
No. A06-2275

STATE OF MINNESOTA
IN COURT OF APPEALS

Irene Hoffman, *et al.*,

Respondents,

v.

Northern States Power Company d/b/a Xcel Energy, Inc.,

Appellant.

Hennepin County District Court Case No. 27-CV-06-5365

**BRIEF OF APPELLANT NORTHERN STATES POWER COMPANY
D/B/A XCEL ENERGY, INC.**

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**STATEMENT OF LEGAL ISSUES
[AS CERTIFIED BY THE DISTRICT COURT]**

1) Does the filed rate doctrine bar plaintiffs' claims?

- The filed rate doctrine precludes judicial consideration of the lawfulness or reasonableness of regulated utility rates; nonetheless, the district court empowered itself to determine the services required by administratively-approved tariffs and to refund rates for service not performed.

Most Apposite Authority

- *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307 (Minn. 2006);
- *Roedler v. United States Dep't of Energy*, No. CIV 98-1843, 1999 WL 1627346 (D. Minn. Dec. 23, 1999); and
- *In re Complaint by Shark*, No. A05-21, 2005 WL 3527152 (Minn. Ct. App. Dec. 27, 2005).

2) Does the primary jurisdiction doctrine require the court to defer resolution of the services required by the applicable tariffs to the responsible administrative agency?

- Despite the special competence of the responsible utility commissions, the district court refused to defer resolution of a dispute over the services contemplated by the applicable tariffs to the regulatory agencies.

Most Apposite Authority

- *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307 (Minn. 2006); and
- *Roedler v. United States Dep't of Energy*, No. CIV 98-1843, 1999 WL 1627346 (D. Minn. Dec. 23, 1999).

STATEMENT OF THE CASE

In this lawsuit, electric utility customers from Minnesota, North Dakota, and South Dakota complain about services supposedly required by tariffs approved by the utilities authorities in their respective jurisdictions. Respondents Irene Hoffman, *et al.* demand damages that amount to a refund of a portion of the rates paid, as well as injunctive relief compelling Northern States Power d/b/a Xcel Energy, Inc. (“NSP”) to deliver the services in question.

NSP asked the Hennepin County District Court to dismiss because judicial authority over respondents’ claims is foreclosed by the filed rate and primary jurisdiction doctrines.¹ The filed rate doctrine divests courts of jurisdiction to resolve disputes over the reasonableness or lawfulness of a regulated utility’s charges and services. *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998); *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307, 314-15 (Minn. 2006). Primary jurisdiction has a similar effect by deferring tariff-based controversies to administrative agencies with the authority and expertise to assess and implement regulated rates. *Roedler v. United States Dep’t of Energy*, No. CIV 98-1843, 1999 WL 1627346, at *16 (D. Minn. Dec. 23, 1999) (reproduced at 001 of NSP’s Appendix (“App.”)).

The district court refused to give way to the filed rate and primary jurisdiction doctrines. *Hoffman v. N. States Power Co.*, No. 27-CV-06-5365, slip op. (Minn. Dist. Ct. Nov. 1, 2006) (“*Dismissal Order*”) (App. 013). Relying solely upon the rationale of a

¹ NSP also sought dismissal because the tariffs’ express terms disclaim the duties that respondents seek to impose.

single concurring justice in *AT&T*, and mirroring the analysis in the *Schermer dissent*, the district court ordained that claims against regulated utilities can be litigated in district court whenever a tariff is said to provide the grounds for relief. *Id.* at 4. Similar reasoning underlies the court's primary jurisdiction holding. *Id.* at 8.²

Recognizing the "importance" and "doubtfulness" of the result, the lower court certified the following questions for immediate Minn. R. Civ. App. P. 103.03(i) review: (1) Does the filed rate doctrine bar plaintiffs' claims?; and (2) Does the primary jurisdiction doctrine require the court to defer resolution of the services required by the applicable tariffs to the responsible administrative agency? *Hoffman v. N. States Power Co.*, No. 27-CV-06-5365, slip op. (Minn. Dist. Ct. Nov. 28, 2006) ("*Certification Order*") (App. 025).

NSP is also afforded appellate rights pursuant to Rule 103.03(j), which authorizes an appeal when a district court rejects a jurisdictional, immunity or analogous defense that, if granted, would end the litigation. Rule 103.03(j) certainly encompasses the denial of filed rate and primary jurisdiction defenses, providing NSP additional grounds to appeal.

Since the governing administrative agencies alone are empowered and equipped to assess the reasonableness of NSP's charges and services, the district court's assertion of jurisdiction and preservation of respondents' claims must be reversed.

² The district court also declined to enforce the tariffs' express language, believing that the subject terms are ambiguous. *Id.* at 10.

THE REGULATION OF UTILITY SERVICES AND CHARGES

This litigation arises out of the relationship between state administrative agencies and utilities. The legislatures of Minnesota, North Dakota, and South Dakota have promulgated comprehensive regulatory schemes governing retail electric and natural gas sales. Minn. Stat. § 216B, *et seq*; N.D.C.C. § 49-05-01, *et seq.*; S.D.C.L. § 49-34A-1, *et seq.* The relevant statutes vest the Minnesota Public Utilities Commission (“MPUC”), the North Dakota Public Service Commission (“NDPSC”) and the South Dakota Public Service Commission (“SDPSC”), respectively, with plenary dominion over the public utilities doing business in those states. *Id.*

The responsible regulatory agencies exclusively determine the reasonableness of energy charges and associated services – *i.e.*, the “rates.” *N. States Power Co. v. Oakdale*, 588 N.W.2d 534, 537 (Minn. Ct. App. 1999); N.D.C.C. § 49-02-03; S.D.C.L. § 49-34A-6. The resulting tariffs specify the terms and conditions upon which utility business is conducted. Minn. Stat. § 216B.05, subd. 1; N.D.C.C. § 49-02-03; S.D.C.L. § 49-34A-10. In all three states no utility can sell electricity to retail customers except pursuant to the approved rates. Minn. Stat. § 216B.06; N.D.C.C. § 49-04-07; S.D.C.L. § 49-34A-9.

Tariffs are not just guidelines about pricing and services. On the contrary, “[u]nder Minnesota law, the MPUC has been delegated authority to regulate public utilities and to determine the reasonableness of the rates they charge. MPUC’s rate-making function is a quasi-legislative function, and decisions of the Commission ‘command the same regard . . . as enactments of the legislature.’” *Hilling v. N. States*

Power Co., No. 3-90 CIV 418, 1990 WL 597044, at *3 (D. Minn. Dec. 12, 1990) (citations omitted) (App. 028). The same is true in North Dakota and South Dakota. *N. States Power Co. v. F.E.R.C.*, 176 F.3d 1090, 1095 (8th Cir. 1999) (recognizing the governing tariffs in Minnesota, North Dakota, South Dakota, Michigan and Wisconsin); *In re One-Time Special Underground Assessment by N. States Power Co. in Sioux Falls*, 628 N.W.2d 332, 334 (S.D. 2001).

