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No. A06-2275

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Irene Hoffman, *et al.*,

Respondents,

v.

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

Appellant.

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

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

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## INTRODUCTION

Respondents struggle to disguise their rate challenge as a lawsuit. A demand for refunds is called redress for “the fair market value of the unperformed maintenance services.” Resp. br. at 19. The usurpation of agency prerogative is styled an “inherently judicial” function. *Id.* at 20. Stripped to the essence, however, this action requires a court to divine the intent of three states’ utilities commissions and then deconstruct those agencies’ tariff calculations into assumed services and corresponding charges so as to determine “benefit of the bargain” relief. *Id.* at 19.

There is no market for tariff services; only NSP is authorized to perform. Hence, the relief sought can only be the amount that NSP should give back for services supposedly unrendered. That assessment necessarily thrusts the judiciary into a domain for which an administrative resolution has been prescribed. There is no escaping this litigation’s contravention of both the filed rate and primary jurisdiction doctrines.

## ARGUMENT

### **I. WHY WE ARE HERE**

#### **A. The Rule 103.03(i) certification.**

Respondents embrace the order below<sup>1</sup> as reason enough to deny appellate review – never mind that the district court deemed its decision to be ripe for prompt scrutiny. Resp. br. at 6-12. The controlling analysis – did the district court correctly conclude that

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<sup>1</sup> *Hoffman v. N. States Power Co.*, No. 27-CV-06-5365, slip op. (Minn. Dist. Ct. Nov. 1, 2006) (“*Dismissal Order*”) (App. 013).

the “important” and “doubtful” filed rate and primary jurisdiction issues merit certification? – is clearly satisfied.

“Importance” turns upon whether a contrary ruling would “potential[ly] terminate or significantly reduce further court proceedings.” *Jostens, Inc. v. Federated Mut. Ins. Co.*, 612 N.W.2d 878, 884 (Minn. 2000). Issues can be certified even though “reversal would not terminate the proceedings entirely.” *Id.*

Questions are “doubtful” when “there is no controlling precedent” in the face of substantial grounds for a difference of opinion. *Id.* at 884-85. To elude this Court’s review respondents herald *Hanson v. Tele-Comm’s, Inc.*, No. C7-00-534, 2000 WL 1376533, at \*3 (Minn. Ct. App. Sept. 26, 2000), an unpublished opinion disclaiming “doubtfulness” because “there [was] controlling precedent.” But unlike in *Hanson*, the district court below departed from controlling filed rate law – *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307, 312 (Minn. 2006) – and proceeded without regard to any Minnesota authority.

*Hanson* merely stands for the proposition that the parties’ differing views based upon case-specific facts cannot render “doubtful” a question about which there is otherwise no “substantial ground for a difference of opinion.” 2000 WL 1376533, at \*3-\*4 (citing *Emme v. C.O.M.B, Inc.*, 418 N.W.2d 176, 180 (Minn. 1988)). In contrast, this case does not come down to a fact dispute. Rather, the parties contest whether the filed rate and primary jurisdiction doctrines trump this lawsuit as a matter of law. *Schermer* and numerous other precedents contradict the district court’s filed rate and primary

jurisdiction conclusions. Under such circumstances, substantial grounds for a difference of opinion cannot be gainsaid.

**1. Filed rate questions are important and doubtful.**

Respondents deny filed rate “importance,” contending a complicated agency proceeding could ensue. Resp. br. at 7. Yet filed rate enforcement would necessarily end all judicial proceedings. *See, e.g., Schermer*, 721 N.W.2d at 317 (“[U]nless there is some basis for an exception, the filed rate doctrine would bar the Class’s claims.”). The availability of administrative relief does not make the question any less important. *See Jostens*, 612 N.W.2d at 884.

Respondents also ordain that the lower court’s filed rate conclusion will pass appellate muster. Resp. br. at 7. Such confidence ignores the flood of authority – led by *Schermer* – that cannot be squared with the district court’s decision. The implications and likelihood of reversal (as demonstrated below), make “importance” a foregone conclusion. *Jostens*, 612 N.W.2d at 884.<sup>2</sup>

The filed rate holding is also “doubtful”: the district court made no bones about the lack of binding precedent, and the certified appeal acknowledges the result to be subject to substantial differences of opinion. *See Emme*, 418 N.W.2d at 179. On this point, the district court was right. The filed rate doctrine indisputably covers the utility regulatory regime. *Schermer*, 721 N.W.2d at 319 (“the insurance regulatory scheme is

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<sup>2</sup> The multi-statewide impact of this case also confirms the “importance” of the filed rate determination. *Davies v. W. Publ’g Co.*, 622 N.W.2d 836, 840 (Minn. Ct. App. 2001) (questions with statewide impact are important).

less stringent than, for example, the scheme for electrical, gas, and telephone utilities.”). Thus either *Schermer* dictates the result, or there “is no controlling precedent.” *Jostens*, 612 N.W.2d at 884-85. Either way, the district court’s treatment of the filed rate doctrine cries out for appellate review.

