

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.

**INITIAL BRIEF AND ADDENDUM OF
RELATOR MINNESOTA MUNICIPAL UTILITIES ASSOCIATION**

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STATEMENT OF ISSUES

I.

Did the Commission err in asserting jurisdiction over the Pipeline despite the legislative directive in section 216B.01 that municipalities are exempt from regulation under Chapter 216B unless "specifically provided" and section 216B.045, concerning intrastate pipelines, did not specifically provide for such regulation?

The Commission asserted jurisdiction over the Pipeline under section 216B.045.

See: Minn. Stat. § 216B.01 ("it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein.")

Minn. Stat. § 216B.045 ("inrastate pipeline' means a pipeline wholly within the state of Minnesota")

Minn. Stat. § 645.16 ("The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.").

II.

Did the Commission's decision to regulate the Pipeline exceed its jurisdiction, or was it arbitrary or capricious?

The Commission asserted jurisdiction over the Pipeline under section 216B.045.

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

Manufactured Housing Institute v. Petterson, 347 N.W.2d 238 (Minn. 1984)

STATEMENT OF THE CASE

In a letter dated January 28, 2004, NNG, the former supplier and now competitor to Hutchinson and New Ulm, provided a "request" to the Commission to "investigate" regulation under the intrastate pipeline statute, section 216B.045, based upon newspaper articles that the Pipeline was operating. Transcript of March 23, 2004 Commission Hearing (hereinafter T.I.) at 6; Relators' Joint Appendix ("Jt. App.") 21. The Commission considered this request in a hearing on March 23, 2004. A Commissioner moved to dismiss the request. T1. at 64. The motion failed on a 2-2 vote. *Id.* The Commission then moved to solicit additional comments from interested parties. *Id.* at 64-65.

Relators Minnesota Municipal Utilities Association ("MMUA") and Hutchinson Utilities Commission ("Hutchinson"), along with other interested parties, provided additional written comments. At the Commission hearing on August 19, 2004, the Commission decided, on a 3-1 vote, that the Hutchinson Pipeline was subject to regulation under section 216B.045. T2. at 74. The September 15, 2004 Order implemented this decision. Jt. App. at 6.

MMUA and Hutchinson petitioned the Commission for rehearing and reconsideration. These petitions were denied, without substantive

discussion, in a Commission hearing dated November 11, 2004. Transcript November 11, 2004 (hereinafter "T.3.") at 4. A written order dated November 18, 2004 denied the requests for reconsideration. Jt. App. at 10.

On December 8, 2004, Hutchinson filed a petition for a writ of certiorari. Jt. App. at 70. MMUA filed a petition for a writ of certiorari on December 17, 2004. Jt. App. at 72. The Court consolidated the appeals in an order dated January 18, 2005. The Commission issued an order dated March 3, 2005 granting a partial stay of enforcement of its September 15, 2004 and November 18, 2004 orders asserting jurisdiction over the Hutchinson Pipeline. Jt. App. at 14.

STATEMENT OF FACTS

Relator MMUA, established in 1931, is a non-profit Minnesota corporation whose mission is to provide services and assistance to Minnesota cities engaged in utility enterprises, including gas, electricity, water and telecommunications. Jt. App. at 44 (Affidavit of Jack Kegel, Oct. 5, 2004, ¶ 2). Thirty-one Minnesota cities provide local natural gas distribution service to their businesses and residences. *Id.*, ¶ 3. Hutchinson is a member of MMUA.

Hutchinson operates natural gas and electric utilities that provide natural gas service to residential, commercial, and industrial customers. The City of Hutchinson established Hutchinson in 1936 as a municipal public utilities commission under Minn. Stat. § 412.321 et seq. Since 1960, Hutchinson has used the Willmar branch line of Northern Natural Gas Company to transport natural gas to the City. Comments of Hutchinson, MMUA Regarding MPUC Regulation, Oct. 24, 2002, at 2, Jt. App. at 53.¹

Hutchinson received approval and built an 89-mile natural gas pipeline (the "Pipeline") connects with the Northern Border Pipeline Company's pipeline near Trimont, Minnesota, and ends in Hutchinson,

¹ The Commission initially requested comments regarding regulation of the Pipeline in connection with NNG's objections to the certificate of need to construct the Pipeline. Many of the underlying facts and exhibits of written legislative history documents were referenced in later pleadings before the Commission. For ease of reference, a copy of

Minnesota. It includes approximately 34 miles of pipeline from Trimont to south of New Ulm, and approximately 55 miles of pipeline from south of New Ulm to Hutchinson. *Id.*; Jt. App. at 2 (Commission Order Sept. 15, 2004, at 2).