Once filed with a commission the tariff has the full force and effect of law until changed or amended by the utility or the commission. *Oakdale*, 588 N.W.2d at 537. See *Quad County Cmty. Action Agency, Inc. v. Elkin*, 315 N.W. 2d 665, 668 (N.D. 1982) (“Until the PSC made a finding that . . . rates were unreasonable, those rates remained in effect.”); S.D.C.L. § 49-34A-21. See also *F.E.R.C.*, 176 F.3d at 1095. No claim of right or obligation can supersede or override the filed rates.

Regulated utilities are charged with providing reliable service within their designated service areas. The tariffs afford protection and advantages to the public and utilities alike, as well as control the price of electric service. See, e.g., *Computer Tool & Eng’g, Inc. v. N. States Power Co.*, 453 N.W.2d 569, 573 (Minn. Ct. App. 1990) (“[a]pproving a liability limitation falls within the ambit of the commission’s broad regulatory power” because reducing a utility’s exposure to litigation reduces the cost of electricity), *rev. denied* (Minn. May 23, 1990). To ensure services are available to the public at an affordable price, the utility commissions of Minnesota and the Dakotas carefully balance utility and ratepayer obligations and establish corresponding charges. The rates are based upon the utility’s costs plus a reasonable rate of return.

STATEMENT OF FACTS³

Respondents are NSP electric customers from Minnesota, North Dakota and South Dakota. Complaint at ¶¶ 6-10 (attached at App. 031). NSP sells energy by transmitting and distributing electricity to residential customers in the applicable service areas. *Id.* at ¶ 20. Electric service is provided pursuant to written terms and conditions. *Id.* at ¶ 21. These arrangements are not individually negotiated; instead, every customer is bound by the tariff on file with the regulatory agency that constitutes the contract for the provision of service. *Id.*

A tariff establishes both the price of power and the parties' respective obligations. *Id.* at ¶ 22. *See also* Minn. Stat. § 216B.02, subd. 5; N.D.C.C. § 49-01-01; S.D.C.L. § 49-34A-10. The tariff language upon which this dispute is based was approved in identical form in Minnesota, North Dakota and South Dakota. Complaint at ¶ 22.

The tariff allocates responsibility for the safe handling of electricity between NSP and ratepayers. Complaint at ¶ 23. Each residential customer's monthly electric bill includes a "Basic Service Charge" assessed to compensate NSP for the cost of the distribution system. This charge is distinct from the variable amounts paid for the energy actually consumed by each customer. *Id.*

³ Although the allegations in respondents' complaint are disputed, this appeal comes to the Court by way of a motion to dismiss and thus the "facts" are drawn from the assertions below. *Wiegand v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807, 811 (Minn. 2004) ("When a defendant brings a Rule 12 motion to dismiss, we must treat the allegations in the complaint as true.").

The putative class action challenges NSP's provision of services under the respective tariffs. Complaint at ¶¶ 1-4. Specifically, respondents allege that NSP failed to inspect "points of connection." Complaint at ¶ 4. Respondents also accuse NSP of not having a program in place to conduct such inspections. Complaint at ¶ 29.

A point of connection is the junction between NSP's distribution lines and a customer's equipment. Complaint at ¶ 24. This connection often occurs within the meter box. *Id.* NSP makes the initial hook-up by affixing company-owned wires (referred to in the tariffs as "service conductors") to lugs inside the meter box. *Id.* From this point of contact, electricity flows through the meter into a customer's wires for consumption within the residence. *Id.* To make the union, NSP personnel place the service conductor in grooved channels, then tighten brass lugs down onto the wires. *Id.* After the connection is completed and the meter installed, the meter box is sealed or locked. *Id.*

Respondents' lawsuit challenges two tariff sections that mention points of connection. The first provision states:

SERVICE CONNECTIONS

The customer, without expense to the Company, will grant the Company right-of-way on his premises for the installation and maintenance of the necessary distribution lines, service conductors, and appurtenances, and will provide and maintain on the premises, at a location satisfactory to the Company, proper space for the Company's transformers, metering equipment, and appurtenances.

The service conductors as installed by the Company from the distribution line to the point of connection with the customer's service entrance conductors will be the Company's property and will be maintained by the Company at its own expense.

The customer will provide for the safekeeping of the Company's meters and other facilities and reimburse the Company for the cost of any alterations to the Company's lines, meters, or other facilities necessitated by customer and for any loss or damage to the Company's property located on the premises. The exception is when such loss or damage is occasioned by the Company's negligence or causes beyond the control of the customer.

Complaint at ¶ 27 (citing General Rules and Regulations, ¶ 5.5 Minnesota; ¶ 5.6 North Dakota and South Dakota (available at App. 045-047)).

A second tariff provision at issue specifies:

CUSTOMER'S WIRING, EQUIPMENT AND PROPERTY

All wiring and equipment on customer's side of the point of connection, except metering equipment, will be furnished, installed and maintained at the customer's expense in a manner approved by the public authorities having jurisdiction over the same.

Complaint at ¶ 28 (citing General Rules and Regulations, ¶ 4.2 Minnesota, North Dakota and South Dakota (available at App. 048-050)). Significantly, neither provision specifically address point of connection maintenance, and inspections are nowhere referenced.

Despite the plain language limiting NSP's maintenance obligations to the service conductors themselves, respondents complain that the points of connection have not been inspected and demand "breach of contract" damages which would result in a refund of charges supposedly paid for the unperformed services. Complaint at ¶¶ 32-33. Respondents also want NSP to be compelled to provide the point of connection services that respondents deem to be required. Complaint at ¶¶ 32-35.

NSP sought dismissal to no avail. The district court rejected the filed rate doctrine bar, relying principally upon Chief Justice Rehnquist's analysis in concurring opinion

that every other justice rejected. *Dismissal Order* at 4. The lower court also refused to yield to the agencies' primary jurisdiction, surmising that resolution of respondents' challenges does not "require any 'special competence' that [the] Court does not already possess." *Id.* at 8. Finally, the court pronounced the tariff to be ambiguous because the language does not "clearly and unambiguously show that [NSP] had and has no duty to inspect or maintain the point of connection." *Id.* at 10.

This appeal follows.

ARGUMENT

I. IMMEDIATE REVIEW IS PROPER

The district court's filed rate and primary jurisdiction conclusions are properly before the Court pursuant to the *Certification Order*; appellate jurisdiction is also invoked by Minn. R. Civ. App. P. 103.03(j).

A. The Certification Order provides jurisdiction.

Appellate rules permit interlocutory order appeals "if the trial court certifies that the question presented is important and doubtful." Minn. R. Civ. App. P. 103.03(i). "A question is increasingly important if it has statewide impact, reversal is likely, lengthy proceedings will be terminated, and a district court's incorrect ruling will inflict substantial harm on the parties." *Davies v. W. Pub. Co.*, 622 N.W.2d 836, 840 (Minn. Ct. App. 2001), *rev. denied* (Minn. May 29, 2001). The primary consideration is "the potential to terminate or significantly reduce further proceedings." *Jostens, Inc v. Federated Mut. Ins. Co.*, 612 N.W.2d 878, 884 (Minn. 2000). Issues are "doubtful" when

“there is no controlling precedent” in the face of substantial grounds for a difference of opinion. *Id.* at 884-85.

