

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.

BRIEF OF RELATOR CITY OF HUTCHINSON

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STATEMENT OF THE ISSUES

I. WHETHER RESPONDENT MINNESOTA PUBLIC UTILITIES COMMISSION, WHICH DOES NOT HAVE JURISDICTION OVER MUNICIPAL UTILITIES UNLESS “SPECIFICALLY PROVIDED FOR”, CAN REGULATE A MUNICIPALLY-OWNED INTRASTATE NATURAL GAS PIPELINE UNDER MINN. STAT. § 216B.045, WHICH HAS NOT “SPECIFICALLY PROVIDED FOR” THE REGULATION OF MUNICIPAL UTILITIES?

The Minnesota Public Utilities Commission held: That it had jurisdiction over relator Hutchinson Utilities Commission’s natural gas pipeline.

Applicable Statutes: Minn. Stat. § 216B.01.

Minn. Stat. § 216B.045.

Minn. Stat. § 645.16.

II. WHETHER MPUC’S DECISION TO EXERCISE JURISDICTION OVER HUC’S PIPELINE WAS ARBITRARY AND CAPRICIOUS.

The Minnesota Public Utilities Commission did not address this issue.

Applicable Cases: *HealthPartners, Inc. v. Bernstein*, 665 N.W.2d 357 (Minn. App. 2003).

In re Space Ctr. Transp., 444 N.W.2d 575 (Minn. App. 1989).

Thompson v. City of Minneapolis, 300 N.W.2d 763 (Minn. 1980).

Peterson v. Minnesota Department of Labor & Industry, 591 N.W.2d 76 (Minn. App. 1999), *rev denied* (Minn. May 18, 1999).

STATEMENT OF THE CASE

This appeal originates from a decision by the Minnesota Public Utilities Commission (“MPUC”) to assert jurisdiction over the natural gas pipeline of the Hutchinson Utilities Commission (“HUC”). Although the extent and nature of MPUC’s regulation of the pipeline is, as yet, undetermined, MPUC has, by order dated September 15, 2004 (the “September Order”), asserted jurisdiction over the pipeline pursuant to Minn. Stat. § 216B.045. After MPUC’s decision asserting jurisdiction, HUC requested that MPUC reconsider its September Order. By order dated November 18, 2004 (the “November Order”), MPUC denied HUC’s Request for

Reconsideration. On December 8, 2004, this court granted HUC's petition for certiorari review of MPUC's decision to assert jurisdiction over the pipeline. HUC also moved on December 8, 2004, for a stay of the September Order pending review and decision by this court. By order dated March 3, 2004 (the "March Order"), MPUC granted in part and denied in part HUC's Request for Stay. The issue of whether MPUC properly asserted jurisdiction over HUC's pipeline is now before this court.

FACTS

I. HISTORICAL FACTS.

HUC is a municipal utility that constructed an 89-mile long underground natural gas transmission pipeline from Trimont, Minnesota to Hutchinson, Minnesota. Relators' Joint Appendix ("Jt. App.") at 2. The pipeline runs within easements secured by HUC in Martin, Watonwan, Brown, Nicollet, Sibley, and McLeod Counties.

Since 1960, to meet the needs of both the City of Hutchinson and HUC's electrical generating facilities, HUC has contracted with Northern Natural Gas Company ("Northern") for capacity on Northern's natural gas pipeline. Jt. App. at 37. In 2001, Northern offered to HUC insufficient capacity on the natural gas pipeline to meet Hutchinson's energy needs. *Id.* Under the terms of the proposed natural gas transportation contract between Hutchinson and Northern, HUC would be operating at 97% of the contracted-for capacity during the peak winter load. *Id.* During peak summer load, HUC would be operating at 127% of the contracted-for capacity. *Id.* To forestall the impending energy shortfall, HUC decided to build its own natural gas pipeline with capacity to serve both HUC and the New Ulm Public Utilities Commission. Jt. App. at 2, Jt. App. at 19. The effect of this, of course, would be that Northern would lose the cities of Hutchinson and New Ulm as customers for its natural gas pipeline.

II. THE CERTIFICATE OF NEED.

Constructing a natural gas pipeline involves certain oversight by MPUC, including the issuance of a Certificate of Need by MPUC to an applicant qualified to build a pipeline.

According to Minnesota law, “any person proposing to construct a large energy facility shall apply for a Certificate of Need . . . [and the] application shall be on forms and in a manner established by the [MPUC].” Minn. Stat. § 216B.243, subd. 4. Jt. App. at 85. Under Minn. Stat. § 216B.243, HUC’s proposed pipeline qualified as a “large energy facility” and, like any other “person” proposing to construct a pipeline, HUC sought and received from MPUC a Certificate of Need to build the pipeline. Jt. App. at 36.¹ Northern intervened in these administrative proceedings and objected. MPUC determined over Northern’s objection that HUC’s proposed pipeline would meet the energy demands that could not be met more cost effectively through other measures and that HUC had justified its need for a pipeline. Jt. App. at 41. Based on this determination, MPUC issued HUC a Certificate of Need to build the pipeline. *Id.*, Northern appealed MPUC’s need determination, which this court affirmed in an unpublished decision of September 23, 2003. Jt. App. at 36 (holding that Northern failed to prove the existence of a

¹ The term “person,” for purposes of Chapter 216B, includes a municipal utility such as HUC. Minn. Stat. § 216B.02 provides the applicable definitions for Chapter 216B, the public utilities regulatory statutes. Pursuant to Minn. Stat. § 216B.02, subd. 3, a “person” is “a natural person, a partnership, or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.” A “corporation,” according to Minn. Stat. § 216B.02, subd. 2, is a “public corporation, a *municipality*, an association, a cooperative whether incorporated or not, a joint stock association, a business trust, or any political subdivision or agency.” (emphasis added).

