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Nos. A04-2342 and A04-2414

State of Minnesota
In Court of Appeals

Hutchinson Utilities Commission, an Enterprise fund of the City of Hutchinson, a Minnesota municipal corporation,

Relator,

vs.

Minnesota Public Utilities Commission,

Respondent,

AND

Minnesota Municipal Utilities Association, a Minnesota non-profit corporation,

Relator,

vs.

Minnesota Public Utilities Commission,

Respondent.

REPLY BRIEF OF RELATOR MINNESOTA MUNICIPAL UTILITIES ASSOCIATION

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SUMMARY OF THE ARGUMENT

The Commission erred as a matter of law in failing to follow the regulatory scheme of Minnesota Statutes Chapter 216B. Rather than follow the Legislative requirement that municipal utilities are excluded from regulation throughout Chapter 216B unless "specifically provided" therein, the Commission ruled that because the intrastate pipeline statute, section 216B.045, does not "exclude" municipal utilities, they are subject to regulation. Such a position inverts the regulatory scheme established by the Legislature.

The Commission, in its orders and its appellate brief, relied heavily upon public policy, arguing that the Hutchinson Utilities Commission ("HUC") Pipeline should be subject to regulation as a matter of policy. But the Commission's very jurisdiction is the issue of this appeal. If the Commission lacked statutory jurisdiction to regulate the HUC Pipeline, it must be reversed, regardless of the Commission's mistaken public policy views. In any event, the Commission's concerns about "unfettered" municipal utility acts are groundless, as municipal utilities are already subject to judicial review and complaint-resolution before the Commission.

The Commission also erred in requiring state regulation, rather than the local regulation prescribed by the Legislature. And the Commission's

decision, focusing on section 216B.045 to the exclusion of section 216B.01, reflected the Commission's will, rather than reasoned decision-making.

The Commission's decision to regulate the HUC Pipeline under section 216B.045 constituted legal error, fell outside the Commission's statutory authority, and was arbitrary and capricious. Its decision should be reversed.

ARGUMENT

I. The Commission Erred in Construing §216B.045 Without Considering the Overall Regulatory Framework of Chapter 216B.

A. The Statutory Framework Negates Regulation of the Pipeline.

The Commission focused on section 216B.045 and failed to consider the overarching regulatory framework of Chapter 216B. The Commission dismissed the regulatory scheme stated in section 216B.01 to *exclude* municipal utilities from regulation throughout Chapter 216B unless "specifically provided" therein. Minn. Stat. § 216B.01.

The Commission improperly rejected this regulatory scheme as "mere" findings. But the Commission incorrectly relied upon the headnote labeled "legislative findings," which by law is not part of the statute. Minn. Stat. § 645.49 ("The headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and are not part of the

statute."). In any event, it makes little sense to slight an express order from the Legislature on how to construe an entire chapter, given that legislative intent is the touchstone of statutory interpretation. Minn. Stat. § 645.16.

The Commission also failed to construe the statute as a whole. Minn. Stat. § 645.17 ("the legislature intends the entire statute to be effective and certain"); *State v. United States Fidelity & Guaranty*, 226 N.W.2d 322, 323-4 (Minn. 1975) ("It is settled that statutes are to be construed so as to give effect to every section and part."); *In re Estate of Nordlund*, 602 N.W.2d 910, 913 (Minn. App. 1999) (construing particular statute as whole, and construing statute "together with" related statutory provisions concerning probate proceedings), *rev. denied* (Minn. Feb. 15, 2000). The Commission failed to consider section 216B.045 within the larger context of the regulatory scheme of section 216B.01, which is how the Legislature ordered the Chapter.

The Commission's orders concerned a matter of straightforward legal analysis, construing the words of the statute, rather than any technical analysis. As such, the Commission's view is not entitled to any deference. *In re Denial of Eller Media Company's Applications*, 664 N.W.2d 1, 7 (Minn. 2003) ("We retain the authority to review de novo errors of law which arise

when an agency decision is based upon the meaning of words in a statute."). Moreover, even when an agency construes the statutes that it regulates, no deference is due to an interpretation "that is in conflict with the express purpose of the Act and the intention of the legislature." *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988). In the present case, section 216B.01 plainly established the intent of the Legislature and the express purposes of Chapter 216B. The Commission's approach failed to follow the express regulatory scheme and merits no deference.

The Commission's approach would require the Legislature to add in each section of Chapter 216B whether or not that particular section applied to municipal utilities. But the Legislature expressly stated in section 216B.01 how to approach municipal utilities throughout the entire chapter of 216B: "it is deemed unnecessary to subject such utilities to regulation <u>under this chapter</u> except as specifically provided herein." Minn. Stat. § 216B.01 (emphasis added).