## 2. The rejection of primary jurisdiction is important and doubtful.

Respondents contend that a primary jurisdiction reversal would have no effect on the proceedings. Resp. br. at 9. By definition, however, deferring this dispute to the utilities commissions would bring this litigation to an immediate halt.<sup>3</sup> The termination or substantial reduction of court proceedings makes a decision “important.” *See Jostens*, 612 N.W.2d at 834.

The separation of powers and comity considerations emphasized in *Schermer* are equally applicable to the primary jurisdiction analysis: resolution of tariff obligation claims “[has] been placed within the special competence of an administrative body.” *Roedler v. United States Dep’t of Energy*, No. Civ. 98-1843, 1999 WL 1627346, at \*16 (D. Minn. Dec. 23, 1999) (App. 001), *aff’d on other grounds*, 255 F.3d 1347 (Fed. Cir. 2001).

Respondents squabble with primary jurisdiction “doubtfulness” (resp. br. at 9-10), but there is no controlling authority – and the district court cited none – to support the

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<sup>3</sup> This Court has not hesitated to instruct district courts to yield to administrative expertise in similar circumstances. *See, e.g., City of Willmar Mun. Utils. Comm’n v. Kandiyohi Co-op. Elec. Power Ass’n*, 452 N.W.2d 699, 703 (Minn. Ct. App. 1990), *rev. denied* (Minn. Apr. 27, 1990).

usurpation of utility regulatory agency prerogative. *Schermer* teaches that litigation involving regulated commerce must be deferred to the legislatively-designated agency. 721 N.W.2d at 314-19. The most apposite precedent – *Roedler* – could not be more on point. 1999 WL 1627346, at \*16 (the judiciary must stand down “whenever enforcement of the claim at issue requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body”).

**B. Rule 103.03(j) additionally affords immediate review.**

Respondents also reject Rule 103.03(j) review, disclaiming the jurisdiction and immunity implications of the filed rate and primary jurisdiction doctrines. Resp. br. at 10-12. In fact, the equal circumscription of judicial authority effected by the doctrines is clear.

Like when jurisdiction is lacking or immunity prevails,<sup>4</sup> the filed rate and primary jurisdiction doctrines remove certain disputes from the judicial realm. In such circumstances interlocutory review is available. *See Kastner*, 646 N.W.2d at 239-40 (statutory immunity defense denials – as well as “analogous cases” – are immediately appealable because denial of such a defense repudiates a party’s “right not to stand trial at all – a right that is lost if the case is permitted to proceed”); *McGowan*, 527 N.W.2d at 831-33 (rejection of administrative process immediately appealable because “no purpose is served by putting the parties or the court through the rigors of trial before that

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<sup>4</sup> *See, e.g., Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759 (Minn. 2005); *Kastner v. Star Trails Ass’n*, 646 N.W.2d 235 (Minn. 2002); *McGowan v. Our Savior’s Lutheran Church*, 527 N.W.2d 830 (Minn. 1995).

determination [whether the Worker's Compensation Act bars plaintiff's claims] is made").

Respondents' attempt to distinguish *McGowan* mocks congruity. Resp. br. at 11 n. 5. *McGowan* reviewed an employer's workers'-comp defense because judicial proceedings would end if the district court was wrong. 527 N.W.2d at 833. The administrative process was found to prevail and to provide the means for resolving the dispute. *Id.*

Similarly, the utilities commissions are the exclusive forum for respondents' tariff-based grievances. *Schermer*, 721 N.W.2d at 319.<sup>5</sup> Litigation is not an option because the filed rate doctrine bars a "private rate-related suit for damages." *Id.* (quoting *Prentice v. Title Ins. Co.*, 176 Wis. 2d 714, 726-27, 500 N.W.2d 658, 663 (1993)). Rule 103.03(j) jurisprudence subjects a district court's nullification of that defense to immediately appellate review.

Likewise, the primary jurisdiction doctrine makes tariff challenge matters for administrative, not judicial, resolution. *Roedler*, 1999 WL 1627346, at \*16 (regulatory agencies are responsible for making the call "whenever enforcement of the claim at issue requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body"). When the right to not be

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<sup>5</sup> *Schermer* terminated the litigation because "the Insurance Commissioner serves as the plaintiff's sole source of relief." *Schermer*, 721 N.W.2d at 319. Such a result was necessary "[i]n order to uphold the regulatory scheme enacted by the Legislature[.]" *Id.* The same analysis controls in the more "stringent" electrical regulatory scheme. *Id.* at 318.

subjected to the judicial process is at issue, resolution cannot await the termination of the proceeding in the very tribunal that lacks jurisdiction in the first place.

In sum, both doctrines protect NSP from being haled before any decision-makers other than the appropriate utilities commission. *Kastner*, 646 N.W.2d at 239-40. Accordingly, NSP should not be “compelled . . . to take up the burden of litigation in this state that might otherwise be avoided.” *McGowan*, 527 N.W.2d at 833 (quotations omitted).