1. The filed rate rejection is “important” and “doubtful.”

The impact of the filed rate doctrine on respondents’ quest for utility bill refunds is clearly “important” for Rule 103.03(i) purposes. The court denied a motion that would “terminate or significantly reduce further proceedings.” *Jostens*, 612 N.W.2d at 884. Reversal in this case would be indistinguishable from the “important” litigation ramifications that the *Davies* court found would sufficiently narrow the proceedings so as to warrant interlocutory review.

The lower court’s refusal to dismiss is also “important” because allowing this litigation to proceed would have far-reaching implications throughout Minnesota, and extra-territorial effect in North and South Dakota. The ramifications would extend to every potential lawsuit that touched upon utility tariffs in the three states. *See Jostens*, 612 N.W.2d at 884 (noting statewide impact as indicative of “importance”).

Furthermore, reversal is exceedingly likely because the district court’s ruling cannot be squared with binding appellate precedent. *See Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307 (Minn. 2006). Even before *Schermer* the preclusion against the relief that respondents seek had been judicially established. *Roedler v. United States Dep’t of Energy*, No CIV 98-1843, 1999 WL 1627346, at *15 (D. Minn. Dec. 23, 1999) (App. 001).

Lacking support from any controlling case law or statutory authority, the dismissal denial is also “doubtful” for Rule 103.03(i) purposes. *Jostens*, 612 N.W.2d at 884-85.

The trial court did not just blaze a new judicial trail by allowing this litigation to proceed: the plainly analogous decision in *Schermer* was discounted; and that precedent's dissent, which by definition is contrary to controlling law, was embraced.

In sum, the lower court's filed rate analysis is both "important" and "doubtful." The certified questions are properly before this Court.

2. Primary jurisdiction is equally "important" and "doubtful."

Just like the filed rate misstep, the lower court's primary jurisdiction mistake is "important" because reversal would "greatly reduce the length and complexity of the proceedings." *Davies*, 622 N.W.2d at 840. Deferring resolution of important regulatory issues to the appropriate administrative agencies would either end or substantially reduce the length and complexity of the proceedings. This Court has not hesitated to instruct district courts to yield to administrative expertise in similar circumstances. *See, e.g., City of Willmar Mun. Utils. Comm'n v. Kandiyohi Co-op. Elec. Power Ass'n*, 452 N.W.2d 699, 703 (Minn. Ct. App. 1990) (assertion of jurisdiction over dispute that district should have referred to the MPUC's competence reversed), *rev. denied* (Minn. Apr. 27, 1990).

The rejection of primary jurisdiction is also "doubtful" for Rule 103.03(i) purposes. There is no controlling authority – and none was cited – supporting the district court's usurpation of the primary jurisdiction of the utility agencies. In the wake of *Schermer*, deference to the agency in litigation involving regulated commerce is clearly the preferred course of action. *Schermer*, 721 N.W.2d at 319. The most apposite precedent – *Roedler* – says just that.

Like the filed rate doctrine disavowal, the lower court's primary jurisdiction refusal is both "important" and "doubtful" for Rule 103.03(i) purposes. In certifying this immediate appeal the district court got it right.

B. Review is compelled regardless of the Certification Order.

In addition to the Rule 103.03(i) certifications, precedent authorizes an immediate appeal of the lower court's filed rate and primary jurisdiction determinations pursuant to Minn. R. Civ. App. P. 103.03(j), which permits an appeal "from such other orders or decisions as may be appealable by statute or under the decisions of the Minnesota appellate courts." Rule 103.03(j) is piqued when a district court rejects a jurisdictional, immunity or analogous defense that, if granted, would end the litigation. *See, e.g., Janssen v Best & Flanagan, LLP*, 704 N.W.2d 759 (Minn. 2005); *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235 (Minn. 2002); *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830 (Minn. 1995); *Hunt v. Nevada State Bank*, 285 Minn. 77, 172 N.W.2d 292 (1969). The filed rate and primary jurisdiction conclusions below are necessarily subject to Rule 103.03(j) treatment – thus affording an additional basis for appellate jurisdiction.

Like the defenses considered in *Janssen*, *Hunt*, *McGowan*, and *Kastner*, the filed rate and primary jurisdiction doctrines circumscribe judicial authority. The filed rate doctrine prevents courts from entertaining challenges to the reasonableness or lawfulness of regulated utility rates. *Schermer*, 721 N.W.2d at 314-15. The limitations upon the exercise of judicial prerogative effected by filed rates reflects the separation of powers concerns upon which the doctrine is based. *Id.*

Courts are precluded from deciding cases like this because a “court-ordered refund” of a regulated rate “would interfere with the regulatory scheme established by the legislature.” *Id.* at 314. *See also N. States Power Co. v. City of St. Paul*, 256 Minn. 489, 493, 99 N.W.2d 207, 211 (1959) (“[P]rescribing or fixing rates for a public utility involves a legislative function which may not be usurped by the courts.”).

The primary jurisdiction doctrine similarly takes tariff challenges out of the courthouse and into an administrative proceeding. The regulatory agencies are vested with dispute oversight responsibility “whenever enforcement of the claim at issue requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Roedler*, 1999 WL 1627346, at *16. When rate refunds or injunctions against utilities are sought, “[t]he purposes behind the doctrine of primary jurisdiction are evident.” *Id.*

Both doctrines protect NSP from being haled before any tribunal other than the appropriate utilities commission. *Kastner*, 646 N.W.2d at 239-40. Thus NSP should not be “compelled . . . to take up the burden of litigation in this state that might otherwise be avoided.” *Hunt*, 285 Minn. at 89, 172 N.W.2d at 300. The appeal is, therefore, properly before the Court pursuant to both Minn. R. Civ. App. 103.03(i) and 103.03(j).

II. STANDARD OF REVIEW

This appeal concerns the availability of court jurisdiction over matters that three state legislatures have placed exclusively in the administrative realm. Jurisdictional determinations are reviewed de novo. *Reed v. Albaaj*, 723 N.W.2d 50, 55 (Minn. Ct. App. 2006). Consequently, “an appellate court need not give deference to a trial court’s

decision.” *Frost-Benco Elec. Ass’n v. Minn. Pub. Utils. Comm’n*, 358 N.W.2d 639, 642 (Minn. 1984).

