.

14  
15  
16 \_\_\_\_\_  
17 Lori L. Otto  
18 Official Court Reporter  
19 Circuit Court, Branch II  
20  
21  
22  
23  
24  
25

1977 Assembly Bill 1077

Date published: June 6, 1978

**CHAPTER 440, Laws of 1977**

AN ACT to repeal 32.09 (5m); to amend 32.05 (2a), (5), (10) (b) and (11) (a) and (b), 32.06 (2a), (9) (a) and (10) (a) and (b), 32.09 (4) and (6) (intro.) and 32.10; to repeal and recreate 32.02 (intro.); and to create 32.035, 32.05 (3m), 32.06 (3m), 32.09 (1m), (6g) and (6r), 32.19 (4) (am) and (4m) and 32.28 of the statutes, relating to requiring the department of agriculture, trade and consumer protection to prepare an agricultural impact statement on certain actual or proposed public projects, changing certain aspects of recovery of costs in certain condemnation actions and in the removal of illegal outdoor signs and making other changes in the law on eminent domain.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

SECTION 1. 32.02 (intro.) of the statutes, as affected by chapter 29, laws of 1977, is repealed and recreated to read:

**32.02 Who may condemn; purposes.** (intro.) The following departments, municipalities, boards, commissions, public officers and corporations may acquire by condemnation any real estate and personal property appurtenant thereto or interest therein which they have power to acquire and hold or transfer to the state, for the purposes specified, in case such property cannot be acquired by gift or purchase at an agreed price:

SECTION 2. 32.035 of the statutes is created to read:

**32.035 Agricultural impact statement.** (1) DEFINITIONS. In this section:

(a) "Department" means department of agriculture, trade and consumer protection.

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(b) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural commodities for sale and home use, and customarily producing the commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(2) EXCEPTION. This section shall not apply if an environmental impact statement under s. 1.11 is prepared for the proposed project and if the department submits the information required under this section as part of such statement or if the condemnation is for an easement for the purpose of constructing or operating an electric transmission line, except a high voltage transmission line as defined in s. 196.491 (1) (f).

(3) PROCEDURE. The condemnor shall notify the department of any project involving the actual or potential exercise of the powers of eminent domain affecting a farm operation. If the condemnor is the department of natural resources, the notice required by this subsection shall be given at the time that permission of the senate and assembly committees on natural resources is sought under s. 23.09 (2) (d) or 27.01 (2) (a). To prepare an agricultural impact statement under this section, the department may require the condemnor to compile and submit information about an affected farm operation. The department shall charge the condemnor a fee approximating the actual costs of preparing the statement. The department may not publish the statement if the fee is not paid.

(4) IMPACT STATEMENT. The department shall prepare an agricultural impact statement for each project, except a project under ch. 81, if the project involves the actual or potential exercise of the powers of eminent domain and if any interest in more than 5 acres of any farm operation may be taken. The department may prepare an agricultural impact statement on a project if any interest in 5 or less acres of any farm operation may be taken and if the condemnation will have a significant effect on any farm operation as a whole. The statement shall list the acreage and describe all land lost to agricultural production and all other land with reduced productive capacity, whether or not the land is taken. The department shall prepare the impact statement within 60 days of receiving the information requested from the condemnor under sub. (3). The department shall publish the statement upon receipt of the fee required under sub. (3). The condemnor may not negotiate with an owner or make a jurisdictional offer under this chapter until 30 days after the impact statement is published.

(5) PUBLICATION. Upon completing the impact statement, the department shall distribute the impact statement to the following:

- (a) The governor's office.
- (b) The senate and assembly committees on agriculture and transportation.
- (c) All local and regional units of government which have jurisdiction over the area affected by the project. The department shall request that each unit post the statement at the place normally used for public notice.
- (d) Local and regional news media in the area affected.
- (e) Public libraries in the area affected.
- (f) Any individual, group, club or committee which has demonstrated an interest and has requested receipt of such information.
- (g) The condemnor.

SECTION 3. 32.05 (3m) of the statutes is created to read:

32.05 (3m) In this section, "uneconomic remnant" means the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability. If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

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SECTION 4. 32.05 (2a), (5), (10) (b) and (11) (a) and (b) of the statutes are amended to read:

32.05 (2a) NEGOTIATION. Before making the jurisdictional offer provided in sub. (3), the condemnor shall attempt to negotiate personally with the owner or one of the owners or his or her personal representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor is authorized to contract to pay the items of compensation enumerated in ss. 32.09 and 32.19 as may be applicable to the property in one or more instalments on such conditions as the condemnor and property owners may agree. The condemnor shall record any conveyance by or on behalf of the owner of the property to the condemnor executed as a result of negotiations under this subsection with the register of deeds of the county in which the property is located. The condemnor shall also record a certificate of compensation stating the identity of all persons having an interest of record in the property immediately prior to its conveyance, the legal description of the property, the nature of the interest acquired and the compensation for such acquisition. The condemnor shall serve upon or mail by certified mail to all persons named therein a copy of the statement and a notice of the right to appeal the amount of compensation under this subsection. Any person named in the certificate may, within 6 months after the date of its recording, appeal from the amount of compensation therein stated in the manner set forth in subs. (9) to (13) for appeals from an award under sub. (7). For purposes of any such appeal, the amount of compensation stated in the certificate shall be treated as the award and the date the conveyance is recorded shall be treated as the date of taking and the date of evaluation.

(5) COURT ACTION TO CONTEST RIGHT OF CONDEMNATION. ~~When~~ If an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer, for any reason other than that the amount of compensation offered is inadequate, ~~such~~ the owner may within 40 days from the date of personal service of the jurisdictional offer or within 40 days from the date of postmark of the certified mail letter transmitting such offer, or within 40 days after date of publication of the jurisdictional offer as to persons for whom such publication was necessary and was made, commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant. Such action shall be the only manner in which any issue other than the amount of just compensation, or other than proceedings to perfect title ~~as provided in~~ under ss. 32.11 and 32.12, may be raised pertaining to the condemnation of the property described in the jurisdictional offer. The trial of the issues raised by the pleadings in such action shall be given precedence over all other actions in said court then not on trial. If the action is not commenced within the time limited the owner or other person having any interest in the property shall be forever barred from raising any such objection in any other manner. Nothing in this section shall be construed to limit in any respect the right to determine the necessity of taking as conferred by s. 32.07 nor to prevent the condemnor from proceeding with condemnation during the pendency of the action to contest the right to condemn. ~~If the final judgment of the court is that the condemnor cannot condemn the property described in the jurisdictional offer, the judgment shall also award the owner such sum as will in the opinion of the court reimburse the owner for reasonable costs, disbursements and expenses including reasonable attorney and engineering fees actually incurred because of the action of the condemnor, but the judgment shall not, in addition thereto, award the owner taxable costs and disbursements pursuant to ch. 814.~~

(10) (b) The court shall enter judgment for the amount found to be due after giving effect to any amount paid by reason of a prior award. The judgment shall include legal interest on the amount so found due from the date of taking if judgment is for the condemnor, and from 14 days after the date of taking if judgment is for the condemnee. ~~Costs shall be allowed pursuant to s. 814.02 (2). If the appeal was by the condemnor and if the amount of just compensation found under par. (a) exceeds the amount of the basic award, the condemnee shall be deemed the "successful party" under s. 814.02 (2).~~

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(11) (a) If the jury verdict as approved by the court does not exceed the basic award, the condemnor shall have judgment against the appellant for the difference between the jury verdict and the amount of the basic award, plus interest on the amount of such difference from the date of taking, ~~plus condemnor's taxable statutory costs and disbursements pursuant to s. 814.02 (2).~~

(b) If the jury verdict as approved by the court exceeds the basic award, the appellant shall have judgment for the amount of such excess plus legal interest thereon to date of payment in full from that date which is 14 days after the date of taking, ~~plus statutory taxable costs and disbursements pursuant to s. 814.02 (2).~~

SECTION 4m. 32.06 (2a) of the statutes is amended to read:

32.06 (2a) AGREED PRICE. Before making the jurisdictional offer ~~provided in~~ under sub. (3) the condemnor shall attempt to negotiate personally with the owner or one of the owners or his or her personal representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor may contract to pay the items of compensation enumerated in ss. 32.09 and 32.19 where shown to exist. The condemnor shall record any conveyance by or on behalf of the owner of the property to the condemnor executed as a result of negotiations under this subsection with the register of deeds of the county in which the property is located. The condemnor shall also record a certificate of compensation stating the identity of all persons having an interest of record in the property immediately prior to its conveyance, the legal description of the property, the nature of the interest acquired and the compensation for such acquisition. The condemnor shall serve upon or mail by certified mail to all persons named therein a copy of the statement and a notice of the right to appeal the amount of compensation under this subsection. Any person named in the certificate may, within 6 months after the date of its recording, appeal from the amount of compensation therein stated by filing a petition with the judge of the circuit court of the county in which the property is located for proceedings to determine the amount of just compensation. Notice of such petition shall be given to all persons having an interest of record in such property. The judge shall forthwith assign the matter to the chairperson of the county condemnation commissioners for hearing under sub. (8). The procedures prescribed under subs. (9) (a) and (b), (10), (12) and (13) shall govern such appeals. The date the conveyance is recorded shall be treated as the date of taking and the date of evaluation.

SECTION 5. 32.06 (3m) of the statutes is created to read:

32.06 (3m) DEFINITION. In this section, "uneconomic remnant" means the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability. If acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

SECTION 6. 32.06 (9) (a) and (10) (a) and (b) of the statutes are amended to read:

32.06 (9) (a) ~~The condemnor must within~~ Within 30 days after the date of filing of the commission's award, if it desires to abandon the proceeding, the condemnor shall petition the judge of the circuit court of the county wherein the property is situated, upon 5 days' notice by certified mail to the owner, for leave to abandon the petition for taking if the condemnor desires to abandon the proceeding. The circuit judge shall grant such the petition upon such terms as he it deems just, which terms may include reasonable expert witness fees incurred by condemnee for not to exceed 3 expert witnesses and a reasonable attorney's fee both as approved by the judge. Upon payment of such amount into court for the benefit of the owner, the judge and shall make a formal order discontinuing said the proceeding which order shall be recorded in the judgment book of the court after the record of the commission's award. The order shall operate to divest any title of condemnor to the lands involved and to automatically discharge the lis pendens.

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(10) (a) If the jury verdict as approved by the court exceeds the commission's award, the owner shall have judgment increased by the amount of ~~his statutory taxable costs and disbursements, together with~~ legal interest from the date title vests in condemnor to date of entry of judgment on the excess of the verdict over the compensation awarded by the commission.

(b) If the jury verdict as approved by the court does not exceed the commission's award, the condemnor shall have judgment against the owner for the difference between the verdict and the amount of the commission's award, with legal interest on such difference from the date condemnor paid such award, ~~plus condemnor's statutory taxable costs and disbursements.~~

SECTION 7. 32.09 (1m), (6g) and (6r) of the statutes are created to read:

32.09 (1m) As a basis for determining value, a commission in condemnation or a court may consider the price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property. A sale or contract is comparable within the meaning of this subsection if it was made within a reasonable time before or after the date of evaluation and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.

(6g) In the case of the taking of an easement, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property enumerated in sub. (6) (a) to (g) where shown to exist.

(6r) (a) In the case of a taking of an easement in lands zoned or used for agricultural purposes, for the purpose of constructing or operating a high-voltage transmission line, as defined in s. 196.491 (1) (f), or any petroleum or fuel pipeline, the offer under s. 32.05 (2a) or 32.06 (2a), the jurisdictional offer under s. 32.05 (3) or 32.06 (3) or the statement of damages and benefits under section 4 of chapter 275, laws of 1931, as amended (Kline Law), the award of damages under s. 32.05 (7), the award of the condemnation commissioners under s. 32.05 (9) or 32.06 (8) or the modified assessment under section 6 of chapter 275, laws of 1931, as amended (Kline Law), and the jury verdict as approved by the court under s. 32.05 (10) or (11) or 32.06 (10) or the verdict of the jury under section 10 (2) of chapter 275, laws of 1931, as amended (Kline Law), shall specify, in addition to a lump sum representing just compensation under sub. (6) for outright acquisition of the easement, an amount payable annually on the date therein set forth to the condemnee, which amount represents just compensation under sub. (6) for the taking of the easement for one year.

(b) The condemnee shall choose between the lump sum and the annual payment method of compensation at such time as the condemnee accepts the offer, award or verdict, or the proceedings relative to the issue of compensation are otherwise terminated. Selection of the lump sum method of payment shall irrevocably bind the condemnee and successors in interest.

(c) 1. Except as provided under subd. 2, if the condemnee selects the annual payment method of compensation, the fact of such selection and the amount of the annual payment shall be stated in the conveyance or an appendix thereto which shall be recorded with the register of deeds. The first annual payment shall be in addition to payment of any items payable under s. 32.19. Succeeding annual payments shall be determined by multiplying the amount of the first annual payment by the quotient of the state assessment under s. 70.575 for the year in question divided by the state assessment for the year in which the first annual payment for that easement was made, if the quotient exceeds one. A condemnee who selects the annual payment method of

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compensation, or any successor in interest, may at any time, by agreement with the condemnor or otherwise, waive in writing his or her right, or the right of his or her successors in interest, to receive such payments. Any successor in interest shall be deemed to have waived such right until the date on which written notice of his or her right to receive annual payments is received by the condemnor or its successor in interest.

2. If lands which are zoned or used for agricultural purposes and which are condemned and compensated by the annual payment method of compensation under this paragraph are no longer zoned or used for agricultural purposes, the right to receive the annual payment method of compensation for a high-voltage transmission line easement shall cease and the condemnor or its successor in interest shall pay to the condemnee or any successor in interest who has given notice as required under subd. 1 a single payment equal to the difference between the lump sum representing just compensation under sub. (6) and the total of annual payments previously received by the condemnee and any successor in interest.

SECTION 8. 32.09 (4) and (6) (intro.) of the statutes are amended to read:

32.09 (4) ~~Where~~ If a depreciation in value of property results from an exercise of the police power, even though in conjunction with the taking by eminent domain, no compensation ~~shall~~ may be paid for such depreciation except as expressly allowed in subs. (5) (b), ~~(5m)~~ and (6) and s. 32.19.

(6) (intro.) In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

SECTION 9. 32.09 (5m) of the statutes is repealed.

SECTION 10. 32.10 of the statutes is amended to read:

32.10 Condemnation proceedings instituted by property owner. ~~Whenever~~ If any property has been occupied by a body person possessing the power of condemnation ~~but where such body and if the person~~ has not exercised said ~~the~~ power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced. ~~Such~~ The petition shall describe the land, state the ~~board, commission or corporation~~ person against which the condemnation proceedings are instituted and the use to which it has been put or is designed to have been put by the ~~board, commission or corporation~~ person against which the proceedings are instituted. A copy of said ~~the~~ petition shall be served upon the ~~board, commission or corporation~~ person who has occupied petitioner's land, or interest in land. The petition shall be filed in the office of the clerk of the circuit court and thereupon the matter shall be deemed an action at law and at issue, with petitioner as plaintiff and the ~~board, commission or corporation~~ occupying person as defendant. The court shall ~~thereupon~~ make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this chapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same and assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied. ~~The court rendering a judgment for the plaintiff in an action brought under this section shall also award to the plaintiff as a part of such judgment such sum as will in the opinion of the court reimburse the plaintiff for reasonable costs, disbursements and expenses including reasonable attorney, appraisal and engineering fees actually incurred because of such action, but the judgment shall not, in addition thereto, award the owner taxable costs and disbursements pursuant to ch. 814.~~

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SECTION 11. 32.19 (4) (am) and (4m) of the statutes are created to read:

32.19 (4) (am) In determining the comparability of a replacement dwelling or mobile home under par. (a), the department of local affairs and development and the department of industry, labor and human relations shall consider and give effect to the overall size, number of rooms and size of rooms, hallways and storage areas of the dwelling or mobile home being replaced, as well as the size and utility of any garage or other outbuildings within the curtilage of the dwelling or mobile home being replaced, regardless of the contribution of the garage or other outbuildings to the owner's income.