By the plain terms of Minn. Stat. § 216B.2421, subd. 4, a “person” includes a municipality proposing to construct a pipeline. Accordingly, the definition of “person” extended to HUC, an enterprise fund of the City of Hutchinson, a Minnesota municipal corporation, requiring HUC to obtain a Certificate of Need from MPUC to construct the pipeline.

reasonable and prudent alternative and failed to show that Northern could meet HUC's capacity and pressure requirements or provide additional services, *id.*, at 41).

Since HUC has completed pipeline construction and commenced operations, it has received no complaints from its only two customers—itsself and the New Ulm Public Utilities Commission—or from the citizenry of Hutchinson and New Ulm. Despite this total absence of customer complaints, MPUC commenced an investigation of HUC's pipeline on March 23, 2004, at the instigation of Northern. *See* Transcript of March 23, 2004, Commission Hearing ("T.1.") at 6.

III. INVESTIGATION BY MPUC OF HUC'S PIPELINE.

On January 28, 2004, Northern, now a competitor of HUC, wrote to MPUC and requested that it investigate whether it had jurisdiction over HUC's pipeline. *Jt. App.* at 21. The letter did not assert any specific complaint against HUC; rather, it requested that MPUC assert jurisdiction over HUC's pipeline under Minn. Stat. § 216B.045, which concerns MPUC regulation of certain intrastate pipelines. *Id.*. The statutory authority for triggering investigations arises from Minn. Stat. § 216B.045, subd. 5, which provides in part,

Any customer of an intrastate pipeline, any person seeking to become a customer of an intrastate pipeline, the department, or the commission on its own motion, may bring a complaint regarding the rates, contracts, terms, conditions, and types of service provided or proposed to be provided through an intrastate pipeline, including a complaint that a service which can reasonably be demanded is not offered by the owner or operator of the intrastate pipeline.

Jt. App. at 82. Notwithstanding that Northern is not a customer under this statute and that jurisdiction is not enumerated as a proper subject of a complaint under this statute, MPUC undertook an investigation. The matter came before MPUC on March 23, 2004. *T.1.* at 1.

Northern and other entities² supporting MPUC's assertion of jurisdiction over HUC's pipeline argued that Minn. Stat. § 216B.045 gave MPUC authority to regulate HUC's pipeline. This statute refers to regulation by MPUC of "owner[s] or operator[s]" of intrastate pipelines, but makes no specific reference to municipalities or municipal utilities.

HUC argued that Northern had no standing as a complainant because, under Minn. Stat. § 216B.045, subd. 5, MPUC may only investigate a matter that has been brought by complaint of a customer, a potential customer, the Department of Commerce, or MPUC on its own motion. HUC argued that because Northern did not qualify as any of the above-stated entities and because Northern's letter of January 28, 2004, did not constitute a "complaint," MPUC did not have statutory authority to investigate the issue raised by Northern.³ Transcript of August 19, 2004, Commission hearing ("T.2.") at 7. Additionally, HUC argued that because its pipeline was a municipal utility and because municipal utilities are expressly excluded from regulation by MPUC under Section 216B.01, MPUC had no statutory authority to assert jurisdiction over HUC's pipeline.⁴ T.2. at 8.

At the March 23, 2004 proceedings, Commissioner Scott acknowledged the unusual procedural posture of the matter, noting that, "If nobody has asked for access [to HUC's pipeline], then the issue, arguably, isn't even ripe for [MPUC] to decide today." T.1. at 21.

² Parties participating in the proceedings on the side of Northern included other public utility companies and another state agency: Centerpoint Energy Minnegasco, Interstate Power and Light Company, Aquila, Inc., and the Minnesota Department of Commerce.

³ See Minn. Stat. § 216B.045, subd. 5 ("[A]ny customer of an intrastate pipeline, any person seeking to become a customer of an intrastate pipeline, the department, or the commission on its motion, may bring a complaint regarding the rates, contracts, terms, conditions and types of service provided or proposed").

⁴ No less than 31 Minnesota municipalities provide local natural gas distribution service to their business and homes. Jt. App. at 44.

Chair Koppendrayer noted, “I don’t want to make a decision until I see a complaint. Period. We have no--no point in asserting jurisdiction if there’s never a complaint.” T.1. at 22.

Commissioner Scott observed, in reference to HUC market competitor Northern having brought the complaint, “Frankly, it sounds to me like there is a whole bunch of bad blood in this docket that doesn’t have much to do with the merits of the docket. That’s what it sounds like to me.”

T.1. at 29. Commissioner Koppendrayer also observed that, “[S]omehow ... there is a desire to assert jurisdiction because of who we are and what we perceive our jobs to be.” T.1. at 61.

MPUC decided at the March 23 hearing to defer the matter and order additional briefing to determine whether MPUC could even address its jurisdiction under Minn. Stat. § 216B.045, where no complaint had been brought by a customer, a potential customer, the Department of Commerce, or MPUC on its own motion. T.1. at 65.