III. THE FILED RATE DOCTRINE TRUMPS THIS LITIGATION

A. The filed rate doctrine limits judicial authority.

The relationship between a regulated utility like NSP and ratepayers like respondents is comprehensively governed by the tariffs that are filed with, and thereafter approved, overseen, and revised exclusively by the appropriate regulatory agencies. See *AT&T*, 524 U.S. at 222-24; *Montana-Dakota Utils. Co. v. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994); *Computer Tool & Eng’g, Inc.*, 453 N.W.2d at 573. The U.S. Supreme Court articulated the filed rate doctrine (originally applied to interstate shipping) almost a century ago:

Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 97 (1915) (emphasis added). The doctrine is not exclusively federal: “the rationale underlying the filed rate doctrine has also been applied to rates filed with state agencies.” *Schermer*, 721 N.W.2d at 312; see also *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1115 (S.D.N.Y. 1992), *aff’d*, 27 F.3d 17 (2d Cir. 1994).

Once rates are approved the filed rate doctrine precludes deviation. The tariff controls until changed by the only entity with the requisite jurisdiction – the responsible utility regulatory agency. See *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981). “[N]ot even a court can authorize commerce in the commodity on other terms.” *Montana-Dakota Utils. Co.*, 341 U.S. at 251-52. As the high court observed:

[T]he right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission’s orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.

Id. (emphasis added).

Consistent with the preceding the filed rate doctrine prevents courts from taking up tariff claims that would encroach upon the authority granted to utility commissions. *Arkansas Louisiana Gas*, for instance, refused to allow a natural gas contract dispute to result in a retroactive rate increase outside of the regulatory process. 453 U.S. at 573-74, 578. The high court reasoned that “[i]t would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.” *Id.* at 580.

The filed rate doctrine recognizes “that regulatory agencies have special expertise, investigative capacities, and experience and familiarity with the regulated industry that enable them to ‘consider the whole picture regarding the reasonableness of a proposed rate,’ whereas the courts are ill-suited to second-guess the decisions of regulatory agencies.” *Schermer*, 721 N.W. 2d at 312 (quoting *Wegoland*, 27 F.3d at 20-21).

“The filed rate doctrine does not apply to rates alone, but to any terms or practices that might affect the rates as well.” *Imports, Etc., Ltd. v. ABF Freight Sys., Inc.*, 162 F.3d 528, 530 (8th Cir. 1998) (citing *AT&T*, 524 U.S. at 222). Such coverage is necessary because “[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached.” *AT&T*, 524 U.S. at 223. The statutes define the term “rate” to comprise “every compensation, charge . . . and any rules, practices, or contracts.” Minn. Stat. § 216B.02, subd. 5. See N.D.C.C. § 49-01-01; S.D.C.L. § 49-34A-1; see also Minn. R. 7825.3100, subd. 14.

The state’s high court recently explained the impact of the filed rate doctrine on litigation involving regulated commerce. The *Schermer* plaintiffs filed a class action against their insurer “alleging that the surcharge that was imposed by [the insurer] on homes whose electrical systems were more than 39 years old was racially discriminatory.” 721 N.W.2d at 309. That discrimination resulted in the class paying excessive premiums, and the lawsuit sought a refund of those overcharges. In essence the complaint alleged that the class was not receiving the insurance for which they paid for, but rather was being charged more for being minorities who were forced to live in older housing. *Id.* at 315. Summary judgment ended the litigation because “the filed rate doctrine prevents a court from retroactively changing a rate that has been filed with and approved by a state regulatory agency.” *Id.* at 309. This Court affirmed. *Id.*

Before the supreme court, plaintiffs argued the filed rate doctrine did not apply “because their challenge is not to the reasonableness of the [Utilities Rating Plan that was filed with the appropriate governing administrative agency], but to its legality, which is a

matter within the peculiar expertise of courts.” *Id.* at 314. Damages were said to be “judicially ascertainable.” *Id.* Both contentions were rejected because “the filed rate doctrine should reflect separation of powers and comity considerations [which] the Class’s argument overlooks.” *Id.*

The invitation to remedy premium overcharge claims and levy damages was declined because “courts are ill equipped to retroactively reallocate rates among ratepayers.” *Id.* at 315. *Schermer*’s direct applicability to this case warrants extensive quotation from the opinion:

[I]f a court were to entertain a private claim that a regulated rate was unreasonable or unlawful, it would necessarily have to second-guess the decisions of the agency to whom the legislature has delegated the responsibility to approve rates, and a court generally would not have the technical expertise to do so nor the capacity to consider the entire rate structure or to balance all competing interests.

....

When a court is asked to determine whether one part of the rate structure is unlawful, as applied to a subset of ratepayers, it must necessarily interfere with the function delegated by the legislature to the [agency], and it has neither the expertise nor the mechanisms to deal with the entire rate structure or the adequacy of the return to the regulated entity.

Id. at 314-15.

Consequently, “the regulation of rates is an ‘intricate ongoing process’ and interference by a court ‘may set in motion an ever-widening set of consequences and adjustments’ which courts are powerless to address.” *Id.* at 315 (quoting *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm’n*, 369 N.W.2d 530, 535 (Minn. 1985)). Giving effect to legislative intent *Schermer* concluded that “[i]n order to uphold the regulatory

scheme enacted by the Legislature, we conclude that the Insurance Commissioner serves as the plaintiff's sole source of relief." *Id.* at 319 (quotations and citation omitted) (emphasis added).

The supreme court is not alone in concluding that claims like respondents' must yield to the filed rate doctrine. Several courts have invoked the filed rate doctrine to preclude litigation seeking damages/refunds or injunctive relief in the specific context of NSP's electric tariffs. *Roedler*, 1999 WL 1627346, at *15; *Hilling v. N. States Power Co.*, No. 3-90 CIV 418, 1990 WL 597044, at *2 (D. Minn. Dec. 12, 1990) (App. 013); *In re Complaint by Shark*, No. A05-21, 2005 WL 3527152, at *3 (Minn. Ct. App. Dec. 27, 2005) (App. 051).

The *Roedler* plaintiffs challenged the inclusion of charges for nuclear waste disposal in customer rates. *Roedler*, 1999 WL 1627346, at *2. Because the disposal facility had yet to be built, plaintiffs demanded damages for past payments and an injunction against further collections. *Id.* As in this case, the complaint accused NSP of charging for a service that ratepayers never received – the permanent storage of spent nuclear fuel. *Id.* at *3. The relief sought was rejected even though the waste disposal facility was not close to coming on line:

[T]o the extent that the Plaintiffs seek a refund of any fee paid to NSP, and/or to the extent that the Plaintiffs seek an injunction against the further collection of any fee by NSP, the Plaintiffs claims are barred by the filed rate doctrine.

Id. at *15 (emphasis added).

In *Hilling*, NSP was accused of inflating electric rates to subsidize unregulated “waste-to-energy” ventures. 1990 WL 597044, at *1. Plaintiffs complained about paying more for electric service than was justified because of NSP’s allegedly wrongful conduct. *Id.* Again the dispute arose out of complaints about ratepayers being charged for something they did not receive. Significantly, the allegations in *Hilling* – which because of the procedural status had to be accepted as true – were that plaintiffs had been defrauded into supporting a waste to energy initiative which afforded no ratepayer benefits.

