
STATE OF MINNESOTA
IN SUPREME COURT

No. A06-2275

Irene Hoffman, David Hoffman, Jerry Ustanko, and Mulugeta Endayehu,

Appellants,

v.

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

Respondent.

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

Minnesota Court of Appeals Case No. A06-2275

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STATEMENT OF LEGAL ISSUES

1. **Did the Court of Appeals err in holding that the filed rate doctrine bars Appellants' claims?**

Most Apposite Authorities

Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1170 (9th Cir. 2002).

Lipton v. MCI Worldcom, Inc., 135 F. Supp. 2d 182, 188 (D.D.C. 2001).

Am. Tel. & Tel. Co. v. Cent. Office Tel., 524 U.S. 214 (1998) (Rehnquist, J., concurring).

Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 739 (S.D. Iowa 2007).

Richardson v. Standard Guaranty Ins. Co., 371 N.J. Super. 449, 853 A.2d 955, 967 (2004).

Gulf State Utilities Co. v. Alabama Power Co., 824 F.2d 1465, 1468-69 (5th Cir. 1987) (en banc).

2. **Did the Court of Appeals err in dismissing the claims of the Appellants of North Dakota and South Dakota based on comity?**

Most Apposite Authorities

Florance v. Mercantile Nat'l Bank at Dallas, 360 N.W.2d 626, 631 (Minn. 1985).

Hague v. Allstate Ins. Co., 289 N.W.2d 43, 46 (Minn. 1979).

Powell v. Great Northern Railway, 102 Minn. 448, 453, 113 N.W. 1017, 1018 (1907).

3. Does the primary jurisdiction doctrine require the trial court to defer resolution of the services required by the applicable tariffs to the responsible administrative agencies?

Most Apposite Authorities

City of Rochester v. People's Coop. Power Ass'n, 483 N.W.2d 477, 480 (Minn. 1992)

Minnesota-Iowa Television Company v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297 (Minn. 1980)

Mitchell v. Chicago Title Ins. Co, No. CT 02-17299, 2004 WL 2137815, at **2-3 (Minn. Dist. Ct. Aug. 13, 2004)

The Hennepin County District Court certified the filed rate and primary jurisdiction issues for immediate appellate review. The Minnesota Court of Appeals held that the filed rate doctrine bars the claims of the Minnesota Appellants. The Court of Appeals then *sua sponte* dismissed the claims of the North Dakota and South Dakota Appellants based on “comity.” Finding those rulings dispositive, the Court of Appeals did not reach the primary jurisdiction issue and remanded the case for dismissal.

STANDARD OF REVIEW

Certified questions are questions of law that this Court reviews de novo. *B.M.B. v. State Farm Fire & Cas. Co.*, 664 N.W.2d 817, 821 (Minn. 2003) (citing *Conwed Corp. v. Union Carbide Chems. & Plastic Co*, 634 N.W.2d 401, 406 (Minn.2001); *Dohney v. Allstate Ins. Co.*, 632 N.W.2d 598, 600 (Minn.2001)). Construction of a public utility tariff, the underlying issue, is also a legal issue subject to de novo review. *See Dohney*, 632 N.W.2d at 600 (interpreting construction of an insurance contract under de novo

review) (citing *Hibbing Educ. Ass'n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn.1985); *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn.1992)).

STATEMENT OF THE CASE

This putative class action involves a contract dispute regarding Respondent Northern States Power Company's (d/b/a Xcel Energy) ("NSP's") failure to comply with its maintenance obligations imposed by the applicable tariffs. Appellants' Appendix ("App.") at 12-13, ¶¶ 1-4. Appellants Irene Hoffman, David Hoffman, Jerry Ustanko and Mulugeta Endayehu, individually and on behalf of all others similarly situated, seek damages from NSP for its failure to provide services required under the tariffs and specific performance of NSP's inspection and maintenance obligations in the future. App. at 21-22, ¶¶ 32-33.

The Honorable Denise D. Reilly, Judge of the Fourth Judicial District, denied NSP's motion for judgment on the pleadings based on the filed rate and primary jurisdiction doctrines.¹ Thereafter, the district court certified two questions for immediate review pursuant to Minn. R. Civ. App. P. 103.03(i): (1) Does the filed rate doctrine bar Appellants' claims; and (2) Does the primary jurisdiction doctrine require the court to defer resolution of the services required by the applicable tariffs to the responsible administrative agency? App. at 84-86.

¹ The court also rejected NSP's argument that the tariffs unambiguously do not require the inspection and maintenance in issue, holding that the tariffs are "[a]t the very least, . . . open to more than one reasonable interpretation." App. at 66.

A panel of the Minnesota Court of Appeals² answered the first question in the affirmative as to the Minnesota Appellants, *sua sponte* held that the claims of the North Dakota and South Dakota Appellants should be dismissed based on “comity,” reversed the district court’s denial of a motion to dismiss on those grounds and remanded to the district court for entry of judgment. App. at 1-11. Because the Court of Appeals considered those holdings dispositive, it did not reach the primary jurisdiction question certified by the district court. *Id.*

STATEMENT OF FACTS

NSP provides electric service to customers in Minnesota, North Dakota, and South Dakota, including Appellants, pursuant to tariffs duly filed with the appropriate regulatory agencies in each state. App. at 12, ¶ 2 and 17, ¶ 21. The tariffs, drafted by NSP, constitute the contracts between NSP and its customers that define the respective obligations of the parties regarding the provision, inspection, and maintenance of the facilities and equipment required for electric service. App. at 17, ¶¶ 21-22. Because the connections between its service wires and the customers’ wires can degrade over time, creating significant fire hazards, the inspection and maintenance of these connections is an important safety issue. App. at 17-19, ¶¶ 22-26.

Appellants allege that the tariffs require NSP to inspect and maintain the points of connection between NSP’s and its customers’ service conductors. App. at 19-20, ¶ 27. Specifically, the General Rules & Regulations of the tariffs assign this responsibility as

² The panel was composed of Judge Jill Flaskamp Halbrooks, Judge Terri J. Stoneburner and Judge David R. Minge.

follows:

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

...

All wiring and equipment *on customer's side of the point of connection*, except metering equipment, will be furnished, installed and maintained at the customer's expense in a manner approved by the public authorities having jurisdiction over the same.³

App. at 19-20, ¶¶ 27-28 (emphasis added).

Consistent with its obligation under the tariffs, NSP places seals on its customers' meter sockets that prevent its customers from gaining access to the point of connection to perform inspections or maintenance. App. at 18, ¶ 24. Although the tariffs require NSP to maintain these points of connection, NSP does not maintain or even inspect their condition. App. at 20, ¶ 29. Because NSP has failed to satisfy its obligations, Appellants seek specific performance by NSP of its inspection and maintenance obligations under the tariffs in the future and to recover damages for its past breaches. App. at 21-22, ¶¶ 32-33. For those damages, Appellants seek to recover the fair market value of the services not performed. App. at 13, 21, ¶¶ 4, 32.