The matter came back before MPUC on August 19, 2004. T.2. at 1. MPUC first considered whether it could address the jurisdiction issue, and, if so, whether it should assert jurisdiction over and regulate HUC’s pipeline under Minn. Stat. § 216B.045. T.2. at 2.

MPUC staff recommended that MPUC assert jurisdiction and seek public comment on how MPUC should do so.

To a certain extent this [jurisdiction] would be controlled by the contract approval section of the statute [Minn. Stat. § 216B.045, subd. 4], which would require Hutchinson to obtain Commission approval for its contract with New Ulm. I think you [MPUC] could request comments on what would be the most reasonable way for Hutchinson to meet the other requirements of the statute.

T.2. at 3. HUC argued that under the Minnesota Rules governing MPUC proceedings, the proper process contemplated that a formal complaint must precede an investigation—it was unlawful for MPUC to investigate and act in the absence of a proper complaint. T.2 at 7; *see also* Minn. R.

7829.1600 (allowing for the filing of an informal complaint (such as the letter here) but

providing that such a complaint cannot trigger formal action by the MPUC). The uncertainty of the commissioners on the jurisdiction question was apparent at the August 19 hearing. Commissioner Reha frankly spoke in favor of exercising jurisdiction to force the issue into the courts.

I love this case, because this is one that, you know, legal minds can really differ, and it's a very close case. And I would love to have the Supreme Court to review this and tell us what to do on it.

* * *

I'm more interested in having the courts decide [the issue of jurisdiction], so I'm tending—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 60, 61. Chair Koppendrayer, on the other hand, spoke against MPUC exercising jurisdiction over HUC's pipeline for some of the following reasons:

There are no complaints for us—there are no complaints from anybody on how the operation of this line is being handled. There are—and I go back once more to the fact that the legislature gives—allows municipalities to enjoy a lot of autonomy.

* * *

So I would ... say, look I don't have a compelling reason to exercise Commission jurisdiction at this point, so I would dismiss the complaint without prejudice, and let them go fight it in another venue, if they want.

T.2 at 62. Ultimately, the commissioners on a 3-1 vote favored exercising jurisdiction over HUC's pipeline. T.2. at 72. MPUC's September Order following the August hearing stated that it had jurisdiction to regulate HUC's pipeline under Minn. Stat. § 216B.045.⁵ The September

⁵ Although MPUC ultimately asserted jurisdiction without explicitly determining that the question of jurisdiction was properly raised according to the statute, HUC is not challenging on appeal MPUC's decision to address jurisdiction. While HUC continues to believe that Northern was not a proper complainant and did not make a proper complaint, HUC acknowledges that for all intents and purposes, MPUC has apparently "on its own motion" (Minn. Stat. § 216B.045, subd. 5) addressed the jurisdiction question. In turn, this court must now address whether MPUC's assertion of jurisdiction was proper where the

Order provided that, (1) MPUC would assert jurisdiction over HUC's pipeline under Section 216B.045; (2) HUC must file with MPUC for approval all contracts for services provided to shippers; and (3) MPUC would solicit public comments on how it should regulate HUC's pipeline. Jt. App. at 14.

HUC requested reconsideration of the agency's ruling and on November 11, 2004, MPUC heard argument from counsel and denied reconsideration of its September Order. Jt. App. at 11. HUC appealed the matter to this court and requested MPUC to stay the September Order. Jt. App. at 14. On February 24, 2005, MPUC granted the stay in part and denied it in part, ruling that, pending decision by this court, (1) HUC would not be required to file its contracts with MPUC; (2) HUC would not be required to maintain records, make reports, allow inspections and examinations, and pay regulatory assessments; (3) the parties would not be required, until after this court's decision, to provide MPUC with comments on how MPUC should regulate HUC's pipeline; (4) HUC would be subject to MPUC's orders during any natural gas emergencies; (5) HUC was obligated to charge reasonable rates; (6) HUC was obligated to provide nondiscriminatory open access to its pipeline; and (7) any customer or potential customer could bring to MPUC a complaint against HUC. Jt. App. at 17. The issue of whether MPUC has properly asserted jurisdiction over the pipeline of HUC, and whether MPUC has properly begun to regulate HUC's pipeline is now before this court.

statutory definition of an intrastate pipeline has not "specifically provided" that municipal utilities fall within its purview. *See* Minn. Stat. § 216B.045, subd. 1.

ARGUMENT

I. THE PROPER STANDARD OF REVIEW IS DE NOVO.

A. This Court Has De Novo Review of the Question of Whether the Minnesota Public Utilities Commission Has Jurisdiction Over a Municipal Utility's Intrastate Gas Transmission Pipeline.

Whether an agency has jurisdiction over a matter is a legal question entitled to *de novo* review. *Frost-Benco Elec. Ass'n, v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). On a jurisdictional question, the appellate court need not defer to “agency expertise.” *Id.* Instead, the party seeking review must merely carry the burden of proving that the agency has exceeded its statutory authority or jurisdiction. *Lolling*, 545 N.W.2d at 375. *De novo* review is also proper because this case presents a question of statutory construction. It is well settled that the appellate courts review questions of statutory construction *de novo*. *Houston v. Int'l Beta Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002).