## **II. FILED RATE DISPUTES ARE NOT FOR JUDICIAL RESOLUTION**

Respondents hurl superficial distinctions in an effort to brush back the power of the filed rate doctrine. But the doctrine is not about how a lawsuit is characterized; instead, its application turns upon the effect of the relief sought. Respondents are not enabled to plead around the rate implications of their complaint, nor can deference to administrative expertise be fudged.

### **A. Utilities commissions have exclusive filed rate oversight.**

Respondents understand the filed rate doctrine to be a question of adjudicative qualification. Resp. br. at 17 (declaring the litigation to present “questions that courts are perfectly competent to address”). In this respect, they are dead on: the doctrine demarcates the competency of courts to consider disputes with filed rate ramifications.

The state’s supreme court explained the rationale as follows: “[R]egulatory agencies have special expertise, investigative capacities, and experience and familiarity with the regulated industry that enable them to consider the whole picture regarding the

reasonableness of a proposed rate, whereas the courts are ill-suited to second-guess the decisions of regulatory agencies.” *Schermer*, 721 N.W.2d at 312 (quotation omitted).<sup>6</sup>

Claims that grow out of filed rates inevitably devolve into judgments about “reasonableness” and market regulation. Such questions simply are not justiciable. *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 250-52 (1951). The U.S. Supreme Court confirmed administrative supremacy over assessments of rate “reasonableness”:

The petitioner, in contending that [courts] are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate. Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission.

*Id.* at 251 (emphasis added).

Respondents’ endorsement of judicial prowess in this area misses the point. Courts must give way to agency expertise in matters implicating rates in order to achieve “the principal rationale of the filed rate doctrine: the preservation of agency authority.” *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1118 (S.D.N.Y. 1992), *aff’d*, 27

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<sup>6</sup> Precedent demonstrates that the filed rate doctrine is not limited to cases in which courts actually “second guess” administrative judgments. Rather, the rule equally governs every case in which courts would necessarily be “guessing” at rates, value, and the like in the first instance. *See, e.g., Schermer*, 721 N.W.2d at 314-19 (filed rates prohibit speculation about rate inflation effected by racial discrimination, which obviously would not have been commission-approved and thus could not be “second guessed”).

F.3d 17 (2d Cir. 1994). The failure to defer would plunge judges into an “intricate ongoing process and interference by a court may set in motion an ever increasing set of consequences and adjustments which courts are powerless to address.” *Schermer*, 721 N.W.2d at 315 (quotation omitted).

*AEP Texas N. Co. v. Texas Indus. Energy Consumers* is instructive. 473 F.3d 581 (5th Cir. 2006). An electric energy tariff filed with the Federal Energy Regulatory Commission (“FERC”) was at issue. *Id.* at 582. The state regulatory agency sought to hold the utility liable for tariff noncompliance, but the federal court turned back the action because FERC alone had jurisdiction to deal with the interstate electricity market. *Id.* at 584-86. Because the “filed rate doctrine, which governs this case, derives from that jurisdictional grant,” the appellate court concluded: “it is within FERC’s jurisdiction, not the states,’ to make a final determination as to whether the tariff has been violated. If a state disputes a utility’s interpretation of a tariff, FERC is the proper forum for resolving the disagreement.” *Id.* at 586.

The reasoning of *AEP* shows the way. The agency with exclusive authority (in this case, the Minnesota, North Dakota, and South Dakota utility commissions) is exclusively empowered to assess and enforce compliance with a filed tariff; the courts (like the state agency in *AEP*) must respect that prerogative.

Respondents invite the Court to decide whether the judiciary is up to the task, but *Montana-Dakota*, *Schermer*, and a host of other precedents already say “no.” Hence, the only question is whether respondents’ claims would inevitably lead a court into the

domain of utilities commissions. *Schermer* and other authorities applying the same doctrine say “yes.”

**B. Agency primacy, not claim verbiage, controls.**

Respondents play word games by labeling their case as not about “refunds” but rather about “the benefit of the bargain,” as if there could be any difference. Resp. br. at 19.<sup>7</sup> The doctrine is not so manipulable. To the contrary, the Eighth Circuit has squarely rejected the attempt to elude the filed rate doctrine by characterizing rate-based causes of action as damages claims.

The *H.J., Inc. v. Nw. Bell Tel.* plaintiffs accused the telephone company of bribing the utilities commissioners. 954 F.2d 485, 486 (8th Cir. 1992). As a result of that malfeasance, consumers were said to have paid more than the services rendered justified. *Id.* The plaintiffs insisted that the filed rate doctrine could not shield the utility from accountability before a jury, but the litigation protection afforded by the doctrine was fully realized. *Id.* at 488-89.