NSP moved for judgment on the pleadings arguing that Appellants' claims are barred by the filed rate and primary jurisdiction doctrines, and that the tariffs unambiguously disclaim any maintenance obligation. The district court denied NSP's motion in its entirety. App. at 55-66. The court held that the filed rate doctrine does not

³ The exact same language appears in the tariffs of all three states. *Id.*

bar Appellants' claims because Appellants do not challenge the filed rate or ask for services outside of what the tariffs provide, but instead merely seek to enforce the existing terms of the tariffs. App. at 59-63. In addition, the court determined that because no regulatory agencies have exclusive jurisdiction over tariff interpretation, and because this case involves inherently judicial issues that do not require special agency expertise, the doctrine of primary jurisdiction does not bar Appellants' claims.⁴ App. at 63-65.

The district court granted NSP's motion to certify for immediate review the questions regarding the application of the filed rate and primary jurisdiction doctrines.

The Court of Appeals held that the Supreme Court's adoption of the filed rate doctrine in *Schermer v. State Farm Fire & Casualty Company*, 721 N.W.2d 307 (Minn. 2006) (hereinafter "*Schermer*") applied with equal force to this litigation. App. at 8. It then answered the filed rate doctrine question in the affirmative, holding that the filed rate doctrine bars the Minnesota Appellants' claims. App. at 8-11. Finding that answer to be dispositive of the Minnesota Appellants' claims, the Court of Appeals did not reach the primary jurisdiction doctrine question. App. at 2. Citing principles of comity, the Court of Appeals declined to resolve the filed rate issue as it relates to North Dakota and South Dakota. App. at 10-11. It thus reversed the district court's denial of NSP's motion for judgment on the pleadings and remanded the case for entry of judgment in NSP's favor. App. at 11.

⁴ The court also rejected NSP's challenge on the merits, holding that "[a]t the very least, the tariff is open to more than one reasonable interpretation [and] [t]hus . . . cannot be decided as a question of law at this time." App. at 66.

Appellants urge this Court to reverse the Court of Appeals' decisions on the filed rate doctrine and comity and to answer in the negative the question of whether the primary jurisdiction doctrine requires the district court to defer resolution of this matter to the Minnesota Public Utilities Commission ("MPUC") and equivalent North Dakota and South Dakota agencies.

ARGUMENT

I. INTRODUCTION

The Court of Appeals' ruling is a bold and unprecedented extension of the filed rate doctrine adopted in *Schermer*, lacking any basis in the careful logic of that opinion. The Court of Appeals stated that the filed rate doctrine applied because "[a] judgment from the court in this matter—whether or not it merely construes the tariff—will interfere with the rate-making process." App. at 9. The Court of Appeals did not offer any explanation as to why a judgment would interfere with rate-making in the context raised by this breach of contract case, but rather merely made a conclusory statement.

In truth, as overwhelming authorities support, Appellants' claims and the relief they seek will not interfere with the rate-making process. Appellants do not assert any claims or seek any relief that has traditionally been found to be barred by the filed rate doctrine: a challenge of approved rates, a rate refund, relief that would require retroactive rate making, or an attempt to require the utility to perform services not already required by a tariff. Rather, Appellants seek to enforce the tariffs via specific performance and to recover damages for past breaches of the tariffs measured by the fair market value of the services not provided by NSP. The courts have consistently held that the filed rate

doctrine does not bar such claims and relief.

The potential impact of the Court of Appeals' decision is disastrously clear. If the decision is allowed to stand, the filed rate doctrine will bar *all* lawsuits involving tariffs, even those seeking only to enforce the terms of tariffs. Indeed, under the Court of Appeals' decision, as the district court found, NSP "can allege that any action taken against it to enforce a tariff's provisions could possibly affect rates . . . so as to invoke the protections of the filed rate doctrine." App. at 63. If this Court accepts the Court of Appeals' decision, "consumers of electricity would have little or no opportunity to have their day in court." *Id.* Appellants doubt that this was the Court's intention in narrowly applying the filed rate doctrine in *Schermer*.

The Court of Appeals *sua sponte* dismissed the claims of the North Dakota and South Dakota Appellants under the doctrine of "comity" because they allegedly involve questions of first impression under North Dakota and South Dakota law. This Court has held that such concerns should be addressed within the context of a *forum non conveniens* motion at the district court level based on a full record. *Florance v. Mercantile Nat'l Bank at Dallas*, 360 N.W.2d 626, 630-32 (Minn. 1985). NSP did not file a motion for *forum non conveniens* in the district court. Thus, the Court of Appeals erred in ruling *sua sponte* based on an inadequate record and pursuant to a narrow doctrine that this Court has never recognized.

Although the Court of Appeals did not reach the question of whether the primary jurisdiction doctrine required deferral of Appellants' claims to the MPUC and the equivalent North Dakota and South Dakota agencies, the district court correctly held that

the primary jurisdiction doctrine does not bar Appellants' claims, explaining that "this case revolves heavily around the interpretation of a contract. It may lead to an injunction and a determination of contract damages based upon non-performance. The interpretation of contracts and the awarding of contract damages are two tasks that this Court is competent to handle." App. 64-65.

For the reasons set forth herein, the Court of Appeals' decision reversing the district court's decision denying NSP's motion for judgment on the pleadings should be reversed and the question regarding application of the primary jurisdiction doctrine should be answered in the negative.

II. THE FILED RATE DOCTRINE DOES NOT BAR APPELLANTS' CLAIMS.

A. Appellants seek only interpretation and enforcement of the tariffs, including damages for their past breach.

Appellants seek only to have a court determine that the tariffs require NSP to inspect and maintain the points of connection, to order NSP to perform this function, and to award Appellants damages for NSP's past breach of this obligation. App. at 21-22, ¶¶ 32-35. As damages for the past breaches, Appellants seek to recover the value of the inspection and maintenance services not performed as measured by their fair market value. App. at 13, 21, ¶¶ 4, 32. Crucially, as discussed below, Appellants do not seek to require NSP to: (1) change rates, (2) refund any part of the rates, or (3) perform any services it is not already obligated to perform under the tariffs.

B. Overwhelming authority supports that the filed rate doctrine does not apply to actions seeking to interpret and enforce tariffs, including by recovery of damages for past breaches.