As in *Roedler* the filed rate doctrine obviated damages:

The only injury plaintiffs allege is that they have been charged excessive rates for electricity, a regulated utility. The plaintiffs do not allege that the [MPUC] did not approve the challenged rates, nor do they allege that NSP has charged any rate other than those approved by the MPUC.

Id. at *2.

Consequently, the relief sought would perforce result in a judicial comparison of the actual filed rate with the charges the agency should have approved absent allegedly improper utility conduct. *Id.* at *2 (citing *Arkansas-Louisiana Gas Co.*, 453 U.S. at 577). “This is precisely what the filed rate doctrine prohibits.” *Id.* Even though intentional fraud – not just breach of contract – was at issue, the filed rate doctrine prevailed.

The *Hilling* plaintiffs’ request for injunctive relief was equally flawed because “establishing and enforcing an injunction in this case would inevitably entangle this court in the MPUC’s rate-making process to the same, if not greater, extent as would an

attempt to fix damages based upon previously filed rates.” *Id.* at *3. The judicial resolution of equitable claims based upon the approved rates was no less precluded.

Shark applied the filed rate doctrine to NSP’s electric utility tariffs as recently as December 2005. 2005 WL 3527152, at *1. The *Shark* ratepayer demanded damages because the approved rates were based upon estimated income taxes that NSP never ended up paying. *Id.* Since rates are determined from projected costs and NSP did not incur the tax costs at issue, the dispute was again about ratepayers not receiving what they had paid for – namely, electricity at a cost that included expected, but not assessed, tax expenses.

The denial of refunds was affirmed. Most notably, this Court acknowledged that a regulatory agency “cannot simply remove an item from the base rate without an analysis that also evaluates other rate-base components and the appropriate rate of return.” *Id.* at *3 (citations omitted). The charges and costs that may be associated with point of connection services are no less intertwined with the other costs that make up the rate base.

B. The filed rate doctrine emasculation must be undone.

Despite the mandate of the filed rate doctrine, the district court apparently intends to deconstruct the tariff into assumed rights, obligations and allocations for purposes of discerning and then enforcing the supposed intent of three different utilities agencies. Such a filed rate standard would trample upon the separation of powers concerns at the doctrine’s core and inject the judiciary into the governance of administratively-regulated utility services – exactly what the filed rate doctrine is intended to prevent.

1. The filed rate conclusion contravenes *Schermer*.

Schermer is indistinguishable for filed rate purposes. Like the *Schermer* plaintiffs, respondents seek damages that would result in the refund of rates that have been paid. Respondents try to dress up their attack on the regulatory scheme by demurring that they do not want utility bill refunds, just damages based upon the costs of services not performed. Such a form-over-substance ploy cannot carry the day.

The district court itself acknowledged that “a decision in favor of Plaintiffs would require this Court to determine the value of the unperformed service.” *Dismissal Order* at 6. Returning to respondents the amount charged for that service is undeniably a refund in its truest form. *See, e.g., Knipmeyer v. Bell Atl. Corp.*, No. 0308, 2001 WL 1179415, at *4 (Pa. Com. Pl. May 22, 2001) (App. 054) (awarding damages for undelivered services would require the court “to calculate the difference in value between [what plaintiffs were promised] and [the] service that the [plaintiffs] actually received. The end result of such an award would be an impermissible refund of a portion of [the] filed rate[.]”).

If “awarding Plaintiffs the value of the services they never received” (*Dismissal Order* at 6) is not a “refund,” then what could it be? *See, e.g., In re Empire Blue Cross & Blue Shield Customer Litig.*, 164 Misc.2d 350, 358 (N.Y. Sup. Ct. 1994) (to assess damages is to “determine what would be a reasonable rate,” which “is precisely the judicial determination . . . that the filed rate doctrine forbids;” indeed “ascertaining of damages and the determination of a reasonable rate are hopelessly intertwined”) (quotations omitted), *aff’d*, *Minihane v. Weissman*, 640 N.Y.S.2d 102 (N.Y.A.D. 1996).

See also Everett v. O'Leary, 90 Minn. 154, 157, 95 N.W. 901, 902 (1903) (plaintiffs seeking damages for insurer's failure to issue a fire insurance policy, even though no fire had occurred, could recover a refund in the form of "the amount paid as the premium").

Whether labeled "damages" or "refunds" the relief that respondents seek would require the "court to speculate about whether the [commission] would have approved this lower, nonsurcharge rate [*i.e.*, the rate paid minus damages awarded] as the reasonable and lawful rate." *Schermer*, 721 N.W.2d at 315 (citing *Arkansas Louisiana Gas Co.*, 453 U.S. at 578-79). Additionally, a "court-ordered refund" of a regulated rate "would interfere with the regulatory scheme established by the legislature and with the ratemaking functions of the [agency]." *Id.* at 314. *See also N. States Power Co. v. City of St. Paul*, 256 Minn. 489, 493, 99 N.W.2d 207, 211 (1959) ("[P]rescribing or fixing rates for a public utility involves a legislative function which may not be usurped by the courts."). In fact, merely deciding whether the point of connection services about which respondents complain were contemplated by the commissions of three different states would encroach upon administrative prerogative.

Damages/refunds would also offend the filed rate doctrine non-discrimination principles. The only claims before the lower court were those of the named respondents – Irene Hoffman, David Hoffman, Jerry Ustanko, and Mulugeta Endyehu.⁴ Thus any award would lessen the amount that those four customers paid for electricity –

⁴ Indeed, as explained *infra* note 6, Minnesota jurisdiction is limited to the Hoffmans because the other named respondents are out-of-state complainants asserting out-of-state tariff challenges implicating out-of-state utilities commissions.

unquestionable rate reduction for just the litigants. The discriminatory consequence of such a remedy was recognized in *Schermer*, which rebuffed a similar challenge to filed rates even though a class had been certified:

If the court were to retroactively adjust the rates of only the Class members, it would inevitably disrupt the balancing of interests achieved by the [commission] when the rates were approved because the court has no jurisdiction to reallocate rates among other customer classes to assure that in total, the rates are adequate for [the company].