The appellate court reasoned “that the underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the

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<sup>7</sup> Respondents dissemble in stating: “As NSP admits, only ‘a refund of approved rates or the imposition of service obligations not specified in the tariff, and thus not included in the rate-setting calculus, would establish rates outside of the statutorily mandated process.’” Resp. br. at 18 (purporting to quote NSP br. at 29). In fact, NSP disavows that crabbed reading of the filed rate doctrine; the very next sentence of NSP’s brief directly refutes the supposed limiting “admission”: “This would be true even if the remedy were characterized as the value or cost of the services that NSP did not perform despite a tariff obligation to do so.” NSP br. at 29.

filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." *Id.* at 489 (emphasis added). The telephone company obviously delivered no service in exchange for rates influenced by illegal bribes. Yet for filed rate purposes the manner of the utility's culpability and the choice of words employed to describe the claim – *e.g.*, fraud or breach of contract – take a back seat to the substantive effect on aggregate rates that would result from allowing the claim to proceed.

Much like respondents, the *H.J.* class insisted that “the filed rate doctrine does not apply because [the action] does not ask the court to engage in rate-making activities.” *Id.* at 492. Nevertheless, the doctrine foreclosed the lawsuit: “We are convinced that the *H.J.* Class’s RICO damages can only be measured by comparing the difference between the rates the Commission originally approved and the rates the Commission should have approved absent the conduct of which the class complains.” *Id.* at 494 (emphasis added). Thus no matter if the underlying conduct was fraudulent or some other breach of duty, the damages remedy inevitably implicated the filed rate doctrine.

*H.J.* demonstrates why the filed rate bar cannot be obviated by pleading, and why formal rate-making activities are not a prerequisite to the doctrine's invocation. The dispositive test is whether a litigant's rate will, in effect, be changed. Despite respondents' efforts to distance their damages demand from rate refunds, the action necessarily requires a court to compare what customers paid with what the rate “should have been” absent NSP's supposed “non-performance” of the point of connection services. *See Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 415-

17 (1986) (doctrine precluded antitrust action that would have measured damages based upon the difference between the filed rates and the rate that a competitive market would have yielded). Simply put, if the ratepayer is overcharged due to a regulated entity's breach of duty, then the redress of that offense has filed rate implications.

*Rios v. State Farm Fire & Cas. Co.* recently applied *H.J.* to a class action seeking contract-based damages arising out of regulated insurance rates. 469 F. Supp. 2d 727, 733, 736-39 (S.D. Iowa 2007). Exactly like respondents, the *Rios* class tried to avoid filed rate consequences by arguing that “they are merely seeking to enforce the terms of the services State Farm filed with the Commissioner.” *Id.* at 737. Heeding the Eighth Circuit’s admonition, the *Rios* court held that “the underlying conduct . . . does not control whether the filed rate doctrine applies. Rather, the applicability of the filed rate doctrine is controlled by whether the court’s decision will have an impact on agency procedures and rate determinations.” *Id.* at 738 (quotation omitted). In other words, when a claim has the potential to affect aggregate rates, that result – and not the pleading – controls.

As the district court below should have found, *Rios* concluded that “[f]or all practical purposes, the damages sought can only be measured by comparing the difference between the premium rates the Commissioner originally approved with the premium rates the Commissioner should have approved absent [the subject contractual provision].” *Id.* at 739. (citation omitted). The dispute was only for administrative resolution because “the court would have to ‘second guess’ what rate the Commissioner would have charged for each relevant Class Period for the homeowners’ policies less the

[complained-of] provision. This type of rate making and damages concept falls squarely within the filed rate doctrine.” *Id.*<sup>8</sup>

Respondents say the inevitable comparison between the rate paid versus the rate that should have been charged is not necessary because the relief sought is the “fair market value” of services not performed. Resp. br. at 19. But as *H.J.* teaches an action’s effect – not its terminology – controls. A “fair market value” remedy is no stronger against the filed rate doctrine because the court is still reduced to usurping the role of regulatory agency in order to surmise the “fair market value” of an electric energy service. No adjudicative exercise not linked to the rate making process can ever determine the value that ratepayers in Minnesota and the Dakotas have missed by not receiving point of connection services. Remedying such a breach would necessarily be an analysis of the services upon which the rates are based. The courts consistently decline to engage in such an undertaking.

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<sup>8</sup> Quizzically, the *Rios* court surmised in dicta that the filed rate doctrine does not bar the assertion of the damages claim. *Id.* (“The filed rate doctrine does not preclude plaintiffs . . . from suing for damages by having been deprived of benefits which were promised, and were consistent with the filed rate, but were not delivered.”) (quotation omitted) (emphasis added). The court was clear, however, that the bar eliminates the possibility of recovery. *Id.* (“[A]lthough the filed rate doctrine does not bar [the] fraudulent inducement/rescission claim, the damages sought (return of all premiums paid [relating to subject clause]), would necessarily and plainly challenge the rates previously approved by the Commissioner.”) (quotation omitted). The court was apparently reminding the litigants that “the application of the filed rate doctrine ‘may seem harsh in some circumstances’ and leave plaintiffs’ alleged state law violations unredressed.” *Id.* (quoting *AT&T Corp. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1988)). See also *infra* at 14 n.9.