“[T]he ‘filed rate doctrine’ . . . forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate . . . regulatory authority.” *Ark. La. Gas Co. v. Hall*, 435 U.S. 571, 577 (1981).⁵ Correspondingly, the doctrine holds that any filed rate—a rate that has been approved by the governing regulatory agency—“is *per se* reasonable and unassailable in judicial proceedings brought by ratepayers.” *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994).⁶ Thus, the filed rate doctrine prevents a court from awarding damages based on a calculation of the difference between the rate actually approved by the regulatory authority and the rate that the plaintiff alleges should have been charged absent the defendant’s wrong doing (*i.e.*, it prevents a retroactive reallocation of rates amongst taxpayers or a retroactive refund of rates already paid). *Schermer*, 721 N.W.2d at 312, 315 & 316 (*citing Ark. La. Gas Co.*, 435 U.S. at 578-79).

However, the doctrine “‘does not serve as a shield’ staving off claims against a carrier based on the tariff itself.” *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1171 (9th Cir. 2002) (citation omitted). “The filed-rate doctrine precludes courts from deciding whether a tariff is reasonable, . . . but it does not preclude courts

⁵ This case was relied upon by this Court in *Schermer* in describing the nature of the filed rate doctrine. 721 N.W.2d at 312.

⁶ This case was also relied upon this Court in *Schermer* in describing the nature of the filed rate doctrine. 721 N.W.2d at 312.

from interpreting the provisions of a tariff and enforcing that tariff.” *Id.* at 1171-72; *see also Am. Tel. & Tel. Co. v. Cent. Office Tel.*, 524 U.S. 214, 229 (1998) (Rehnquist, J., concurring) (“In order for the filed rate doctrine to serve its purpose, . . . it need pre-empt only those suits that seek to alter the terms and conditions provided for in the tariff.”). *Balthazar v. Verizon Hawaii, Inc.*, 123 P.3d 194, 206 (Haw. 2005) (“Plaintiffs are . . . correct in asserting that the filed-rate doctrine does not necessarily pose a bar to claims that do not challenge the reasonableness of rates or practices in a filed tariff.”).

In *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182 (D.D.C. 2001), for example, the court refused to apply the filed rate doctrine where the plaintiff alleged that MCI had charged her more than the amounts set forth in MCI’s “5-10-25” plan. The court held that the filed rate doctrine was not applicable to the case because the plaintiff was “seeking enforcement of . . . the tariff as it stands” rather than “challenging the rates themselves.” *Id.* at 188. The plaintiff was not making a claim for excessive rates or “seek[ing] deviation from [the] filed tariff,” *id.* at n.3, but claimed “violation of the tariff itself.” *Id.* at 188. The court concluded that the filed rate doctrine did not bar plaintiff’s claims, as “she challenges the defendant’s compliance with the tariff itself.” *Id.* at 189.

Not only does the filed rate doctrine not bar a claim by a consumer seeking to recover charges that exceeded the rates set forth in a tariff, a consumer can also seek to recover damages caused by the failure of the defendant to provide services the defendant was required to but did not provide under the tariff or contract. *Rios v. State Farm Fire & Cas. Co.*, 469 F. Supp. 2d 727, 739 (S.D. Iowa 2007) (“The filed rated doctrine does not preclude . . . suing for damages by having been deprived of benefits which were

promised, and were consistent with the filed rate, but were not delivered”) (quoting *Richardson v. Standard Guaranty Ins. Co.*, 371 N.J. Super. 449, 853 A.2d 955, 967 (2004)).

This Court’s decision in *Schermer* is in no way inconsistent with these decisions. In *Schermer*, the plaintiffs claimed that an insurance premium surcharge approved by the Minnesota Department of Commerce (“MDOC”) was illegal, and they sought to recover the surcharge premiums. 721 N.W.2d at 309. This Court held that such a claim constituted a request to retroactively reallocate rates among taxpayers and to secure retroactive refunds of insurance rates already paid, exactly what the filed rate doctrine prohibits. *Id.* at 315-317. In other words, the plaintiffs sought damages calculated by the difference between the premiums actually paid and those that would have been paid had the MDOC not approved the illegal surcharge. *Id.*

The cases NSP relied upon in the courts below are equally distinguishable from this case and the cases relied upon by Appellants because the plaintiffs in those cases either sought to enforce agreements outside the tariff or to require the court “to adjudicate what a reasonable rate would be.” *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1114 (S.D.N.Y. 1992), *affirmed*, 27 F.3d 17 (2d Cir. 1994). In *Wegoland*, for example, the plaintiffs complained that the defendant’s fraudulent behavior led federal regulatory commissions to approve an unreasonably high telephone rate. *Id.* at 1113. The district court explained that under those circumstances, the filed rate doctrine applied because “[t]here is no particular reason to believe that courts would be better than agencies at ferreting out the misrepresentations of the defendants.” *Id.* at 1120. Additionally,

calculating the damages would have required calculation of the rates that would have been charged absent the defendants' fraud. *Id.* at 1119-20.

Similarly, in *Hilling v. Northern States Power Co.*, No. 3-90 CIV 418, 1990 WL 597044 (D. Minn. Dec. 12, 1990), the plaintiffs alleged that NSP's rate was artificially inflated and thus that they had been "overcharged" for services. *Id.* at *1. The court applied the filed rate doctrine, explaining that "[a]ny assessment of damages would . . . require this court to find the MPUC-approved rate unlawful, and to compare that rate with what the MPUC would have considered a 'reasonable' rate absent NSP's allegedly improper conduct. This is precisely what the filed rate doctrine prohibits." *Id.* at *2.

Such reasoning applies equally to cases such as *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951), where the claim likewise rested on the allegation that fraud and collusion led to unreasonably high public utility rates,⁷ and *Taffet v. Southern Co.*, 967 F.2d 1483, 1491 (11th Cir. 1992), where the court would have been called upon to calculate damages "measured by the difference between the filed rate and the rate that would have been charged absent some alleged wrongdoing."

NSP also relied heavily on *Roedler v. U.S. Department of Energy*, No. CIV.98-1843, 1999 WL 1627346 (D. Minn. Dec. 23, 1999), which did not even involve a claim

⁷ Likewise, *In re Complaint by Shark*, No. A05-21, 2005 WL 3527152 (Minn. Ct. App. Dec. 27, 2005) deals with ratepayers' complaints that "NSP's rates were unreasonable." *Id.* at *1. *In re Shark* is also distinguishable because it involved judicial review of a decision by the Minnesota Public Utilities Commission. As such, its procedural posture was completely different from this case.

directly against the utility (NSP) with whom the ratepayers had a contract; rather the real wrongdoer was the U.S. government, which the court held not liable because of several defensive doctrines uniquely applicable to the government. The court referred to NSP as a “nominal defendant.” *Id.* at *1. Thus, the court’s discussion of the filed rate doctrine is dicta. Further, the plaintiff in *Roedler* did not allege a breach of contract or otherwise claim that NSP failed to provide required services, making it far different from this case.⁸

In contrast, Appellants (and the plaintiffs in the cases that Appellants rely upon) do not claim that the tariffs are unreasonable as a result of a fraud perpetrated against regulatory agencies by NSP, or that they were promised something outside the tariffs or that NSP had some obligation beyond that set forth in the tariffs. *Brown*, 277 F.3d at 1172. Rather, Appellants merely seek to enforce and uphold the tariffs, which they agree are entirely reasonable. Significantly, NSP concedes that “[c]ustomer and utility alike must abide by the tariffs, which have the full force and effect of law.” App. at 34; see also *Northern States Power Co. v. F.E.R.C.*, 176 F.3d 1090, 1095 (8th Cir. 1999) (citing *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951)); *In re One-Time Special Underground Assessment by Northern States Power Co. in Sioux Falls*, 628 N.W.2d 332, 334 (S.D. 2001). Appellants seek to force NSP to abide by its tariffs.