Hutchinson decided to undertake the Hutchinson Pipeline because its supplier, Northern Natural Gas ("NNG"), could not meet the City's needs. *In re Application of City of Hutchinson*, Unpub., Ct. No. A03-99, 2003 WL 22234703, at * 1-2 (Minn. App. Sept. 23, 2003) (noting City winter peak load constituted 97% of capacity and summer peak load constituted 127% of capacity under 1996-2001 contract with NNG, that NNG pipeline is capacity constrained and fully subscribed) (Addendum at M-4). By applying for and constructing its own pipeline, Hutchinson has spared its customers the two rate increases that Northern Natural has requested, which involved at least a 20% increase in rates. T.1. at 45; *see also id.* (noting bond payment to finance Pipeline is less than payments to NNG).

In an order dated December 13, 2002, the Commission granted Hutchinson's certificate of need for a large energy facility. Despite arguments by the City's competitor and former supplier, NNG, the Commission determined that it need not determine whether the Pipeline

these earlier pleadings are included in the Relators' Joint Appendix. Jt. App. 51 - 67.

would be subject to regulation under section 216B.045, a decision this Court affirmed on appeal. *In re Application of City of Hutchinson*, 2003 WL 22234703, at * 6 (concluding Commission did not err in concluding it need not decide whether pipeline would be subject to regulation under section 216B.045, and upholding certificate of need).

In a letter dated January 28, 2004, NNG provided a “request” to the Commission to “investigate” based upon the enclosed hearsay (and often inaccurate) newspaper articles. T.I. at 6-7; Commission Staff Briefing Papers (March 16, 2004) (Attachment A (NNG letter)). The Commission held a hearing to consider the NNG request on March 23, 2004. T.I. at 1. At the hearing, one Commissioner commented that the request “could be full of misinformation and it wouldn’t matter.” T.I. at 7.

Section 216B.045 requires, among other items, filing agreements for Commission review and approval or modification, maintaining open access to the pipeline for all potential subscribers, and being subject to the Commission’s determination of a “just and reasonable rate”. Minn. Stat. § 216B.045 (2004). Since the statute was enacted in 1987, only one intrastate pipeline exists, involving a Minnegasco affiliate, which prompted the Legislature to pass the statute to create state, rather than federal, jurisdiction. T.I. at 29. Given this limited regulation to one existing

pipeline, Commission staff acknowledged that the nature of regulation under section 216B.045 was not well-defined. Transcript of August 19, 2004 Commission Hearing (hereinafter "T.2.") at 4.

At the March 23, 2004 hearing, the parties emphasized the fully-subscribed nature of the Pipeline. T.1. at 8 ("With the New Ulm contract, once that is completed, there will be no remaining firm capacity in that pipeline."). Hutchinson noted the practical concerns with Commission regulation. The Pipeline was built to serve Hutchinson and New Ulm and not to serve as a common carrier for all shippers. T.1. at 19. The Pipeline was built to decrease from 16-inch pipe to 12-inch pipe, to serve both cities; if additional capacity were taken off the Pipeline, it could affect the delivery pressure or volume available to Hutchinson. T.1 at 19-20. In addition, the Pipeline was financed with tax exempt bonds. *Id.* at 20. Private shippers could affect the continued tax exemption for those bonds. *Id.* Finally, Hutchinson argued that the state regulation would enact a new regime of regulation that was unauthorized, unnecessary, and would impose additional costs. *Id.* at 39.

The Commission moved to dismiss the request to regulate. T1. at 64. That motion failed on a 2-2 vote. *Id.* The Commission then moved to solicit additional comments from interested parties. *Id.* at 64-65.

MMUA and Hutchinson, among other interested parties, provided written comments. The comments noted the progress of the Pipeline. On April 23, 2004, Hutchinson signed a Natural Gas Firm Transportation Capacity Agreement with the City of New Ulm (the "Agreement"). Jt. App. at 19 (Affidavit of John Webster, May 17, 2004, ¶ 2); T.1 at 8. The Agreement was effective April 1, 2004. *Id.* Under the Agreement, Hutchinson committed long-term firm transportation capacity to New Ulm, namely 20,000 Dth (one-third of the Pipeline Capacity) per day for 365 days per year until the last day of March, 2026 unless extended. *Id.*, ¶ 3. Hutchinson retained the full balance of the pipeline's firm capacity in order to serve Hutchinson's needs. *Id.*, ¶ 4. One hundred percent of the pipeline's firm capacity is committed to Hutchinson and New Ulm. No firm capacity remained through at least 2026 for the Commission to regulate. MMUA, Hutchinson Reply Comments, May 17, 2004.