(4m) BUSINESS OR FARM REPLACEMENT PAYMENT. In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment, not to exceed \$50,000, to any displaced person who is displaced from any business or farm operation which the person has owned for not less than 180 days prior to the initiation of negotiations for the acquisition of the real property on which the business or farm operation lies, and who actually purchases a comparable replacement for such acquired property within 2 years after the date the person vacates the acquired property or receives payment from the condemnor, whichever is later. The additional payment under this subsection shall include the following amounts:

(a) The amount, if any, which when added to the acquisition cost of the property (other than any dwelling on such property) equals the reasonable cost of a comparable replacement for such acquired property, as determined by the department of local affairs and development and the department of industry, labor and human relations, jointly. Such replacement property shall be within reasonable proximity of the property being acquired and shall be suited for the same type of business or farm operation as that which is being conducted by the displaced person at the time of acquisition.

(b) The amount, if any, which will compensate such displaced person for any increased interest cost which such person is required to pay for financing the acquisition of any replacement property, if the property acquired was encumbered by a bona fide mortgage which was a valid lien on the property for at least 180 days prior to the initiation of negotiations for its acquisition. The amount under this paragraph shall be equal to the excess in the aggregate interest and other debt services cost of that amount of the principal of the mortgage on the replacement property which is equal to the unpaid balance of the mortgage on the acquired property, reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits in commercial banks in the general area where the replacement property is located.

(c) Reasonable expenses incurred by the displaced person for evidence of title, recording fees and other closing costs incident to the purchase of the replacement property, but not including prepaid expenses.

SECTION 12. 32.28 of the statutes is created to read:

32.28 Costs. (1) In this section, "litigation expenses" means the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court under this chapter or chapter 275, laws of 1931, as amended (Kline Law).

(2) Except as provided in sub. (3), costs shall be allowed under ch. 814 in any action brought under this chapter or chapter 275, laws of 1931, as amended (Kline Law). If the amount of just compensation found by the court or commissioners of condemnation exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer, the condemnee shall be deemed the successful party under s. 814.02 (2).

(3) In lieu of costs under ch. 814, the court shall award litigation expenses to the condemnee if:

CHAPTER 440

- (a) The proceeding is abandoned by the condemnor;
- (b) The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking;
- (c) The judgment is for the plaintiff in an action under s. 32.10;
- (d) The award of the condemnation commission under s. 32.05 (9) or 32.06 (8) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15% and neither party appeals the award to the circuit court;
- (e) The jury verdict as approved by the court under s. 32.05 (11) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%;
- (f) The condemnee appeals an award of the condemnation commission which exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%, if the jury verdict as approved by the court under s. 32.05 (10) or 32.06 (10) exceeds the award of the condemnation commission by at least \$700 and at least 15%;
- (g) The condemnor appeals the award of the condemnation commission, if the jury verdict as approved by the court under s. 32.05 (10) or 32.06 (10) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%;
- (h) The condemnee appeals an award of the condemnation commission which does not exceed the jurisdictional offer or the highest written offer prior to the jurisdictional offer by 15%, if the jury verdict as approved by the court under s. 32.05 (10) or 32.06 (10) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%; or
- (i) The condemnee appeals an assessment of damages and benefits under section 10 (2) of chapter 275, laws of 1931, as amended (Kline Law), if the verdict of the jury awards an amount at least \$700 and at least 15% greater than the award made by the city.

**SECTION 14. Program responsibilities.** (1) In the list of program responsibilities specified for the department of agriculture, trade and consumer protection in section 15.131 (intro.) of the statutes, insert reference to section "32.035".

(2) In the list of program responsibilities specified for the department of industry, labor and human relations in section 15.221 (intro.) of the statutes, insert reference to section "32.19 (4m) (a)".

(3) In the list of program responsibilities specified for the department of local affairs and development in section 15.281 of the statutes, insert reference to section "32.19 (4m) (a)".

**SECTION 15. Applicability.** The treatment of sections 32.05 (5), (10) (b) and (11) (a) and (b), 32.06 (9) (a) and (b), 32.10 and 32.28 of the statutes by this act shall apply to all actions and proceedings on or after the effective date of this act, regardless of when such actions or proceedings were commenced.

**SECTION 16. Effective date.** This act shall take effect on the first day of the 4th month after its publication.

1 transportation.

2 (c) All local and regional units of government which have  
3 jurisdiction over the area affected by the project. The department  
4 shall request that each unit post the statement at the place nor-  
5 mally used for public notice.

6 (d) Local and regional news media in the area affected.

7 (e) Public libraries in the area affected.

8 (f) Any individual, group, club or committee which has demon-  
9 strated an interest and has requested receipt of such information.

NOTE: This SECTION of the bill establishes an agricul-  
tural impact statement. The department of agriculture,  
trade and consumer protection is required to prepare and  
distribute the agricultural impact statement if an envi-  
ronmental impact statement is not already prepared for  
the project. The department is required to provide  
information about the net effect of condemnation  
projects on agricultural land and production.

The condemnor initiates the process by informing the  
department of the project whenever there is an "actual  
or potential" exercise of the powers of eminent domain.  
This means that the condemnor must inform the department  
of the project even if the property owner will voluntar-  
ily sell the property to the condemnor.

The department then prepares the impact statement  
according to the statutory criteria and time limits and  
distributes the impact statement to those designated to  
receive it.

10 SECTION 3. 32.05 (3m) of the statutes is created to read:

11 32.05 (3m) In this section, "uneconomic remnant" means the  
12 property remaining after a partial taking of property. If the prop-  
13 erty remaining is of such size, shape or condition as to be of  
14 little value or or substantially impaired economic viability. If  
15 the acquisition of only part of a property would leave its owner  
16 with an uneconomic remnant, the condemnor shall offer to acquire the

1 remnant concurrently and may acquire it by purchase or by condemna-  
 2 tion if the owner consents.

NOTE: This SECTION of the bill is based on section 208 of the uniform eminent domain code. It gives condemnors the authority to acquire uneconomic remnants. Condemnors must offer to acquire any uneconomic remnant. The condemnor may acquire the remnant by condemnation only if the owner consents. The definition of "uneconomic remnant" limits the condemnation authority granted by the bill to property that falls within the definition.

3 SECTION 4. 32.05 (5), (10) (b) and (11) (a) and (b) of the  
 4 statutes are amended to read:

5 32.05 (5) COURT ACTION TO CONTEST RIGHT OF CONDEMNATION. ~~then~~  
 6 If an owner desires to contest the right of the condemnor to condemn  
 7 the property described in the jurisdictional offer, for any reason  
 8 other than that the amount of compensation offered is inadequate,  
 9 ~~such~~ the owner may within 40 days from the date of personal service  
 10 of the jurisdictional offer or within 40 days from the date of post-  
 11 mark of the certified mail letter transmitting such offer, or within  
 12 40 days after date of publication of the jurisdictional offer as to  
 13 persons for whom such publication was necessary and was made, com-  
 14 mence an action in the circuit court of the county wherein the prop-  
 15 erty is located, naming the condemnor as defendant. Such action  
 16 shall be the only manner in which any issue other than the amount of  
 17 just compensation, or other than proceedings to perfect title ~~as~~  
 18 ~~provided in~~ under ss. 32.11 and 32.12, may be raised pertaining to  
 19 the condemnation of the property described in the jurisdictional  
 20 offer. The trial of the issues raised by the pleadings in such  
 21 action shall be given precedence over all other actions in said

LRB or Bill No.  
AB 1077  
Amendment No. if Applicable

If there is a state or local fiscal effect, attach worksheet.

Subject: Relating to various changes in the law on eminent domain.

Fiscal Effect

- State  Increase/Decrease Existing Appropriation  
 Create New Appropriation  
 Increase/Decrease Existing Revenues

- Increase Costs - May Be Possible to Absorb Within Agency's Budget  Yes  No  
 Decrease Costs  
 No State Fiscal Effect on DLAD

- Local:  Increase/Decrease Costs or Revenues  No Local Fiscal Effect  
 Permissive  Mandatory

- Fund Sources Affected  
 GPR  FED  PRO  PRS  SEG

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate:

This bill makes several changes in the statutes relating to eminent domain and the expenses which the condemnee may receive in certain condemnation proceedings. The following changes are likely to affect local governments:

- 1) The requirement for an agricultural impact statement.
- 2) The authority of the condemnor to acquire uneconomic remnants.
- 3) The option for the condemnee to select either a lump-sum settlement or an annual payment for property condemned for an easement.
- 4) The modification of the current "before and after" rule for determining the just compensation in a partial taking of property other than an easement.
- 5) The provision that the fair market value of buildings, fixtures, and improvements cannot be less than the reasonable cost of a functional replacement.
- 6) The four circumstances specified for which a condemnee may receive litigation expenses.

This bill is likely to increase condemnation-related costs of local units of government by an indeterminable amount. These costs can be categorized as: administrative, property acquisition, finance, business relocation, and litigation.

Administrative. There may be increased administrative costs involved in notifying the Department of Agriculture of "each actual or potential exercise of the power of eminent domain." It is not possible to determine the number of agricultural properties that will be condemned by local governments or the additional costs imposed for each notification. However, it is likely that the number will be small and the administrative costs negligible.

Property Acquisition. The authority granted the condemnor to purchase "uneconomic remnants" poses a potential property acquisition cost. Although it is not possible to project the number of cases where the owner of condemned property will consent to the purchase of an "uneconomic remnant" or the price of such property, the increased costs which fit the definition of an "uneconomic remnant." In addition, the modification of the current "before and after" rule for determining just compensation in a partial taking of property other than an easement also poses a potential property acquisition cost. This provision is likely to increase local government costs where the fair market value of the remaining property is enhanced as a result of the partial taking. It is not possible, however, to estimate the number of partial takings other than easements. Neither is it possible to determine the number of cases where the partial taking will increase the fair market value of the remaining property.

(continued on attached sheet)

Long-Range Fiscal Implications

Agency  
Department of Local Affairs and Development

Authorized Representative  
Daniel Thompson

Date  
12/5/77

# UNIFORM EMINENT DOMAIN CODE

With Prefatory Note and Comments

*Drafted by the*

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

*and by it*

Approved and Recommended for Enactment  
in All of the States

*at its*

Annual Conference  
Meeting in its Eighty-Third Year  
Kaanapali Beach, Maui, Hawaii

August 1-9, 1974

Law Library  
Univ. of Wisconsin  
Madison, Wisconsin

App. 163

short-term occupier (the maximum that can be required from an owner holding over). Under this section, a condemnor that takes by eminent domain receives no preferential advantage as com-

pared to its position when it acquires by purchase; and the tenant incurs no hardship in the form of an increase in rent above that required by his unexpired lease.

### Section 207. [Coercive Action Forbidden]

In order to compel an agreement on the price to be paid for the property, a condemnor may not advance the time of condemnation, defer negotiations or condemnation and the deposit of funds in court for the use of the owner, nor take any other action coercive in nature.

#### COMMENT

Section 207 is an adaptation of Section 301, par. (7) of the Federal Acquisition Policies Act.

### Section 208. [Offer to Acquire Uneconomic Remnant]

(a) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

(b). "Uneconomic remnant" as used in this section means a remainder following a partial taking of property, of such size, shape, or condition as to be of little value or that gives rise to a substantial risk that the condemnor will be required to pay in compensation for the part taken an amount substantially equivalent to the amount that would be required to be paid if it and the remainder were taken as a whole.

#### COMMENT

Subsection (a) of Section 208, which is based upon section 301, par. (9) of the Federal Acquisition Policies Act, goes beyond the federal act and expressly authorizes a condemnor to acquire an uneconomic remnant—a power which, under the language of the Federal Act, is only implied. The statutory powers of condemnors under state law are, in many

states, construed strictly; if an express grant of power were not included, this section might be deemed applicable only to acquisitions by agencies which are elsewhere empowered to acquire uneconomic remnants. Under Section 102(b), this section prevails over any statutory provisions inconsistent with it.

Subsection (b) is not based upon the Federal Act, but is believed to be consistent with its intent. Subsection (b) limits the operative effect of paragraph (a) to instances in which a partial taking results in one or more "physical" or "financial" remnants. Examples include remnants that are totally "land-locked" so that no physical use of the property is practicable; remnants reduced below minimum zoning area requirements where there is no reasonable possibility of a zoning change; remnants in such physical condition as to preclude economically practicable use for any plausible application; and remnants that are of significant potential value only to one or a few persons (*e. g.*, adjoining landowners). See, *e. g.*, Department of Public Works v. Superior Court, 68 Cal.2d 206, 65 Cal.Rptr. 342, 436 P.2d 342 (1968); State v. Buck, 226 A.2d 840 (N.J.1968). The duty of the condemnor to offer to acquire the remnant is limited to cases in which a failure to acquire it along with the rest of the "take" could impose a substantial economic hardship on the owner while acquisition would not be likely to increase total costs appreciably.

Section 208 does not require the acquiring agency to condemn the remnant if the offer is rejected; and it does not preclude a condemnor from acquiring an "uneconomic" remnant by eminent domain if the owner refuses the offer. On the other hand, if the owner is prepared to sell, but

is not willing to agree to the amount of compensation offered, this section authorizes the parties to agree to its acquisition by condemnation proceedings, so that the compensation may be ascertained by the trier of fact.

This section does not confer, nor does it affect, any authority which a public entity or private condemnor may have to acquire remnants other than those which are "uneconomic." For example, the acquisition of usable remnants for "protective" or "recoupment" purposes is not included within the mandatory offer here required. This section assumes that any offer in such cases, if elsewhere authorized by state law, ordinarily should be optional with the acquiring agency, and not mandatory, so that it will be free in light of the relative advantages and corresponding costs to decide whether to undertake the acquisition.

A separate offer required by subsection (a) must be made with respect to each remnant that meets the definition of subsection (b), and each may be acquired by different means, subject to the owner's consent. The offer in each instance must meet the requirements of Sections 202 to 203 (prior appraisal, and offer at not less than appraised compensation). The appraisal made of the portion of the owner's property included within the "take" may be used as the basis for the offer to acquire the uneconomic remnant if it contains sufficient valuation data for that purpose.

WISCONSIN LEGISLATIVE COUNCIL

SUMMARY OF PROCEEDINGS

SPECIAL COMMITTEE ON EMINENT DOMAIN

213 Northwest, State Capitol  
Madison, Wisconsin

September 9, 1977  
9:30 a.m. - 12:20 p.m.

[The following is a brief summary of the tape recording of the September 9, 1977 meeting of the Special Committee on Eminent Domain. The tapes are retained by the Legislative Council in its office at 147 North, State Capitol, Madison.]

COMMITTEE MEMBERS PRESENT:

Rep. Hanson, Chairperson; Mr. Ford, Secretary; Sen. Bidwell; Reps. Lee, McClain, Potter, Schmidt, Snyder; Public Members Anderson, Hollander, LeMay, Roszak, Van Sickle, Wedeward.

COMMITTEE MEMBERS EXCUSED:

Sen. Adelman, Vice-Chairperson; Sens. Goyke, Swan; Public Members Helstad, Lloyd, Quinn, Turk, Wickhem.

COUNCIL STAFF PRESENT:

Jim Fullin, Senior Staff Attorney; Mark C. Patronsky and Barbara Heaney, Staff Attorneys; and JoAnn Culp, Secretarial Staff, Legislative Council.

OTHERS PRESENT:

Rodney Jahnke, Maribel; Carol Wieland, Citizens for Highway Reform, Plymouth; Members of the Press and Others.