⁸ NSP also relies on *Imports, Etc., Ltd. v. ABF Freight System*, 162 F.3d 528 (8th Cir. 1998), which actually supports Appellants’ position. In that case, the court concluded that the modified service agreed to by the parties did not “affect the rate” provided for by the relevant tariff, and therefore that it was not barred by the filed rate doctrine. 162 F.3d at 531. If modified service agreed to by the parties did not affect rates, then surely requiring parties to provide services actually prescribed by the tariff does not affect the rates.

Understanding this, the district court correctly held that the filed rate doctrine does not apply to Appellants' claims because Appellants "are not asking for services outside of what the tariff provides . . . [but rather] are simply asking the court to determine whether [NSP] is performing all its obligations under the tariff as it now stands." App. at 60. Such "[a]n action that merely seeks the interpretation and enforcement of a tariff by a court, and which does not effectively alter the filed rates is not subject to the provisions of the filed rate doctrine." *Id.* The district court's decision was well-reasoned and supported by ample precedent. App. at 59-63.

C. **The damages sought by Appellants are not barred by the filed rate doctrine.**

Appellants do not seek to recover damages corresponding to the portion of the rates they paid that were approved by the regulatory agencies to cover the expense of NSP's inspection and maintenance obligations. Nor do they seek to recover the difference between the rates they were actually charged and what would have been charged had the inspection and maintenance obligations for the points of connection not been included in the tariffs. In short, in no way, shape or form do they seek a rate refund or retroactive rate making.

Rather, Appellants seek to recover the fair market value of the inspection and maintenance services they did not receive. App. at 13, 21, ¶¶ 4, 32. This constitutes classic breach of contract damages, not the restitution recovery that a rate refund would represent. *Rios*, 469 F. Supp. 2d at 739 (distinguishing between the two). The Court of Appeals' apparent failure to understand this distinction underlies its erroneous opinion.

The Court of Appeals acknowledged Appellants' two main contentions: (1) that they do not challenge the rates charged by NSP, but rather assert that NSP failed to provide a service required by the tariffs, and (2) that they seek not a refund of the rate paid, but rather contract damages measured by the fair market value of the services promised but not provided. App. at 8-9. The Court of Appeals did not dispute the first of Appellants' contentions, perhaps in light of the overwhelming authorities discussed above, which hold that the filed rate doctrine does not bar a claim seeking to enforce a tariff.

Rather, the Court of Appeals exclusively disputed Appellants' second contention regarding the damages they seek:

We reject this latter distinction as no more than semantic. In determining the application of the filed-rate doctrine, our focus is on 'the impact the court's decision will have on agency procedures and rate determinations.' [citation omitted]. . . . Whether properly characterized as a request for additional services or enforcement of the tariff "as it stands," [Appellants'] claims will inevitably impact the rate-making process between NSP and the MPUC. Public-utility rate setting is a complex process, involving the agency's review and careful balancing of multiple factors affecting the regulated entity's appropriate rate of return. [citation omitted]. A judgment from the court in this matter—whether or not it merely construes the Tariff—will interfere with the rate-making process. [citation omitted]

App. at 9.

Thus, the Court of Appeals stated in purely conclusory fashion that awarding damages to Appellants would impact the rate-making process. While the Court of Appeals' failure to explain its conclusion makes responding more difficult, Appellants believe that this conclusion is easily disproved.

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.” App. at 184. Crucially, Appellants seek neither. As to the latter, Appellants contend that the tariffs already impose on NSP the obligation to inspect and maintain the points of connection. Thus, they do not seek to impose a new inspection and maintenance obligation.

Furthermore, Appellants do not seek “a refund of approved rates.” Rather, they seek the classic damages recoverable by a buyer when the seller has breached the contract by failing to provide a good or service which the buyer has already paid for—the fair market value of the good or service. M.S.A. § 336.2-713 (setting buyer’s damages for non-delivery by the seller at the difference between the market price and the contract price);⁹ *Kneale v. Jay Ben Inc.*, 527 So.2d 917, 918 (Fla. App. 1988) (where buyer has paid full purchase price and seller fails to deliver, buyer’s damages are market value of the undelivered items). That is different than a refund of the amount paid for the good or service—it can be higher or lower. *Kneale*, 527 So.2d at 918 (awarding market price which was significantly higher than contract price). Simply put, a critical distinction exists between breach of contract damages and a refund, which would constitute restitution. *Rios*, 469 F. Supp. 2d at 739.

Nor do Appellants seek damages determined by calculating what the rate would have been had the tariffs not obligated NSP to maintain the points of connection. Instead, Appellants demand the benefit of their bargain with NSP, requiring the district court to

⁹ This, of course, assumes that the contract price has not yet been paid by the buyer to the seller.

determine the fair market value of the unperformed maintenance services. That value is distinct from what it would have cost NSP to provide those services and from any portion of the rates which could be considered to cover that cost. Again, NSP's argument (and perhaps the Court of Appeals' decision) confuses breach of contract damages, which Appellants seek, with restitution, which they do not.

Several courts have held that actions for breach of a tariff or contract charging approved rates that do not seek refunds or damages based upon a comparison of the charged rate and a theoretical rate, but rather seek classic breach of contract or other damages, are not barred by the filed rate doctrine. For example, in *Gulf State Utilities Co. v. Alabama Power Co.*, the plaintiff had contracted to buy electric power from the defendant at approved rates, including purchasing a minimum amount according to a definition of excess capacity. 824 F.2d 1465, 1468-89 (5th Cir. 1987) (en banc). The Fifth Circuit held that the plaintiff's claim that the defendant caused it to purchase more electricity than it was required to purchase was not preempted by the filed rate doctrine because it sought damages that were not based upon calculating a rate different from the filed rate. *Id.* at 1472.

In *Rios*, the plaintiffs sought, on behalf of one class, to rescind an insurance policy endorsement (because the insurer failed to disclose it would never honor the endorsement) and to recover the entire premium paid for it. 469 F. Supp. 2d at 732. On behalf of a second class, the plaintiffs sought to recover damages for all class members who submitted claims pursuant to the endorsement that the insurance company did not honor. *Id.* at 732-33.