After receiving comments, the Commission held a hearing on August 19, 2004. The Chair of the Commission noted the "autonomy in which legislatures and the federal government allows municipalities to operate", the decision by two cities to enter into a capacity agreement as in their best interests, and the absence of any complaint. T.2. at 23, 19-20, 62-63. Another commissioner questioned "why you're fighting this" and noted

“we’re not imposing very much on you.” *Id.* at 27, 52. A third commissioner provided the explanation for her decision as “somebody always told me, never concede jurisdiction unless you absolutely have to, and so I’m more inclined to find jurisdiction and let the courts decide that I’m wrong.” *Id.* at 61. The Commission decided, on a 3-1 vote, to regulate the Pipeline under section 216B.045. T.2. at 74.

The Commission issued an order dated September 15, 2004 asserting jurisdiction under section 216B.045. *Jt. App.* at 1-9. Hutchinson and MMUA filed petitions for rehearing and reconsideration.

The reconsideration pleadings emphasized the impact of regulation beyond the two cities. At least 31 municipal utilities operate natural gas utilities. *Jt. App.* at 44 (*Kegel Affdvt.*, ¶ 3). All municipal utilities must answer to their own utility commission (if applicable), the mayor and city council, and to the ratepayers (and voters) that they see not only at public meetings, but also in day-to-day interactions within their communities. *Id.*, ¶ 5.

Most municipal utilities may require additional capacity to adequately serve their citizens. *Id.* (¶ 6). The existing pipelines, particularly in the southern region of Minnesota, are few in number and subject to increasingly limited capacity, increasing prices, resulting in decreased

municipal control. *Id.*, ¶ 6. These municipalities face great difficulties in planning and providing for their customers. The hindrance of additional regulation by the Commission only militates against planning to construct a large energy facility pipeline that could benefit the region. *Id.*, ¶ 7.

The Commission declined to consider the MMUA and Hutchinson petitions for rehearing and reconsideration, without substantive discussion, in a Commission hearing dated November 11, 2004. T.3 at 4. A written order followed, without addressing the impact on additional cities, in an order dated November 18, 2004. Jt. App. at 10-13. This appeal by MMUA and Hutchinson followed.

STANDARD OF REVIEW

On pure legal issues such as statutory interpretation, this Court may review agency decisions de novo. *No Power Line v. Minnesota Env't'l Quality Council*, 262 N.W.2d 312, 320 (Minn. 1977); *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."); *In re Proposal by US West Communications*, 558 N.W.2d 777, 780 (Minn. App. 1997) (reasoning "relatively uncomplicated statutory interpretation" issue does not require deference to Commission). Similarly, whether an agency has

jurisdiction over a matter is a legal question to be reviewed de novo. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

SUMMARY OF THE ARGUMENT

The Commission erred as a matter of law in analyzing the statutory framework of Chapter 216B as applied to the Pipeline. The Commission overlooked express legislative findings excluding municipalities from regulation throughout Chapter 216B absent “specific provision.” Section 216B.045 contained no such specific provision. For every other instance in which the Commission has exercised jurisdiction over municipal utilities, it may cite to a specific statutory reference authorizing the jurisdiction. No such citation exists in section 216B.045. By the plain language of the statute, Chapter 216B does not permit regulation over the Pipeline.

In addition, the legislative history of section 216B.045 reflected that the statute was passed to enable a Minnegasco affiliate to avoid federal regulation. As initially drafted, the bill would have applied to all “persons,” which would include municipalities. Minn. Stat. § 216B.02, subd. 3. But the bill was changed to remove the reference to persons, instead referring only to “pipelines.” Minn. Stat. § 216B.045, subd. 1 (defining intrastate pipeline as “a pipeline wholly within the state of Minnesota”). The legislative knew

how to specifically provide for municipal regulation, and declined to do so in section 216B.045.

Moreover, the Commission improperly exceeded its statutory authority under Chapter 216B. The Commission is limited to its statutory powers. The Legislature has denied Commission regulation of municipal utilities except as specifically provided. And the Commission's jurisdiction must be construed narrowly to avoid conflicting with federal law. The federal regulatory regime provides for local regulation of municipal utilities. The Commission's decision in this case, adopting state regulation, disrupts this regime. 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 Pipeline under section 216B.045 constitutes legal error, fell outside the Commission's statutory authority, and is arbitrary and capricious. Its decision should be reversed.

ARGUMENT

I. THE COMMISSION ERRED IN REGULATING THE PIPELINE UNDER SECTION 216B.045, WHICH DOES NOT SPECIFICALLY PROVIDE FOR MUNICIPAL REGULATION.