RECEIVED

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ATTENTION: THE NEXT MEETING OF THE EMINENT DOMAIN COMMITTEE WILL BE HELD AT THE CALL OF THE CHAIR.

LEGISLATIVE REFERENCE  
BUREAU

CALL TO ORDER AND ROLL CALL  
[AGENDA ITEM 1]

Representative McClain called the meeting to order. He explained that he would preside until the arrival of Chairman Hanson, who had been detained. The roll was held open until a quorum was present.

REPORT TO LEGISLATIVE COUNCIL  
CONTINUATION OF COMMITTEE  
[AGENDA ITEM 2]

Representative McClain explained that the Committee's draft containing WLCS numbers 333/2, 338/1, 339/1, 340/1, 341/1 and 342/1 was accepted by the Legislative Council and recommended for introduction on a vote of 17 to 0. (The bill is numbered 1977 Assembly Bill 969.) The Committee recommendations on right of first refusal (WLCS: 343/1) was returned to the Committee with a request for further review. The vote was 12 to 6. The Council also voted, unanimously, to continue the Committee so that the remaining work could be completed.

When Chairman Hanson arrived, he elaborated on Representative McClain's remarks. He urged the Committee to cooperate in preparing suggestions for change in the eminent domain laws with a broad enough appeal to secure passage of the legislation.

DISCUSSION AND APPROVAL OF BILL DRAFTS  
HELD OVER FROM AUGUST 24, 1977 MEETING  
[AGENDA ITEM 3]

a. WLCS: 344/1, Agricultural Impact Statement. Initially, discussion of this draft was deferred at the request of Representative Lee until Mr. Anderson arrived. Representative Lee said that Mr. Anderson had specific suggestions on the draft. The Committee proceeded to a discussion of WLCS: 353/1.

When Mr. Anderson arrived, the Committee took up WLCS: 344/1. Mr. Patronskey explained that the draft reflected the Committee's instructions. Mr. Anderson suggested an amendment to avoid possible duplication between environmental and agricultural impact statements: (1) If an environmental impact statement is prepared, a separate agricultural impact statement would not be required, but (2) that portion of the environmental impact statement relating to agriculture should be prepared by the Department of Agriculture.

Representative Potter moved, seconded by Representative Lee, to amend the proposal as it was proposed by Mr. Anderson. The motion passed on a roll call vote of Ayes, 13 [Ford, Bidwell, Lee, McClain, Potter, Schmidt, Snyder, Anderson, Hollander, LeMay, Roszak, Van Sickle and Wedeward]; Noes, 0; Absent or Not Voting, 9 [Hanson, Adelman, Goyke, Swan, Helstad, Lloyd, Quinn, Turk and Wickhem].

Mr. Van Sickle said that the draft may impose an unnecessary burden when only an easement is taken, for any taking could affect an entire farm operation. Mr. Hollander thought it would be impossible to estimate on an annual basis the kind, amount and value of commodities affected. Representative Schmidt said that it may be possible to summarize the impact on the total acreage involved; it would be very difficult to provide this information for every farm. Representative Potter discussed the need for the proposal; the public should know the agricultural impact of the entire project. The statement should be prepared by the Department of Agriculture because it has more credibility than the Department of Transportation or the Department of Natural Resources. Representative McClain suggested that the Bill could be less specific, and require the Department of Agriculture to promulgate rules subject to review by the agriculture committees of the Legislature. Mr. Anderson said that the Public Service Commission now obtains statements from the Department of Agriculture. Mr. Roszak recalled statements at the Sheboygan Falls hearing about severed drainage tile lines. The owners were not compensated and this suggested a need for WLCs: 344/1. Mr. Wedeward agreed that the situation mentioned in Sheboygan Falls called for a solution that was not dealt with by an environmental impact statement. He believed that perhaps the entire Bill should be replaced with a statement-of-duties section in the Chapter dealing with the Department of Agriculture.

Representative McClain suggested that some details of the draft should be reconsidered and the cost of the statement should be considered. However, the concept was good and the statement would be a useful aid for appraisers. Mr. Van Sickle said that there would be double costs; the information must be prepared by both the agency and the condemnors. Representative Potter suggested that the scope of the Bill could be narrowed by requiring the statement when there was a project involving 15 or more acres. Mr. LeMay suggested that the statement could be prepared only for disputed takings. Representative Lee said that the public needs the statement as much as the affected landowner.

Mr. Anderson suggested an amendment to change "affecting more than five acres" to "taking more than five acres," and deleting the second sentence. Mr. Van Sickle thought the entire Bill was not germane to eminent domain problems. For the benefit of the Committee, Representative McClain summarized the items to be covered by the motion: (1) adopting provisions of Mr. Anderson's original motion; (2) deleting the entire second sentence of sub. (3); (3) applying provisions only to cases where at least five acres were in fact taken or could be taken; (4) requiring a single statement for the entire project; and (5) limiting application to agricultural land.

Representative Schmidt moved, seconded by Mr. LeMay, to adopt the motion as outlined above. The motion passed on a roll call vote of Ayes, 14 [Hanson, Ford, Bidwell, Lee, McClain, Potter, Schmidt, Snyder, Anderson, Hollander, LeMay, Roszak, Van Sickle and Wedeward]; Noes, 0; and Absent or Not Voting, 8, [Adelman, Goyke, Swan, Helstad, Lloyd, Quinn, Turk and Wickham].

Representative McClain moved, seconded by Representative Lee, to exempt from the requirements of the draft, land taken under the special provisions of Ch. 81 (by town governments). The motion passed on a roll call vote of Ayes, 11 [Hanson, Ford, Lee, McClain, Potter, Schmidt, Anderson, Hollander, LeMay, Roszak and Wedeward]; Noes, 1 [Snyder]; Absent or Not Voting, 10 [Adelman, Bidwell, Goyke, Swan, Helstad, Lloyd, Quinn, Turk, Van Sickle and Wickhem].

b. WLCS: 353/1, Comparable Sales. Mr. Patronsky explained that this draft was based on s. 1108 of the Uniform Eminent Domain Code. It established two standards for comparable sales:

1. The sale must have occurred within a reasonable time before or after the date of valuation.

2. The property involved must be sufficiently similar.

The draft contains standards for establishing that similarity. Mr. LeMay said this would eliminate the use of older sales with an adjustment factor for time. Mr. Van Sickle questioned whether the draft was really necessary since this is the way sales are now compared. Mr. Halversen, representing the Department of Transportation, said an adjustment was almost always necessary because of the differences between properties.

Representative Schmidt moved, seconded by Mr. Wedeward, that the draft be adopted. The motion passed on a roll call vote of Ayes, 13 [Ford, Bidwell, Lee, McClain, Potter, Schmidt, Snyder, Anderson, Hollander, LeMay, Roszak, Van Sickle and Wedeward]; Noes, 0; Absent or Not Voting, 9 [Hanson, Adelman, Goyke, Swan, Helstad, Lloyd, Quinn, Turk and Wickhem].

c. WLCS: 354/1, Market Value in Partial Takings. Mr. Patronsky explained that this draft modified the present statutory language for determining just compensation in a partial taking. The additional language permits recovery of the fair market value of the property taken if that sum exceeds the "before and after" value.

Representative Potter said that this draft addresses a problem that occurred in his district in which condemnees received awards of \$0. This draft was some guarantee that the condemnee would receive at least the value of the property taken.

Mr. Van Sickle asked if the bill applied where the partial taking involved an easement; if so this might cause problems in setting a value. Mr. Fullin explained that the language is based on the Uniform Eminent Domain Code, which does apply to easements.

Mr. Van Sickle moved, seconded by Mr. Hollander, to exclude easements from partial taking. The motion passed on a roll call vote of Ayes, 10 [Hanson, Ford, Bidwell, Potter, Schmidt, Snyder, Anderson, Hollander, LeMay and Van Sickle]; Noes, 3 [Lee, Roszak and Wedeward]; Absent or Not Voting, 9 [Adelman, Goyke, Swan, McClain, Helstad, Lloyd, Quinn, Turk and Wickhem].

Representative Potter moved, seconded by Mr. Hollander, to adopt the draft as amended. The motion passed on a roll call vote of Ayes, 13 [Hanson, Ford, Bidwell, Lee, Potter, Schmidt, Snyder, Anderson, Hollander, LeMay, Roszak, Van Sickle and Wedeward]; Noes, 0; Absent or Not Voting, 9 [Adelman, Goyke, Swan, McClain, Helstad, Lloyd, Quinn, Turk and Wickhem].

d. WLCS: 355/1, Uneconomic Remnants. Mr. Patrosky explained that this draft applies to both quick taking and regular taking procedures and allows condemnors to acquire uneconomic remnants. It is based on s. 208 of the Uniform Eminent Domain Code. In response to a question from Mr. Anderson, Mr. Patrosky stated that he knew of no case law on the Uniform Code. Mrs. Heaney observed that the Wisconsin Statutes include authority to acquire uneconomic remnants in a few cases. Chairman Hanson recognized Mrs. Carol Wieland, a spectator, who referred to a remnant of 30 acres to which there was no access. This kind of property should also be taken in the condemnation process.

Mr. Anderson moved, seconded by Mr. Potter, to amend the last sentence of both SECTIONS 1 and 2 of the draft by adding the phrase "or of substantially impaired economic viability." The motion passed on a roll call vote of Ayes, 12 [Hanson, Ford, Bidwell, Lee, Potter, Schmidt, Snyder, Anderson, Hollander, LeMay, Roszak and Wedeward]; Noes, 0; Absent or Not Voting, 10 [Adelman, Goyke, Swan, McClain, Helstad, Lloyd, Quinn, Turk, Van Sickle and Wickhem].

It was moved by Representative Potter, seconded by Mr. LeMay, that the draft, as amended, be adopted. The motion passed on a roll call vote of Ayes, 12 [Hanson, Ford, Bidwell, Lee, Potter, Schmidt, Snyder, Anderson, Hollander, LeMay, Roszak and Wedeward]; Noes, 0; Absent or Not Voting, 10 [Adelman, Goyke, Swan, McClain, Helstad, Lloyd, Quinn, Turk, Van Sickle and Wickhem].

e. WLCS: 356/1, Replacement of Improvements. Mr. Patrosky explained that the present language of s. 32.09 (5m) has been criticized as ambiguous. The draft is based on s. 1004 of the Uniform Eminent Domain Code. The draft provides that the fair market value of buildings, fixtures and improvements cannot be less than the cost of "functional replacement." The draft defines that term to include costs of relocation and rehabilitation. These factors are to be determined by examining comparable facilities. After a brief discussion,

Mr. LeMay moved, seconded by Mr. Ford, to adopt the draft as presented. The motion passed on a roll call vote of Ayes, 12 [Hanson, Ford, Bidwell, Lee, Potter, Schmidt, Snyder, Anderson, Hollander, LeMay, Roszak and Wedeward]; Noes, 0; Absent or Not Voting, 10 [Adelman, Goyke, Swan, McClain, Helstad, Lloyd, Quinn, Turk, Van Sickle and Wickhem].

f. WLCS: 357/1, Litigation Expenses. Mr. Fullin explained that the draft provides systematic compensation for litigation expenses. The payment of attorneys' fees is the basic feature of the draft, but other costs are included. SECTION 7 of the draft defines litigation expenses and establishes the manner of calculating other costs. The draft would also apply to condemnations under the Klein Law. Mr. Ford and Chairman Hanson originally urged that litigation costs should be recovered at each stage of litigation. Other members expressed a concern that such a provision would encourage litigation and expressed approval of the bill as drafted.

Representative Lee moved, seconded by Mr. Anderson, to adopt the draft as presented. The motion passed on a roll call vote of Ayes, 13 [Hanson, Ford, Bidwell, Lee, McClain, Potter, Schmidt, Snyder, Anderson, Hollander, LeMay, Roszak and Wedeward]; Noes, 0; Absent or Not Voting, 9 [Adelman, Goyke, Swan, Helstad, Lloyd, Quinn, Turk, Van Sickle and Wickhem].

g. WLCS: 359/1, Annual Payments. Mr. Fullin outlined the provision of the draft. A new section, 32.09 (6m) would be created to give a condemnee an option, in the case of the taking of an easement, to receive an annual payment rather than a lump sum. Where the annual payment was selected, payments would be adjusted each year to reflect percentage increases in full-value assessment of all taxable property in the state. Upon transfer of the property, the new owner could either continue to receive the annual payment or waive this right. The balance of the bill elaborated what constituted waiver.

Representative Schmidt asked whether the subsequent owner had the right to terminate annual payments forever or just for the time he held the land. He felt that the right should be a covenant running with the land. Mr. Fullin responded that the point was well-taken. If he were redrafting the bill, he would suggest permitting "waiver in writing as to himself or herself and all successors in interest." The Committee agreed informally. At the request of Senator Bidwell, Mr. Fullin explained the escalation clause more fully; the provision was tied to increases in land values rather than to the rate of inflation.

Mr. Wedeward moved, seconded by Mr. Anderson, to adopt the draft including the additional language suggested by Counsel. The motion passed on a roll call vote of Ayes, 12 [Hanson, Ford, Bidwell, Lee, McClain, Potter, Schmidt, Anderson, Hollander, LeMay, Roszak and Wedeward]; Noes, 1 [Snyder]; Absent or Not Voting, 9 [Adelman, Goyke, Swan, Helstad, Lloyd, Quinn, Turk, Van Sickle and Wickhem].

DISCUSSION AND CONSIDERATION OF WLCS: 343/3,  
RIGHT OF FIRST REFUSAL  
[AGENDA ITEM 4]

Chairman Hanson summarized the reasons why the Legislative Council had returned the Committee draft for additional study. The Council felt it was not desirable public policy to tie up land for such long periods of time (25 years). The draft was not practicable: it would be difficult to trace ownership. Chairman Hanson instructed the staff to prepare a draft incorporating the major suggestions of the Council. That draft was now before the Committee for discussion purposes.

Representative Lee felt that it was important to affirm the Committee belief in the concept of the right of first refusal, although he agreed that 25 years was a long time to provide for the continuance of the right.

Mr. Hollander moved, seconded by Mr. Ford, to amend the draft to provide that the right of first refusal should continue for 10 years after the vesting of title. The motion carried on a unanimous voice vote.

Mr. Anderson moved, seconded by Representative Lee, to amend the draft to apply to easements acquired by condemnation or "sale after a jurisdictional offer" rather than by "threat of condemnation." The motion passed on a unanimous voice vote.

Representative Lee felt that language should be reinstated in the draft that would restrict condemnors to using the condemned land for the specific project that led to the original taking. At Chairman Hanson's suggestion, since there appeared to be general agreement with Representative Lee's suggestion, all changes, including the previously adopted amendment, were summed up for the Committee by Mr. Patronsky and incorporated in a motion to adopt the draft as amended.

Representative Lee moved, seconded by Representative Potter, to adopt WLCS: 343/3 with the following changes: (1) to change "threat of condemnation" to "or sale after jurisdictional offer", (2) change 25 years to 10 years, and (3) to provide that "property may not be transferred or used for another project until the condemnor gives the right of first refusal to the original owners or their heirs or assigns." The motion passed on a roll call vote of Ayes, 12 [Hanson, Ford, Lee, McClain, Potter, Snyder, Schmidt, Anderson, Hollander, LeMay, Roszak and Wedeward]; Noes, 0; Absent or Not Voting, 10 [Adelman, Bidwell, Goyke, Swan, Helstad, Lloyd, Quinn, Turk, Van Sickle and Wickhem].

PUBLIC APPEARANCES  
[AGENDA ITEM 5]

There were no public appearances.

OTHER BUSINESS  
[AGENDA ITEM 6]

Chairman Hanson invited discussion on the desirability of combining drafts before presentation to the Council. He noted that, if necessary, the issues in a combined draft could be divided for consideration.