The plain language of "specifically provided" is also capable of common understanding. "Provide" is defined as "to furnish; supply" and "to make available." *American Heritage Dictionary* (2000). "Specific" is defined as "explicitly set forth; definite" and "intended for, applying to, or acting upon a particular thing . . . concerned particularly with the subject

specified." *Id.* Applying the common understanding, the language "specifically provided" required an explicit and definite reference to municipal utilities. No such explicit or definite reference to municipal utilities is made in section 216B.045.

The Commission's efforts to find a reference to municipal utilities in section 216B.045 are unpersuasive. The word "person" in the definition of intrastate pipeline in section 216B.045 undisputedly does not apply to the entity owning or operating the intrastate pipeline – the entity designed to be regulated. The "natural gas received from another person" language simply described the source of the gas, in this case the Northern Border interstate pipeline, not the entity to be regulated. Minn. Stat. § 216B.045, subd. 1. The plain language of section 216B.045 does not refer to municipal utilities; it cannot satisfy the "specifically provided" language required by the Legislature.

The Commission's brief confusingly has sought to claim both sides of the issue. On the one hand, the Commission claimed the statute to be "clear and unambiguous", "inclusive and unequivocal" (brief at 12), but the Commission also claimed the statute was ambiguous and technical (brief at 17-20). This difficulty for the Commission in addressing the statute reflects its struggle to avoid following the regulatory scheme in Chapter 216B.

Rather than adopting the Commission's confusing approach of focusing on section 216B.045 without regard to section 216B.01, the Court must consider the plain language of the regulatory scheme. The "plain, obvious, and rational meaning of a statute should always be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute intellect would discover." *Lynch v. Alworth-Stephens Co.*, 294 F. 190 (8th Cir. 1923), *affd.*, 267 U.S. 394 (1925).

The plain language of "specifically provided" in section 216B.01 is supported by the remaining structure of Chapter 216B. The Commission cannot explain the series of statutes within Chapter 216B that do "specifically provide" for municipal utilities. *See* MMUA Initial Brief at 14-15. The Commission has effectively inverted the entire statutory framework of Chapter 216B – rather than specifically including municipal utilities, as stated in section 216B.01, the Commission has interpreted the statute to mean that municipal utilities are included unless expressly excluded. The Commission's inverting the regulatory scheme constitutes legal error.

B. The Legislative History Does Not Support Regulation.

The legislative history of section 216B.045 reflected a goal of avoiding federal regulation to allow a Minnegasco-affiliated pipeline to be

constructed. Curiously, rather than focus on the written history itself, the Commission simply quoted what others (competitors to HUC) have said about the legislative history (brief 17-19), a device that the courts have consistently rejected, as not even legislators may comment on what a statute was meant to say. *Washington County v. American Fed. State & County Employees*, 262 N.W.2d 163, 167 (Minn. 1978) (affidavits of individual legislators inadmissible); *County of Hennepin v. County of Houston*, 39 N.W.2d 858, 859 (Minn. 1949) (court "examine[s] the objective footprints on the trail of legislative enactment.").

Moreover, the written legislative history is more persuasive than individual comments by legislators because legislative intent is collective. *See Handle With Care, Inc. v. Department of Human Services*, 406 N.W.2d 518, 522 (Minn. 1987) ("statements made in committee discussion or floor debates are to be treated with caution."). The written history reflects that the Legislature initially considered a bill that would have included municipal utilities: "regulate contracts establishing the rates, service, and facilities of ***persons other than public utilities*** furnishing or transporting to a person . . . gas through a pipeline located wholly within Minnesota to the extent that regulation is permitted by the Natural Gas Act, United States Code, title 15, section 717(c)." Jt. App. at 60 (emphasis added).

But the final enactment, after a delete-all amendment, simply defined "intrastate pipeline" without reference to a "person" "furnishing" or "transporting" gas through an intrastate pipeline. Minn. Stat. § 216B.045. This legislative history is not an example of an amendment that was proposed but ultimately rejected by the Legislature; the change was enacted and became the statute as it exists today. That the change also resulted in a separate subdivision defining intrastate pipeline is irrelevant. The key and undisputed issue remains that the Legislature could have "specifically provided" for municipal utilities to be included within the intrastate pipeline statute (as it did under the initial bill) but elected not to "specifically provide" for municipal utilities.

The Commission's arguments mistake the true inquiry and issue on appeal. The Commission has narrowly and incorrectly focused on why municipal utilities were not "excluded" from section 216B.045, as are public utilities, rather than following the Legislature's order that municipal utilities are automatically excluded unless "specifically provided" within Chapter 216B.