A Ninth Circuit precedent arising out of the California energy crisis provides further support. *Public Util. Dist. No. 1 v. IDACORP Inc.* concerned “contract-related claims against energy wholesalers by a public utility which contends it was forced to pay exorbitant prices for electricity.” 379 F.3d 641, 644 (9th Cir. 2004). The contract for power was allegedly procured pursuant to market rates that were the product of a dysfunctional, manipulated market. *Id.* at 645. In other words, plaintiffs were not getting what they were paying for. The complaint sought “restitution” “equal to the difference between [the amount charged] and the fair value for the electric power.” *Id.*

Dismissal on preemption and filed rate grounds was affirmed. According to the appellate court, the filed rate doctrine was “grounded in an agency’s exclusive rate-setting authority.” *Id.* at 650 (citation omitted). “At its most basic, the filed rate doctrine provides that state law . . . may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the . . . agency in question.” *Id.* (emphasis added) (citation omitted). Thus because “[t]he relief sought by [plaintiff] would require the court to set damages by assuming a hypothetical rate, the ‘fair value,’ [the action] violat[es] the filed rate doctrine.” *Id.* (citation omitted) (emphasis added).<sup>9</sup>

Respondents ask this Court to undo established precedent precluding breach-of-filed-rate damages claims. Yet more than nine months after respondents first faced the filed rate challenge to their lawsuit, the only support mustered to evade the doctrine is

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<sup>9</sup> The court allowed declaratory relief, but was adamant that should plaintiff “prevail and receive a determination that no valid contract exists, [plaintiff] may not turn to the district court for monetary relief.” *Id.* at 653 (emphasis added).

Chief Justice Rehnquist's solitary concurrence in *AT&T*. If the other Justices believed that the file rate doctrine could be dodged by pleading a breach of contract claim that, nonetheless, requires judicial tinkering with rates, Rehnquist's concurrence would have been the majority opinion. As it is, the Chief Justice's ruminations did not sway his colleagues and thus cannot control this litigation.<sup>10</sup> Instead, *Schermer* – and cases like *H.J.* and *Public Util. Dist. No. 1* applying the same jurisprudence – show the way.

**C. The relief sought necessarily intrudes upon commission prerogative.**

Respondents' damages claims cannot be based upon anything other than the rate they paid versus the value they think they received. Being an electric service customer does not entitle ratepayers to anything more than services provided by NSP, not some third-party electrician. Hence the relief sought would necessarily be based on some measure of the rate supposedly associated with the delivery of points of connection maintenance and inspections.

Such a claim cannot withstand the force of *Schermer* and *H.J.* These precedents teach that the "damages [respondents seek] can only be measured by comparing the difference between the rates the Commission originally approved and the rates the

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<sup>10</sup> The same goes for *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1171-72 (9th Cir. 2002) and *Lipton v. MCI WorldCom, Inc.*, 135 F. Supp. 2d 182, 188-89 (D.D.C. 2001), which follow the *AT&T* concurrence – not the majority. Incidentally, the defendant in both cases – MCI WorldCom – was in the throes of one of the largest accounting scandals in history; under those circumstances the defendant was not about to be afforded anything but the narrowest construction of filed rate protection.

Commission should have approved absent” the supposed tariff breach. *H.J.*, 954 F.2d at 494. That is a job the utility regulatory agencies were created to perform.

**1. Respondents demand rate-based damages.**

The damages that respondents seek for supposedly unfulfilled rate services cannot be pulled out of thin air; the calculation must necessarily start with the rate actually charged. *See AT&T*, 524 U.S. at 223 (“Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached.”). Respondents did not contract to have point of connection services, if that work was required at all, by the electrician of their choice. On the contrary, pursuant to the tariff respondents became entitled to receive a bundle of electric services – all to be delivered by NSP.

In approving the tariff, the Minnesota, North Dakota, and South Dakota commissions passed judgment on the “benefit of the bargain” paid in exchange for the NSP services provided. Thus assuming the tariff encompassed points of connection inspections, the three state commissions have already figured in the “benefit of the bargain” that NSP must charge – and respondents must pay – for the inspections that are never mentioned in the tariff. Necessarily then, any quest “to determine the value of the unperformed service” (*Dismissal Order* at 6) necessarily begins with the filed rate.

*Schermer* is on all fours. Like in *H.J.*, the *Schermer* court read beyond the superficial pleadings to conclude that the relief sought for discrimination-inflated rates would impermissibly require the “court to speculate about whether the [commission] would have approved this lower, nonsurcharge rate [*i.e.*, the rate paid minus damages awarded] as the reasonable and lawful rate.” 721 N.W.2d at 315 (citation omitted).

Accordingly, the court would be asked to ascertain and carve out that portion of the rate that reflects racial discrimination.

