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Nos. A04-2342 and A04-2414

State of Minnesota
In Court of Appeals

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

vs.

Minnesota Public Utilities Commission,
Respondent,

AND

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

vs.

Minnesota Public Utilities Commission,
Respondent.

RELATOR HUTCHINSON UTILITIES COMMISSION'S REPLY BRIEF

Gary A. Van Cleve (#156310)
Molly Mc Kee (#341885)
LARKIN HOFFMAN DALY & LINDGREN, LTD.
7900 Xerxes Avenue South
1500 Wells Fargo Plaza
Bloomington, Minnesota 55431
(952) 835-3800

Attorneys for Relator
Hutchinson Utilities Commission

Kathleen M. Brennan (#0256870)
Andrew J. Shea (#99909)
McGRANN SHEA ANDERSON CARNIVAL STRAUGHN & LAMB, CHARTERED
800 Nicollet Mall, Suite 2600
Minneapolis, MN 55402-7035
(612) 338-2525

Attorneys for Relator
Minnesota Municipal Utilities Association

(Additional Counsel Listed on following page)

2005 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Kari Valley Zipko
Assistant Attorney General
State of Minnesota
445 Minnesota Street
Suite 1100
St. Paul, MN 55101
(651) 282-5700

Attorneys for Respondent

Hugh Nierengarten, Esq.
NIERENGARTEN & HIPPERT, LTD.
11 North Minnesota Street
P.O. Box 214
New Ulm, MN 56073

Attorney for Amicus Curiae City of New Ulm

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103-2044
(651) 261-1232

Attorneys for Amicus Curiae League of Minnesota Cities

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INTRODUCTION

Relator Hutchinson Utilities Commission ("HUC") submits this brief in reply to Respondent Minnesota Public Utilities Commission's ("MPUC") brief in support of MPUC's determination to assert jurisdiction over HUC's natural gas pipeline. Because MPUC has failed to cite any statutory authority supporting its assertion of jurisdiction, has failed to prove that the Legislature intended MPUC to regulate pipelines owned by municipal utilities, and has failed to articulate why the regulatory scheme that existed before MPUC asserted jurisdiction is deficient, this court must reject MPUC's argument that it has the authority to regulate HUC's pipeline and reverse the administrative decision dated September 15, 2004, asserting MPUC regulatory authority over HUC's pipeline.

ARGUMENT

I. THIS COURT'S REVIEW OF MPUC'S ASSERTION OF JURISDICTION IS *DE NOVO*; MPUC'S DETERMINATION OF JURISDICTION IS NOT ENTITLED JUDICIAL DEFERENCE.

MPUC concedes that this court reviews *de novo* errors of law arising from an agency decision which is based on a statutory interpretation. *See* Brief of Respondent Minnesota Public Utilities Commission("Respondent's Brief") at 8. But MPUC argues further that "an agency's interpretation of the statutes it administers is entitled to deference." *Id.* This may be true when the reviewing court delves into areas of "agency expertise," but it is not the case when the court reviews issues of agency jurisdiction. *Compare In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota*, 642 N.W.2d 264, 278 (Minn. 2001), *with Frost-Benco Elec. Ass'n. v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). The issue on appeal here is whether MPUC has jurisdiction to assert regulatory authority over HUC's pipeline; the law is well-settled that these types of jurisdictional questions are subject to *de novo* review on appeal and that the decision of the agency is, under this standard, not entitled to any deference by the

reviewing court. *Frost-Benco*, 358 N.W.2d at 642. Because it is clear that MPUC has exceed its jurisdictional authority, this court must reverse MPUC's September 15, 2004, order asserting jurisdiction.

II. THE LEGISLATURE HAS NOT DEFINED THE TERMS "OWNER" OR "OPERATOR" TO INCLUDE A MUNICIPALITY.

MPUC argues that the "phrase 'every owner' must by definition include the City [of Hutchinson]." *See* Respondent's Brief at 11.[1] This argument fails because, although the Legislature has not provided a statutory definition of an "owner" or an "operator," it has defined a municipality. *See* 216B.02, subd. 2b (defining municipality for purposes of the statute). Because the Legislature has chosen to define a municipality, any reference to a municipality in the statute must be by this defined term; MPUC's effort to extrapolate a more expansive reference to a municipality in the statute is inappropriate and violates well-established rules of statutory construction. *See Metro Sports Facilities Comm'n v. County of Hennepin*, 561 N.W.2d 513, 516 (Minn. 1997) (courts are prohibited from adding words to a statute not included by the Legislature); *see also Gennin v. 1996 Mercury Marquis*, 609 N.W.2d 266, 270 (Minn. App. 2000). Put simply, if, as MPUC contends, the Legislature intended to extend MPUC regulatory authority over municipal pipelines, the Legislature would have (and should have) done so unambiguously by using the defined term "municipality" which it adopted in Minn. Stat. § 216B.02, subd. 2b.

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[1] MPUC argues further, without any statutory support, that, "The language of the Act includes municipal utilities in . . . the use of the broad terms every 'owner' and every 'operator.'" *See* Respondent's Brief at 15.