This Court must reverse the Commission's decision if it constitutes legal error. Minn. Stat. § 14.69(d). The Commission's September 15, 2004 Order began with an incorrect starting point -- the "plain language" of section 216B.045, the intrastate pipeline statute. The proper beginning, however, remained the initial section within Chapter 216B, in which the Legislature directed how to address municipal utilities under the chapter. The true question was not whether section 216B.045 excluded municipalities, but whether it "specifically provided" for regulation of municipal utilities. The Legislature has consistently followed this approach throughout Chapter 216B. The plain language and legislative history of section 216B.045 also followed this approach. And this approach is consistent with other examples of municipal self-regulation and authority. The Legislature has spoken on how to regulate municipal utilities. The Commission erred in failing to follow the Legislature's statutory framework.

A. SECTION 216B.01 PROHIBITS REGULATION UNLESS SPECIFICALLY PROVIDED.

The 1974 legislation that substantially enacted Minnesota Statutes

Chapter 216B expressly stated that municipal utilities would be self-regulated. “Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them. . . it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein.” Minn. Stat. § 216B.01 (emphasis added) (Addendum at M-3).

The remainder of Chapter 216B is structured to *exclude* municipal utilities entirely, with the exception of a few sections that specifically refer to municipalities. See, e.g., Minn. Stat. § 216B.025 (“A municipality may elect to become subject to regulation by the commission pursuant to sections 216B.10 [accounting system] and 216B.11 [depreciation].”); Minn. Stat. § 216B.16, subd. 12 (municipality small-gas-utility exemption to rate changes procedure); § 216B.161, subd. 1(e) (municipality definition for area development rate plan); § 216B.164, subd. 9 (governing body of municipalities may regulate small power production); § 216B.241, subd. 1b (municipalities shall identify and employ energy conservation improvement spending); § 216B.36 (“Notwithstanding the definition of ‘public utility’ under section 216B.02, subdivision 4, a municipality may require payment of a fee under this section by a cooperative electric association . . . that furnishes utility services within the municipality.”).

The Commission's decision to regulate the Pipeline, however, distorted the regulatory scheme of Chapter 216B by regulating without a specific provision in section 216B.045 including municipal utilities. When a statutory section clearly states how to interpret the entire chapter, the statutory language must be construed to give effect to all parts of the statute. Minn. Stat. § 645.17 ("the legislature intends the entire statute to be effective and certain"). This approach also supports the fundamental principle that the touchstone of statutory construction is to determine the intent of the legislature. Minn. Stat. § 645.16 ("The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature."). In section 216B.01, the Legislature stated its intent expressly, instructing how to construe the entire Chapter. The Commission erred in overlooking what should have been the touchstone for its statutory interpretation and in failing to follow section 216B.01.

**B. THE PLAIN LANGUAGE OF 216B.045 DOES NOT
"EXPRESSLY PROVIDE" FOR MUNICIPAL REGULATION.**

Although the Commission's September 15, 2004 Order reasoned that the "plain language" of section 216B.045 "covers" a municipality, the statutory language itself makes no such statement.

Subdivision 1. Definition of intrastate pipeline. For the purposes of this section "intrastate pipeline" means a pipeline wholly within the state of Minnesota which transports or delivers

natural gas received from another person at a point inside or at the border of the state, which is delivered at a point within the state to another, provided that all the natural gas is consumed within the state. An intrastate pipeline does not include a pipeline owned or operated by a public utility, unless a public utility files a petition requesting that a pipeline or a portion of a pipeline be classified as an intrastate pipeline and the commission approves the petition.

Minn. Stat. § 216B.045 (Addendum at M-2).

Section 216B.045 does not “specifically provide” for municipal utilities. If the Legislature had intended to regulate municipal utilities operating intrastate pipelines, it would have specifically provided for it in section 216B.045. After all, the Legislature articulated in numerous sections when municipal utilities should be regulated.

The Commission’s reasoning relied exclusively upon the words “owned an operated” in section 216B.045 without reference to “specifically provided” for municipal regulation. Jt. App. 6-7_(Order at 6-7). An agency, like courts, may not add words to a statute. *Wallace v. Commissioner of Taxation*, 289 Minn. 220, 184 N.W.2d 588, 594 (1970) (in reviewing statute, court may not supply what legislature purposefully omitted or inadvertently overlooked); *In re Request for Service in Qwest’s Tofte Exchange*, 666 N.W.2d 392, 398 (Minn. App. 2003) (holding Commission erred in preventing recovery of sufficient costs of extending facilities).