The court held that while the first class' fraudulent inducement/rescission claim itself was not preempted by the filed rate doctrine, the damages sought (the return of all premiums paid for the endorsement) were preempted because they would necessarily interfere with the rates approved by the insurance commission because the damages could only be measured by comparing approved premium rates to rates the commission would have approved absent the endorsement. *Id.* at 739. However, the court also held that both the claims of the second class for breach of the endorsement and the damages they sought (for having been deprived of promised benefits that were consistent with the filed rate but not delivered) were not preempted by the filed rate doctrine. *Id.*

Finally, in *Richardson v. Standard Guaranty Ins. Co.*, plaintiffs claimed that the defendant insurers breached the credit insurance policies by failing to make timely payments, miscalculating the premiums, and ignoring cancellation notices. 853 A.2d at 967. The court held that the claim for damages caused by the failure to provide contractually required benefits was not preempted by the filed rate doctrine:

While the doctrine precludes a claim for damages which would indirectly cause the application of rates different from the filed rates, . . . the filed rate doctrine does not preclude a consumer from suing for damages by having been deprived of benefits which were promised, and were consistent with the filed rate, but were not delivered.

Id.

In each of these cases, the courts examined whether the plaintiffs either directly requested a refund of approved rates or sought damages that were dependent upon the calculation of the difference between the approved rate and a rate that would have been charged absent the wrongdoing of the defendant. If the damages did not fall within either

category, they were not preempted by the filed rate doctrine. In this case, Appellants do not seek either type of damages. Rather they seek recovery of the fair market value of the inspection and maintenance service not provided by NSP.

NSP argued in the courts below that an award of damages in this case implicated rate making because it could result in it raising its future rates. App. at 42. This is entirely speculative, and no case has ever held that the potential for such a speculative and attenuated effect runs afoul of the filed rate doctrine. Accepting such an argument would effectively immunize utilities from all lawsuits, because any suit seeking any relief could theoretically result in increased costs that could affect future rates.

For instance, if NSP were sued for race discrimination by a class of African American employees seeking back pay, promotions, and pay increases, this argument would support dismissal of that case under the filed rate doctrine because of the potential to increase costs and affect future rates. The law cannot and does not support such an absurd result.

Further, this argument ignores that NSP has in the past and will in the future receive adequate reimbursement for the cost of inspecting and maintaining the points of connection, such that the results of this suit could provide no basis for NSP to raise its rates in the future. Appellants contend that this obligation is provided for on the faces of the tariffs. App. at 19-20, ¶¶ 27-29. Accordingly, the rates currently charged and those charged in the past, as approved by the three states' regulatory agencies, already compensate for these inspection obligations, as the rates are and were set in amounts sufficient to cover all of NSP's operating costs (including inspection and maintenance

obligations shown on the faces of the tariffs) and a reasonable profit. *Northwestern Bell Tel. Co. v. State*, 299 Minn. 1, 5-6, 216 N.W.2d 841, 846 (1974). Thus, because the past and current rates already compensate NSP for the inspection and maintenance obligation, it would have no basis to seek a rate increase in the future if it were forced to pay damages for its past breaches or to fulfill its obligation in the future.

Finally, the specific performance/injunctive relief sought by Appellants would not subvert the filed rate doctrine's goal of promoting nondiscriminatory prices as the relief would apply to all of NSP's affected customers. Moreover, injunctive relief does not undermine the filed rate doctrine's goal of nonjusticiability, because injunctive relief "would neither enmesh the court in the rate-making process nor undermine . . . regulatory authority." *Marcus v. AT&T Corp.*, 138 F.3d 46, 62 (2d Cir. 1998). Simply put, forcing a utility to abide by the tariff approved by a regulatory agency in no way undermines the agency's authority. To the contrary, it upholds the agency's authority by enforcing the tariffs the agencies approved.

D. Separation of powers does not require application of the filed rate doctrine to Appellants' claims.

The Court of Appeals also relied on this Court's discussion of the separation of powers between the legislature and the judiciary in *Schermer* as a reason to apply the filed rate doctrine to Appellants' claims. App. at 10. Such reliance is misplaced. Because the filed rate doctrine does not apply, as discussed above, there are no powers to separate. More specifically, separation of powers is protected by the filed rate doctrine because rate-making is a legislative function. Since Appellants' claims, and the relief sought by

Appellants, would not impinge upon or interfere with rate making, the courts will not impinge upon legislative prerogative by entertaining this suit.

E. The Court of Appeals' ruling would remove all suits against utilities and insurance companies from the court system with disastrous results for consumers.

Under the Court of Appeals' ruling, the filed rate doctrine would bar all suits based upon tariffs and contracts involving regulatory agency-approved rates because they conceivably could have a potential to impinge upon rate-making. In the utility context, this means every suit against a utility for overcharges or failure to provide services would be barred, leaving the MPUC as the only potential source of relief. Certainly, customers across the state would be ill served by having to proceed before the MPUC located in St. Paul, and it is certainly questionable whether the agency would be prepared to handle the onslaught.

Even more disastrous would be the impact of the Court of Appeals' ruling on the insurance industry. The MDOC approves not only the rates charged by insurance companies but the insurance policy forms themselves. *Nathe Brothers, Inc. v. American Nat'l Fire Ins. Co.*, 615 N.W.2d 341, 345-49 (Minn. 2000). Despite this, the courts have traditionally interpreted and enforced insurance policies. *See, e.g., id.* at 344. Under the Court of Appeals' ruling, however, every suit by a policyholder brought against an insurer for breach of an insurance policy would be preempted by the filed rate doctrine. Thus, hundreds or possibly thousands of suits filed by policyholders across the state every year would have to be brought, if at all, before the MDOC. Nobody—not policyholders, insurers or the MDOC—could conceivably fare well under such a regime.

In summary, Appellants do not seek to challenge the tariffs, but rather to enforce them. Their enforcement, including recovery of damages for their past breach, does not run afoul of the filed rate doctrine. If this Court were to uphold the Court of Appeals' ruling to the contrary, it would force hundreds or thousands of suits filed every year in courts against regulated entities to be sent to the States' regulatory agencies with disastrous consequences for all. For these reasons, this Court should reverse the Court of Appeals' decision and remand this case back to the trial court for further proceedings.

III. THE COURT OF APPEALS ERRED IN SUA SPONTE DISMISSING THE CLAIMS OF THE NORTH DAKOTA AND SOUTH DAKOTA APPELLANTS BASED ON A "COMITY" DOCTRINE NEVER ADOPTED BY THIS COURT.