III. MPUC'S ARGUMENT THAT THE LEGISLATURE INTENDED TO PROVIDE FOR COMMISSION REGULATION OF MUNICIPAL PIPELINES FAILS.

MPUC argues that "the Legislature required [MPUC] to regulate all other owners and operators of intrastate pipelines that would not otherwise be subject to state regulation." *See* Respondent's Brief at p. 16. This argument fails because the Legislature has never expressed this broad intention.

A. MPUC's Interpretation Imputes a Legislative Intent Which Has Never Been Evinced by the Legislature.

MPUC argues that by enacting Minn. Stat. § 216B.045, the Legislature intended to provide for the regulation of every natural gas pipeline—including municipal pipelines. *See* Respondent's Brief at 20. This argument fails because the Legislature has not evidenced an intent to regulate *every* pipeline, only those pipelines that are described in Minn. Stat. § 216B.045. Pipelines owned and operated by public utilities and by municipal utilities are not included among these pipelines and are therefore not subject to regulation pursuant to the statute. *See* Minn. Stat. § 216B.01 (stating that, with respect to municipal utilities, the Legislature determined it "unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein").[2] To argue otherwise is to violate the well-established rule of statutory construction 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

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[2] MPUC also argues that this court should only give the language of Minn. Stat. § 216B.01 "some weight" because it appears in a statutory section under the headnote entitled "Legislative findings." *See* Respondent's Brief at 26. This argument directly violates Minn. Stat. § 645.49, which states, "The headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes *are mere catchwords* to indicate the contents of the section or subdivision *and are not part of the statute.*" (emphasis added); *see Highland v. Metro. Airport Comm'n,* 538 N.W. 2d 717, 721 (Minn. App. 1995) (concluding that the caption to Minn. Stat. § 473.651, "Fixed Rentals," did not change the plain import of the language of the statutory section).

the Legislature. *See Metro Sports*, 561 N.W.2d at 516; *Gennin*, 609 N.W.2d at 270. The Legislature has determined that some pipelines are subject to MPUC regulation pursuant to statute; however, municipal pipelines are not among those enumerated. Therefore, the MPUC's order asserting jurisdiction over HUC's pipeline is beyond MPUC's statutory jurisdictional authority and that determination must be reversed by this court.

B. MPUC's Purported Concern About Non-Resident Potential Customers is Purely Hypothetical and Does Not Justify Extending MPUC's Jurisdiction Beyond its Statutory Limits.

MPUC argues that, without its oversight, there would be no complaint procedure for non-resident potential customers of HUC's pipeline and that "the determination of just and reasonable rates and contracts will be left solely to the entity offering those rates and contracts." *See* Respondent's Brief at 20. MPUC argued below that neither resident nor non-resident customers would have adequate safeguards against potential bad acts by HUC without MPUC's assertion of jurisdiction and regulation of the pipeline. MPUC makes no argument to this court, however, concerning those two classes of customers.[3] With respect to non-resident potential customers, MPUC speculates about a class of *potential* customers that allegedly could be harmed by as-yet-unmade decisions of HUC. This argument is speculative, hypothetical, and irrelevant. Although MPUC asserts that this class of potential customers has no redress for grievances, the class does not even exist. There has never been a single complaint by a non-resident potential customer with respect to HUC's operation of the pipeline. Clearly, MPUC's speculative policy argument based on these potential customers does not support an extension to MPUC's statutorily-granted regulatory jurisdiction. Even if this class of customers was not purely

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3 *See* Relator Hutchinson Utility Commission's Brief at 20 (discussing the regulatory framework which protects both resident and non-resident customers of HUC's pipeline from unfair, unreasonable, or discriminatory treatment).

hypothetical, Minnesota law is clear that the jurisdiction of an agency is created and circumscribed by the agency's enabling statute; it cannot be extended beyond the specifically-enumerated grant 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) ("[A]ny reasonable doubt of the existence of any particular power in the [MPUC] should be resolved against the exercise of such power."); *see also* Relator Hutchinson Utility Commission's Brief at 10 (providing further argument on subject).

CONCLUSION

MPUC cannot identify a single customer or non-customer complaint against HUC arising from the provision of natural gas services. In fact, there has never been a single allegation of unfair rates, abuse, or discrimination by HUC with respect to customers of the pipeline. The only other customer of the pipeline besides the City of Hutchinson—the city of New Ulm—has filed an amicus brief supporting HUC's position that MPUC is improperly asserting jurisdiction over HUC's pipeline. Despite these undisputed facts, MPUC has asserted jurisdiction over the pipeline without any statutory authority. MPUC exceeded the authority granted to it by the Legislature when it asserted jurisdiction over the pipeline. Accordingly, this court should reverse MPUC's assertion of jurisdiction.

Dated: 9 May 2005

Gary A. Van Cleve (156310)
Molly Mc Kee (341885)
Larkin Hoffman Daly & Lindgren Ltd.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431-1194
(952) 835-3800

Attorneys for Relator Hutchinson Utilities Commission

1010120.1