C. Other Statutes Do Not Support Regulating the Pipeline.

As a tool in statutory interpretation, a court may consider other statutes "employing similar language". *Stribling v. United States*, 419 F.2d

1350, 1352 (8th Cir. 1969); *Minnesota Wood Specialties v. Mattson*, 274 N.W.2d 116, 119 (Minn. 1978) (courts may consider statutes addressing same subject); *Jones v. Fiesel*, 283 N.W. 535, 536 (Minn. 1939); *Overstreet v. North Shore*, 318 U.S. 494, 498 (1943). Relator MMUA has cited, and the Commission has failed to distinguish, a series of provisions within Chapter 216B that do specifically refer to municipal utilities. MMUA brief at 14-15. Similarly, MMUA has noted the broad authority granted to municipal utilities, including facilities outside the limits of a city. *Id.* at 23-25.

The costs and assessments provision within section 216B.045, subdivision 6, provides further support for not regulating municipal utilities under the intrastate pipeline statute. The Commission has conceded, as it must, that section 216B.045 provided no basis for regulatory costs and assessments from municipal utilities, as section 216B.045 refers to all entities subject to costs <u>except</u> the subdivision concerning municipal utilities. *Contrast* Minn. Stat. § 216B.045, subd. 6 (referencing 216B.062, subds. 2, 4, and 6) *with* 216B.062, subd. 5 (authorizing assessments against municipal utilities). Although the Commission noted that the regulatory assessment provision in section 216B.062, subdivision 2 may be broader than that in subdivision 5 concerning municipal utilities, this

argument is irrelevant because subdivision 2 is expressly limited to public utilities, not municipal utilities. Section 216B.045 does not cite the one regulatory assessment provision specific to municipal utilities. It is an absurd interpretation to assume that the Legislature meant, in section 216B.045 to regulate municipal utilities, but provided no regulatory assessment for the cost of that regulation.

The Commission has continued to incorrectly claim that the large energy certificate-of-need statute, section 216B.243, supports its view. But section 216B.243 is readily distinguishable from the intrastate pipeline statute in section 216B.045. A certificate of need is expressly required for "[a]ny *person* proposing to construct a large energy facility . . . ." Minn. Stat. § 216B.243, subd. 4 (emphasis added). This language is remarkably similar to the initial but not enacted bill concerning intrastate pipelines: "regulate . . . facilities of persons other than public utilities furnishing . . . gas" Jt. App. at 60. Both provisions reference "persons" who seek to perform some action – construct a large energy facility or furnish gas within Minnesota. The "person" is the entity that seeks to act and that would be regulated because of that action. No such construction may be applied to section 216B.045, in which the word "person" is the descriptive, passive starting point of the gas, rather than the entity to be regulated. The later

references within the certificate-of-need statute to "applicant" plainly refer to the "person" who is "proposing to construct" the large energy facility. Minn. Stat. § 216B.243, subd. 4.

The use of the word "person" in the certificate-of-need statute, and the express reference to municipal utilities throughout Chapter 216B reveals that the Legislature consistently followed the requirement in section 216B.01, that municipal utilities are not to be regulated unless it is specifically indicated. The Commission erred in failing to follow this regulatory scheme, and its orders must be reversed.

II. The Commission Exceeded Its Jurisdiction and Erred in Substituting Mistaken Public Policy For Statutory Jurisdiction and the Legislature's Regulatory Scheme.

The jurisdiction of the Commission, as a state agency, is necessarily limited to its statute. *Minnegasco v. Minnesota Pub. Util. Comm'n*, 549 N.W.2d 904, 907 (Minn. 1996) ("The MPUC, as a creature of statute, only has the authority given it by the legislature."). The Commission has argued that its view of public policy should determine the scope of its jurisdiction. But an agency may not regulate by fiat. The Commission's view of public policy -- that municipal utilities should be regulated by the state -- is no substitute for statutory jurisdiction. *Contrast* Transcript, Volume 2 ("T.2") at 50-1 (Minnegasco counsel: "[A] municipal pipeline owner is not effectively

regulated outside the city's borders . . . .Commissioner Johnson: "And that's where public policy comes in"); *id.* at 63 ("It's public policy here."); *with* Minn. Stat. § 14.69 (b) (reversal for agency decision "in excess of the statutory authority or jurisdiction of the agency").