Appellants could not find any decision of this Court upholding or requiring dismissal of claims over which a Minnesota court had jurisdiction based on "comity" to another state, much less a decision doing so merely because the case would involve an issue of first impression under another state's law. Indeed, this Court has consistently held that the fact that a case must be decided under another state's law is not sufficient grounds for dismissal. *Florance v. Mercantile Nat'l Bank at Dallas*, 360 N.W.2d 626, 631 (Minn. 1985); *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 46 (Minn. 1979); *Powell v. Great Northern Railway Co.*, 102 Minn. 448, 453, 113 N.W. 1017, 1018 (1907). Rather, this Court has considered the necessity of deciding another state's law as one of many factors that must be weighed by a trial court in exercising its discretion in ruling upon a motion to dismiss for *forum non conveniens*. *Florance*, 360 N.W.2d at 630-32; *Hague*, 289 N.W.2d at 45-46.

In *Florance*, for example, this Court did express concern about a Minnesota court potentially having to decide novel questions of Texas trust law. 360 N.W.2d at 631. This Court noted, however, that a number of other factors need to be decided on a complete record in order to determine whether or not certain claims should be dismissed based upon *forum non conveniens*. *Id.* at 630-31. Accordingly, this Court held that “the fairest solution [was] to remand [the] issue to the district court” because “[a]pplying the doctrine of *forum non conveniens* is, ordinarily, a discretionary ruling to be made by the trial court” and “the trial court [had] never expressly ruled on the issue.” *Id.* at 632. This Court noted that the trial court would be in the best position to weigh the difficulty of applying Texas law against the other *forum non conveniens* factors that needed to be considered. *Id.*

In this case, NSP never challenged the jurisdiction of the Minnesota courts over it or over any of the claims of any of the Appellants. Further, it did not move to dismiss the claims of the North Dakota and South Dakota Appellants based on *forum non conveniens*. Rather, the Court of Appeals *sua sponte* dismissed those claims based on “comity” without the trial court ever having made a determination as to the difficulty or novelty of applying the filed rate doctrine under the laws of North Dakota and South Dakota, and without any consideration of other factors that potentially would support Minnesota courts adjudicating that issue.¹⁰ That action certainly does not comport with this Court’s

¹⁰ Significantly, many reasons support the Minnesota courts deciding the claims of the North Dakota and South Dakota Appellants. NSP provides electric service in all three states under identical tariffs. App. at 12, 17, ¶¶ 1, 2, 19, 20. More than two-thirds of the total customers in those three states reside in Minnesota. App. at 13, ¶ 6. Resolving the

precedents.

This Court should, accordingly, reverse the ruling of the Court of Appeals and remand the claims of the North Dakota and South Dakota Appellants to the trial court. At that point, if NSP chooses to file a motion to dismiss for *forum non conveniens*, and if it has not waived its right to do so, the trial court can exercise its discretion in light of all the factors this Court has held relevant to *forum non conveniens* and rule on the issue. The Court of Appeals' *sua sponte* application of a separate "comity" doctrine never adopted by this Court which is not in accordance with this Court's precedents, and which was not exercised based on an adequate record, must be set aside.

IV. THE PRIMARY JURISDICTION DOCTRINE DOES NOT REQUIRE THE TRIAL COURT TO DEFER RESOLUTION OF THE SERVICES REQUIRED BY THE APPLICABLE TARIFFS TO THE RESPONSIBLE ADMINISTRATIVE AGENCIES.

The Court of Appeals did not reach the question of whether the primary jurisdiction doctrine required the district court to refer Appellants' claims to the MPUC and the corresponding North Dakota and South Dakota agencies. Because this Court's review of certified questions is *de novo*, Appellants urge this Court to answer the question in the negative to help develop and clarify the law. Specifically, Appellants urge the Court to affirm the district court's ruling that the doctrine of primary jurisdiction does not bar their claims because: (1) the claims are of the type routinely handled by courts, which do not implicate the unique expertise or special competence of utility regulatory

claims of all customers in all three states in a single class action is the superior method for resolving their claims. App. at 16, ¶ 17.

agencies, and (2) no regulatory agency has exclusive jurisdiction over questions of tariff interpretation. App. at 64-65.

A. Appellants' claims raise inherently judicial questions that do not require special agency expertise.

1. This case involves inherently judicial issues.

The judicially created doctrine of primary jurisdiction is “concerned with the orderly and sensible coordination of the work of agencies and courts.” *City of Rochester v. People’s Cooperative Power Ass’n, Inc.*, 483 N.W.2d 477, 480 (Minn. 1992) (quoting *State, by Pollution Control Agency v. U.S. Steel Corp.*, 240 N.W.2d 316, 319 (Minn. 1976)). “Its application promotes ‘proper relationships between the courts and administrative agencies charged with particular regulatory duties’ and is used ‘whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.’” *City of Rochester*, 483 N.W.2d at 480 (quoting *U.S. v. Western Pacific R.R. Co.*, 352 U.S. 59, 63–64 (1956)).¹¹

¹¹ Application of the primary jurisdiction doctrine in South Dakota and North Dakota is consistent with Minnesota’s jurisprudence. See, e.g., *Mordhorst v. Egart*, 223 N.W.2d 501, 504 (S.D. 1974) (“The doctrine of primary jurisdiction can arise only when both the court and an administrative agency have authority to pass on a question. The proper application of this doctrine should result in *orderly and sensible coordination of the work of agencies and the courts.*”) (emphasis added); accord *City of Rochester*, 483 N.W.2d at 480. See also *Dan Nelson, Automotive, Inc. v. Viken*, 706 N.W.2d 239, 242 (S.D. 2005). While the North Dakota Supreme Court has not defined the primary jurisdiction doctrine, its discussion of it is consistent with Minnesota’s application of the doctrine, which is aimed at the “orderly and sensible coordination” between agencies and courts. See, e.g., *Lende v. North Dakota Workers’ Compensation Bureau*, 568 N.W.2d 755, 760 (N.D. 1977) (referring to the primary jurisdiction doctrine as one of a “mixed bundle of considerations” that can be considered in determining whether the doctrine of

“[T]he doctrine should be invoked sparingly as it results in added expense and delay.” *AAA Striping Services Co. v. Minnesota Dept. of Transp.*, 681 N.W.2d 706, 714 (Minn. Ct. App. 2004) (citing *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988)). In particular, “[t]he doctrine is inapplicable if the issues raised are inherently judicial, unless the legislature has *explicitly* granted *exclusive* jurisdiction to the administrative body.” App. at 64 (quoting *City of Rochester*, 483 N.W.2d at 480) (emphasis added).