Representative Schmidt suggested that it would be appropriate to keep the draft on "right of first refusal" [WLCS: 343/3] separate since the Council had already considered the concept earlier and returned it to the Committee for additional study.

The Committee agreed informally with Representative Schmidt's suggestion. Chairman Hanson said he would show legislative members the final drafts prior to presenting the recommendations to the Legislative Council. He would not call a meeting merely to approve the combined draft and the redrafted version of WLCS: 343/3; the Committee would receive copies of those drafts.

Chairman Hanson recalled that the Committee had been continued by the Council. He asked for suggestions for additional areas to be studied. Mr. Roszak wanted to study the Klein Law. He was also concerned that the Committee had not received from the Department of Transportation the material he had requested about the costs of land in relation to engineering and construction costs for highways. Mr. Patrosky promised to pursue the matter. Mr. Wedeward hoped the Committee would pursue the question of who should be given the right to condemn.

PLANS FOR FUTURE MEETINGS  
[AGENDA ITEM 7]

Chairman Hanson said the next meeting would be at the call of the Chairman but would not occur until after completion of the present floorperiod.

BH(MCP):jc;jmm

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WISCONSIN COURT OF APPEALS  
DISTRICT II

**07-27-2012**

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OF WISCONSIN**

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**Scott N. Waller and Lynnea S. Waller,  
Plaintiffs-Respondents,**

**Appeal No. 2012AP000840  
Appeal No. 2012AP805**

**v.**

**American Transmission Co., LLC  
Defendant-Appellant.**

**Circuit Court Case  
No. 2008CV000520  
No. 2010CV691**

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**BRIEF AND APPENDIX OF PLAINTIFFS-RESPONDENTS,  
SCOTT N. WALLER AND LYNNEA S. WALLER**

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Consolidated Appeals

Appeal From A Judgment Dated March 1, 2012,  
Circuit Court Case No. 208CV00520  
Hon. James L. Carlson, Presiding

Appeal From A Judgment Dated February 29, 2012  
Circuit Court Case No. 2010CV691  
Hon. James L. Carlson, Presiding

---

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## INTRODUCTION

This case involves the taking of a utility easement by the Petitioner, American Transmission Company (“ATC”) from a residential property owned by the Respondents, Scott & Lynnea Waller, in the town of Delavan. The Wallers challenged the right of ATC to acquire the easement under Wis. Stat. § 32.06(5), unless and until ATC acquired the balance of the property as an “uneconomic remnant”. Wis. Stat. § 32.06 (3m).

What followed was a nightmare of litigation involving multiple motion hearings, a hearing before the Condemnation Commission, a jury trial, a court trial, lengthy and repetitive depositions of the Wallers and other witnesses, and two appeals to the Court of Appeals, all as outlined in the Statement of the Case. Eventually, Judge Carlson ruled that the Wallers were left with an “uneconomic remnant.” Judge Carlson also awarded the Wallers litigation expenses in the amount of \$211,261.74 under Wis. Stat. § 32.28(3)(b), as plaintiffs in a successful challenge action. In a separate suit, Judge Carlson conducted a trial and ruled that the Wallers were “displaced persons” and therefore entitled to relocation benefits under Wis. Stat. § 32.19 in the amount of \$26,350.00 plus costs in the amount of \$1,811.92, for a total judgment of \$28,161.92.

In this appeal, ATC is challenging factual determinations of the Trial Court which are not reviewable under the provisions of Wis. Stat. § 805.17(2). ATC has also challenged whether the Wallers properly commenced a challenge action pursuant to the provisions of Wis. Stat. § 32.06(5), an issue that has been resolved twice by the Court of Appeals.

STATEMENT OF ISSUES

1. Did the Trial Court properly interpret and apply the uneconomic remnant statute, Wis. Stat. § 32.06(3m)?

**Not Answered by the Trial Court**

2. How must a landowner raise a claim that a condemnor has taken too little property, leaving the landowner with an uneconomic remnant?

**Answered by the Trial Court and the Court of Appeals in Decisions dated October 28, 2009 and May 25, 2011 (*Waller I* and *Waller II*):** By commencement of an action under Wis. Stat. § 32.06(5).

3. May a landowner recover litigation expenses under Wis. Stat. § 32.28(3)(b)?

**Answered by the Trial Court:** Yes.

4. Were the Wallers displaced persons entitled to relocation benefits pursuant to the provisions of Wis. Stat. § 32.19(2)(e)a?

**Answered by the Trial Court:** Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

While this action turns on “findings of fact” under an unambiguous statutory standard, publication could avoid similar litigation in the future. In addition, this appeal and ATC’s denial of the Waller claims involve a gross abuse of ATC’s authority and resources, designed to punish the Wallers for challenging its actions. ATC should be available for questioning regarding its persistence in pursuing a defense of the Wallers’ modest claims.

Both oral argument and publication are appropriate.

## STANDARD OF REVIEW

The standard of review for findings of fact made by a trial court is that they will be affirmed unless clearly erroneous. *Employers Ins. of Wausau v. Jackson*, 190 Wis. 2d 597, 527 N.W.2d 681 (1995); Wis. Stat. § 805.17 (2). When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, 257 Wis. 2d 421, 651 N.W.2d 345.

Review of the application of an unambiguous statutory standard to agreed facts is a question of law to be reviewed *de novo*. *Marotz v. Hallman*, 2007 WI 89, ¶15, 302 Wis. 2d 428, 734 N.W.2d 411.

STATEMENT OF FACTS

Scott and Lynnea Waller are husband and wife and have owned property at 6249 Mound Road, Delavan, Wisconsin since 1989. (R 266, p. 1, ¶2; R-App. p. 104.)<sup>1</sup> The property involves 1.51 acres of land (65,775 square feet), a one family residence, site improvements, landscaping and out buildings. *Id.* The property is zoned A-1 Agricultural; it has been used by the Wallers since its acquisition in 1989 as a residence, for hobby farming, including raising chickens, turkeys and pasturing sheep. *Id.*

On March 30, 2006 the Public Service Commission issued a certificate of public convenience and necessity to ATC for a high-voltage transmission line project which passed through the Waller property. (RR. 43, Ex. 660.) The ATC project involved installing 138 KV electric transmission lines on 45' easements on two sides of the Waller's triangular property. (R. 259, Ex. 1, R-App p. 101.)

The Wallers were provided with a copy of an appraisal report dated December 9, 2007 prepared for ATC by John Rolling and Rolling & Co. He found the following before and after values:

Before:	\$130,000
After:	<u>\$ 55,500</u>
Damage:	\$ 74,500 57%

(R. 259, Ex. 217, p. 1.)

The Rolling appraisal report contained the following conclusion:

“We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land.”

(R. 259, Ex. 217, p. 18.)

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<sup>1</sup> Following the lead of the Petitioners, the designation “R” refers to the record in the right-to-take case (2008-CV-520, appealed as 12-AP-840). The designation “RR” refers to the record in the relocation case (2010-CV-691, appealed as 12-AP-805). The designation “R-App” refers to the page number of the Respondent’s Appendix that accompanies this brief.

The Wallers retained Kurt Kielisch of Appraisal Group One to appraise their property before and after taking. Mr. Kielisch's report dated February 18, 2008 made these findings:

Before:	\$132,000
After:	<u>\$ 15,500</u>
	\$116,500 88%

(R. 259, Ex. 8, p. 8.)

Mr. Kielisch also concluded that the residential improvements after taking had no value. His report stated:

“Granting of such rights to the Grantee reduces the property owner’s right to enjoy their property and utilize it to its fullest use. Due to the restricted use of the property and the giving up of the right to control the easement area, it is concluded that the easement area represents a 100% loss of property value to the property owner.”

(R. 259, Ex. 8, p. 20.)

On March 14, 2008, Dave Davies, negotiator for ATC, met with the Wallers and agreed to buy the entire property for \$132,000, but conditioned the offer on having the Wallers waive their relocation benefits under the provisions of Wis. Stat. §32.19.<sup>2</sup> (R 266, p. 2, ¶4.) The Wallers declined the Offer. *Id.*

On March 20, 2008, American Transmission Company, LLC served the Wallers with a Jurisdictional Offer in the amount of \$99,500, representing 76.53% of ATC’s appraised value of the total property, for the purchase of a forty-five foot utility easement along two sides of their triangular property covering .799 acres (34,804 square feet) and running for a distance of 291 feet along the north boundary of the property and 482 feet

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<sup>2</sup> By negotiating for a waiver of relocation benefits, Mr. Davies violated the provisions of Wis. Stat. §§ 32.197, 32.25, 32.26, 32.29 and Comm 202.001, 202.08(3), 202.10, and 202.12, Wis. Adm. Code. That issue is not before the court but is part of the context of the case.

along the southeastern boundary for a total distance of 773 feet. (R. 259, Ex. 1.) The easement covered 52.91% of the lot. *Id.*

\*\*\*

The Wallers filed a claim with ATC for relocation benefits under Wis. Stat. § 32.20 on December 15, 2008. The claim was denied. Upon petition of the Wallers under Wis. Stat. § 32.26(5), a Department of Commerce representative, Jack Sanderson, visited the Waller property on April 20, 2009, and on June 3, 2009 determined that the Wallers were displaced persons and entitled to relocation benefits under Wis. Stat. § 32.19(2)(e)a.<sup>3</sup> (RR. 43, Ex. 10).

On September 10, 2009 the Wallers' relocation claim was supplemented to reflect actual relocation costs incurred by the Wallers following the acquisition of replacement property in the Town of Sharon on March 12, 2009. (RR. 43, Ex. 8.) The claim totaled \$60,789.37; the claim was updated on January 19, 2012 to \$66,948.68. (RR. 43, Ex. 9, R-App. p. 111.)

The Wallers proceeded on their own to investigate the market of comparable replacement homes, since ATC had not filed a relocation plan as required by Wis. Stat. § 32.25. (RR. 43, Ex. 3.) After more than nine months of searching, the Wallers purchased a replacement home at 2141 Salt Box Road in the Town of Sharon on March 12, 2009 for \$177,500. (RR. 43, Ex. 5.)

On April 30, 2010 the Wallers commenced an action pursuant to Wis. Stat. § 32.20 to recover the amount of the claim. After a trial on January 25, 2012, Judge Carlson found that the Wallers were displaced persons under the provisions of Wis. Stat.

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<sup>3</sup> The responsibilities for reviewing relocation plans have since been transferred to the Department of Administration, due to a restructuring of the Department of Commerce at the state level. Mr. Sanderson remains in his current position, now with the Department of Administration.

§ 32.19(2)(e) and ordered Judgment on February 29, 2012 for relocation expenses in the amount of \$26,350.00 plus costs of \$1,811.92 for a total judgment of \$28,161.29 (RR. 50, R-App. p. 116.)

STATEMENT OF THE CASE

On March 20, 2008, American Transmission Co., LLC, ATC, served the Wallers with a Jurisdictional Offer to acquire a forty-five foot utility easement along two sides of their triangular property at 6249 Mound Road, Delavan, Wisconsin. (R. 259, Ex. 1, R-App. p. 101.) The Jurisdictional Offer of \$99,500 represented 76.53% of the \$130,000 appraised value of the property. *Id.*

On April 25, 2008, the Wallers commenced an action pursuant to the provisions of Wis. Stat. § 32.06(5) claiming that the remnant left after the acquisition of the easements was an uneconomic remnant as that term is defined in Wis. Stat. §32.06(3m) (Case No. 08CV520). On May 7, 2008 ATC petitioned the Court for a hearing before the Condemnation Commission pursuant to the provisions of Wis. Stat. § 32.06(7) (Case No. 08GF78). (R. 6). At a hearing on May 22, 2008, Judge Robert J. Kennedy declined to conduct a hearing on whether the Wallers were left with an uneconomic remnant and the case was adjourned to November 5, 2008. He then referred the matter to the Condemnation Commission on May 22, 2008 and gave ATC immediate possession of the property. (R. 10.)

Following a hearing on June 11, 2008, the Condemnation Commission filed an Award of Damages in the amount of \$90,000 based on the following findings:

Fair Market Value before the taking	\$130,000.00
Fair Market Value immediately after the taking	<u>\$ 40,000.00</u>
Reduction in fair market value	\$ 90,000.00 69%

(R. 47.) The Award of Damages of the Condemnation Commission was appealed to Circuit Court of Walworth County on July 29, 2008 (Case No. 08CV955).

On November 5, 2008 in Case No. 08CV520, the Court dismissed the action, ruling that Wis. Stat. § 32.06(5) did not authorize the Wallers to raise the issue of whether they had been left with an uneconomic remnant. (R. 113.) An Order for Dismissal was signed on November 18, 2008. (R. 53.)

On October 28, 2009, the Court of Appeals reversed the ruling and remanded the case to the Circuit Court of Walworth County for trial on the issue of whether the Wallers were left with an uneconomic remnant. *Waller v. ATC (Waller I)*, 2009 WI App. 172, 322 Wis. 2d 255, 776 N.W.2d 612.

On remand, the case was assigned to the Honorable John R. Race who conducted a scheduling conference on January 4, 2010. On January 22, 2010, the Court signed and filed a Scheduling Order which, contrary to the decision of the Court of Appeals, directed that a jury trial be conducted in the related valuation case (Case No. 08CV955) involving the Waller appeal from the award of the Condemnation Commission, before a trial in the uneconomic remnant case would occur (Case No. 08CV520). (R. 76.)

On February 24, 2010, the Wallers petitioned the Court of Appeals to issue a Writ of Mandamus directing the trial court to comply with the remand in its decision dated October 28, 2009. (R. 82.) On March 17, 2010, the Court of Appeals denied the Petition for Mandamus on the ground that the trial court had discretion on how to proceed after remand and on the ground that the Wallers retained an adequate remedy by appeal. (R. 87.)

A jury trial was conducted on March 22, 23 and 24, 2010 in the related valuation case involving the Waller appeal from the adequacy of an Award of Damages by the Condemnation Commission (Case No. 08CV955). The jury found:

Before Value:	\$132,000
After Value:	<u>\$ 38,000</u>
Damage	\$ 94,000

(R. 187.)

Without taking evidence on the issue of whether the property left in the ownership of the Wallers was an uneconomic remnant, the Court made an oral ruling dismissing the Waller action in Case No. 08CV520, in which they contended that they were left with an uneconomic remnant under Wis. Stat. § 32.06(3m). (R. 208, p. 42.) Judgment was entered on May 21, 2010. (R. 197.) The Wallers appealed on June 9, 2010.

On May 25, 2011 the Court of Appeals reversed the dismissal of the Waller uneconomic remnant action and stated:

As the Wallers were entitled to a determination of whether their remaining property is an uneconomic remnant as defined in Wis. Stat. § 32.06(3m) prior to the just compensation phase of the eminent domain proceedings, we reverse and remand for a § 32.06(5) hearing and proceeding consistent with this decision. If the circuit court finds that the Wallers' property is an uneconomic remnant, the jury's just compensation verdict is vacated.

*Waller v. ATC (Waller II)*, 2011 WI App 91 ¶17, 334 Wis.2d 740, 799 N.W.2d 487.

On this second remand, the uneconomic remnant case was tried by Judge James Carlson on November 10 and 14, 2011. Judge Carlson found the acquisition of the 45-foot easements resulted in the Waller property sustaining “substantially impaired economic viability”. (R. 266, p. 5, ¶13, R-App. p. 108.) The Court then concluded the Wallers were left with an uneconomic remnant and signed detailed Findings of Fact and

Conclusions of Law and an Order for Judgment and Judgment directing ATC to acquire the “uneconomic remnant” based on a value of \$130,000 for the entire property. (R. 266, p. 6, R-App. p. 109; R. 283, R-App. p. 110.)