The word “person” in section 216B.045, subd. 1 cannot be extended

in this context to refer to a municipality. The only reference to the word “person” in the above-quoted subdivision in the present case cannot mean Hutchinson. That word “person” refers to the source of the gas – Northern Border. See Department of Commerce Comments (quoting statute as “received from another person [from Northern Border Pipeline Company]”), *quoted in* Commission Staff Briefing Papers, p. 18 (March 16, 2004) (attachment B).

The plain language of section 216B.045 distinguishes other statutes that include the word “person” in a context that would apply to municipalities. For example, the certificate-of-need statute, Minn. Stat. § 216B.243, under which Hutchinson applied and received approval to construct the Pipeline, included the term “person” in a definition that specifically includes municipalities. A large energy facility requires a certificate of need for “[a]ny *person* proposing to construct a large energy facility” Minn. Stat. § 216B.243, subd. 4 (emphasis added). This distinction explained why Hutchinson sought a certificate-of-need permit. Section 216B.045, by contrast, does not use the word “person” in a context applicable to Hutchinson. The plain language of section 216B.045 defining “intrastate pipeline” provided no support for municipal regulation.

Moreover, the remainder of section 216B.045 does not support

regulating municipal utilities. The Commission was required to construe and give effect to all portions of the statute. Minn. Stat. § 645.17. The September 15, 2004 Order, by contrast, examined only the definition of “intrastate pipeline” in subdivision one. Section 216B.045, subdivision 6, by contrast, referred to the Commission’s authority to assess costs to public utilities, but it excluded municipal utilities. *Contrast* Minn. Stat. § 216B.045, subd. 6 (referencing 216B.062, subds. 2, 4, 6) *with* 216B.062, subd. 5 (authorizing assessments against municipal utilities).

Section 216B.062, subdivision 5 specifically stated the areas of Commission authority over municipal utilities and the imposition of costs for exercising such authority. The regulation of intrastate pipelines under section 216B.045 is not included. If the Legislature intended for the Commission to regulate municipal utilities, it would have provided the ability to assess regulatory costs against municipal utilities. Instead, the illogical scenario arises in which the Commission has ordered the Pipeline to be regulated under section 216B.045, but the Commission lacked authority to assess any costs of that regulation against Hutchinson. Courts must construe statutes to avoid an absurd result. See Minn. Stat. § 645.17 (the legislature does not intend a result that is absurd, impossible of execution, or unreasonable).

The Commission's decision to regulate incorrectly relied upon the language of section 216B.045, which does not "specifically provide" for municipal regulation.

**C. THE LEGISLATIVE HISTORY OF SECTION 216B.045
REVEALED AN INTENT NOT TO REGULATE MUNICIPALS.**

The specific references to "municipal utilities" throughout Chapter 216B (identified above) demonstrated the Legislature's ability to specifically provide for municipal utilities when the Legislature so intended. The legislative history of section 216B.045 also demonstrated that the Legislature did not intend to regulate municipal utilities. The original bill (SF 258) would have specifically included municipalities, but it was revised to exclude them.

Section 216B.045 is the codification of 1987 Minn. Session Laws, Chapter 9 (S.F. No. 258). The original bill provided that:

The commission is hereby vested with the powers, rights, functions, and jurisdiction to regulate in accordance with the provisions of Laws 1974, chapter 429 every public utility as defined herein and to regulate contracts establishing the rates, service, and facilities of **persons other than public utilities** furnishing or transporting to a person natural, manufactured, or mixed 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 (Reply Comments of City and MMUA, Oct. 29, 2002, Exhibit A (S.F. 258, revisor 87-0774, Jan. 16, 1987) (emphasis added)). But

Senator Jude, an author and member of the Senate Committee on Public Utilities and Energy, substantially revised the original bill with a “strike everything amendment” in Committee on February 24, 1987. *Id.*, Jt. App. at 61, Exhibit B (Minutes from February 24, 1987 Committee Meeting); *id.* at 63 (revised bill). On March 2, 1987, the Bill (S.F. No. 258) was placed on the consent calendar, and was unanimously passed by the Senate. On March 16, 1987, the Bill (S.F. No. 258) was passed and returned from the House. It was approved by the Governor on March 25, 1987 and became effective the day following final enactment.

The final, enacted version of Senate File 258 did not refer to “persons.” Minn. Stat. § 216B.045, subd. 1 (defining intrastate pipeline as “a pipeline wholly within the state of Minnesota”). The Legislature’s decision not to refer to “persons” is significant, as Chapter 216B defines “person” to include municipalities. Minn. Stat. § 216B.02, subd. 3 (“‘Person’ means a natural person, a partnership . . . and a corporation as hereinbefore defined.”); § 216B.02, subd 2 (“‘Corporation’ means a private corporation, a public corporation, a *municipality* . . .”) (emphasis added). The Legislature initially considered – but rejected – municipalities within its intrastate pipeline regulatory scheme.