721 N.W.2d at 315.

Thus contrary to the filed rate doctrine “[a]n award of . . . damages to some ratepayers would completely alter the allocation among classes of customers that the [commission] had approved.” *Id.* If the certified class in *Schermer* was denied overcharge damages, the damning consequence for this putative class action is obvious.⁵

Although *Schermer* arose in the insurance context, the court acknowledged that filed rate doctrine development “has arisen primarily in the context of electric, gas, and telephone utilities,” which is a more “stringent” regulatory scheme. *Schermer*, 721

⁵ This Court has also noted that the filed rate doctrine’s purpose of prohibiting discrimination among ratepayers and ensuring that consumers are treated equally. See *Schermer v. State Farm Fire & Cas. Co.*, 702 N.W.2d 898, 906-07 (Minn. Ct. App. 2005) (“Application of the filed rate doctrine (1) prevents the judiciary from ‘reconstitut[ing] the whole rate structure’ of an industry; (2) avoids retroactive relief that would lead to discrimination in rates such that a victorious plaintiff would end up paying less than similarly situated nonsuing customers; and (3) avoids ‘undermin[ing] the congressional scheme of uniform rate regulation.’”), *aff’d*, 721 N.W.2d 307 (Minn. 2006). Discrimination among ratepayers would be the inevitable result of granting the sought after relief because respondents would have paid less for the same services than similarly situated customers who do not participate in a class recovery. It is inconceivable that every ratepayer over the last six years would be included in any class resolution. Such rate discrimination undermines uniform rate regulation. *Id.* See also *Schermer*, 721 N.W.2d at 312.

N.W.2d at 314, 318. Thus the filed rate doctrine reigns with more force in this electric utility case than in *Schermer*.

Substituting the relevant parties and subjects, the state supreme court's reasoning in *Schermer* shows the way:

For all of these reasons – because the regulation of [electrical services] rates is a legislative, not a judicial function; because the [state] legislature[s] ha[ve] established a comprehensive system for regulating [electrical services] rates and ha[ve] delegated the administration of that system to the [MPUC, NDPSC, and SDPSC]; because only the [MPUC, NDPSC, and SDPSC] ha[ve] the capacity to determine what is a reasonable rate structure for [services providers], by balancing the interests of ratepayers and [services providers] and by allocating fairly among classes of ratepayers; because the legislature[s] ha[ve] severely restricted the authority of the [MPUC, NDPSC, and SDPSC] to make retroactive refunds or rebates; and because the legislature[s] ha[ve] substituted regulatory remedies to protect all [consumers] in place of the private remedies that individual [consumers] might possess – we conclude that the filed rate doctrine applies generally to rates filed with and approved by the [MPUC, NDPSC, and SDPSC].

Id. at 317.

Equally compelling is the overlap of the district court's analysis and the *Schermer* dissent. The dissenting justice endorses the lower court's theory that in order to resolve respondents' claims the district court would merely conduct the "judicial function of applying facts to the law." *Schermer*, 721 N.W.2d at 322 (Page, J., dissenting). See *Dismissal Order* at 8 ("this case does not require any special competence that this Court does not already possess"). Justice Page would also accept the declaration below that "were this Court to follow Defendant's argument for the application of the filed rate doctrine, it would be difficult to imagine any context in which a customer could sue a regulated utility in a court of law without running into the doctrine as a barrier to their

action.” *Dismissal Order* at 6-7. *See Schermer*, 721 N.W.2d at 322 (“Consequently, far from respecting separation of powers, the court’s decision violates separation of powers by delegating a judicial function to an executive official without the availability of judicial review.”) (Page, J., dissenting).

While respondents, the district court and the dissenting justice are on the same page, the *Schermer* majority read the law to be exactly the opposite. The recognition of time-honored regulatory principles is certainly compelling in the more “stringent” utility field. *Schermer*, 721 N.W.2d at 318. Thus the district court’s filed rate misstep must be brought in line with *Schermer*.

2. Other precedents support the filed rate doctrine preclusion.

Schermer requires that the claims in this case succumb to the same fate as *Roedler*, *Hilling* and *Shark* actions. Respondents’ lawsuit challenges NSP’s tariff-based charges and services by seeking refunds (dressed up as damages) and enjoined performance – precisely what the filed rate doctrine prohibits. *See Montana-Dakota Utils. Co.*, 341 U.S. at 251-52.

For instance, respondents’ breach of contract claim prays for “damages measured by the value of the services” that NSP allegedly failed to provide by foregoing regular points of connection inspection. Complaint at ¶ 4. If granted, this relief would necessarily result in the refund of the rates already paid for residential electric services, directly contrary to the filed rate doctrine. The costs of performing the inspections at issue are either in the rate base, in which case respondent would want money back, or are not, in which case respondents want the court to redo the rate. In either case, the relief

sought is beyond judicial prerogative. *Shark*, 2005 WL 3527152, at *3; *Roedler*, 1999 WL 1627346, at *15; *Hilling*, 1990 WL 597044, at *2. Importantly, the filed rate doctrine bars such relief even if the tariff obligations unquestionably have been breached. *Roedler*, 1999 WL 1627346, at *2-*3.

The prohibition on court-ordered rate interference reflects the perils inherent in the judicial assumption of such tasks; after all “[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached.” *AT&T*, 524 U.S. at 223. A court is not empowered to recalculate a utility bill to determine an appropriate rate refund by comparing the filed rate with some hypothetical charge that might have been appropriate with hindsight. *Peoples Natural Gas Co.*, 369 N.W.2d at 533 (“a refund would be forbidden retroactive ratemaking”); *Shark*, 2005 WL 3527152, at *3 (“a refund is not available as a remedy”); *Hilling*, 1990 WL 597044, at *2 (“damages based upon the amount [plaintiffs] have been ‘overcharged’ . . . is precisely what the filed rate doctrine prohibits”).

Not even the Minnesota, North Dakota, and South Dakota commissions are authorized to undo the tariffs that have been approved in order to reallocate charges and associated services. Among other things, such an undertaking would require compliance with the statutorily-specified ratemaking process; an administrative proceeding contesting the current rate provides the only means for redressing unreasonable rates. *Schermer*, 721 N.W.2d at 319 (“[i]n order to uphold the regulatory scheme enacted by the Legislature, . . . the [governing utility agency] serves as [respondents’] sole source of relief.”) (emphasis added). “Because of the separation of powers and comity concerns

outlined above, courts should be reluctant to do what the regulatory agency is powerless to do.” *Schermer*, 721 N.W.2d at 316 (citing *Arkansas Louisiana Gas Co.*, 453 U.S. at 578).

The filed rate doctrine similarly dooms the demand that NSP be ordered to “perform necessary inspections and any required maintenance of the points of connection.” Complaint at ¶ 35. Courts cannot grant respondents’ requested injunctive relief:

[E]stablishing and enforcing an injunction in this case would inevitably entangle this court in the MPUC’s rate-making process to the same, if not greater, extent as would an attempt to fix damages based upon previously filed rates. Issues of the proper allocation of costs, the proper price to be paid for power from other sources, and the ultimate reasonableness of utility rates involve local policy choices and technical matters within the peculiar expertise of the MPUC. Such issues are not appropriate for judicial determination.

Hilling, 1990 WL 597044, at *3. See also *Roedler*, 1999 WL 1627346, at *15.

The state’s high court follows the same approach, holding that judicial imposition of such terms violates the separation of powers considerations safeguarded by the filed rate doctrine because the “regulatory agencies have special expertise, investigative capacities, and experience and familiarity with the regulated industry that enable them to ‘consider the whole picture regarding the reasonableness of a proposed rate,’ whereas the courts are ill-suited to second-guess the decisions of regulatory agencies.” *Schermer*, 721 N.W.2d at 312 (quoting *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 20-21 (2d Cir. 1994)).