This case involves inherently judicial issues. Appellants allege that the plain and unambiguous language of NSP’s tariffs requires it to inspect and maintain the points of connection at the residences of Appellants and the Class. App. at 19-20, ¶¶ 27-29. However, NSP neither inspects nor maintains these points of connection, nor does it have a program in place to do so, which constitutes a material breach of contract. *Id.*

As the district court correctly determined, “[t]his is a case about the breach of a tariff’s provision as it currently stands.” App. at 64. Claims involving interpretation and breach of a tariff present inherently judicial issues because “[t]ariffs are interpreted no differently than any other contract.” *Info Tel Communications, LLC v. Minnesota Public*

“exhaustion of remedies” may be applied in a case, “including, but not limited to, expertise of administrative bodies, statutory interpretation, pure questions of law, constitutional issues, discretionary authority of the courts, primary, concurrent, or exclusive jurisdiction, inadequacies of administrative bodies, etc.”) (quoting *Shark Brothers, Inc. v. Cass County*, 256 N.W.2d 701, 705 (N.D. 1977)). Therefore, as the district court correctly determined, the primary jurisdiction doctrine does not apply in any of the states when the issues involved in a case are of the type routinely handled by courts or when resolution of the issues does not require the unique expertise of an administrative agency

Utilities Comm'n, 592 N.W.2d 880, 884 (Minn. Ct. App. 1999). Thus, tariff interpretation, like contract interpretation, is a question of law requiring the application of well-established rules of construction. *Id.* Therefore, the primary jurisdiction doctrine does not apply.

2. This case does not require special agency expertise.

The district court correctly held that the primary jurisdiction doctrine does not apply because “this case does not require ‘special competence’ that this Court does not already possess.” App. at 64. The district court explained that “this case revolves heavily around the interpretation of a contract. It may lead to an injunction and a determination of contract damages based upon non-performance. The interpretation of contracts and the awarding of contract damages are two tasks that this Court is competent to handle.” App. at 64-65 (citations omitted).

Indeed, this Court has similarly ruled that breach of contract claims involve the inherently judicial task of interpreting contract language, and thus do not require the specialized expertise of regulatory agencies.¹² For example, in *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass’n*, 294 N.W.2d 297, 302-03 (Minn.

¹² NSP suggests that *Roedler v. U.S. Dept. of Energy*, No. CIV. 98-1843, 1999 WL 1627346 (D. Minn. Dec 23, 1999), supports an argument that the primary jurisdiction doctrine bars Appellants’ claims because they purportedly “implicate[] the regulatory scheme” of an agency. App. at 187-89. However, the *Roedler* court discussed the primary jurisdiction doctrine only as an alternative basis for dismissal of the claims in that case. Moreover, the *Roedler* court’s opinion includes only a perfunctory analysis that fails to consider the relationship of the plaintiff’s claims to the relevant regulatory scheme. *Roedler*, 1999 WL 162346 at *16. Accordingly, *Roedler* provides no meaningful guidance, especially as compared to this Court’s decisions.

1980), this Court affirmed a district court's refusal to apply the primary jurisdiction doctrine to a breach of contract claim despite a pending challenge to the validity of the contract before the Federal Communications Commission. In doing so, the Court noted that the district court was "not asked to rule on the validity of the contract provision under the FCC's rules and policies, but rather on the validity of the provision under state law." *Id.*

Similarly, in this case, Appellants' breach of contract claim requires the district court to interpret the language of NSP's tariffs. Moreover, unlike *Minnesota-Iowa Television*, there is no parallel proceeding to this case currently pending before any regulatory agency. The district court's reasoning for refusing to apply the primary jurisdiction doctrine is thus even stronger here.

More recently, in *Mitchell v. Chicago Title Ins. Co.*, No. CT 02-17299, 2004 WL 2137815 at **2-3 (Minn. Dist. Ct. Aug. 13, 2004), the court declined to apply the primary jurisdiction doctrine to bar a breach of contract claim where the question before the court was whether the defendant insurance company was abiding by a published rate.¹³ The court determined that this question was "well within this court's judicial competence and conventional experience" and did not require it to rule on a challenge to the rate's *reasonableness*, which might have required agency expertise. *Id.*

This case is no different. Here, Appellants' breach of contract claim requires the district court to determine if the tariffs obligate NSP to inspect and maintain residential

¹³ A published rate, much like a tariff, establishes rates and terms that apply to all customers.

service conductors at the point of connection. The analysis of contract language is a quintessentially judicial task clearly within the district court's judicial competence and conventional expertise. Furthermore, this case does not require the court to engage in ratemaking or otherwise impinge on any regulatory agency function. *See also City of Rochester*, 483 N.W.2d at 480-81; *Minnesota-Iowa Television Co*, 294 N.W.2d 297, 302; *Info Tel*, 592 N.W.2d at 884 ("Tariffs are interpreted no differently than any other contract.")¹⁴

3. No agency expertise is required to resolve any ambiguities in the tariffs.

NSP argues that the district court must go beyond the language of the tariffs and delve into agency intent in order to resolve the potentially ambiguous language and that the relevant agencies, not the court, are superior in determining their own intent. App. at 188-190. This argument has several flaws.

First, it assumes that the district court will find the tariffs to be ambiguous. However, the district court has not made a final determination of tariff ambiguity. In ruling on NSP's motion for judgment on the pleadings, the district court considered only the reasonableness of Appellants' interpretation and then concluded that "[a]t the very

¹⁴ NSP's reliance on *Info Tel* for the proposition that questions of tariff interpretation should be referred for agency consideration under the primary jurisdiction doctrine is misplaced. *See* App. at 189-90. *Info Tel* did not involve the application of the primary jurisdiction doctrine, but rather the review of an agency decision in a dispute initially brought before the MPUC. 592 N.W.2d at 883. While this Court remanded the matter to the MPUC, it did not do so, as NSP incorrectly suggests, out of "obedience" to the agency pursuant to the primary jurisdiction doctrine. It did so because the MPUC's order did not fully determine all of the issues relevant to the tariff interpretation question in that case. *Id.* at 885. Accordingly, *Info Tel* lends no support to NSP's argument.

least, the tariff is open to more than one reasonable interpretation. Thus, the interpretation of the tariff cannot be decided as a question of law at this time.” App. at 66 (emphasis added). Accordingly, the district court did not consider whether NSP’s interpretation of the tariffs is reasonable.

Appellants are confident they will establish that NSP’s interpretation is unreasonable, such that the tariffs unambiguously favor Appellants’ interpretation.¹⁵ In order to do so, the district court will not need to venture beyond the faces of the tariffs. And, as set forth above, tariff interpretation presents inherently judicial issues that the district court is perfectly competent to address.

Even assuming that the district court found the tariffs to be ambiguous, resolving that ambiguity would not require specialized agency expertise. The well-established rules of tariff construction would simply resolve any ambiguity by construing the tariff against NSP as the drafter.¹⁶ *Info Tel*, 592 N.W.2d at 884. Such a common judicial task is well

¹⁵ Appellants allege that the tariffs obligate NSP to inspect and maintain the points of connection, and that such services must be performed in order to prevent fires and the resulting risk of injury and death. App. at 18, ¶ 24. NSP installs locks on the meter boxes containing the points of connections, preventing customers from gaining the access necessary for inspection and maintenance. *Id.* Thus, the only reasonable interpretation of the tariffs is that NSP is obligated to perform the inspection and maintenance services. Under NSP’s interpretation of the tariffs, the inspection and maintenance could *never* take place because NSP is not required to perform such services and NSP prevents its customers from doing so. Such an interpretation that prevents necessary inspection and maintenance is manifestly unreasonable.