The Legislature was fully aware of how to expressly include

municipalities and to do so “specifically” when deemed appropriate. At the same meeting of the Senate Public Utilities and Energy Committee on February 24, 1987 that considered S.F. 258, the Committee considered a separate bill, requiring the operators of power lines to trim trees touching power lines, and added an amendment to specifically reference “municipal utility.” *Id.*, Ex. B (Senate Public Utilities & Energy Committee Minutes, Feb. 24, 1987, at pg. 2). If the Legislature intended the “intrastate pipeline” statute to apply to municipal utilities, it would have specifically provided for it in S.F. 258, which it had approved only an hour earlier.

Use of the broader terms “persons” or “corporation” would have included a municipal utility under section 216B.045. As discussed above, that language was rejected and the undefined terms, “owner or operator,” in effect replaced the defined terms. These terms that survived are descriptive nouns at best, not demonstrative of any intent to regulate municipal utilities. The Commission erred in focusing on undefined terms to determine regulatory authority in lieu of the express statutory directive in section 216B.01.

Finally, the little testimony before the Senate Committee focused on the only-existing intrastate pipeline to be regulated under section 216B.045, the Minnegasco-affiliated pipeline. In an audiotape provided to the

Commission in connection with MMUA and Hutchinson's October 29, 2002 Reply Comments, Senator Tad Jude generally described S.F. No. 258 and justified the legislation on the basis that the Twin Cities were then one of the few major metropolitan areas served by only one gas pipeline supplier, Northern Natural Gas Co., and that the bill would facilitate the construction of a second 32-mile gas pipeline from an interstate pipeline near Cambridge, Minnesota, to the Minnegasco distribution system near Coon Rapids, Minnesota. Jt. App. at 55; *id.* at 68 (Nov. 5, 2002 Letter to Commission enclosing legislative history audio tapes).

Minnegasco Vice President Gary Peterson then testified in support of the bill. Mr. Peterson again emphasized that the Twin Cities were then one of the few major metropolitan areas served by only one gas pipeline supplier, Northern Natural Gas Co. He stated that the proposed gas pipeline would be constructed and operated by a Tennegasco/ANR Gathering Joint Venture (Tenneco and Coastal Corp.), and that the bill would permit the proposed pipeline to be regulated by the Commission, and thereby avoid federal FERC regulation. Jt. App. at 55-56 (MMUA, Hutchinson Reply Comments, Oct. 29, 2002).

The legislative history of section 216B.045 evidenced an intent to avoid federal regulation for the Minnegasco-affiliated pipeline, and

specifically rejected a broad definition of intrastate pipelines that would have included municipalities to adopt a narrow definition that did not reference municipalities.

D. THE COMMISSION ERRED IN DISMISSING LOCAL REGULATION AS INADEQUATE.

Despite the directive in section 216B.01 for municipal self-regulation, the Commission's Order reasoned that because the Pipeline physically extends beyond the borders of the city, it "must" be subject to Commission regulation. But such an approach is contrary to statute.

The Legislature has consistently granted municipal utilities broad authority, even outside the physical boundaries of the city limits. A statutory city is empowered to own and operate any gas facilities reasonably necessary to serve private consumers or its own needs. The city by its utilities commission as council is granted authority to make "*all necessary rules and regulations for the operation, extension and improvements of . . . utility facilities.*" Minn. Stat. § 412.321, subd. 1 (emphasis added). A city utility is expressly permitted to extend its utility *outside of the City* to furnish services "at such rates and upon such terms as the council or utilities commission . . . may determine." Minn. Stat. § 412.321, subds. 1, 3 (emphasis added); see also Minn. Stat. § 453A.02, subd. 14 (municipal gas agency may develop and construct facilities for

gas exploration, production, transportation, storage, sale or exchange of gas) (emphasis added).

A city utility is also granted the same broad authority, acting alone, to exercise the powers of a municipal gas agency. Minn. Stat. § 453A.08, subd. 2. That authority includes “powers which might be exercised by a natural person or a private corporation in connection with similar property and affairs.” Minn. Stat. § 453A.04, subd. 21. The same authority is granted to municipal electric utilities. Minn. Stat. §§ 453.58, 453.54 subd, 21. The Minnesota Supreme Court has approved these broad powers. *Southern Minn. Municipal Power Agency v. Boyne*, 578 N.W.2d 362, 364, 366 (Minn. 1998). Cities are also explicitly authorized to form joint ventures with other city utilities to conduct activities similar to municipal power agencies, as a “private corporation” and to construct, own and operate *inter alia*, transmission facilities. Minn. Stat. § 452.25. These legislative enactments all support the Pipeline extending beyond the city limits without Commission regulation.