On January 26, 2012, Judge Carlson conducted a hearing regarding the claim of the Wallers to reimbursement of litigation expenses in the amount of \$299,626.74 pursuant to Wis. Stat. § 32.28(3)(b). At that hearing, the Judge ordered reimbursement of attorneys fees, and on March 9, 2012 signed a final order awarding the Wallers \$211,261.74 in litigation expenses. (R. 286, R-App. p. 111.)

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On December 15, 2008 the Wallers filed a claim with ATC pursuant to the provisions of Wis. Stat. § 32.20 for relocation benefits due under Wis. Stat. § 32.19. ATC denied the claim. The Wallers then petitioned, pursuant to Wis. Stat. § 32.26(5) that the Department of Commerce make a determination that the Wallers should be considered “displaced persons” entitled to relocation benefits as a result of ATC’s acquisition. (RR. 43., Ex. 7.) On April 30, 2010 the Wallers commenced an action pursuant to Wis. Stat. § 32.20 to recover the amount of the claim (Case No. 10CV691).

The action to recover relocation expenses in the amount of \$66,948.68 was tried before Judge James Carlson on January 25, 2012. Judge Carlson found that the Wallers were displaced persons entitled to relocation benefits. (RR. 47, R-App. p. 116.) On February 29, 2012 Judgment was entered in favor of the Wallers in the amount of \$28,161.92. (RR. 50, R-App. p. 117.) The Wallers’ claim for relocation expenses was

reduced, in part, because of the provisions of Wis. Stat. § 32.19(4) which limits recovery for the acquisition of “replacement housing” to \$25,000. (RR. 47, R-App. p. 116.)

## ARGUMENT

### I.

The Findings of the Trial Court  
Are Supported By Substantial Evidence In The Record And Confirm  
The Conclusion That The Wallers Were Left With  
An “Uneconomic Remnant”.

In its decision in *Waller II*, this Court stated:

From the outset, the underlying dispute between the parties has been whether the land left to the Wallers after the partial taking is an uneconomic remnant. An uneconomic remnant is defined as “the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability.” Wis. Stat. § 32.06(3m). If a partial taking leaves the property owner with an uneconomic remnant, “the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.”

*Waller v. ATC (Waller II)*, 2011 WI App 91 ¶12, 334 Wis. 2d 740, 799 N.W.2d 487

In addition, the Court held, “Whether the remaining property after a partial taking has ‘little value’ or is ‘of substantially impaired economic viability’ is a factual question for the circuit court to resolve.” *Id.* ¶15. This Court then proceeded to remand the case to the Circuit Court for a “determination of whether the Wallers’ remaining property is an uneconomic remnant as defined in Wis. Stat. § 32.06(3m). *Id.* ¶ 17.

In strict compliance with the remand of the Court of Appeals, Judge Carlson conducted a trial to the Court on November 10 and 14, 2011. At the conclusion of the trial, he found that the acquisition of the utility easements by ATC had caused the Waller property to sustain “substantially impaired economic viability”. (R. 266, p. 5, R-App. p. 108.) He signed formal Findings of Fact and Conclusions of Law on December 14, 2011. (R. 266, p. 6, R-App. p. 109.)

The basis for the trial court's finding that the Waller property had sustained "substantially impaired economic viability" is set out in the formal Findings of Fact and Conclusions of Law as follows:

a) The Jurisdictional Offer dated March 20, 2008, set damage to their property at \$99,500 which constituted 76% of the \$130,000 value of the Waller property.

b) Both appraisers, Kielisch for the Wallers and Rolling for ATC, agree that the value of the residential improvements have been made totally obsolete as a result of the taking, and that the Highest & Best Use of the property changed from residential to vacant industrial. Both appraisers made allowance in their determination of damage for the cost of demotion of the residential improvements.

c) Following installation and activation of the e138 kv high voltage transmission line, the Wallers experienced regular interference with radio, television and telephone reception which prompted concerns concerning the health and safety of the site for themselves, their three children, their six grandchildren, and for anyone else who might purchase or occupy the property.

d) The removal of trees and shrubbery within the easement area substantially reduced the attractiveness of the site and eliminated the sound and site barrier between the home and I-43.

(R. 266, p. 5, ¶13, R-App. p. 108.)

The Findings of Fact of the Trial Court are supported by substantial evidence in the record and must be sustained unless found to be clearly erroneous. Wis. Stat. § 805.17(2). In *Employers Ins. of Wausau v. Jackson*, 190 Wis. 2d 597, 527 N.W.2d 681 (1995), the Supreme Court stated,

"Statutory construction is a question of law that we review *de novo*. The factual findings of the trial court, however, will not be disturbed unless they are found to be clearly erroneous."

ATC references *Faulkner v. Northern States Phone Co.*, 75 Wis. 2d 116, 248 N.W.2d 885 (1977), which establishes that a determination of necessity by an entity having the power of eminent domain cannot be challenged in the absence of “fraud, bad faith or gross abuse of discretion”. However, the Wallers have never challenged the right of ATC to acquire the easement in connection with the broader project approved by the Public Service Commission. The essence of the Waller claim is that ATC may not proceed with that authority unless and until ATC acquires the uneconomic remnant. The right to make such a claim has been confirmed in *Waller I* and *Waller II*.

Next, ATC contends that Judge Carlson applied the wrong standard. Judge Carlson applied the precise standard in the statute which is referenced in the Court of Appeals decision in *Waller II*. The Court of Appeals determined that the factual issue to be determined was whether the acquisition of the ATC easements caused the Waller property to sustain “substantially impaired economic viability”. *Waller II*, 2011 WI App 91 ¶15. On the basis of compelling evidence in the record, the Trial Court ruled the Waller property had sustained “substantially impaired economic viability”.

ATC also challenges the reliance of the trial judge on the testimony of Jack Sanderson that the Waller property, as a result of the taking of the easements, was no longer decent and safe under the provisions of the Wisconsin Administrative Code 202.04. ATC would have preferred the court rely on the testimony of its professional witnesses, Mr. Rolling, an appraiser, and Mr. Henry Reynolds, a licensed professional engineer and an employee of ATC.

However, when the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness’s testimony.

Wis. Stat. § 805.17 (2). In *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207 ¶19, 257 Wis. 2d 421, 651 N.W.2d 345, the Court of Appeals stated,

“The reason for this rule is that the trier of fact had the opportunity to observe the witnesses and their demeanor. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.”

The trial court was justified in giving weight and credibility to Mr. Sanderson’s testimony. He is an experienced agent of the Wisconsin Department of Administration, charged with the responsibility of investigating and evaluating relocation claims of parties affected by eminent domain acquisitions filed pursuant to Wis. Stat. § 32.26(5). Mr. Sanderson is an independent representative of the Department of Administration, who concluded that, after taking, the Wallers were displaced persons entitled to relocation benefits. ATC is attempting to re-try factual issues in the appellate court, in violation of well-established rules of judicial review.

ATC next argues that the trial court improperly placed reliance on the terms of the Jurisdictional Offer that set the damage to the Waller property at \$99,500, which constituted 76% of the \$130,000 value placed on the Waller property by ATC’s appraiser, John Rolling. ATC contends that the Jurisdictional Offer should not have been considered because it was a settlement offer which in most litigation cases is excluded from consideration under the provisions of Wis. Stat. § 904.08. ATC does not understand that the Jurisdictional Offer is not a settlement offer in the context of Wis. Stat. § 904.08. It is an offer which is the jurisdictional basis upon which a condemnor may proceed to acquire an owner’s property. In this case, the Trial Court could not have made a determination of whether the Wallers were left with an uneconomic remnant unless he considered the offer of acquisition made by ATC. ATC argues that the Court should

have used the valuation of the jury verdict, which set the before value of the property at \$132,000 and the after value of the property at \$38,000. In making this argument, ATC fails to recognize that the Waller challenge action, based on the claim that they were left with an uneconomic remnant, was to be tried *prior to* any hearing before the Condemnation Commission and/or the Circuit Court. Judge Carlson proceeded correctly, and in disciplined compliance with the directives of the Court of Appeals in *Waller I* and *Waller II*. The documentary evidence before him was ATC's appraisal by John Rolling, the Waller appraisal by Appraisal Group One, and the Jurisdictional Offer.<sup>4</sup>

Finally, ATC argues the trial court made findings that were excluded from the record, regarding a conversation between the Wallers and Dave Davies. The Wallers testified that they declined the offer because Davies conditioned the offer upon waiver of their relocation rights. (R. 303, p.34, L 23 – p.35, L 2.) The exchange between the Wallers and Davies is relevant and was considered by the trial court in the formal Findings of Fact and Conclusions of Law. (R. 266, p. 2, ¶4, R-App. p. 105.)

ATC then proceeds to cite a series of cases relating to “uneconomic remnants”. None of those cases make reference to the standard in the Wisconsin Statutes that if an acquisition from a private property owner results in “substantial impairment of economic viability” it will be considered an uneconomic remnant. Judge Carlson's findings and conclusions are supported by the overwhelming preponderance of the evidence and must be sustained unless found to be clearly erroneous. His findings and conclusions on this record are not reviewable. Challenging those findings is frivolous and warrants imposition of sanctions.

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<sup>4</sup> Wis. Stat. § 32.06(2)(b) requires that ATC, as condemnor, must disclose the appraisal report on which the Jurisdictional Offer was based. Since the Jurisdictional Offer of \$99,500 is not based on either the Rolling or Kielisch appraisal reports; it is apparent that ATC failed to follow the statute.

II.  
The Wallers' Uneconomic Remnant Claim  
Was Properly Commenced Under the Challenge Provisions  
of Wis. Stat. § 32.06(5)

ATC contends that the Waller uneconomic remnant claim should have been processed as an inverse condemnation action under the provisions of Wis. Stat. § 32.10 or should have been raised in valuation proceedings under the provisions of Wis. Stat. § 32.06(10). These contentions are inconsistent with the specific rulings of the Court of Appeals in *Waller I* and *Waller II*. Astonishingly, ATC acknowledges in its brief that this issue has been resolved in two previous decisions of the Court of Appeals, *Waller I* and *Waller II*, but still seeks to overturn these decisions.

*Res judicata* bars ATC from arguing these matters again. *Cathey v. Indus. Comm'n*, 25 Wis. 2d 184, 130 N.W.2d 777 (1967). The *Cathey* court stated at page 186:

In order to evaluate Mr. Cathey's principal contentions on the instant appeal, we would be obliged to re-examine the correctness of our previous decision, and we decline to do this. Litigation must have an end. The doctrine of *res judicata* is applicable to bar a second examination of the merits of a controversy which has previously been decided.

We will not re-examine the merits of those contentions of the appellant which were involved in the previous appeal.

ATC is barred from re-arguing the issues on this appeal that have been decided in *Waller I* and *Waller II*. To burden the Wallers and the Court with the need to respond to these arguments again is abusive and warrants the imposition of sanctions.

III.  
The Wallers Are Entitled to Recover Litigation Expenses,  
Including Attorneys Fees, Pursuant to the Provisions of  
Wis. Stat. § 32.28(3)(b).

After a nightmare of litigation which lasted nearly four years, the Wallers were successful in obtaining judgment that ATC was obligated to acquire the balance of the property in their ownership as an uneconomic remnant following a trial before Judge Carlson on November 10 and 14, 2011.

The awarding of litigation expenses is mandated in successful challenge actions filed under Wis. Stat. § 32.06(5). Wis. Stat. § 32.28(1) and (3) provide as follows:

**32.28 Costs. (1)** In this section, “litigation expenses” means the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court under this chapter.

...

**(3)** In lieu of costs under ch. 814, litigation expenses shall be awarded to the condemnee if:

...

(b) The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking.

The language in Wis. Stat. § 32.28(3)(b) specifically mirrors the “challenge action” statutes, Wis. Stat. §§ 32.05(5) and 32.06(5), which authorize a property owner to “contest the right of the condemnor to condemn the property described in the jurisdictional offer.” Wis. Stat. § 32.06(5). In this case, the Wallers have established that ATC did not have the right to condemn “the property described in the jurisdictional offer,” and proceed with their acquisition unless and until ATC acquired all of the

property. Having been successful in a challenge action, Wis. Stat. § 32.28 (3)(b) entitles the Wallers to litigation expenses.

The trial court's award of litigation expenses to the Wallers is also consistent with the ruling in *Warehouse II, LLC v. Wis. DOT*, 291 Wis. 2d 80, 715 N.W.2d 213 (2006). There, the petitioner challenged the right of the Department of Transportation to proceed with an acquisition unless and until it engaged in good faith negotiations. Warehouse II prevailed in that action and was awarded litigation expenses under the provisions of Wis. Stat. § 32.28(3)(b). The awarding of litigation expenses to the Wallers is consistent with the language of the statute and applicable case law.

IV.  
The Wallers Are Displaced Persons  
Entitled To Relocation Benefits.

In the Wallers' relocation action, 2010-CV-691, Judge Carlson ruled that the Wallers were displaced persons under Wis. Stat. § 32.19(2)(e)a and were entitled to relocation benefits under Wis. Stat. § 32.19(2)(b); he signed Findings of Fact and Conclusions of Law on February 15, 2012. (RR. 47, R-App. p. 116.) On February 29, 2012 he signed a Judgment awarding the Wallers \$28,161.92 in relocation benefits. (RR. 50, R-App. p. 117.)

The overwhelming weight of the evidence demonstrates that the Wallers are "displaced persons" entitled to relocation benefits. The court noted and approved the conclusions of ATC appraiser Mr. Rolling that the Waller residential improvements were rendered totally obsolete by the taking of the easements. The court also noted and approved the conclusions of Jack Sanderson, a representative of the Department of Commerce charged with reviewing relocation claims, who found on the basis of a thorough investigation, including a visit to the property, that the Wallers were displaced persons and entitled to relocation benefits under Wis. Stat. § 32.19(2)(e)(a). (RR. 43, Ex. 11).

Yet, ATC persists in its brief that the Wallers were not displaced persons and not entitled to relocation benefits. ATC continues to defy the statutory mandate which provides that "findings of fact shall not be set aside unless clearly erroneous." Wis. Stat. § 805.17(2).

Judge Carlson heard and evaluated all of the testimony. He understood that upon giving notice of the proposed acquisition by ATC, the Wallers initiated an exhaustive

survey of possible replacement properties. Exhibit 3 contains a list of 51 properties that the Wallers examined prior to making their final decision to acquire the home in the Town of Sharon on March 12, 2009. (RR. 43, Ex. 3.) Judge Carlson also understood that because of the necessity of correcting defects in the Sharon property, the Wallers were unable to move to the Sharon property until August 18, 2009. (RR. 47.) The fact that the Waller were forced under these circumstances to continue living in the property on Mound Road in Delavan until August 18, 2009 does not undermine their claim of entitlement to be relocated. Both appraisers agreed the residential value of the improvements had been destroyed and provided in their calculation of damages amounts to tear down the residential improvements so that the property could be saleable for commercial or industrial purposes.

ATC's concern about Judge Carlson's acceptance of Mr. Sanderson's testimony is unpersuasive. Mr. Sanderson was the representative of the Department of Commerce charged with the duty of evaluating claims for relocation. He was a totally independent voice in determining whether the Wallers were displaced persons entitled to relocation. Mr. Sanderson went further, and determined that as a result of the acquisition of the utility easements, the Mound Road property was no longer decent and safe for residential use. Wisconsin Administrative Code 202.04(2). (RR. 43, Ex. 13.)

Judge Carlson's conclusion that the Wallers were displaced persons entitled to relocation benefits is supported by dominant evidence in the record and confirmed by the later decision that ATC was obligated to acquire the entire property. His findings cannot be set aside unless found to be clearly erroneous. Challenging those findings is frivolous and warrants the imposition of sanctions.