Point of connection inspection obligations are neither specified by the tariff nor contemplated in the rate setting process. Thus judicial intervention would necessarily change a rule, practice, or contract affecting the provision of retail electric service, which is embodied in the definition of the filed rate in Minnesota, North Dakota, and South Dakota. Minn. Stat. § 216B.02, subd. 5; N.D.C.C. § 49-01-01; S.D.C.L. § 49-34A-1.

The lower court's tariff "ambiguity" holding demonstrates the impropriety of judicial action. The district court concluded that it was empowered to enforce the tariff "as it stands," a point that NSP obviously disputes. *Dismissal Order* at 4, 6. Paradoxically, the lower court later noted that the tariff is ambiguous. *Id.* at 9-10. If the tariff is in fact ambiguous, then the lower court cannot simply enforce the tariff "as it stands." Where does an ambiguous tariff stand?

Unraveling the ambiguity that was deemed to exist is almost certain to implicate additional service obligations that the utilities commissions did not intend to impose. To guard against such risks the implementation and enforcement of tariff obligations are specifically vested in the appropriate governing agency. *AT&T*, 524 U.S. at 223 (filed rate doctrine bars suits that challenge services, billing or other practices when such challenges, if successful, would have the effect of changing the filed tariff); *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (the filed rate doctrine "bars all claims – state and federal – that attempt to challenge the [terms of a tariff] that [an] . . . agency has reviewed and filed"). The interpretation of an ambiguous regulation necessarily has the potential for changing the duties imposed upon the utility. Thus by its own logic the

lower court has charted a path that will inevitably trespass upon the administrative agency's territory.

In sum, a refund of approved rates or the imposition of service obligations not specified in the tariff, and thus not included in the rate-setting calculus, would establish rates outside of the statutorily-mandated process. This would be true even if the remedy were characterized as the value or cost of the services that NSP did not perform despite a tariff obligation to do so. Regardless of the label, the damages sought would alter the relationship between ratepayer and utility by changing the charges incurred and specifying the services that must be delivered. Because the filed rate doctrine encompasses all terms or practices that might affect rates, enjoining the performance of a service obligation is a remedy that courts are not empowered to grant. *Imports, Etc., Ltd.*, 162 F.3d at 531 (citing *AT&T*, 524 U.S. at 222).

IV. AGENCY PRIMARY JURISDICTION MUST BE RESPECTED

A. The primary jurisdiction doctrine institutionalizes agency deference.

Judicial authority over respondents' claims also contravenes the primary jurisdiction doctrine. Related to the filed rate doctrine, primary jurisdiction has a similar effect by ensuring that tariff-based claims are resolved by an administrative agency with the expertise and authority to assess and implement regulated rates and services. *Roedler*, 1999 WL 1627346, at *16.

The primary jurisdiction doctrine promotes "uniformity in statutory and regulatory construction and utilization of the agency's specialized knowledge." *Id.* When a court is presented with an issue that is within the province of an administrative body,

considerations of comity and avoidance of conflict require deference to agency authority and expertise. *Montana-Dakota Utils. Co.*, 341 U.S. at 253. See also *Schermer*, 721 N.W.2d at 314-19 (ratemaking and interpreting filed rates is a “legislative function” requiring deference to the appropriate regulatory agency to respect the “separation of powers and comity” concerns inherent in the filed rate and primary jurisdiction doctrines).

“The ‘primary jurisdiction’ doctrine provides that ‘in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created . . . for regulating the subject matter should not be passed over.’ . . . ‘Court jurisdiction is not thereby ousted, but only postponed.’” See *City of Willmar Mun. Utils. Comm’n v. Kandiyohi Co-op. Elec. Power Ass’n*, 452 N.W.2d 699, 703 (Minn. Ct. App. 1990) (quoting *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass’n*, 294 N.W.2d 297, 302 (Minn. 1980)).

By deferring to the appropriate administrative agency, the courts preserve the orderly and sensible coordination of regulatory authority by ensuring informed and consistent regulation. *United States v. W. Pac. R.R.*, 352 U.S. 59, 63 (1956). The judiciary should stand aside “whenever enforcement of the claim at issue requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Roedler*, 1999 WL 1627346, at *16 (citing *Atlantis Express, Inc. v. Standard Transp. Servs., Inc.*, 955 F.2d 529, 532 (8th Cir. 1992)). In cases seeking rate refunds and injunctive relief “[t]he purposes behind the doctrine of primary jurisdiction are evident.” *Id.*

B. The assertion of judicial oversight contravenes agency primacy.

1. Separation of powers mandates obeisance.

Schermer acknowledged the separation of powers and comity considerations implicated by the regulation of commercial enterprises. 721 N.W.2d at 316. This pronouncement applies equally to the primary jurisdiction doctrine because resolution of respondents' claims "have been placed within the special competence of an administrative body." *Roedler*, 1999 WL 1627346, at *16.

The threshold determination in this case is whether the tariff obligates NSP to inspect the points of connection. Significantly, the tariff never mentions inspections – much less requiring point of connection inspections – and maintenance duties are only specified for service conductors and customer wiring. Complaint at ¶¶ 27, 28. The point of connection is only referenced as the demarcation between the NSP-owned "service conductor" and customer-owned wiring and equipment. Hence, a decision regarding point of connection responsibility requires an interpretation of the tariff – and by extension the approving commission's intent. No entity could better discern regulatory point of connection itself. Further, the agency is far better equipped to understand what maintenance, if any, would be appropriate at the point of connection. These are exactly the determinations that the primary jurisdiction doctrine was formulated to address.

Furthermore, the refunds and injunctive relief demanded would inevitably amount to judicial imposition of enhanced services, which indisputably impinges upon the special competence of the utility agencies. *See, e.g.*, Minn. Stat. § 216A.05, subd. 2(2); N.D.C.C. §§ 49-02-03 & 49-02-04; S.D.C.L. § 49-34A-6. The legislatures of Minnesota,

North Dakota, and South Dakota vested their respective utility regulatory commissions with exclusive responsibility for setting rates, including the associated standards, rules, and practices. Minn. Stat. §§ 216B.03, 216B.09; N.D.C.C. §§ 49-02-03 through 49-02-04; S.D.C.L. § 49-34A-6. The right to object to rates is extremely limited and is controlled solely by the agency. Minn. Stat. § 216.17; N.D.C.C. §§ 49-02-02 through 49-02-03; 49-05-02; 49-34A-26. Once set, rates are maintained until prospectively changed by the agency. Minn. Stat. § 216B.23; N.D.C.C. § 49-02-03; S.D.C.L. §§ 49-34A-9, 49-34A-21.

An elaborate ratemaking protocol has been legislated in each state, and authority over the process has been exclusively placed in the hands of the regulatory agencies. The courts have no role and must stand aside to enable the agency to exercise its “specialized knowledge.” *Roedler*, 1999 WL 1627346, at *16.