The Commission’s September 15, 2004 Order incorrectly stated that “any nonresident” of Hutchinson would have no redress concerning the pipeline. Jt. App. at 7 (Order, at 7). To the contrary, all of the firm capacity of the Pipeline is committed by contract to the cities of Hutchinson and New

Ulm: 2/3 capacity to Hutchinson and 1/3 to New Ulm. Jt. App. at (Webster Affdvt., May 17, 2004, ¶¶ 3-4). The Commission's September 15, 2004 Order did not recognize this important fact. Even if the Commission were entitled to re-evaluate local regulation, the citizens of Hutchinson and New Ulm may petition the city council, the municipal utility, vote their mind, and make any grievances known.

And ratepayers outside the two cities have recourse to file a complaint with the Commission. "The commission shall have the power to hear, determine and adjust complaints made against any municipally owned gas or electric utility with respect to rates and services upon petition of ten percent of the nonresident consumers of the municipally owned utility or 25 such nonresident consumers whichever is less." Minn. Stat. § 216B.17, subd. 6. The Commission did not even acknowledge this provision. The statutory framework provided a solution for handling non-resident complaints. Nor did the Commission acknowledge that cities remain subject to remain subject to judicial review; they may not engage in unreasonable, arbitrary, or capricious conduct. See, e.g., *Billy Graham Evangelical Ass'n v. City of Minneapolis*, 667 N.W.2d 117, 123 (Minn. 2003) (reviewing application of city ordinance to determine if unreasonable, arbitrary, or capricious). The Commission erred in regulating a "solution"

contrary to existing statutes.

Moreover, the Commission's analysis fundamentally misconstrued local regulation. Local, municipal regulation is real. Municipal utilities must answer to their own utility commission, the mayor and city council, and to the ratepayers (and voters) that they see not only at public meetings, but also in day-to-day interactions within their communities. Jt. App. at 45 (Kegel Affdvt., ¶ 5). Local oversight is more immediate than a statewide body in a separate and often distant city.

II. THE COMMISSION'S DECISION TO REGULATE THE PIPELINE EXCEEDED ITS JURISDICTION AND WAS ARBITRARY AND CAPRICIOUS.

The Commission's decision must be reversed if it was "in excess of the statutory authority or jurisdiction of the agency." Minn. Stat. § 14.69(b). Reversal is also required for an "arbitrary or capricious" decision. Minn. Stat. § 14.69(f).

A. THE COMMISSION EXCEEDED ITS JURISDICTION.

This Court must independently consider whether the Commission exceeded its jurisdiction. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). The Minnesota Supreme Court has recognized that the Commission's jurisdiction is limited by 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.”). Because jurisdiction remains fundamental, an agency must be circumspect in exercising doubtful power. “Any reasonable doubt of the existence of any particular power in the [MPUC] should be resolved against the exercise of such power.” *Great N. Ry. v. Public Serv. Comm’n*, 284 Minn. 217, 220, 169 N.W.2d 732, 735 (1969), *quoted in, In re Minnesota Power*, 545 N.W.2d 49, 51 (Minn. App. 1996).

Minnesota courts have rejected agency efforts to regulate that exceeded its statutory authority. *Minnegasco*, 549 N.W.2d at 908-09 (holding Chapter 216B did not provide Commission authority to impute revenue to gas utility for value of good will); *In re Proposal by US West Communications*, 558 N.W.2d 777, 780-81 (Minn. App. 1997) (holding Commission exceeded statutory authority in striking telephone company promotion); *Minnesota Power & Light v. Taxing Dist. City of Fraser*, 289 Minn. 64, 71, 182 N.W.2d 685, 689 (1970) (holding agency lacked authority to vary from unambiguous statute); *In re Enlargement & Increasing Number of Managers of Brown’s Creek Watershed Dist.*, 633 N.W.2d 76, 80 (Minn. App. 2001) (holding agency exceeded its statutory authority in enlarging watershed district).

In *Minnegasco*, the court recognized that only the Legislature, rather than the court, could respond to policy questions beyond the plain language of the statute.

The only issue before us is one of statutory construction: whether chapter 216B, as enacted by the legislature, permits the MPUC to impute such revenue. To the extent that this case presents a fairness question, it is a policy question to be answered by the legislature and not the seven members of this court. . . . As it is, the legislature has spoken [W]e will not enlarge the powers of the MPUC beyond those expressly granted by the legislature.

Minnegasco, 549 N.W.2d at 909. Similarly, in the present case, the legislature has spoken to require “specifically provided” regulation of municipal utilities under Chapter 216B.