Accordingly, the general principles of judicial deference to agency decisionmaking do not apply in this matter. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 642 N.W.2d 264, 278 (Minn. 2001) (concluding that decisions of administrative agencies enjoy presumption of correctness; deference should be shown by reviewing court in areas of “agency expertise”). Issues of agency jurisdiction and statutory construction are areas of judicial expertise. This court is not required to afford any deference to MPUC's decision granting itself jurisdiction over a municipal utility pipeline, which decision violates the letter of the applicable statutory law.

B. The Legislature By Statute Has Granted and Circumscribed MPUC's Regulatory Authority.

Like all governmental agencies, MPUC is a creature of statute. *Webber v. City of Inver Grove Heights*, 461 N.W.2d 918, 922 (Minn. 1990); *State ex rel. Indep. Sch. Dist. No. 276 the*

Dep't of Ed., 256 N.W.2d 619, 624 (Minn. 1977). MPUC only has such authority as is conferred by the Legislature. *Petition of Minnesota Power for Auth. to Change its Schedule of Rates for Retail Elec. Servs.*, 545 N.W.2d 49, 51 (Minn. App. 1996). The enabling statutes here are clear in limiting MPUC's jurisdiction from extending to municipal utilities such as HUC. Even in the absence of such clarity, the law mandates that if there is any doubt about whether HUC's pipeline falls within MPUC's jurisdiction, such doubt must be resolved *against* a finding of jurisdiction. *Petition of Minnesota Power*, 545 N.W.2d at 51 (“[A]ny reasonable doubt of the existence of any particular power in the [MPUC] should be resolved against the exercise of such power.”) quoting *Great N. Ry. v. Public Serv. Comm'n*, 284 Minn. 217, 220, 169 N.W.2d 732, 735 (1969).

The general authority of MPUC is conferred by Minn. Stat. § 216A.05. By the plain terms of this statute, MPUC does not have broad, open-ended authority to conduct investigations, assert jurisdiction, and regulate various entities. Instead,

The function of the [MPUC] shall be legislative and quasi judicial in nature. It may make such investigations and determinations, hold such hearings, prescribe such rules and issue such orders with respect to the control and conduct of *businesses coming within its jurisdiction* as the Legislature itself may make but only as it shall from time to time authorize. It may adjudicate all proceedings brought before it in which the violation of any law or rule administered by the department of commerce is alleged.

Minn. Stat. § 216A.05, subd. 1 (emphasis added). The operative language of the statute setting out MPUC's authority speaks to its control “of businesses coming within its jurisdiction.” See Minn. Stat. § 216A.05, subd. 1. As argued *infra*, absent express and specific reference, municipal utilities such as HUC do not fall within MPUC's jurisdiction.

C. The Rules of Statutory Construction Under Minnesota Statutes Chapter 645 Begin with the Fundamental and Self-Evident Premise that the Plain Meaning of a Statute Controls and Cannot Be Disregarded Under the Pretext of Pursuing the Spirit of the Statute.

Chapter 645 of Minnesota Statutes provides the framework for interpreting and applying the statutes of this State. Among the provisions of Chapter 645 is the often-recognized axiom that

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

Minn. Stat. § 645.16. The Minnesota Supreme Court underscored the paramount nature of this guiding principle of statutory interpretation in *Owens ex rel. Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 737 (Minn. 2000), stating,

Our role in interpreting statutes is to look at the language of the statute before us and where that language is clear, as it is here, we must not engage in any further construction. [Minn. Stat. § 645.16] directs courts to follow the letter of the law where they find that the language is clear.

Id. at 737; *see also State ex rel. Livingston v. Minneapolis Fire Dept. Relief Ass.*, 285 N.W. 479, 480 (Minn. 1939) (concluding that statute should be construed as it reads, and effect should be given to the clear meaning of its language).

In construing a statute, this court must look first at the specific statutory language and then be guided by the most natural and obvious meanings of that language. *State v. Edwards*, 589 N.W.2d 807, 810 (Minn. App. 1999). Put differently, the plain meaning of the words of a statute should not be disregarded if their meaning is clear. *Kirwold Const. Co. v. M.G.A. Const., Inc.*, 513 N.W.2d 241, 244 (Minn. 1994). Additionally, the appellate court must look to the statute as a whole and give effect to all of its provisions. *In re Estate of Northland*, 602 N.W.2d 910, 913 (Minn. App. 1999). A statute is interpreted whenever possible so that no word, phrase,

or sentence should be deemed superfluous, void, or insignificant. *State v. Larivee*, 656 N.W.2d 226, 229 (Minn. 2003); *Cohen v. Gould*, 225 N.W. 435, 438 (Minn. 1929) (determining that reviewing court must not interpret a statute in a way in which complete sentences of the statute are rendered mere surplusage).

Also important in this case is the corollary that courts are prohibited from adding words or provisions to a statute or reading into a statute words or provisions which were intentionally or inadvertently omitted by the Legislature. *Metro Sports Facilities Comm'n v. County of Hennepin*, 561 N.W.2d 513, 516 (Minn. 1997); *Gennin v. 1996 Mercury Marquis, etc.*, 609 N.W.2d 266, 270 (Minn. App. 2000).