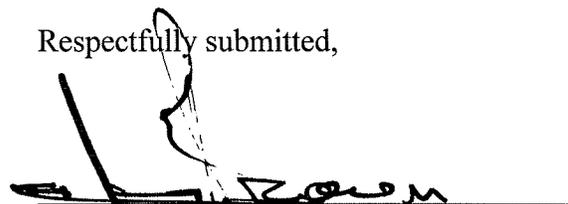
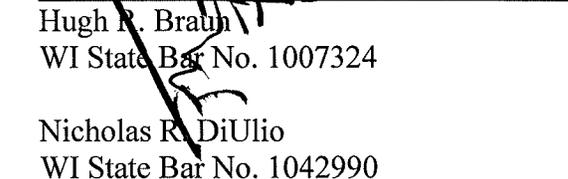
CONCLUSION

ATC has brought to this appeal challenges to a series of factual issues which are not reviewable under the provisions of Wis. Stat. § 805.17(2). ATC has also challenged whether the Wallers properly commenced a challenge action pursuant to the provisions of Wis. Stat. § 32.06(5), an issue that has been resolved twice by the Court of Appeals in *Waller I* and *Waller II*.

The Court of Appeals is asked to affirm the Judgment in the uneconomic remnant action and in the relocation action, and the order regarding litigation expenses. The Court of Appeals is also asked to impose substantial sanctions for ATC's clearly frivolous challenges to the findings of fact of the Trial Court.

Dated at Milwaukee, Wisconsin this 26 day of July, 2012.

Respectfully submitted,

  
\_\_\_\_\_  
Hugh R. Braun  
WI State Bar No. 1007324  
  
Nicholas R. DiUlio  
WI State Bar No. 1042990

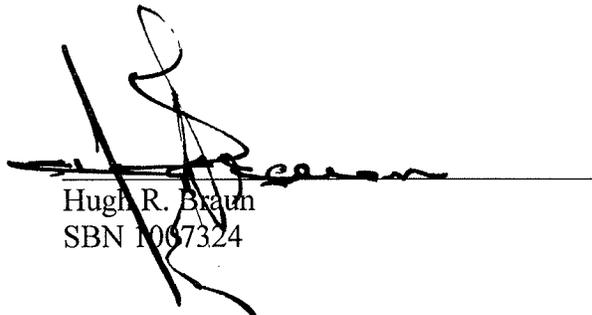
GODFREY, BRAUN & FRAZIER, LLP  
Sixteenth Floor  
735 North Water Street  
Milwaukee, WI 53202  
(414) 278-8500

BRIEF CERTIFICATION

I hereby certify pursuant to Wis. Stat. Rule §809.19(8)(c) the foregoing Brief was produced using proportional serif font conforming to the requirements of Wis. Stat. Rule §809.19(8). The length of the body of this Brief (Statement of Facts, Statement of Case, Argument and Conclusion), as determined by the word processing system by which it was generated, is 4,930 words.

Dated this 26 day of July, 2012.

Respectfully submitted,



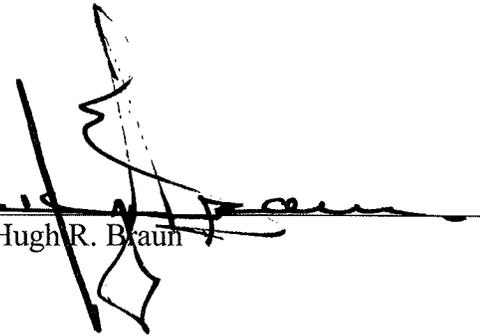
Hugh R. Braum  
SBN 1067324

BRIEF CERTIFICATION  
ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this Brief which complies with the requirement of Wis. Stat. § 809.19(12). I hereby certify that the electronic brief is identical in content and format to the printed form of the brief filed on July 26 2012. A copy of this certificate has been served on the court and opposing parties as of this date.

Dated this 26 day of July, 2012.

By:   
Hugh R. Braun

**RECEIVED**

WISCONSIN COURT OF APPEALS  
DISTRICT II

**07/27/2012**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

---

**Scott N. Waller and Lynnea S. Waller,  
Plaintiffs-Respondents,**

**v.**

**American Transmission Co., LLC  
Defendant-Appellant.**

**Appeal No. 2012AP000840  
Appeal No. 2012AP805**

**Circuit Court Case  
No. 2008CV000520  
No. 2010CV691**

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**APPENDIX OF PLAINTIFFS-RESPONDENTS,  
SCOTT N. WALLER AND LYNNEA S. WALLER**

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INDEX TO APPENDIX

Walworth County Case No. 2008-CV-520

<u>Record No.</u>	<u>Description</u>	<u>Page</u>
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R. 266.....	Findings of Fact & Conclusions of Law	R-App. 104
R. 283.....	Judgment	R-App. 110
R. 286 .....	Final Order Regarding Litigation Expenses	R-App. 111

Walworth County Case No. 2010-CV-691

<u>Record No.</u>	<u>Description</u>	<u>Page</u>
RR. 43, Ex. 9.....	Summary of Relocation Costs	R-App. 112
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RR. 50.....	Judgment	R-App. 117

**JURISDICTIONAL OFFER**  
**Wis. Stat. § 32.06**

**By Certified Mail**

TO: Scott N. Waller  
Lynnea F. Waller  
6249 Mound Road  
Delevan, WI 53115

Anchor Bank, FSB  
25 West Main Street  
Madison, WI 53703

PLEASE TAKE NOTICE that this document is the Jurisdictional Offer of the American Transmission Company LLC, and its corporate manager, ATC Management Inc., whose address is N19 W23993 Ridgeview Pkwy. W., P.O. Box 47, Waukesha, Wisconsin 53187-0047 (collectively herein "ATC"), submitted to you in accordance with the provisions of Section 32.06(3), Wis. Stats., as follows:

1. That American Transmission Company LLC and ATC Management Inc. are electric transmission companies as defined in Section 196.485(1)(g) Wis. Stats, jointly constituting a public utility as defined in Section 196.01(5) Wis. Stats., and transact business as a single transmission company (hereinafter collectively referred to as "ATC").
2. That ATC owns and operates an electric transmission system located in Walworth County, Wisconsin, and other parts of the State of Wisconsin, which system delivers electric power from generating stations and elsewhere, to various points of delivery for ultimate distribution to consumers thereof.
3. That in order to provide adequate electric service to parts of Walworth County and elsewhere, ATC intends to install, construct, own and maintain an electric transmission line through a portion of the Town of Darien, Wisconsin and across a portion of the real estate of the Owner as hereinafter described.
4. Pursuant to Section 32.07(1) Wis. Statutes, the necessity of the taking of the "Easement Premises" has been determined by issuance of a certificate of public convenience and necessity.
5. That ATC, in good faith, intends to acquire an easement interest in and to a portion of the following described real estate and use it for utility purposes:

That the specific easement interest sought to be acquired with respect to the above described real estate is more particularly described in Exhibit A attached hereto and incorporated herein (herein the Easement Premises).

6. That ATC's proposed date of occupancy of the Easement Premises is April 12, 2008

7. That ATC hereby offers compensation for the Easement Premises in one lump sum of \$99,500.00, itemized as follows:

Acquisition of easement interest: Ninety nine thousand and five hundred dollars (\$99,500.00)

In the alternative, ATC offers compensation for the Easement Premises in annual payments of One Thousand Five Hundred Thirty and 77/100ths Dollars (\$1,530.77) payable on January 15th of each year.

8. That compensation for additional items of damage set forth in Section 32.19, Wis. Stats., maybe claimed under section 32.20, Wis. Stats. and will be paid if shown to exist.
9. That the Appraisal of the Easement Premises upon which ATC's Offer is based is available for inspection and copying by persons having an interest in the land sought to be acquired, from 9:00 a.m. to 3:00 p.m., weekdays at:

American Transmission Company LLC  
Real Estate Department  
2 Fen Oak Court  
Madison, WI 53718-8810

10. That the Owners have twenty (20) days from the date of the personal service of this Offer, if personally served, or 20 days from the date of postmark of the certified mail envelope transmitting this Offer, if transmitted by mail, or 20 days from the date of publication of this Offer, if published, in which to accept this Offer.
11. That if this Offer is accepted, Owner shall execute the acceptance clause below and deliver the same to the attention of Attorney Mark J. Steichen, Boardman Law Firm, P.O. Box 927, Madison, WI 53701-0927.
12. That if this Jurisdictional Offer is accepted, the transfer of the requisite interest in and to the Easement Premises shall be accomplished within 60 days after date of acceptance, including payment of the consideration stipulated in this Jurisdictional Offer, unless such time is extended by mutual written consent of the Owner and ATC.
13. That if this Offer is not accepted within said 20-day period, ATC may petition for a determination of just compensation by the Walworth County Condemnation Commissioners; and that either ATC or any other party hereto may appeal from the award of the County Condemnation Commissioners to the Circuit Court within 60 days as provided for in Section 32.06(10), Wis. Stats.
14. That if the Owner desires to contest the right of ATC to condemn the Easement Premises for any reason other than the amount of compensation offered, the Owners may within 40 days from the date of service of this Jurisdictional Offer, commence an action in the

Walworth County Circuit Court naming ATC as a defendant; and such action shall be the only manner in which any issue other than the amount of just compensation may be raised pertaining to the condemnation of the Easement Premises. The commencement of an action by the owner does not prevent ATC from filing the Petition for Determination of Just Compensation by the Walworth County Condemnation Commissioners.

Dated this 20<sup>th</sup> day of March, 2008.

AMERICAN TRANSMISSION COMPANY LLC a  
Wisconsin limited liability company  
By ATC Management Inc., its manager

By Teresa M. Kochaver  
Name: Teresa M. Kochaver  
Title: Manager, Real Estate

ACCEPTANCE/REJECTION

This Jurisdictional Offer is accepted/rejected (please, circle one) this \_\_\_\_\_ day of \_\_\_\_\_ 2008.

OWNER:

Name: \_\_\_\_\_  
Scott N. Waller Date

Name: \_\_\_\_\_  
Lynnea F. Waller Date

OWNER/MORTGAGEE:

Anchor Bank, FSB

By: \_\_\_\_\_  
Date: \_\_\_\_\_  
Title: \_\_\_\_\_

Return To:  
Mark J. Steichen  
Boardman Law Firm  
1 S. Pinckney Street, Ste 410  
P.O. Box 927  
Madison, WI 53701-0927

SCOTT N. WALLER and  
LYNNEA S. WALLER,

Plaintiffs,

Case No. 08-CV-520

v.

AMERICAN TRANSMISSION CO., LLC,

Defendant.

**FILED**  
CIRCUIT COURT

DEC 14 2011

CLERK OF COURTS - WALWORTH CO.  
BY ELISABETH YAZBEC

**FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

This matter came on for trial commencing on November 10 and November 14, 2011. Upon reviewing the testimony of the witnesses, the exhibits and hearing argument of counsel, the Court makes the following:

FINDINGS OF FACT

1. On March 20, 2008, American Transmission Co., LLC, (ATC), served the Wallers with a Jurisdictional Offer to acquire a forty-five foot utility easement along two sides of their triangular property at 6249 Mound Road, Delavan, Wisconsin. The Jurisdictional Offer in the amount of \$99,500 represented 76.53% of the \$130,000 appraised value of the property by ATC. Exhibit 1.
2. Scott and Lynnea Waller are husband and wife and have owned property at 6249 Mound Road, Delavan, Wisconsin since 1989. The property includes 1.51 acres of land (65,775 square feet), a one family residence, site improvements, landscaping and out buildings. The property is zoned A-1 Agricultural. It has been used by the Wallers since its acquisition in 1989 as a residence, for hobby farming activities including raising chickens, turkeys and pasturing sheep.

3. The easements acquired by ATC were 45 feet in width along the east and north sides of the Waller triangular property covering .799 acres (34,804 square feet) and running for a distance of 291 feet along the north boundary of the property and 482 feet along the southeastern boundary for a total distance of 773 feet. The easement covered 52.91% of the lot. ATC acquired the easement to install a 138 KV high voltage electric transmission line. Exhibit 2, 3.

4. On March 14, 2008, Dave Davies, a representative of ATC, wrote to and met with the Wallers. The Wallers agreed to accept the offer provided ATC would buy the remaining property. Dave Davies agreed to buy the entire parcel but he conditioned that purchase on having the Wallers waive their relocation benefits under the provisions of Wis. Stat. § 32.19.

5. The easement authorized ATC to do the following:

“construct, install, operate, maintain, repair, replace, rebuild, remove, relocate, inspect and patrol a line of structures, comprised of wood, concrete, steel or of such material as Grantee may select, and wires, including associated appurtenances for the transmission of electric current, communication facilities and signals appurtenant thereto”

ATC was also granted the associated rights to:

1) Enter upon the easement strip for the purposes of exercising the rights conferred by this easement.

2) Construct, install, operate, maintain, repair, replace, rebuild, remove, relocate, inspect and patrol the above described facilities and other appurtenances that the Grantee deems necessary.

3) Trim, cut down and remove any or all brush, trees and overhanging branches now or hereafter existing on said easement strip.

4) Cut down and remove such trees now or hereafter existing on the property of the Landowner located outside of said easement strip which by falling might interfere with or endanger said line(s), together with the right, permission and authority to enter in a reasonable manner upon the property of the Landowner adjacent to said easement strip for such purpose. Exhibit 2.

5) Paragraph 5 of Exhibit A to the easement provided "the utility shall employ all reasonable measures to ensure that the landowners telephone and radio reception is not adversely affected by the high voltage transmission lines."

Pursuant to this authorization, ATC removed all of the brush and trees which constituted a sound barrier between the residence of the Wallers and Interstate 43. The easement did not contain a limitation on the number of lines that could be installed. Exhibit 2.

6. ATC retained Rolling & Co. In a report dated December 12, 2007, Mr. Rolling concluded that the acquisition of the easement would have an immediate negative effect on the residential appeal of the property noting that over one-half of the property will be under easement. Exhibit 6. The appraisal report contained the following comments:

"The subject will have major transmission lines along two of its three sides. The transmission lines will be within 60' of the house. A substantial part of the landscaping will have been lost. Our before analysis suggested a property which was already in transition from improved residential use to vacant industrial lot use. We believe the installation of the transmission line pole and the lines themselves brings this property to the tipping point from residential appeal toward light industrial appeal. It is more likely that the next buyer of the property will be an industrial developer rather than a residential user. We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land." Exhibit 5, 6.

7. Art Sullivan of Appraisal Group One prepared an appraisal report for the Wallers dated February 18, 2008. He concluded that after taking, the value of the residential improvements was destroyed and the value of the remaining property was \$15,500. Exhibit 7, 8. Both appraisers allocated as part of the damages, sustained as a result of the taking, an amount necessary to tear down the residential improvements. Both appraisers agreed that the highest and best use of the Waller property changed from rural residential to vacant industrial after taking.

8. Mr. Kielisch of Appraisal Group One prepared a Supplement to its 2008 Report, which concluded that the property remaining in the ownership of the Wallers after the taking of the easements sustained "substantially impaired economic viability." Exhibit 15.
9. Upon receipt of \$90,000 in January, 2009, the Wallers paid the mortgage on their Town of Delavan home and purchased a new home in the Town of Sharon on March 12, 2009. Such acquisition was done without relocation benefits. Because of septic and well problems at their new home in Sharon, the Wallers were not able to occupy the property until August 15, 2009.
10. After the high voltage transmission lines were installed and activated, the Wallers experienced interference with radio and television reception, the use of cell phones, their electricity meter and the speedometer in a motor vehicle.
11. Acting pursuant to Wis. Stat. § 32.19, the Wallers applied for relocation benefits. American Transmission Company denied the claim and the Wallers petitioned the Department of Commerce for review of the denial pursuant to Wis. Stat. § 32.26(5). On June 3, 2009, Jack Sanderson of the Department of Commerce advised ATC that he had visited the property and made a determination that as a result of the acquisition of the easements by ATC, the Wallers were displaced persons and entitled to relocation benefits pursuant to the provisions of Wis. Stat. § 32.19(2)(e). Mr. Sanderson's conclusions were confirmed by a letter from Atty. Joseph R. Thomas, Chief Counsel of the Department of Commerce, to ATC on September 1, 2009. Exhibits 9 and 10. Mr. Sanderson also found that the residence of the Wallers after the acquisition of utility easements by ATC did not meet the standards of "decent, safe and sanitary housing" established in Comm. 202.04 of the Wisconsin Administrative Code.
12. The Wallers have agreed with the ATC valuation of the property before taking at \$130,000. Exhibit 6. The Wallers also accept ATC's determination of damages as a result of

taking at \$99,500. They concede that the property remaining after ATC's acquisition of easements has a value of \$30,500.