The benefit the *Schermer* class bargained for was insurance, not paying more because they were minorities. Nonetheless, a court-ordered return of regulated rates “would interfere with the regulatory scheme established by the legislature and with the ratemaking functions of the [agency].” *Id.* at 314.

This case is no different. Whether labeled “damages,” “refunds,” or “benefit of the bargain,” the relief sought would require the “court to speculate about whether the [commission] would have approved this lower . . . rate [*i.e.*, the rate paid minus damages for failing to perform point of connection services] as the reasonable and lawful rate.” *Id.* at 315 (citation omitted). How else could damages be calculated? Thus the effect of the remedy would perforce be a refund of rates paid, a result the filed rate doctrine cannot permit. *In re Complaint by Shark*, No. A05-21, 2005 WL 3527152, at \*3 (Minn. Ct. App. Dec. 27, 2005) (“a refund is not available as a remedy”) (App. 051); *Hilling v. N. States Power Co.*, No. 3-90 CIV 418, 1990 WL 597044, at \*2 (D. Minn. Dec. 12, 1990) (“damages based upon the amount [plaintiffs] have been ‘overcharged’ . . . is precisely what the filed rate doctrine prohibits”) (App. 028).

## **2. *Schermer* cannot be eluded.**

Respondents try to cabin *Schermer* to holding that courts cannot speculate “as to what might be ‘reasonable’ or ‘appropriate’ rates, functions reserved to the regulating agencies.” Resp. br. at 17. But such speculation (in this case, as to a specific rate component) is exactly what respondents ask this Court to condone: “a decision in favor of

[respondents] would require this Court to determine the value of the unperformed service.” *Dismissal Order* at 6.

Regardless of the designation – fair value or rate refund – the court would be called upon to figure the “reasonable” value of NSP’s tariff obligations. *Public Util. Dist. No. 1*, 379 F.3d at 650. The fair value of some other entity’s performance of point of connection inspection and maintenance is irrelevant because all services required by the tariff are performed by NSP, and no one else. In the designated service area no other entity could offer tariff-required services to ratepayers in lieu of NSP, any more than a competitor could sell retail electricity. *See* Minn. Stat. § 216B.40 (“each electric utility shall have the exclusive right to provide electric service at retail . . . an no electric utility shall render or extend electric service at retail within the assigned service area of another electric utility[.]”); S.D.C.L. § 49-34A-42 (same). *See also Montana-Dakota Utilities Co. v. Williams Elec. Co-op., Inc.*, 263 F.2d 431, 435-36 (8th Cir. 1959) (applying North Dakota law). Respondents’ suggestion that the value of supposedly unperformed services could be determined without regard to the rate strikes at the heart of the regulated monopoly principles pursuant to which retail electric energy commerce is conducted. *Id.*

Respondents advance superficial distinctions for the legion of filed rate precedents that doom their case. *See* Resp. br. at 14-16 (ignoring *Wegoland* and *Montana-Dakota* as “fraud” cases; writing off *Shark* based on its procedural posture; discarding *Roedler* because “the real wrongdoer was the U.S. government”). Precedents like the Eighth Circuit’s *H.J.* render such niceties meaningless to the filed rate analysis – the effect on rates is all that matters.

Respondents also ignore that their damages/refunds would fly in the face of the filed rate doctrine's non-discrimination principles. Only four persons are ratepayer plaintiffs to this litigation. If respondents were awarded damages their effective rate would decrease, amounting to a rate reduction for just these litigants contrary to the filed rate doctrine. *Schermer*, 721 N.W.2d at 315 ("An award of . . . damages to some ratepayers would completely alter the allocation among classes of customers that the [commission] had approved."). If the certified class in *Schermer* was denied overcharge damages then this putative class action can fair no better.

Finally, although respondents do not dispute the contention, the Court must be reminded that injunctive relief is even more offensive to the primacy of agency expertise:

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

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

### **III. SPECIALIZED AGENCIES ARE PRIMARILY RESPONSIBLE**

The primary jurisdiction doctrine applies when cases "rais[e] issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created . . . for regulating the subject matter." *City of Willmar*, 452 N.W.2d at 703. Respondents, nevertheless, resist agency jurisdiction because they insist that courts are enabled to interpret tariffs. Resp. br. at 20-29. This

argument fails to comprehend that the primary jurisdiction doctrine places tariff disputes like this in the hands of expert commissioners to ensure that the regulatory interpretation is correct; the agencies are singularly empowered to exercise their oversight and to assess their intent.

**A. The claims implicate primary jurisdiction.**

Respondents downplay the agencies' role in promulgating, interpreting, administering and enforcing tariffs. Resp. br. at 20-28. But the utilities agencies in Minnesota, North Dakota, and South Dakota – through legislative enactments as well as the filed rate doctrine – are exclusively charged with establishing and amending the services a utility must provide and the price that must be charged for those services. *See* Minn. Stat. § 216B.05; N.D.C.C. §§ 49-02-03, 49-02-04; S.D.C.L. § 49-34A-6.