¹⁶ The only exception to the rule requiring construction of an ambiguous tariff against its author arises “where the construction would ignore a permissible and reasonable construction which conforms to the intentions of the framers of the tariff.” *Info Tel*, 592 N.W.2d at 884. In order to avail itself of this exception, NSP would be required to adduce evidence of its intentions in framing the tariff and to demonstrate a reasonable

within the district court's competence and plainly requires no special agency expertise.

Finally, even if the district court were to find the tariffs ambiguous and conclude that it must consider extrinsic evidence, it would not be required to wade into agency intent. Instead, the district court would inquire into NSP's intent at the time that it filed the tariffs. *Info Tel*, 592 N.W.2d at 884. Of course, no specialized agency expertise would ever be necessary to evaluate objective evidence of NSP's intentions in framing the tariffs. Courts do this every day when faced with ambiguous contracts. Likewise, no agency expertise would be needed to determine whether NSP's interpretation of the tariffs is permissible and reasonable. As set forth above, the district court is competent to perform these tasks.

B. Issues of first impression do not justify the application of the primary jurisdiction doctrine.

Whether a case presents an issue of first impression has no impact on the application of the primary jurisdiction doctrine. *See, e.g., Minnesota-Iowa Television Co*, 294 N.W.2d at 302-06 (rejecting the primary jurisdiction doctrine and noting that the court's interpretation of a statute is a question of first impression); *Mitchell*, 2004 WL 2137815 at **2-3. NSP nonetheless argues that this case presents an "issue of first impression"¹⁷ and that issues of first impression require application of the primary jurisdiction doctrine. App. at 190-91. NSP is wrong. *E.g., Minnesota-Iowa Television Co*, 294 N.W.2d at 302-06.

construction conforming to its intentions. NSP would not be able to avail itself of this exception here, because as set forth above, its interpretation of the tariff is unreasonable.

¹⁷ Appellants do not concede that their claims present any issues of first impression.

The cases NSP relies on do not support the proposition that an issue of first impression is a factor bearing on the application of the primary jurisdiction doctrine. *See* App. at 190-91 (citing *In re Minn. Joint Underwriting Ass'n*, 408 N.W.2d 599, 604-05 (Minn. Ct. App. 1987) (appeal from an agency decision that did not involve application of the primary jurisdiction doctrine)); *City of Willmar Mun. Utils. Comm'n v. Kandiyohi Cop. Elec. Power Ass'n*, 452 N.W.2d 699, 703 (Minn. Ct. App. 1990) (quoting *Minnesota-Iowa Television Co* to define the primary jurisdiction doctrine, but not relating to issues of first impression)).

In sum, the district court correctly held that this case involves inherently judicial issues requiring no special agency expertise. The supposed presence of issues of first impression does not change the ineluctable conclusion that the primary jurisdiction doctrine does not apply.

C. **Regulatory agencies do not have exclusive jurisdiction over Appellants' claims.**

The district court correctly determined that, the regulatory agencies in Minnesota, North Dakota and South Dakota¹⁸ “may be empowered with the exclusive power to determine the reasonableness of rates. They do not, however, have exclusive jurisdiction

¹⁸ NSP's assertion that a Minnesota court cannot interpret NSP's North Dakota and South Dakota tariffs likewise fails, as it erroneously assumes application of the primary jurisdiction doctrine. App. at 188 n.6. If this Court affirms the district court's determination that the primary jurisdiction doctrine does not apply, the district court will proceed with the interpretation of NSP's tariffs in connection with Appellants' claims, and it will, therefore, necessarily not handle the appeal of an agency decision of any state. Therefore, NSP's reliance on the North Dakota and South Dakota statutes delegating review of agency decisions to courts in those states is entirely inappropriate.

over cases involving the non-performance of a tariff.” App. at 64.

NSP incorrectly claims that “deference to the appropriate regulatory agency was compelled.” App. at 187. In doing so, NSP fails to cite to a single statutory provision from any of the three states granting the agencies *exclusive* authority over tariff interpretation or claims for breach of tariff. *Id.* Rather, the statutes cited by NSP merely grant the agencies *general* authority over the reasonableness of tariff rates and classifications. *See, e.g.*, App. at 186-87 (NSP Appellate Brief, citing Minn. Stat. Ann. § 216A.05) (listing the functions and powers of the Minnesota Public Utilities Commission); N.D.C.C. §§ 49-02-03–04 (setting forth the power of the North Dakota Public Service Commission to establish rates and regulate services); S.D.C.L. § 49-34A-6 (directing the South Dakota Public Service Commission to establish and regulate reasonable rates).

Moreover, in *City of Rochester*, this Court reversed a district court’s decision invoking the primary jurisdiction doctrine to send to the MPUC proceedings regarding a city’s acquisition of a utility’s facilities and service rights rather than continuing eminent domain proceedings before the district court. 483 N.W.2d at 478-79. This Court recognized that the city would eventually acquire the property under either proceeding, noting that “the question is simply whether the matter of compensation and its method of determination is one uniquely suited to agency disposition.” *Id.* at 480.

This Court concluded that while parallel yet alternative proceedings were available before the judiciary and the agency, the primary jurisdiction doctrine could not deprive the city of its choice to proceed before the court rather than before the agency. *Id.* at 481.

According to the Court, “[t]hat conclusion is mandated where the sole issue presented is one of “just compensation”—an issue guided in either forum by identical considerations and not implicating the unique administrative experience of the agency.” *Id.*

Here, the district court relied on *City of Rochester* to properly hold that “[e]ven if the regulatory agencies have the authority to hear Plaintiffs’ claim (thus, creating two alternative routes for Plaintiffs’ claim), the invocation of the primary jurisdiction doctrine would still not be required.” App. at 64.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court: (1) reverse the Court of Appeals’ decision on the filed rate doctrine, (2) reverse the Court of Appeals’ decision on “comity,” and (3) answer in the negative the question of whether the primary jurisdiction doctrine requires deferral of Appellants’ claims.

Dated: May 15, 2008

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants Irene Hoffman, David Hoffman, Jerry Ustanko and Mulgeta Endayehu certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a)(1) in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 9,952 words.

Dated: May 15, 2008

A handwritten signature in black ink, appearing to read "Scott W. Carlson". The signature is written in a cursive style with a horizontal line underneath the name.

Scott W. Carlson