The Commission has argued on appeal that public policy and its view of the "Legislature's goals" in section 216B.045 provide a backdoor support for regulation. But the courts have limited an agency's authority to regulate to the plain statutory language, not public policy. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984) (courts independently review agency's jurisdiction). And the Commission's approach also overlooked the stated, enacted intent of the Legislature in Section 216B.01. The Court must decline the invitation to allow regulation by claimed legislative "goals" that are directly contrary the Legislature's stated intent. Minn. Stat. § 645.16 ("the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

Moreover, the Commission's argument contradicts the reality of intrastate pipelines within Minnesota. The Commission has suggested that the protections of sections 216B.045 will not be met if they are not applied to the HUC Pipeline. But the Commission failed to note the reality that only one intrastate pipeline exists in Minnesota – the very pipeline that prompted

the enactment of section 216B.045 to avoid federal regulation. T1. at 29; Jt. App. 66 (Senate research memorandum). Yet the parade of horribles speculated by the Commission in its brief has not come to pass. Indeed, the "protections" of section 216B.045 still exist, but must not be applied to municipal utilities because the Legislature did not "specifically provide" for regulation. Section 216B.01 does not state that municipal utilities are not regulated "except if the Commission determines that public policy supports regulation" or "except if the Commission determines that the particular facility has insufficient oversight in its view."

The reality, as reflected in the record, also remains that the only customers to the HUC Pipeline are municipal utilities – HUC and the New Ulm Public Utilities Commission ("NUPUC"). Although the Commission suggested that this could be short-lived, the signed contract continues until the year 2026 (with options to extend) -- double the length of time that the Commission has determined to be the typical utility planning period. *In re Complaint Regarding Annexation of a Portion of the Service territory of People's Cooperative Power by City of Rochester (North Park Additions)*, MPUC No. C-132,299/SA-88-270, Order Determining Compensation, at 11 (July 11, 1990) (reasoning "long range [utility] planning is normally conducted for ten year periods."). And the firm capacity of the entire HUC

Pipeline is entirely committed to HUC and NUPUC. Jt. App. at 19; T.1 at 8. The Commission's public policy arguments overlooked or mischaracterized the facts in the record.

Moreover, the Commission's public policy concerns have already been satisfied in any event. The Commission in its brief, although not in the actual orders, seemed preoccupied with the rates charged by the HUC Pipeline. But the Commission has not routinely overseen the rates of municipal utilities in the first place; municipal utilities determine the appropriate rates. Nevertheless, municipal utility rates must be reasonable, as they are subject to review by the courts. *Cascade Motor Hotel v. City of Duluth*, 348 N.W.2d 84, 85 (Minn. 1984) (holding municipal utility gas and water policies must be "reasonable" and "fair" and reversing policy requiring payment of prior owner's unpaid bill as arbitrary); Minn. Stat. § 444.075, subd. 3 (water and sewer rates must be "just and equitable."); Minn. Atty. Gen. Op. 624a-3 (June 28, 1999) (municipal utility rates must be "fair and reasonable."). Reasonable utility rates are already required. No regulation under section 216B.045 is needed as a public policy goal.

Similarly, the issue of how to address a natural gas emergency, and whether state regulation is required as a matter of public policy to manage such an emergency, is a red herring. Federal law has granted broad

authority to the President to declare a natural gas supply emergency. 15 U.S.C. § 3363 (President may, by executive order, allocate supplies of natural gas, including notification from governor of shortage); *see also* 15 U.S.C. § 717z (President may declare natural gas supply emergency). The lack of regulation under section 216B.045 of the HUC Pipeline hardly dooms the state to natural gas shortages.

Moreover, there is no merit to the Commission's public policy argument that non-residents of Hutchinson and New Ulm would have no recourse. Complaints may be brought to the Commission by non-residents. Minn. Stat. § 216B.17, subd. 6.

For the first time on appeal, the Commission has claimed that a "potential customer" of the HUC Pipeline may lack redress. Brief at 21-23. The Court need not consider this novel argument not addressed in the Commission's orders. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (appellate court may not consider matters not argued and decided below).

And the argument is unsupported by the record in any event. The record contains no evidence of a potential customer seeking access to the HUC Pipeline. T2. at 21. Indeed, one Commissioner commented that "bad blood" between competitors, rather than any complaint or access request

motivated this proceeding. T2. at 21, 29 ("I'm trying to figure out, frankly, why we're here, given that nobody has asked for access to the pipeline . . . . Frankly, it sounds to me like there's a whole bunch of bad blood in this docket that doesn't have much to do with the merits"). The Commission's new public policy argument is therefore reduced to speculating about a potential customer potentially seeking potential interruptible service in the event that some potential additional power becomes available.