Respondents discount these statutes as mere grants of “general authority over the reasonableness of the tariff rates and classifications.” Resp. br. at 28. The tariffs, however, have the full force and effect of law. Courts are barred from meddling, be that by dictating a service obligation or effecting a rate refund. *See, e.g., N. States Power Co. v. Oakdale*, 588 N.W.2d 534, 537 (Minn. Ct. App. 1999); *Quad County Cmty. Action Agency, Inc. v. Elkin*, 315 N.W. 2d 665, 668 (N.D. 1982); S.D.C.L. § 49-34A-21. Primary jurisdiction, therefore, demands that agencies with requisite tariff interpretation expertise resolve claims like those asserted by respondents.

**1. Precedent requires deference to agency expertise.**

Respondents eschew administrative expertise, pronouncing the district court's self-assessment that "this case does not require 'special competence' that this Court does not already possess" to be right on. Resp. br. at 22. The law, however, is to the contrary.

*Roedler* considered primary jurisdiction in an almost identical context and concluded that the issues were not for judicial resolution. 1999 WL 1627346 at \*16. The *Roedler* plaintiffs charged that ratepayers had paid for but not received off-site nuclear waste storage. Despite acknowledging the utility's failure to deliver, Judge Frank determined that the court lacked authority to infringe upon the agency's domain. *Id.* In cases with tariff-required service ramifications the "purposes behind the doctrine of primary jurisdiction are evident" because "[t]he matter implicates the utilization of a statutory and regulatory scheme." *Roedler*, 1999 WL 1627346 at \*16. Notably, respondents can do no more than dismiss *Roedler's* compelling conclusion as "perfunctory." Resp. br. at 23 n. 10.

On the issue of primary jurisdiction, respondents pretend that *Schermer* does not exist; unfortunately for them that binding precedent plainly exposes the flaw in the district court's can-do rationale for holding onto this case. *See* 721 N.W.2d at 313 ("prescribing or fixing rates for a public utility involves a legislative function which may not be usurped by the courts.") (citation omitted). The *Schermer* dissent endorsed the

district court's logic,<sup>11</sup> but the controlling majority emphasized that an "agency has 'technical expertise' and is able to balance many competing interests and . . . unlike a court, the agency may draw on its 'own internal sources of knowledge and experience' and is not limited to the evidentiary record." *Id.* (discussing *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 312 Minn. 250, 255-56, 251 N.W.2d 350, 354, 358 (1977)).

Agency oversight is also called for because

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

*Id.* at 315. The filed rate implications of respondents' claims compels the courts to step aside in order that agency primary jurisdiction may be exercised.

Against the results in *Schermer* and *Roedler*, respondents tout two hopelessly irrelevant cases: *Mitchell v. Chicago Title Ins. Co.*, No. CT 02-17299, 2004 WL 2137815 (Minn. Dist. Ct. Aug. 13, 2004) and *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297 (Minn. 1980). *Mitchell* – a pre-*Schermer*, district court decision – did not involve issues within the regulatory agency's expertise. 2004 WL 2137815 at \*1-\*3. Rather, the question was whether the utility had notice of a loan

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<sup>11</sup> *Schermer*, 721 N.W.2d at 322 (Page, J., dissenting) (surmising that such filed rate "interpretation" is merely a "judicial function of applying facts to the law.").

renewal that would trigger the application of one tariff provision rather than another. *Id.* at \*2. Neither the meaning of the tariff nor the scope of duties imposed was in dispute.

*Minnesota-Iowa Television Co.* is even less apposite because “the [regulatory agency] and [the] court [were] not being asked to rule on the same question.” 294 N.W.2d at 302. The dispute was not over a filed tariff, so the regulatory ramifications of this case were not implicated.

If respondents object to amounts paid to NSP or the services rendered, those complaints must be pressed before the responsible regulatory agency, not the courts. Only then can there be any confidence that the tariff will be enforced according to agency intent and consistent with comprehensive regulatory policy.<sup>12</sup>

## **2. Tariff claim resolution is not an “inherently judicial” function.**

Respondents accept primary jurisdiction as the means for deciding issues within the special competence of an administrative body, and also concede the doctrine’s role in maintaining the “orderly and sensible coordination of the work of agencies and courts.” Resp. br. at 20-21 (quoting *City of Rochester v. People’s Cooperative Power Ass’n, Inc.*, 483 N.W.2d 477, 480 (Minn. 1992) (citations omitted)). Yet respondents would have

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<sup>12</sup> Contrary to respondents’ assertion (resp. br. at 27-28), courts do defer issues of first impression to the appropriate agency. See *In re Minn. Joint Underwriting Ass’n*, 408 N.W.2d 599, 604-05 (Minn. Ct. App. 1987) (“[c]ourts should show deference to the agency’s expertise and special knowledge in the field of its training, education, and experience . . . [and] should defer to the agency’s skill and expertise even in cases of first impression.”) (emphasis added).

tariff interpretation, administration and enforcement be an “inherently judicial” function. *Id.* at 20-22.