II. THE PLAIN LANGUAGE OF CHAPTER 216B PROVIDES THAT HUC'S PIPELINE IS NOT SUBJECT TO MPUC REGULATIONS.

A careful and inclusive review of the statutory language of Chapter 216B reveals that the plain language of the statute excludes municipal utilities from regulation by MPUC. *See* Minn. Stat. § 216B.045. Chapter 216B of the Minnesota Statutes states the Legislature's intent with respect to the regulation of public utilities. The codified legislative findings in support of the regulation of public utilities provide,

It is hereby declared to be in the public interest that public utilities be regulated as hereinafter provided in order to provide the retail customers of natural gas and electric service in this state with adequate and reliable services at reasonable rates, consistent with financial and economic requirements of public utilities and their need to construct facilities to provide such services or to otherwise obtain energy supplies, to avoid unnecessary duplication of facilities which increase the cost of service to the consumer and to minimize disputes between public utilities which may result in inconvenience or diminished efficiency in service to the consumers. *Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them and cooperative electric associations are presently effectively regulated and controlled by the membership under the provisions of Chapter 308A, it is deemed unnecessary to subject*

such utilities to regulation under this chapter except as specifically provided herein.

Minn. Stat. § 216B.01 (emphasis added).

A plain reading of these legislative findings compels the conclusions that (a) the Legislature deemed it in the public interest to regulate public utilities; (b) regulation of public utilities would help balance the need for adequate and reliable power at reasonable rates for consumers against the financial and economic needs of the utilities; (c) regulation would help avoid unnecessary duplication of energy facilities; and (d) regulation would help minimize disputes between public utilities.⁶ Of paramount importance here is the expressly-stated legislative rationale and finding with respect to municipal utilities: the Legislature found that municipal utilities are “effectively regulated by the residents of the municipalities”; accordingly, “it is deemed unnecessary to subject such utilities to regulation under this chapter *except as specifically provided herein.*” *Id.* (emphasis added).

It is with this framework in mind that the intrastate pipeline statute must be examined. MPUC cannot assert jurisdiction over HUC’s pipeline because the Legislature did not specifically provide for the regulation of intrastate pipelines of municipal utilities under Minn. Stat. § 216B.045, which provides,

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

⁶ Of course, the irony here is that the utility regulation statutes have been used by a public utility (Northern) to create a dispute with a municipal utility (HUC).

requesting that a pipeline or a portion of a pipeline be classified as an intrastate pipeline and the commission approves the petition.

Nowhere in this subdivision does the Legislature “specifically provide” for pipelines of municipal utilities to be regulated. MPUC cannot read words into the statute which the Legislature omitted. *See Metro*, 561 N.W.2d at 516 (courts are prohibited from adding words or provisions to statute or reading into statute words or provisions intentionally or inadvertently omitted by Legislature); *see also Gennin*, 609 N.W.2d at 270.

Further, the failure of the Legislature to *specifically exclude* a municipal utility from regulation under Minn. Stat. § 216B.045 does not operate to include municipal utilities within the jurisdiction of the statute. *Id.* It is a perversion of the regulatory scheme of Chapter 216B to include HUC’s pipeline within the ambit of regulation under Minn. Stat. § 216B.045 in the absence of a specific inclusion of a municipality, as mandated by Minn. Stat. § 216B.01. Including municipal utilities absent clearly-supported statutory language effectively nullifies the express and all-encompassing exclusion of Minn. Stat. § 216B.01, which excludes municipalities from regulation unless specifically provided for by statute. *See* Minn. Stat. § 216B.01 (“[I]t is deemed unnecessary to subject [municipal utilities] to regulation under this chapter except as specifically provided herein”); *see also Larivee*, 656 N.W.2d at 229; *Cohen*, 225 N.W. 435 at 438.

It was argued before MPUC that because the pipeline is owned and operated by a municipal utility, Minn. Stat. § 216B.045’s use of the words “owner or operator” provides “plain language” support for the proposition that municipal utilities are not exempt from regulation under the statute. *Jt. App.* 82. The fact remains that neither the term “municipality,” nor the

broader terms “persons” or “corporation”—each of which are defined to include a municipality⁸—were used by the Legislature to define those entities subject to MPUC intrastate pipeline regulation. *See* Minn. Stat. § 216B.045, subd. 1 (failing to use the terms “municipality,” “persons,” or “corporation” in reference to the entities to be regulated under the statute). The statute uses the undefined “owner or operator,” which is not indicative of any intent to regulate municipal utilities and which certainly does not meet the requirement that municipalities be “specifically provided for”.

By contrast, several sections of Chapter 216B do expressly *include* municipal utilities within the purview of MPUC’s regulation. *See, e.g.*, Minn. Stat. § 216B.025 (“a municipality may elect to become subject to regulation by the commission pursuant to Sections 216B.10 [governing accounting systems] and 216B.11 [governing depreciation]”); Minn. Stat. § 216B.16, subd. 12 (providing municipal exemption to rate changes procedure for small gas utility franchise); Minn. Stat. § 216B.161, subd. 1(e) (providing municipalities definition for area development rate plan); Minn. Stat. § 216B.164, subd. 9 (providing that the governing body of municipalities may regulate small power production); Minn. Stat. § 216B.241, subd. 1(b) (providing that municipalities shall identify and employ energy conservation improvements spending); Minn. Stat. § 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 electrical association . . . that furnishes utility services within the municipality”).