Anticipating *Schermer*’s separation of powers pronouncements, Judge Donovan Frank applied Minnesota law to *Roedler* conclude that the primary jurisdiction doctrine makes the agencies primarily responsible for resolving disputes over tariff obligations. *Id.* The federal court deferred to agency primary jurisdiction because plaintiffs were seeking remedies – rate refunds and injunctive relief – that necessarily implicated the regulatory scheme. *Id.* In such circumstances “[t]he purposes behind the doctrine of primary jurisdiction are evident.” *Id.* Thus, contrary to the conclusion below, deference to the appropriate regulatory agency was compelled. *Id.*

The claims in this case cannot be distinguished from the relief sought in *Roedler*. Respondents want the court to refund a portion of the agency-approved rates and to

impose a future maintenance obligation. Complaint at ¶¶ 32-35. Such relief would circumvent agency review in circumstances in which deference to agency expertise is compulsory. *Roedler*, 1999 WL 1627346, at *16.

Roedler also demonstrates that claims like those of respondents are not “inherently judicial” as with a simple contract dispute. In a typical breach of contract case a court is called upon to assess the contracting parties’ intent. In this tariff dispute – like in *Roedler* – the dispositive consideration is the regulatory agencies’ intent and regulatory calculations.⁶ The contracting intent of ratepayers is of no moment because the tariffs have been promulgated by three independent executive agencies, which are in the best position to assess their own regulatory intent.

Judicial resolution of these issues could – unbeknownst to a court – read additional obligations into the tariff that the responsible agency had no intention, or even positively declined, to include. This is exactly why the courts must defer the resolution of tariff disputes to administrative agencies. *Id* See also *Schermer*, 721 N.W.2d at 312 (“[i]t

⁶ Importantly, Minnesota courts cannot possibly have jurisdiction over the out-of-state utility rates. A Hennepin County trial court’s review of rates set in North Dakota and South Dakota administrative proceedings would be ludicrous as well as constitutionally dubious. The Dakota legislatures have mandated that any challenge to rates determined by the NDPSC or SDPSC be brought before the courts of those states. See N.D.C.C. §§ 28-32-42(3)(a)-(b) (appeal of NDPSC actions “must be taken to the district court designated by law” or “to the district court of the county in which the hearing . . . was held”); S.D.C.L. §§ 1-26-30.2 (appeal of agency decision “shall be allowed in the circuit court”). These statutorily-specified fora must be respected. As demonstrated, respondents cannot properly pursue these claims before any court, but even if the requisite administrative procedures had been exhausted a challenge to an NDPSC order could only take place in a North Dakota court, and an SDPSC order could only be reviewed in South Dakota. The applicable statutes leave no place for a Minnesota judicial intrusion upon North and South Dakota sovereignty.

would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.”) (quotations omitted).

The lower court’s “ambiguous” determination presents precisely the circumstance in which the invocation of primary jurisdiction is most compelling. *Roedler*, 1999 WL 1627346, at *16. The very attempt to resolve the ambiguity would require reverse engineering of every service and cost component of a tariff according to the somehow-divined intent of no less than three utilities commissions. Conducting this detailed analysis and potentially imposing additional obligations requires the “special competence of an administrative body” with its “specialized knowledge.” *Id.* (citing *Atlantis Express*, 955 F.2d at 532).

This Court’s decision in *Info Tel Commc’ns, LLC v. Minn. Pub. Utils. Comm’n*, 592 N.W.2d 880 (Minn. Ct. App. 1999)⁷ demonstrates why courts should defer questions of duties owed under a filed tariff to the appropriate regulatory agency. *Info Tel* involved this Court’s review of a regulatory agency’s interpretation of tariff provisions. 592 N.W.2d at 884. In interpreting the applicable tariff provisions this Court relied upon the MPUC’s findings regarding several issues, including the purposes underlying the tariff provisions. *Id.* at 884-85.

Upon concluding that the tariff was ambiguous this Court remanded the case to the agency to make thorough findings with respect to all relevant factors, including the costs

⁷ *rev. denied* (Minn. July 28, 1999).

avoided or incurred by the parties, which is an “essential element in the interpretation of the tariff[.]” *Id.* at 885. This Court was obviously obeisant to the MPUC’s primary jurisdiction and deferred the resolution of tariff rights and obligations to the administrative process.

As *Info Tel* acknowledged, the resolution of tariff ambiguities raises “issues of fact not within the conventional experience of judges.” *City of Willmar*, 452 N.W.2d at 703. The exercise of “administrative discretion” is also involved. *Id.* Thus like in *City of Willmar* this Court should instruct the lower court to respect the special competence of the “agencies [that were] created . . . for regulating [this] subject matter[.]” *Id.* (quotations omitted).

2. First impression issues belong before the commissions.

Agency primacy also prevails when, like in this case, a court is called upon to resolve an issue of first impression or of particular complexity that the legislature has committed to a regulatory agency. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907); *Roedler*, 1999 WL 1627346, at *16. “Courts should show deference to the agency’s expertise and special knowledge in the field of its training, education, and experience . . . [and] should defer to the agency’s skill and expertise even in cases of first impression.” *In re Minn. Joint Underwriting Ass’n*, 408 N.W.2d 599, 604-05 (Minn. Ct. App. 1987).

If the claims asserted by respondents are not barred by the filed rate doctrine, then at the very least the issues require an initial analysis and careful balancing of the interests and costs to the state, the utility, and the various classes of consumers. And resolving the

perceived ambiguity is an issue of first impression since the utility agency has not yet weighed in (or even been allowed to express its view) on the tariff's requirements.

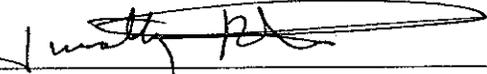
These are matters that the legislatures have deputed to appropriate agencies. *City of Willmar*, 452 N.W.2d at 703. Thus this Court should instruct the lower court to defer to the appropriate agency's primary jurisdiction. *Id.*

CONCLUSION

Recognizing the important and doubtful nature of allowing this case to proceed, the lower court properly certified the filed rate doctrine and primary jurisdiction doctrine issues for an immediate appeal. The filed rate doctrine divests courts of authority to resolve respondents' claims in favor of administrative action. Furthermore, resolution of the claims requires the special competence and knowledge of the appropriate governing agency. At the very least, therefore, the lower court must be directed to defer to the agencies' primary jurisdiction. Either way, this dispute does not belong in court.

Dated: January 16, 2007

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant Northern States Power Company d/b/a Xcel Energy, Inc. certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a)(1) in that it is, printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 9,577 words, excluding the Table of Contents and Table of Authorities.

Dated: January 16, 2007

A handwritten signature in black ink, appearing to read "Timothy R. Thornton", is written over a horizontal line. The signature is somewhat stylized and includes a large, sweeping flourish that extends to the left and then curves back under the line.

Timothy R. Thornton

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