
STATE OF MINNESOTA
IN THE 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

APPELLANTS' REPLY BRIEF

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ARGUMENT

Appellants respectfully submit this reply brief pursuant to Minn. R. Civ. App. P. 128.02(3), which confines reply briefs to “new matter” raised by Respondent. The parties and the amici have extensively briefed the proper characterization of plaintiffs’ claims and the application of *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307 (Minn. 2006); this brief will address certain new contentions raised by Respondent.

I. RESPONDENT’S CONTENTION ABOUT CONSTRUCTION OF THE TARIFF

At pp. 27-29 of its brief, Respondent Northern States Power sets out its argument as to why “the tariff appellants want to ‘enforce’ says nothing about point-of-connection inspections.” Resp. Brief at 27. The argument should be rejected for two reasons.

First, it runs counter to the basic thrust of Respondent’s entire position: that no court should, or can, interpret tariff provisions at all. Respondent cannot ask the Court to endorse its view of the provisions as a basis for finding the filed-rate doctrine applicable, yet simultaneously maintain that the doctrine bars all review of the tariff terms. In any event, Appellants’ view of the meaning of the provisions must be accepted as the correct one at this stage of the proceedings.

Second, even if some threshold examination of the tariff is required, the trial court conducted such an examination in this case and found Appellants’ interpretation a plausible one. Appellants would concede that plaintiffs ought not to be able to avoid the filed rate doctrine merely by pleading that certain services are required, when plainly they

are not required. Trial courts can review tariffs to determine if plaintiffs' claims are plausible.

Here, the trial court actually conducted a much more thorough review, and found Appellants' position to be reasonable at a minimum. Since the validity of this interpretation was not certified for appeal, it controls here.

II. DAMAGES FOR BREACH OF CONTRACT

Appellants contended at page 17 of their initial brief that 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." This is not the same as a refund. Respondent does not dispute that this is a correct statement of the traditional measure of contract damages. Instead, Respondent argues that since only Respondent itself is authorized to maintain the connections, there is no "market" for this service, and thus no "market value" for it.

This convenient argument should be rejected. To accept it is effectively to allow defendant to immunize itself from damages. And while the Legislature has allowed Respondent to function as a regulated monopoly, that cannot mean that any failure to provide any service, no matter how plainly required by the tariff, is irremediable by a ratepayer in court. The *value* of the service, of course, may be established easily through expert or non-expert testimony.

None of the cases Respondent cites on this point is apposite. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), and *Public Utility District No. 1 v. IDACORP, Inc.*, 379 F.3d 641 (9th Cir. 2004), both held simply that the filed-rate doctrine bars claims over rates that were approved, but that were allegedly arrived at by anticompetitive or manipulative behavior by defendants. *See Square D*, 476 U.S. at 417 (rates in question were “duly submitted, lawful rates under the Interstate Commerce Act” pursuant to earlier Supreme Court holding); *IDACORP*, 373 F.2d at 651 (“market-based” rate challenged by plaintiff as having been set by manipulative behavior is akin to a “filed” rate under Federal Energy Regulatory Commission regime, and doctrine precluded a court’s substituting a different, “reasonable” rate). The cases in Respondent’s footnote 13 are no more relevant: the citation of the 1903 case from this Court, *Everett v. O’Leary*, 90 Minn. 154, 95 N.W. 901 (1903), is puzzling since it has nothing to do with the filed-rate doctrine at all and holds only that the measure of damages in a contract case is to be determined by the actual loss sustained. *In the Matter of Blue Cross & Blue Shield Customer Litig.*, 164 Misc.2d 360 (N.Y. Sup. Ct. 1994) is a straightforward application of the filed rate doctrine to bar claims about what the rate in question should, or would, have been absent the misrepresentations alleged by plaintiffs. *Id.* at 358. *Knipmeyer v. Bell Atlantic Corp.*, No. 0308, 2001 WL 1179415 (Pa. Com. Pleas May 22, 2001), an unpublished Pennsylvania trial court ruling, is inapplicable for the simple reason that no value could possibly be attached to the “service” that plaintiffs

claimed not to have “received” (an accurate description of the nature of certain kinds of phone listings), and there was no service still to be performed. The court thus had no possible way of formulating damages but to refund part of the legal rate. *Id.* at *4. Here, by contrast, there is a district service—maintenance of the connections—that has not been performed, and that has a value.

III. CONSEQUENCES OF AN AWARD OF DAMAGES

Finally, Northern States Power argues that paying damages to the named plaintiffs will constitute rate discrimination, in that these four plaintiffs will pay less for electricity than other customers. This argument is unavailing for two reasons. First, the case is filed in a class action. If a class is certified, all ratepayers will be treated the same, and no “discrimination” will occur. Until a decision on class certification, then, Respondent’s argument is premature.

Second, even if the four named plaintiffs are artificially viewed in isolation, Northern States Power’s argument fails because they would be receiving damages, not rate refunds. They would still pay the same rates as all other customers.

CONCLUSION

For the above reasons, and those contained in Appellants’ original brief, Appellants respectfully pray that the decision of the Court of Appeals be reversed.

Dated: June 30, 2008

Respectfully submitted,



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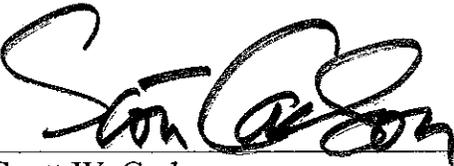
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CERTIFICATE OF COMPLIANCE

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 1,203 words.

Dated: June 30, 2008



Scott W. Carlson