Accordingly, the Legislature clearly knew how to address and include municipal utilities within the purview of MPUC regulation when it saw fit. The complete omission of any

⁸ *See supra*, fn. 1.

reference to a “municipality” in the intrastate pipeline statute shows that the Legislature purposely chose to exclude municipal utilities from regulation under Minn. Stat. § 216B.045 by failing to “specifically provide” for such inclusion, as required by Minn. Stat. § 216B.01.

Because Minn. Stat. § 216B.045 does not specifically confer jurisdiction over municipalities and because such jurisdiction cannot be implied, MPUC cannot, as a matter of law, assert jurisdiction over HUC’s pipeline. *Cf. Petition of Minnesota Power*, 545 N.W.2d at 51 (any doubt as to whether agency possesses particular power must be resolved against finding such power exists).

III. THE CLEAR INTENT OF THE LEGISLATURE IS THAT PIPELINES OWNED AND OPERATED BY MUNICIPAL UTILITIES ARE NOT SUBJECT TO REGULATION UNDER SECTION 216B.045.

Because the language of the intrastate pipeline statute is clear, MPUC erred as a matter of law in asserting jurisdiction over HUC’s pipeline. Moreover, even if the language were ambiguous, permitting resort to ascertaining Legislative intent (*see* Minn. Stat. § 645.16), the conclusion is the same: the intent was clearly to exclude municipal utilities from regulation.

The starting point in discerning the intent of the Legislature is to examine the language of the statute in question. *Group Health Plan Inc. v. Phillip Morris Inc.*, 621 N.W.2d 2, 6 (Minn. 2001). If the language of the statute is clear, a reviewing court must not engage in any further construction of the statute. *Owens*, 605 N.W.2d at 737. Even if construction of the language of a statute is warranted, the reviewing court may not assume a legislative intent which is in plain contradiction to the words used by the Legislature. *Mankato Citizen Tel. Co. v. Comm’n of Taxation*, 145 N.W.2d 313, 316-17 (Minn. 1956). When the words of the law are not explicit, the intention of the Legislature may be ascertained by considering, among other things, the contemporaneous legislative history and the consequences of particular interpretations. Minn. Stat. § 645.16 (7), (6); *Manson v. Village of Chisholm*, 170 N.W. 924, 924 (Minn. 1919).

As detailed in the sections below, the legislative history of Minn. Stat. § 216B.045 fails to support the argument that municipal utilities are implicitly included in regulation under this section of the statute. The initial version of the bill which ultimately became Minn. Stat. § 216B.045 did not use the phrase “owner or operator,” but used the term “persons,” which would have included all municipal utilities on account of the broad definition of “persons.”⁹ Jt. App. 60. The final version of the bill, however, replaced the term “persons” with the term “owner or operator,” which continues as the current language of Minn. Stat. § 216B.045. Jt. App. 63, 66. Ultimately, the Legislature evinced an intent to increase the number of intrastate pipelines, not broadly expand regulation of municipally-owned utilities. Accordingly, any implicit reference to municipal utilities was deleted from the final version of the Minn. Stat. § 216B.045. Jt. App. 82.

Additionally, the canon of statutory construction requiring the reviewing court to consider the consequences of a particular interpretation in ascertaining the intention of the Legislature supports the argument that the Legislature did not intend that the regulatory framework provided in Minn. Stat. § 216B.045 extend to municipal utilities. Minn. Stat. § 645.16(7). Once again, the touchstone is the Legislative findings of Section 216B.01, which expressly recognized that because municipal utilities were “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. This Legislative finding is undermined, not furthered, if MPUC regulation is held to extend to intrastate pipelines of municipal utilities.

⁹ See *supra*, fn. 1 (providing the statutory definition of “persons” for Minn. Stat. Chap. 216B).

A. The Legislature Intentionally Deleted the Implied Reference to Municipal Utilities from the Final Draft of the Bill That Became Minn. Stat. § 216B.045.

Minn. Stat. § 216B.045 is the codification of 1987 Minnesota Session Laws, Chapter 9, Senate File No. 258 (revisor 87-0774) (Jan. 16, 1987) (“S.F. 258”). The original draft of S.F. 258 was introduced in 1987 and would have amended Minn. Stat. § 216B.08 to provide as follows:

[MPUC] is hereby vested with the powers, rights, functions, and jurisdiction to regulate in accordance with the provision 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).

S.F. 258 (emphasis added).

Before adoption, however, the bill was substantially revised by the Senate Public Utilities and Energy Committee (the “Committee”) with a “strike everything amendment.” Jt. App. 61, 63. Senate File 258, as it was finally enacted, did not alter former Minn. Stat. § 216B.08, and it declined to reword the statute’s language to include “persons” within the regulatory scheme. *Compare* Minn. Stat. § 216B.045, subd. 1 (defining intrastate pipeline as one “wholly within the state of Minnesota which transports or delivers natural gas 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 . . . [but] does not include a pipeline owned or operated by a public utility”), Jt. App. 82, *with* original version of S.F. 258 (defining intrastate pipelines as “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”). Jt. App. 60. The Legislature’s decision to delete the reference in the statute to “persons” is significant because, as discussed earlier, Chapter 216B

defines “person” to include a municipality. *See* Minn. Stat. § 216B.02, subd. 3. The Legislature initially considered, but ultimately rejected, including municipalities within the intrastate pipeline regulatory scheme.