The Legislature has expressly limited Commission authority concerning municipal utilities. Under section 216B.01, municipal utilities are to be regulated by their residents. This regulation is deemed sufficient, making further state regulation unnecessary under Chapter 216B, except as specifically provided. Minn. Stat. § 216B.01. Section 216B.045 does not “specifically provide” for municipal utility regulation. Any policy argument aimed at bolstering broad Commission regulation should be directed to the Legislature. The Commission exceeded its jurisdiction under the statutory framework of Chapter 216B.

Rather than addressing whether the Commission had authority to

regulate, at least one commissioner reasoned from a presumption of authority: "somebody always told me, never concede jurisdiction unless you absolutely have to, and so I'm more inclined to find jurisdiction and let the courts decide that I'm wrong." T.2 at 61.

That the Commission acted outside its jurisdiction is further evidenced by its contradicting pervasive federal regulation. The federal Natural Gas Act defines "state commission" to mean "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." 15 U.S.C. § 717a(8) (emphasis added). The Pipeline is regulated, according to the Natural Gas Act, by the municipality acting as the appropriate "state commission."

The Commission's decision to regulate, however, supplants local regulation with state-Commission regulation. Although MMUA and Hutchinson raised this argument, the Commission declined to address it in its orders. T.2 at 30-31. Reversing the Commission's orders in this matter will reconcile section 216B.01, upholding local regulation, with federal statutes upholding local regulation. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 17 (Minn. 2002) (courts construe statutes to avoid conflict with federal law), *cert. denied*, 123 S.Ct. 2668 (2003).

Because the Commission acted outside its statutory authority, its decision must be reversed.

B. THE DECISION WAS ARBITRARY AND CAPRICIOUS.

An agency decision is deemed arbitrary or capricious if it reflects the agency's will, rather than reasoned analysis. *In re Space Ctr. Transp.*, 444 N.W.2d 575, 581 (Minn. App. 1989). Courts have determined an agency's decision to be arbitrary and capricious if it relied on factors not considered by the Legislature, failed to consider an important aspect, provided an explanation contrary to the evidence, or was so implausible that it cannot be explained as a difference in view or the agency's expertise. *Brown v. Wells*, 288 Minn. 468, 472, 181 N.W.2d 708, 710-11 (1970). This Court must conduct a "searching and careful" inquiry of the record to ensure that the agency action has a rational basis." *Manufactured Hous. Institute v. Pettersen*, 347 N.W.2d 238, 244-45 (Minn. 1984) (holding agency's unexplained selection of maximum level arbitrary).

In the present case, the Commission's orders to regulate the Pipeline made scant reference to section 216B.01, the touchstone for applying the Chapter to municipal utilities. Instead, the Commission placed undue weight on undefined terms of "owner" or "operator" under section 216B.045. The Commission failed to address the legislative history of

section 216B.045, the conflict with federal law, nor the impact upon Minnesota municipalities in seeking to better serve their citizens and obtain adequate power supplies. And the Commission reasoned that the 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 demonstrates its will rather than reasoned decision-making.

Moreover, the Commission's Order raised troubling issues for all Minnesota ratepayers. Hutchinson is hardly the only utility to be affected by this decision. Each of the thirty other municipal utilities in Minnesota must now consider Commission regulation. The scope of that regulation remains completely undefined – and subject to suggestions by competitors. The municipal utilities must now consider Commission regulation as yet another hurdle in the long and expensive process to construct a pipeline. Jt. App. At 46 (Kegel Affdvt., ¶ 7).

Increasing the burdens on municipal utilities to create their own solutions will only strengthen the tight grasp of the few existing pipelines. Municipal utilities face decreasing control over their rates (dictated in larger part by the supplier) and long-term planning, decreasing capacity, and increasing prices. *Id.*, ¶ 6. Rather than encouraging municipal utilities to

generate a business-like, local solution to decreasing capacity by building their own pipelines, the Commission's decision subjected municipal utility ratepayers to the dictates of suppliers outside their community. In addition, capacity on an existing pipeline that could be freed up by a municipal utility's new pipeline, benefiting all users along existing pipelines, must remain dedicated to the municipality. The hindrance of additional regulation by the Commission only militates against planning to construct a large energy facility pipeline that could benefit the region. *Id.*

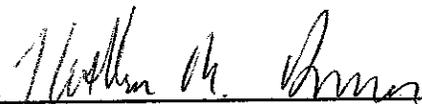
The Commission must be reversed as an arbitrary and capricious decision to regulate municipal utilities without basis.

CONCLUSION

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

Dated: March 21, 2005.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).