13. The property remaining in the ownership of the Wallers following the acquisition of utility easements by ATC has sustained "substantially impaired economic viability," for the following reasons:

a) The Jurisdictional Offer dated March 20, 2008, set damage to their property at \$99,500 which constituted 76% of the \$130,000 agreed upon value of the Waller property.

b) Both appraisers, Kielisch for the Wallers and Rolling for ATC, agree that the value of the residential improvements have been made totally obsolete as a result of the taking, and that the Highest & Best Use of the property changed from residential to vacant industrial. Both appraisers made allowance in their determination of damage for the cost of demolition of the residential improvements.

c) Following installation and activation of the 138 kv high voltage transmission line, the Wallers experienced regular interference with radio, television and telephone reception which prompted concerns concerning the health and safety of the site for themselves, their three children, their six grandchildren and for anyone else who might purchase or occupy the property.

d) The removal of trees and shrubbery within the easement area substantially reduced the attractiveness of the site and eliminated the sound and site barrier between the home and I-43.

CONCLUSIONS OF LAW

Upon these Findings of Fact, the Court concludes:

1. Wisconsin Eminent Domain statutes are to be strictly construed in favor of the condemnee and against the condemnor. *Schroedel Corporation v. State Highway Commission*, 34 Wis.2d 32, 148 N.W.2d 691 (1967).
2. The property remaining in the ownership of the Wallers following the acquisition of utility easements by ATC is an "uneconomic remnant" as defined in Wis. Stat. § 32.06(3m).

Dated at Elkhorn, Wisconsin this 14 day of December, 2011.

BY THE COURT:



The Honorable James L. Carlson  
Circuit Court Judge  
Circuit Court of Walworth County

STATE OF WISCONSIN

CIRCUIT COURT

WALWORTH COUNTY

SCOTT N. WALLER and  
LYNNEA S. WALLER,

Plaintiffs,

v.

AMERICAN TRANSMISSION CO., LLC,

Defendant.

DOCKETED 3/2/12 @ 1:47pm  
Comp A PH

Case No. 08-CV-520

FILED  
CIRCUIT COURT

MAR 01 2012

CLERK OF COURTS-WALWORTH CO.  
BY: PAT M. HAYES, DEPUTY CLERK

JUDGMENT

This matter came on for trial on November 10<sup>th</sup> and November 14<sup>th</sup>, 2011. The Court, having signed and filed its Findings of Fact and Conclusions of Law, and Order for Judgment, NOW THEREFORE, IS ORDERED:

Judgment is entered in favor of Scott N. Waller and Lynnea S. Waller and against American Transmission Co., LLC in the amount of \$47,509.72.

Upon receipt of these payments, the Wallers shall convey the property at 6249 Mound Road, Delavan, Wisconsin to ATC by Quit Claim Deed.

Dated at Elkhorn, Wisconsin this 1<sup>st</sup> day of ~~February~~ <sup>March</sup>, 2012.

BY THE COURT:

*James L. Carlson*

Hon. James L. Carlson  
Circuit Court Judge  
Circuit Court of Walworth County

3-2-12 \$5.00 docketing fee received. PH

STATE OF WISCONSIN

CIRCUIT COURT

WALWORTH COUNTY

SCOTT N. WALLER and  
LYNNEA S. WALLER,

Plaintiffs,

Case No. 08-CV-520

v.

AMERICAN TRANSMISSION CO., LLC,

Defendant.

**FILED**  
CIRCUIT COURT

MAR 12 2012

CLERK OF COURTS - WALWORTH  
BY ELISABETH YAZBEG

**FINAL ORDER REGARDING LITIGATION EXPENSES**

Upon the Findings of Fact and Conclusions of Law Regarding Litigation Expenses,

IT IS ORDERED:

- American Transmission Co., LLC shall pay to the Wallers litigation expenses in the amount of ~~\$263,359.24~~ <sup>211,261.74</sup> as set forth in detail at the hearing on 1/24/12.

Dated at Elkhorn, Wisconsin this 9<sup>th</sup> day of ~~February~~ <sup>March</sup>, 2012.

BY THE COURT:

  
 \_\_\_\_\_  
 Hon. James L. Carlson  
 Circuit Court Judge

SUMMARY OF RELOCATION COSTS

January 19, 2012

1. Difference Between Old Home And New Home \$130,000 - \$177,500 Interest 4.95% (3/12/09 – 1/12/12) (34 mo.)	\$ 47,500.00 6,661.87
2. Home Inspection	230.00
3. Replacement of Dug Well (Illegal Well)	5,670.00
4. Cost of Loan (Settlement Charges to Borrower)	1,760.17
5. Mortgage Insurance 5/01/09 – 1/01/12 \$118.02 per month x 32 mo.	3,776.64
6. Self Move Comm 202.54 8 rooms -- \$1,050. 3 outbuildings -- \$300	<u>1,350.00</u>
TOTAL:	<u>\$ 66,948.68</u>

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 2

WALWORTH COUNTY

---

SCOTT N. WALLER AND  
LYNNEA S. WALLER,

Plaintiffs,

Case No.: 10-CV-691

v.

**FILED**  
CIRCUIT COURT

AMERICAN TRANSMISSION COMPANY, LLC,

FEB 15 2012

Defendant.

CLERK OF COURTS - WALWORTH CO.  
BY ELISABETH YAZBEC

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

---

This matter came on for trial commencing on January 25, 2012. Upon reviewing the testimony of the witnesses, the exhibits and hearing argument of counsel, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. On March 20, 2008 American Transmission Company, LLC, provided the Plaintiffs, Scott & Lynnea Waller, with a Jurisdictional Offer seeking to acquire two 45-foot utility easements along two sides of the Wallers' triangular property at 6249 Mound Road, Delavan, Wisconsin. The property includes 1.51 acres of land (65,775 square feet), a one-family residence, site improvements, landscaping, and outbuildings. The main building has a total of eight rooms, and there are three outbuildings on the property. The property is zoned A-1 Agricultural. It has been used by the Wallers since its acquisition in 1989 as a residence and for hobby farming activities. (Exhibit 2).

2. The easements acquired by ATC covered .799 acres or 34,804 square feet, 52.91% of the lot. ATC acquired the easements to install a 138-KV high voltage electric transmission line.

3. ATC retained Rolling & Co. In an appraisal report dated December 12, 2007 (Exhibit 2), Mr. Rolling concluded that the acquisition of the easement would have an immediate negative effect on the residential appeal of the property, noting that over one-half of the property will be under easement. The appraisal report continued with the following comments:

“The subject will have major transmission liens along two of its three sides. The transmission lines will be within 601 of the house. A substantial part of the landscaping will have been lost. Our before analysis suggested a property which was already in transition from improved residential use to vacant industrial lot use. We believe the installation of the transmission line pole and the lines themselves brings this property to the tipping point from residential appeal toward light industrial appeal. It is more likely that the next buyer of the property will be an industrial developer rather than a residential user. We conclude that the residential improvements are rendered totally obsolete. Highest and best use changes from improved residential to vacant industrial land.” (Exhibit 2, p. 18)

4. On March 12, 2009 the Wallers purchased a comparable replacement home in the Town of Sharon which meets the standards of Wis. Stat. § 32.19(2)(b).

5. The Wallers filed a relocation claim with ATC pursuant to the provisions of Wis. Stat. § 32.19(2)(e) on December 18, 2008, which was denied. In response to a Waller petition forwarded pursuant to the provisions of Wis. Stat. §32.26(5), Mr. Jack Sanderson of the Department of Commerce visited the Waller property on April 20, 2009 at 2:00 PM. Following the visit to the property, Mr. Jack Sanderson on June 3, 2009 determined that the Wallers were displaced persons and entitled to relocation benefits under Wis. Stat. § 32.19(2)(e) a. (Exhibit 14)

6. On September 10, 2009 the relocation plan was supplemented to reflect actual relocation costs incurred by the Wallers, which was further updated in January, 2012. (Exhibit 9).

7. The Wallers moved from their Delavan property to the Sharon property as a direct result of the acquisition of the easement for public purposes by ATC.

8. Upon the testimony of the parties and upon the documentary proof made part of the record, the Court finds that the Wallers have sustained the following costs in connection with the acquisition of relocation property:

1. Comparable Replacement Housing

a. Difference Between Old Home And New Home \$130,000 - \$177,500	\$ 47,500.00
b. Home Inspection	230.00
c. Replacement of Dug Well ( <del>Illegal Well</del> ) <i>je</i>	5,670.00
d. Cost of Loan (Settlement Charges to Borrower)	1,760.17
e. Mortgage Insurance 5/01/09 – 1/01/12 \$118.02 per month x 32 mo.	3776.64
<hr/>	
Statutory Cap- § 32.19(4)	\$25,000

2. Self Move- Comm 202.54 8 rooms -- \$1,050. 3 outbuildings -- \$300	<u>1,350.00</u>
--	-----------------

TOTAL: \$ 26,350.00

CONCLUSIONS OF LAW

Upon these Findings of Fact, the Court concludes:

1. That the Wallers are displaced persons under Wis. Stats. § 32.19(2)(e)1a. They have acquired comparable replacement property that complies with Wis. Stat. § 32.19(2)(b), and therefore are entitled to judgment for recovery of their relocation costs.

2. Due to Wis. Stat. § 32.19 (4)(a), the Wallers are limited to a maximum of \$25,000 to recover costs for obtaining a comparable replacement dwelling. This includes cost of replacing the well on the property.

3. In addition to the \$25,000 allowed, the Wallers are entitled to the cost of moving in the amount of \$1,350, based on Wis. Adm. Code Comm. §202.54..

4. The Wallers are entitled to judgment in the amount of \$26,350 for moving and finding a comparable replacement dwelling, ~~plus pre-judgment interest, for a total of 30,503.42,~~ *etc* plus taxable costs.

Dated at Elkhorn, Wisconsin this 15<sup>th</sup> day of February, 2012.

BY THE COURT:

  
\_\_\_\_\_  
Hon. James L. Carlson  
Circuit Court Judge, Walworth County

STATE OF WISCONSIN

CIRCUIT COURT

WALWORTH COUNTY

SCOTT N. WALLER and  
LYNNEA S. WALLER,

DOCKETED 2/29/12 @ 3:18P  
COMPA *ca*

Plaintiffs,

Case No. 2010-CV-691

**FILED**  
CIRCUIT COURT

v.

AMERICAN TRANSMISSION CO., LLC,

FEB 29 2012

Defendant.

CLERK OF COURTS - WALWORTH CO.  
BY ELISABETH YAZBEC

**JUDGMENT**

This matter came on for trial on January 25, 2012. The Court, having signed and filed its Findings of Fact and Conclusions of Law, Order for Judgment, and Bill of Costs,

NOW THEREFORE,

Judgment is entered in favor of Scott N. Waller and Lynnea S. Waller and against American Transmission Co., LLC in the amount of \$26,350.00, in addition to costs, pursuant to Wis. Stat. § 814.04, in the amount of 1,811.92., for a total of \$28,161.92.

Dated at Elkhorn, Wisconsin this 29<sup>th</sup> day of February, 2012.

*Elisabeth Yazbec*

Judgment Clerk

*Deputy*

APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. Rule 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) relevant decisions of the Court of Appeals; (4) the findings or opinion of the trial court; and (5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26 day of July, 2012.

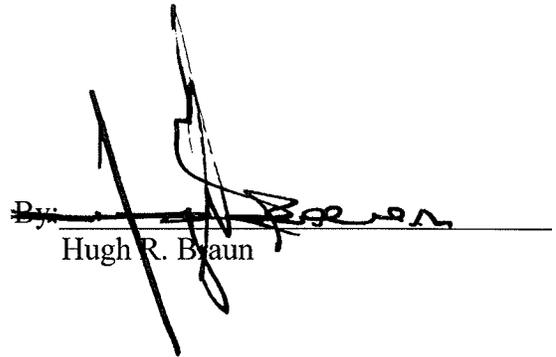
  
Hugh R. B. Smith  
SBN 1007324

APPENDIX CERTIFICATION  
ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this Appendix which complies with the requirement of Wis. Stat. § 809.19(13). I hereby certify that the electronic appendix is identical in content and format to the printed form of the appendix filed on July \_\_\_\_\_, 2012. A copy of this certificate has been served on the court and opposing parties as of this date.

Dated this 26 day of July, 2012.

  
By: \_\_\_\_\_  
Hugh R. Braun

**RECEIVED**

**08-14-2012**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

WISCONSIN COURT OF APPEALS  
DISTRICT II

Consolidated Appeal Nos. 2012AP805 and 2012AP840

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SCOTT N. WALLER AND LYNNEA S. WALLER,

Plaintiffs-Respondents,

v.

AMERICAN TRANSMISSION COMPANY LLC,

Defendant-Appellant.

---

Appeal from Final Judgments of the Circuit Court of  
Walworth County, the Hon. James L. Carlson Presiding,  
Circuit Court Case Nos. 2008CV520 and 2010CV691

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**REPLY BRIEF OF  
AMERICAN TRANSMISSION COMPANY LLC**

---

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## INTRODUCTION

Scott and Lynnea Waller (“Waller”) simply do not respond to many of ATC’s arguments. These un rebutted arguments are deemed conceded under this Court’s precedent.

To the extent they have responded, the Wallers rely on nothing more than the circuit court’s conclusory statements, made after applying incorrect legal principles, that the after-taking property is an uneconomic remnant. Waller Response Br. 15. The circuit court, however, failed to explain the impairment to the property’s economic viability—in the face of the jury’s determination of real value and the expert testimony. The Wallers do not address this shortcoming.

But even if the circuit court’s statements were supported by properly found “facts” (they are not), they fail, as a matter of law, to establish an uneconomic remnant. The court did not conclude that the property could not be sold as a

residence; it did not conclude that the property could not be profitably used for commercial or industrial purposes. The court made none of these findings, necessary to meet the statutory definition of an uneconomic remnant. Nor could it have. Under any of the appraisals, the jurisdictional offer, or the jury verdict, the remnant has more than little value—it is economically viable.

#### **STANDARD OF REVIEW**

The Wallers contend that the circuit court’s findings of “fact” are “not reviewable....” Waller Response Br. 1. This misstates the standard of review. Findings of fact will be upheld unless clearly erroneous, but whether those facts meet the standard for inverse condemnation—or, analogously, the statutory uneconomic remnant standard—is a question of law. *See Brenner v. New Richmond Reg’l Airport Comm’n*, 2012 WI 98, ¶ 35, 816 N.W.2d 291; *Howell Plaza, Inc. v. State Hwy. Comm’n*, 92 Wis. 2d 74, 80, 284 N.W.2d 887 (1979)

(whether a landowner has been deprived “of all, or substantially all, of the beneficial use of one’s property .... is a question of law”).

Thus, whether the property meets the statutory definition of an “uneconomic remnant” and whether the Wallers qualify as “displaced persons” are both questions of law. This Court reviews them independently.