In contrast to the Legislature’s decision to exclude municipal utilities from Minn. Stat. § 216B.045, the Legislature clearly and unambiguously included municipal utilities within the regulatory framework when it deemed MPUC regulation appropriate. At the same meeting in which the Committee considered S.F. 258, the Committee considered a separate bill in which it amended the proposed bill to refer specifically to municipalities within the statutory regulatory framework. *Jt. App. 62*. Accordingly, if the Legislature had intended Minn. Stat. § 216B.045 to apply to municipal utilities, it would have specifically provided for regulation and would have declined to amend S.F. 258 to exclude municipal utilities. *Jt. App. 63*.

Because the legislative history clearly demonstrates the intent of the Legislature to exclude municipal utilities from regulation under Minn. Stat. § 216B.045, MPUC erred when it determined that it has the authority to regulate HUC’s pipeline. *See* Minn. Stat. § 645.16(7); *Manson*, 170 N.W. at 924. The decision of the MPUC must, therefore, be reversed by this court.

B. Review of the Public Policy Concerns Related to Regulation of HUC’s Pipeline by MPUC Supports the Conclusion That the Legislature did not Intend to Subject Municipal Utilities to Regulation Under Minn. Stat. § 216B.045.

Public policy also supports the argument that MPUC does not have jurisdiction to regulate the pipeline of HUC. Because the pipeline is effectively regulated by HUC, because statutes interpreting the authority of municipalities create a broad spectrum of municipal autonomy from agency regulation, and because public policy regarding the interpretation of statutes supports the absence of MPUC jurisdiction to regulate HUC’s pipeline, MPUC erred which it asserted jurisdiction over HUC’s pipeline.

1. Minnesota Statutes Provide Sufficient Remedy for those Allegedly Aggrieved by HUC's Pipeline.

It is not true, as argued to the agency, that MPUC should regulate municipal utilities under Section 216B.045 because municipal utilities would otherwise go unregulated. This argument ignores the Legislature's findings that municipal utilities are "effectively regulated by the residents of the municipalities which own and operate them . . ." Minn. Stat. § 216B.01.

Further, the argument that HUC's pipeline will be unregulated without MPUC involvement at this juncture is illusory. Minn. Stat. § 216B.17, subd. 6, states that,

[MPUC] 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.

Accordingly, the regulatory framework for municipal utilities provides a procedure for handling complaints of consumers of HUC's pipeline—even those consumers that are outside the boundaries of Hutchinson—and MPUC's improper assertion of jurisdiction at this juncture, on public policy reasons, is unfounded and unnecessary.

2. Minnesota Statutes Provide a Broad Exclusion for Municipalities from Minnesota State Agency Regulatory Authority.

Further support for the argument that municipal utilities are already effectively regulated exists in the broad grants by the Legislature of municipal autonomy from agency regulation. In various statutes concerning municipalities, the Legislature has specifically declined to subject municipalities to the same type of state regulatory oversight to which private entities are subject. Bearing in mind this legislative predilection,¹⁰ the decision of MPUC to assert jurisdiction over

¹⁰ MPUC Chair Koppendrayner recognized this at the August 19 hearing, when he said, "I go back once more to the fact that the legislature gives — allows municipalities to enjoy a lot of autonomy." T.1. at 62.

HUC's pipeline did not just violate Minn. Stat. § 216B.045, but contradicts the legislatively-established framework of a "hands off" regulatory approach with respect to municipalities.

For example, Minn. Stat. § 412.321 provides: (1) that municipalities are authorized to create gas utilities to supply utility service to a municipality or private consumers; (2) that municipal utilities may construct all facilities reasonably needed for that purpose; and (3) that municipal utilities may also extend their service beyond the municipality's limits and furnish service to consumers "in such area and at such rates and upon such terms as the council or [municipal utilities] commission . . . shall determine." Minn. Stat. § 413.321, subs. 1, 3.

Even broader powers and authority are conferred on municipalities by Chapter 453A, the Municipal Gas Agency Act. Under Chapter 435A, municipalities are authorized to exercise any of the powers conferred upon a municipal-gas agency, including the development and construction of facilities for gas exploration, production, transportation, storage, sale, or exchange of gas. Minn. Stat. §§ 453A.02, subd. 14; 453A.04, subd. 2; 45A.08, subd. 2. Like powers are granted to municipal utilities in Chapter 435, the Municipal Power Agency Acts. The authority includes the right to constructed transmission lines *outside* of the municipality. *See* Minn. Stat. § 453.54, subs. (2) & (16); *see also* § 453.58.

Clearly, the Legislature has expressed, both in Minn. Stat. § 216B.01 and various Chapters relating to municipal powers and authority, its clear intention that municipalities operate, for the most part, free from state regulatory authority. By asserting jurisdiction over the HUC's pipeline, the MPUC has violated both statute and Minnesota public policy with respect to municipal utilities.

IV. MPUC'S DECISION TO EXERCISE JURISDICTION OVER HUC'S PIPELINE IS BOTH UNCONSTITUTIONAL AND ARBITRARY AND CAPRICIOUS.

The decision of MPUC to assert jurisdiction over HUC's pipeline not only violates the plain language of Minn. Stat. Ch. 216B.045, ignores legislative history, and contradicts public policy, but it also arbitrarily and capriciously subjects HUC to regulation that, to date, is not defined. Further, MPUC has asked competitors of HUC to help define that regulation of HUC's pipeline. MPUC's actions are unconstitutional and arbitrary and capricious, and must be reversed.