This logic cannot hold. The commissioners are uniquely qualified to discern and explain their own intent. Furthermore, the agencies have the institutional competence necessary to sort out the proper mix of services and associated costs: approved rates must be attributable to some services that is delivered, and rate regulation must be uniform. *Schermer*, 721 N.W.2d at 314-16. Thus the assessment of the services that the tariff obligates the utility to provide – especially when the obligation is, at best, implied – is anything but inherently judicial.

Respondents proffer no authority to the contrary. The sole support for their “inherently judicial” canard is a comment that “[t]ariffs are interpreted no differently than any other contract.” Resp. br. at 22 (quoting *Info Tel Commc’ns, LLC v. Minnesota Public Utilities Comm’n*, 592 N.W.2d 880, 884 (Minn. Ct. App. 1999)). *Info Tel.*, however, did not address when an agency must be given the first opportunity to interpret a tariff. Rather, the court was simply discussing the standard of review applicable to commission tariff interpretations. *Id.* at 884. If anything, *Info Tel*’s reliance upon commission findings regarding several tariff issues demonstrates that such matters are not “inherently judicial.”

### **3. Agency expertise is necessary to resolve tariff ambiguities.**

The tariff articulates no point of connection inspection duty, thus there is no ambiguity regarding that obligation: the “duty” does not exist. Even if the tariff were

ambiguous, respondents are misguided in contending the judiciary, instead of the commissions that approved and oversee the clause, can resolve tariff imprecision.

The perils of attempting to decipher an ambiguous tariff are clear. Ratemaking is a complex process. A court attempting to interpret an “ambiguous” tariff provision could, despite the best of intentions, impermissibly change the regulatory scheme in ways that judges cannot foresee. *Schermer*, 721 N.W.2d at 315 (“[T]he regulations of rates is an intricate ongoing process and interference by a court may set in motion an ever-widening set of consequences and adjustments which courts are powerless to address.”) (citation omitted).. Thus if a tariff ambiguity exists, the regulatory agencies – with their inherent expertise and authority – must resolve the question.

This is not a simple contract dispute between two negotiating parties in which ambiguity should be resolved “against NSP as the drafter.” *See* Resp. br. at 26. The tariff does not define point of connection “maintenance” and never mentions point of connection “inspections.” Thus a court would have to venture beyond express tariff language to determine what inspections, if any, were contemplated in the rate-setting calculus, and what portion of the rates were allocated to this undertaking in each state. Resolving ambiguities against NSP fixes nothing. *See, e.g., Hilling*, 1990 WL 597044, at \*3 (“Issues of proper allocation of costs, the proper price to be paid for power from other sources, and the ultimate reasonableness of utility rates involve local policy choices and technical matters within the peculiar expertise of the [utility agencies]. Such issues are not appropriate for judicial determination.”).

More importantly, the rates were ultimately promulgated by the agencies, not NSP, and because of that genesis have the force and effect of law. Statute ambiguity is not interpreted against a party to which the law applies. There is no reason to approach tariff interpretation any differently.

**B. Respecting primary jurisdiction will not add expense or delay.**

Respondents appeal to inapplicable concerns of added expense and delay. Resp. br. at 21. In fact, deferring to agency expertise would inevitably reduce expenses and expedite resolution: the utility agencies are well suited to answer questions regarding regulatory intent and rate calculations because each has extensive institutional knowledge regarding how the services and fees, which make up the electricity rates, were formulated. The commissions, not the courts, can cut to the quick.

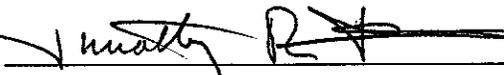
Plus, if primary jurisdiction is ignored the parties would be forced to engage in extensive discovery upon three different utility agencies in order to determine what services NSP was expected to deliver in exchange for the charges the utility is allowed to collect. *See In re Shark*, 2005 WL 3527152, at \*3. Pursuing such a roundabout procedure, rather than going directly to the responsible agencies, is inefficient and a waste of judicial resources. *See Schermer*, 721 N.W.2d at 313 (“the agency has ‘technical expertise’ and is able to balance many competing interests and . . . unlike a court, the agency may draw on its ‘own internal sources of knowledge and experience’ and is not limited to the evidentiary record.”) (quoting *St. Paul Area Chamber of Commerce*, 312 Minn. at 255-56, 262, 251 N.W.2d at 354, 358).

**CONCLUSION**

The appeal is properly before this Court and this dispute is not for judicial resolution. The district court's filed rate and primary jurisdiction mistakes must be corrected.

Dated: March 26, 2007

**BRIGGS AND MORGAN, P.A.**

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel for Northern States Power Company d/b/a Xcel Energy, Inc. certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a)(1) in that it is, printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 6,961 words, excluding the Table of Contents and Table of Authorities.

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