## **ARGUMENT**

### **I. THE WALLERS’ PROPERTY IS NOT AN UNECONOMIC REMNANT.**

The statutory definition of an uneconomic remnant is, at best, imprecise. *See* Wis. Stat. § 32.06(3m). But the legislative history, uneconomic remnant case law from other jurisdictions, and the similarly phrased standard in regulatory takings cases lend specificity to the statutory phrase “substantially impaired economic viability.” *See* ATC’s Initial Br. 58-72. The Wallers offer no commentary or response to any of these persuasive guides, except to dismiss

the relevance of non-Wisconsin cases. *See* Waller Response Br. 18.

Section 32.06(3m), construed and applied properly to these undisputed facts, flatly contradicts the circuit court's conclusion:

- The jury valued the after-taking property at \$38,000, a determination the Wallers never appealed. R.187. The property remains economically viable and valuable.
- The property is fully functional as a residence, though this is not the highest and best use.
- The property has value as vacant land to be developed for light industrial use, its highest and best use.
- The taking at issue expanded a pre-existing utility easement. Any aesthetic change from the addition of the transmission line along a second side of the property was minimal compared with the earlier transformation of the area surrounding the Wallers' house from agricultural land to an industrial park.

These facts show the property is not an uneconomic remnant. These facts demonstrate the lack of any nexus

between the circuit court's findings of fact and the statutory standard.

**A. Condemnors Have Substantial Discretion To Determine The Property Required For Public Projects.**

Judicial review of whether property is an uneconomic remnant is narrow. *See Mitton v. Wis. DOT*, 184 Wis. 2d 738, 745, 516 N.W.2d 709 (1994) (quoting *Falkner v. N. States Power Co.*, 75 Wis. 2d 116, 135, 248 N.W.2d 885 (1977)).

Because any uneconomic remnant determination may expand—here dramatically—the scope of property acquired, a determination that property is not an uneconomic remnant must be upheld unless the condemnor has committed fraud, acted in bad faith, or grossly abused its discretion. *Falkner*, 75 Wis. 2d at 132. The circuit court did not narrowly review ATC's uneconomic remnant determination.

The Wallers try to limit *Falkner* by arguing that the only issue presented in that case was the necessity of the

taking. Not so. The core dispute in *Falkner* was: how much property can a condemnor take? *See* 75 Wis. 2d at 142 (the condemnor “has a large measure of discretion in determining the area and estate of land it needs”). The conclusion: A condemnor must take as little property as needed, and a court will uphold the condemnor’s conclusion unless there has been a gross abuse of discretion. *See id.* at 132 (“scope of [judicial] review is narrow”).

Here, the circuit court did not find that ATC abused its discretion in concluding that the Wallers’ property, subject to the easement, is not an uneconomic remnant. *See* R.266, App.1-6. Indeed, the evidence shows ATC properly exercised its discretion. *See* ATC’s Initial Br. 40-41. ATC first determined that only an easement was necessary, but then offered to voluntarily acquire the entire property if the Wallers would consent. They refused, so ATC proceeded to take only the easement—the least amount of property

necessary to complete the transmission-line upgrade, and the only interest ATC could constitutionally and statutorily take.

**B. The Circuit Court’s Holding Is Not Supported By The Statutory Definition Of An Uneconomic Remnant.**

The Wallers, in conclusory fashion, maintain that the circuit court applied “the precise standard in the statute” and that “compelling evidence” supports the judgment. Waller Response Br. 16. The circuit court’s own explanation, however, discloses that it applied a standard—grounded on the Wallers’ subjective preferences and a retrospective cost comparison—with no statutory basis. And the Wallers offer no substantive argument to the contrary.

First, the Wallers’ subjective personal concerns and their preference to live elsewhere reveal nothing of the property’s economic viability in the marketplace. By contrast, the jury verdict informs the objective statutory standard, demonstrating the property’s continued economic

viability. The circuit court, however, disregarded the jury verdict and placed overriding significance on the Wallers' personal views. *See* ATC's Initial Br. 42-43.

Second, the circuit court wrongly framed the uneconomic remnant analysis as requiring an evaluation of "the fairest thing to do" and a comparison of the cost to acquire the remnant with the cost to litigate the scope of the taking. R.298:221-22, App.19-20. This standard, if it is a standard, disregards the procedural fairness guaranteed by the "just compensation" process. *See* Wis. Stat. § 32.06(7)–(10).

The Wallers—on their own appeal from the condemnation commission—received a jury verdict on their property's before- and after-taking values. R.187. In accordance with the verdict, ATC has already paid the Wallers just compensation—\$94,000. Procedurally and substantively, nothing could be more "fair" to both parties. The judicial creation of a subjective "fairness standard" in

addition to the statutory just compensation procedures invades the province of the legislature.

**C. Neither Jack Sanderson’s Testimony Nor The Jurisdictional Offer Can Sustain The Decision.**

Contrary to the Wallers’ contention, the challenge to Jack Sanderson’s testimony is not about “re-try[ing] factual issues....” Waller Response Br. 17. Nor, contrary to the Wallers’ suggestion, is the challenge to Sanderson’s credibility. (Although his testimony was not credible.) It is more fundamental: Sanderson’s testimony about facts—many, he admitted, for which he had no personal knowledge—cannot support his inadmissible, legally flawed, and unsustainable opinions. *See* ATC’s Initial Br. 50-52, 101-03.

The Wallers offer no response to Sanderson’s lack of knowledge, experience, and authority—all of which deprive his opinions of any value and should have rendered them

inadmissible. *See* ATC’s Initial Br. 48-52, 101-03. Instead, without any discussion of the facts, the Wallers label Sanderson “a totally independent voice,” whose testimony the circuit court properly credited.

Of course, the evidence establishes that this label could not be further from the truth. Sanderson had more than 30 *ex parte* telephone communications with the Wallers’ attorney and numerous email exchanges, including an email congratulating the Wallers’ counsel on his “appellate victory.” RR.55:128, 135-36. Sanderson is the antithesis of “independent” or a decision-maker. He lacks the qualifications and knowledge to render the opinions that the circuit court considered. The opinions were inadmissible, let alone entitled to deference.

Nor is the jurisdictional offer relevant, much less essential (as the Wallers contend), to an uneconomic remnant determination. *See* Waller Response Br. 17. The statutes

expressly prohibit any reliance on a jurisdictional offer in valuing property:

The petition [for condemnation proceedings] *may not disclose* the amount of the jurisdictional offer, and *if it does so it is a nullity*.

\*\*\*

The amount of the jurisdictional offer or of the [condemnation] commission's award *shall not be disclosed* to the jury during such [just compensation] trial.

Wis. Stat. § 32.06(7), (10) (emphases added).

If the jurisdictional offer cannot be considered in these valuation contexts, why would it be relevant—let alone essential—to an uneconomic remnant determination where valuation is indispensable? It is not. A jurisdictional offer—by definition a last attempt to avoid litigation—has no probative value. It was plain error to base a decision, even in part, on the jurisdictional offer.

Instead, the circuit court should have acknowledged the jury verdict as dispositive. The verdict remains the only

competent finding of the property's before- and after-taking valuations.<sup>1</sup> It established an after-taking value of \$38,000. The verdict is objective proof that the property is not of little value and that it is economically viable. Sanderson's testimony, parroting the Wallers' concerns, and ATC's jurisdictional offer cannot defeat the objective facts central to the jury's verdict: the Wallers' house was usable and economically viable both as a residence and vacant commercial property. The circuit court's complete disregard for the verdict is reversible error.

**D. The Circuit Court Based Findings Of Fact On Inadmissible And Stricken Testimony—The Wallers Offer No Response.**

ATC's Initial Brief (pages 55-57) catalogued the findings of fact that depend entirely on either stricken testimony or exhibits never admitted into evidence. The

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<sup>1</sup> The circuit court on remand from *Waller II* made no finding at all of the property's valuation. See R.266, App.1-6.

Wallers, however, like an ostrich, *see Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011), ignore that the circuit court struck the very testimony they cite in their brief (*compare* Waller Response Br. 18 *with* R.304:34-35, 37) and that, improperly, became the basis of one of the court’s findings of fact. (*See* R.266:2, ¶ 4, App.2.)

By failing to offer any substantive response, the Wallers have conceded the circuit court’s error. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (“respondents cannot complain if propositions of appellants are taken as confessed which respondents do not undertake to refute”).<sup>2</sup> The Wallers, therefore, concede that some of the circuit court’s findings of fact have no

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<sup>2</sup> Setting aside the procedural deficiencies in the Wallers’ request for sanctions, *see* Wis. Stat. § 809.25(3), the circuit court’s errors—including relying on exhibits not admitted into evidence and stricken testimony—establish the basis for ATC’s good faith arguments, regardless of whether this Court accepts them.

evidentiary basis. They had the time and the space to respond, but they chose not to do so.

**II. AN UNECONOMIC REMNANT CLAIM MUST BE RAISED IN A VALUATION PROCEEDING OR, ALTERNATIVELY, THROUGH AN INVERSE CONDEMNATION ACTION.**

ATC repeatedly has made the procedural argument—that a landowner must bring an uneconomic remnant challenge in a valuation proceeding or an inverse condemnation action—in part to preserve it for supreme court review. It is neither disrespectful nor inappropriate to maintain, as ATC does, that the procedural direction provided in *Waller v. American Transmission Co. LLC*, 2011 WI App 91, 334 Wis. 2d 740, 799 N.W.2d 487 (*Waller II*), and *Waller v. American Transmission Co. LLC*, 2009 WI App 172, 322 Wis. 2d 255, 776 N.W.2d 612 (*Waller I*), is inefficient and results in duplicative proceedings without offsetting protections for property rights.

However, ATC recognizes that the court of appeals cannot “overrule, modify or withdraw language” from its published opinions. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Accordingly, ATC filed a petition to bypass on August 10, 2012, seeking supreme court review of this appeal.

**III. THE STATUTES DO NOT AUTHORIZE LITIGATION EXPENSES FOR A LANDOWNER ON AN UNECONOMIC REMNANT CLAIM.**

The award of litigation expenses, including attorney fees, is contrary to the American Rule. To shift fees, there must be express statutory authority. *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2012 WI 70, ¶ 72, 342 Wis. 2d 29, 816 N.W.2d 853. The only statute identified by the Wallers and the circuit court—Wis. Stat. § 32.28(3)(b)—does not authorize the award of litigation expenses here. This is especially true because the Wallers concede that they have *never* challenged ATC’s right to take. *E.g.*, R.111:15, 20.

As a preliminary matter, however, the Court need not reach the statutory question because the Wallers failed to meet their burden of proof for any award of litigation expenses. *See* ATC's Initial Br. 86-87. Confronted with this deficiency, the Wallers offered no response. *See* Waller Response Br. 20-21. Once again, arguments not refuted are conceded. *Schlieper*, 188 Wis. 2d at 322. The Wallers, therefore, are not entitled to litigation expenses.

If the Court can overlook the Wallers' failures to meet their burden of proof and, on appeal, to respond to ATC's argument, litigation expenses still cannot be awarded. The Wallers wrongly assume that every landowner who succeeds on a right-to-take challenge receives litigation expenses. *See* Waller Response Br. 20. Not so. *See* Wis. Stat. § 32.28(2); *Warehouse II, LLC v. DOT*, 2006 WI 62, ¶¶ 10, 20, 291 Wis. 2d 80, 715 N.W.2d 213. Here, fees cannot and should not be shifted.

First, it is contrary to the statutory purpose: “to make the owner ‘whole’” when “the owner is deprived of property against his or her will....” *Warehouse II*, 291 Wis. 2d 80, ¶ 31 (quoting *Standard Theatres, Inc. v. DOT*, 118 Wis. 2d 730, 744-45, 349 N.W.2d 661 (1984)). Unlike the facts in both *Warehouse II* and *Standard Theatres*, the Wallers have not been “deprived of property” against their will; they want ATC to acquire *more* property. Yet the Wallers have already been paid just compensation for the property that ATC did take—they have been made whole, albeit as the result of a jury verdict that was *less* than ATC’s jurisdictional offer.

Second, legislative history does not support the award of litigation expenses in actions raising uneconomic remnant challenges. To the contrary, the legislature created the uneconomic remnant statute in the same Assembly Bill that “increase[d] the types of circumstances in which condemnees would receive litigation expenses.” *Compare Warehouse II*,

291 Wis. 2d 80, ¶¶ 25, 27 n.9 *with* App.152-62. But that same legislative history shows that the purpose of the uneconomic remnant statute was to “give[] condemnors the authority to acquire uneconomic remnants.” (App.161 (Note to Section 3).) That is, the legislature intended to give condemnors more rights and more authority—not to confer rights on landowners.

Nothing suggests that the legislature even intended to give landowners the right to pursue uneconomic remnant actions. Moreover, nothing discloses any intent to allow landowners to recover litigation expenses if they succeeded on a novel uneconomic remnant challenge. *See Warehouse II*, 291 Wis. 2d 80, ¶ 28; *see generally* Legislative Reference Bureau Drafting Record for 1977 A.B. 1077. These omissions are telling—the Wallers cannot recover litigation expenses.

**IV. THE WALLERS ARE NOT ENTITLED TO RELOCATION BENEFITS BECAUSE THEY MOVED VOLUNTARILY.**

Landowners who choose to move without threat of condemnation and without a physical taking of their house cannot be displaced persons under the statutes. Rather than addressing this legal argument or the chasm between the facts found (many are indeed clearly erroneous) and the unsupportable legal conclusion that they are “displaced persons,” *see* ATC’s Initial Br. 93-105, the Wallers wrongly invoke the “clearly erroneous” standard. The facts cannot support the judgment.

The Wallers lived in their house for more than one year after ATC’s taking of a utility easement. They moved voluntarily even though the house was not physically impacted by the upgraded transmission line. As a matter of law, the relocation statutes and regulations preclude the conclusion that the Wallers are “displaced persons.”

The Wallers again rely on the testimony of Jack Sanderson and on ATC's appraisal to try to defend the circuit court's conclusion. But Sanderson's testimony cannot change the fact that the public project did not displace the Wallers—they acted on a decision to move made before they ever became aware of the project. Nothing that Sanderson could or did say changes this dispositive fact. *See supra* § I.C.

Moreover, the Wallers mischaracterize ATC's appraisal. They take a comment about the change in highest and best use of their property and pretend that their house has no value for all time in any context. This is wrong. ATC's appraiser, John Rolling, explained that the house retains value: it could be sold or rented for use as a residence, and it contributes value for some commercial uses. ATC's Initial Br. 20-21. The Wallers, however, ignore this testimony and context. Paragraph 3 in the circuit court's findings of fact

(RR.47:2, App.122) is irrelevant to and does not support the court's displaced person conclusion.

The dispositive facts are few. The Wallers' house remained habitable and of substantial value after the taking of the utility easement. The Wallers were not required to move. Instead, they chose to move—but only after continuing to live there. Their voluntary decision does not and cannot entitle them to relocation benefits.

### **CONCLUSION**

For the foregoing reasons and for those in ATC's Initial Brief, ATC requests that the court reverse the judgment declaring the after-taking property an uneconomic remnant, reverse the order granting litigation expenses, and reverse the judgment awarding relocation benefits.

Dated this 14th day of August, 2012.

GODFREY & KAHN, S.C.

By: s/Bryan J. Cahill

Katherine Stadler  
State Bar No. 1030775  
Bryan J. Cahill  
State Bar No. 1055439

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**RULE 809.19(8)(D) CERTIFICATION**

I hereby certify that this brief and accompanying appendix conform to the rule contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of those portions of this brief referred to in s. 809.19(1)(d), (e), and (f) is 2,998 words.

Dated: August 14, 2012.

*s/Bryan J. Cahill*  
Bryan J. Cahill  
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**ELECTRONIC FILING CERTIFICATION**

I hereby certify, pursuant to Wis. Stat. § 809.19(12)(f),  
that the text of the electronic copy of the brief is identical to  
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Dated: August 14, 2012.

*s/Bryan J. Cahill*  
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