Generally, this court applies a *de novo* standard of review to appeals raising constitutional questions. Review of agency decisions is no exception to the general rule. *See In the Matter of Keith W. Kindt*, 542 N.W.2d 391, 394 (Minn. App. 1996) (concluding that, in the context of medical assistance benefits, the court of appeals examines *de novo* the agency's decision for constitutional violations.) Additionally, the court of appeals must reverse or modify the determination of an agency if that determination is supported by arbitrary and capricious findings or conclusions. *HealthPartners, Inc. v. Bernstein*, 665 N.W.2d 357, 360 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003). An agency determination is arbitrary and capricious if it reflects the will of the agency, rather than a reasoned analysis. *In re Space Ctr. Transp.*, 444 N.W.2d 575, 581 (Minn. App. 1989).

At the August 19, 2004, proceeding before MPUC, staff recommended to MPUC that it assert jurisdiction over HUC and begin regulating HUC's pipeline. T.2. at 3. Staff also recommended that MPUC, rather than use the regulatory provisions of the very statute MPUC asserted jurisdiction under, seek public comment from, among others, HUC's competitors on "what would be the most reasonable way for Hutchinson to meet the other requirements of the statute." *Id.*

As an initial matter, this recommendation, which was adopted by MPUC, raises serious constitutional concerns. The decision is vague and overbroad. A determination of an agency is vague and overbroad where its words are not sufficiently specific to provide fair warning of the type of conduct which is unacceptable. *See Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980) (examining agency rule for vagueness and overbreadth, but concluding it was not). Here, the September order requiring comments so that MPUC may determine *how* it will regulate MPUC does not provide MPUC sufficient warning of what aspects of its operation will be regulated and what such regulation will entail. Moreover, the decision appears to violate HUC's equal protection rights. The Minnesota Equal Protection Clause requires equal application of the laws such that all those similarly situated are treated similarly. *See Peterson v. Minnesota Department of Labor & Industry*, 591 N.W.2d 76, 79 (Minn. App. 1999), *rev denied* (Minn. May 18, 1999) (determining that private entities' right to equal protection was not violated by state's differential treatment). Here, MPUC is treating HUC disparately from all other pipeline owners and operators in that MPUC has solicited comments on how it will regulate HUC's pipeline rather than regulating the pipeline under the framework established by statute, which is presumably applied to the other "owners and operators" of a intrastate pipelines.

Staff's recommendation adopted by MPUC is also arbitrary and capricious because it ignores the regulatory framework established by the Legislature for municipal utilities and subjects HUC's pipeline to regulation created, in part, by input from HUC's *direct competitors*. The Legislature never meant for municipal utilities to be regulated under Minn. Stat. § 216B.045; accordingly, the Section does not easily lend itself to regulation of a municipal utility.

For instance, Minn. Stat. § 216B.045, subd. 7, governs MPUC's regulation in the event of a natural gas emergency. Subdivision 7 provides that,

The commission may declare a natural gas supply emergency if it finds that a severe natural gas shortage endangering the health or safety of the citizens of the state exists or is imminent in the state. If the commission declares that a natural gas supply emergency exists, it may for the duration of the emergency order the suspension of any contract providing for the sale and transportation of natural gas through an intrastate pipeline, and may for the duration of the emergency order the suspension of any contract providing for the sale and transportation of natural gas through an intrastate pipeline, and may for the duration of the emergency order an owner or operator of the intrastate pipeline to furnish such transportation services as are required by the public interest.

By this provision, MPUC could order HUC to divert the natural gas supplying the City of Hutchinson to another municipality. In the worst-case scenario, the pipeline that Hutchinson funded and constructed to meet its own energy shortfall could, under the regulation of MPUC, be rerouted to another municipality and leave Hutchinson with not just an energy shortfall, but an energy crisis.

Finally, the notion that HUC's competitors should help determine to what extent MPUC regulates HUC is farcical, to say the least. Even if Minn. Stat. § 216B.045 provided for MPUC to regulate HUC's pipeline—which it does not—it is unclear why MPUC would regulate HUC's pipeline in a manner different than that in which it regulates other intrastate pipelines in the state. One logical explanation is that the framework established by the Legislature to govern regulation of intrastate pipelines was never intended to regulate municipal utilities and creates an unworkable regulatory scheme when applied to a municipal utility.

Additionally, MPUC's decision that the extent to which HUC will be regulated shall be determined after input from HUC's competitors is so implausible a decision that it clearly falls

under the arbitrary and capricious standard and must be reversed. *See In re Rochester Ambulance Serv.*, 500 N.W.2d 495, 499 (Minn. App. 1993).

CONCLUSION

MPUC's determination to assert jurisdiction over HUC's pipeline surpasses the authority granted to it by the Legislature, ignores the plain language of Minn. Stat. § 216B.01 which excludes municipalities from regulation, contradicts the Legislature's express intent in creating Minn. Stat. § 216B.045, contorts public policy relating to pipelines and municipal regulation, and subjects HUC to indeterminate regulation. For all the above-stated reasons, the decision of MPUC to assert jurisdiction over HUC's pipeline is contrary to law, unconstitutional, and arbitrary and capricious and must be reversed by this court.

Dated: 21 March 2005



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