The Commission's arguments that no one would approach the public officials of HUC or NUPUC or the respective city councils is entirely speculative. Citizens and non-citizen neighbors routinely air complaints about city services, whether permitting, zoning, garbage collection, or street plowing, to the city provider of the services. The Court may take judicial notice that people may take advantage of a public forum. Indeed, the HUC Pipeline is unique because it is operated from a public-service, rather than a for-profit, model. Amicus Brief, League of Minnesota Cities, at 3-4. HUC and NUPUC, as customers of the Pipeline, have every incentive to provide reliable service at reasonable rates. *Id.*

Even if the Court doubts these practical arguments, neither HUC nor NUPUC has unfettered discretion. The courts act as the ultimate deciders of disputes and check against executive power. Any aggrieved party with

standing may petition the courts for redress against municipalities. Section 1983 and similar litigation is not uncommon. Curiously, the Commission prefers Commission review of municipal utilities, rather than judicial review. Such a preference has no basis in law.

In any event, the record in the present case reveals no complaints have been made concerning the HUC Pipeline's service or rates. T2. at 21, 29. NUPUC is also a sophisticated customer, with over sixty years of gas purchase, distribution, and sales negotiating experience. NUPUC Brief, at 12; *id.*, App. B at 15. The Commission need not second-guess this sophisticated entity.

Finally, the exclusion of "public utilities" in section 216B.045 is irrelevant to the case at bar. Chapter 216B does not regulate public utilities only when "specifically provided." And public utilities are for-profit entities that the Legislature could properly determine required state agency regulation. Even the Commission was unable to cite a requirement of "open access" or "gas emergency" to pipelines operated by public utilities, akin to section 216B.045, yet the Commission has expressed no concern nor demonstrable facts of catastrophe due to this apparent absence of public utility regulation.

The Commission's statutory jurisdiction, rather than its mistaken

concerns of public policy, must determine whether the HUC Pipeline is subject to Commission regulation. The absence of statutory jurisdiction requires reversal.

A. The Commission Erred in Requiring State Regulation of the Pipeline When the Legislature Provided for Local Regulation.

The Commission's arguments also focused on a mistaken notion that absent Commission intervention, the HUC Pipeline would suffer a "void" of regulation. It is important to recall that section 216B.045 was created to avoid federal regulation, not to create elaborate state regulation nor eschew local regulation. Jt. App. 66.

The Commission's decision to regulate the HUC Pipeline conflicts with federal regulation. The Natural Gas Act, under the so-called Hinshaw Amendment, specifies that certain pipelines and facilities are exempt from federal regulation if they are regulated by a "State." 15 U.S.C. § 717(c). "State Commission" in turn is defined to include municipal utilities. 15 U.S.C. § 717a(8) ("State commission" means "the regulatory body of the State ***or municipality*** having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.") (emphasis added). The Commission's approach, by contrast, has subjected the HUC Pipeline to state-agency regulation, rather than the local

regulation provided in federal law and by the Minnesota Legislature in section 216B.01.

The Commission has not disputed municipal utilities' ability and authority to construct and operate natural gas pipelines. It erred, however, in assuming that such action required Commission, rather than local regulation. If the Commission, as the Legislature, truly supported local regulation, it would not assume that public policy required state-agency regulation. Neither public policy arguments nor speculation about potential complaints or concerns authorizes regulation in the present case, given the explicit regulatory framework that excludes municipal utilities from regulation, and the lack of a "specifically provided" requirement in section 216B.045 to regulate municipal utilities.

III. The Commission's Orders Are Arbitrary and Capricious.

The Commission's orders to regulate the Pipeline failed to consider the regulatory framework of Chapter 216B provided in section 216B.01, the touchstone for applying the Chapter to municipal utilities. The Commission failed to apply the common understanding of "specifically provided," and instead focused on the lack of an exclusion for municipal utilities in section 216B.045.

The Commission also failed to address the remaining framework of

Chapter 216B, which specifically regulates municipal utilities in certain sections, the written legislative history of section 216B.045, the conflict with federal law, the limited jurisdiction of the Commission by statute, and the public policy and Legislative intent favoring local regulation. The Commission reasoned that the HUC Pipeline's location outside the city required regulation, without considering the broad authority of cities to provide utility services outside their city limits. The Commission's narrow focus on section 216B.045 and mistaken public policy arguments demonstrates its will rather than reasoned decision-making. The Commission's orders asserting jurisdiction over the HUC Pipeline must be reversed as arbitrary and capricious.

CONCLUSION

For the reasons above-stated, the Court of Appeals should reverse the Commission's order asserting jurisdiction over the Hutchinson Pipeline.

Dated: May 9, 2005.

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