
Nos. A07-1975, A07-2070

STATE OF MINNESOTA
IN COURT OF APPEALS

Greg Siewert, *et al.*,

Respondents,

v.

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

Appellant.

Wabasha County District Court Case No. C5-04-498

BRIEF OF APPELLANT NORTHERN STATES POWER COMPANY

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STATEMENT OF LEGAL ISSUES

[AS CERTIFIED BY THE DISTRICT COURT]

1. Does the statute of repose preclude claims brought more than 10 years after substantial completion of a real property improvement regardless of the improvement's ownership, control or relationship to a larger distribution system?

Constructing an electrical distribution system to supply energy to a farm plainly constitutes an improvement to that real property; nonetheless, the district court ignored binding precedent and concluded that the system is not subject to Minn. Stat. § 541.051 time limits due to the facility's ownership, control and relationship to a larger distribution system.

Authorities:

State Farm Fire & Cas. v. Aquila, Inc.,
718 N.W.2d 879 (Minn. 2006)

Lietz v. N. States Power Co.,
718 N.W.2d 865 (Minn. 2006)

Pacific Indem. Co. v. Thompson-Yaeger, Inc.,
260 N.W.2d 548 (Minn. 1977)

2. Does the filed rate doctrine bar plaintiffs' challenge to services and facilities provided pursuant to a state commission-approved tariff?

The filed rate doctrine precludes judicial consideration of the reasonableness of tariff specified utility services; the district court nevertheless intends to impanel a jury to assess the adequacy of tariff-compliant facilities and services.

Authorities:

AT&T v. Central Office Tel., Inc.,
524 U.S. 214 (1998)

Schermer v. State Farm Fire & Cas. Co.,
721 N.W.2d 307 (Minn. 2006)

3. Does the primary jurisdiction doctrine require judicial deference to the responsible administrative agency for the resolution of disputes over the services and facilities required by the applicable tariff?

Despite the legislatively-recognized competence of the utility regulatory agency, the district court refused to defer the resolution of this dispute over tariff-provided facilities and services to the administrative process.

Authorities:

Schermer v. State Farm Fire & Cas. Co.,
721 N.W.2d 307 (Minn. 2006)

Roedler v. United States Dep't of Energy,
No. CIV. 98-1843, 1999 WL 1627346 (D. Minn. Dec. 23, 1999)

STATEMENT OF THE CASE

Greg Siewert and Harlan Siewert contend that Northern State Power Company's ("NSP's") electrical distribution system – in place and operative for decades prior to the Siewerts' arrival on the farm – subjected their cows to harmful electrical exposures. The Siewerts demand damages and want NSP to be enjoined to provide what the Siewerts deem to be more appropriate facilities and services.

NSP moved for summary judgment on several grounds, including the: (1) statute of repose, Minn. Stat. § 541.051;¹ (2) filed rate doctrine; and (3) utility commission primary jurisdiction. The Wabasha County district court, the Honorable Terrence Walters presiding, ignored these proscriptions against litigation and instead embraced wholly irrelevant case law to allow this lawsuit to proceed. *Siewert v. N. States Power Co.*, No. C5-04-498, slip op. (Minn. Dist. Ct. Sept. 20, 2007) ("*Summary Judgment Order*") (reproduced at 1-6 of NSP's Appendix ("A.")).

Given the important jurisdictional and immunity implications of the lower court's order, NSP sought immediate review of the denied defenses by (1) bringing a motion to certify questions for appeal; (2) appealing as a matter of right (A07-1975); and (3) petitioning for discretionary review (A07-1973).

On October 30, 2007, the district court agreed that its conclusions warrant prompt appellate review. *Siewert v. N. States Power Co.*, No. C5-04-498, slip order (Minn. Dist. Ct. Oct. 30, 2007) ("*Certification Order*") (A.10). The appeal that arose from the

¹ All relevant statutes have been reproduced in NSP's Appendix.

Certification Order (A07-2070) rendered moot the Siewerts' motion to dismiss the appeal as of right (A07-1975). *Siewert v. N. States Power Co.*, Nos. A07-1975, A07-2070, slip order (Minn. App. Nov. 2, 2007) (A.131). To enhance judicial economy, the certification appeal (A07-2070) and the appeal as a matter of right (A07-1975) were consolidated for briefing, oral argument and decision. *Id.*²

² Because “the district court’s decision is appealable as a matter of right and [NSP] has perfected two appeals, discretionary review is unnecessary” and the petition for discretionary review was dismissed. *Siewert v. N. States Power Co.*, No. A07-1973, slip order (Minn. App. Nov. 6, 2007) (A.133).

INTRODUCTION

Two things are clear regarding the electricity that gives rise to the Siewert claim. First, the provision of electric energy services is subject to strict and extensive regulation. Second, the distribution systems that deliver those services to retail customers like the Siewerts have been in place for many years. The indisputable facts of comprehensive regulation and facility age make the statute of repose and filed rate and primary jurisdiction doctrines insurmountable obstacles to the continuation of this litigation. Hence, the district court was dead on about the summary judgment denials being “important” and “doubtful.”

The appellate result is equally important but in no way doubtful. Overwhelming authority compels reversal:

- The electrical distribution system that is the focus of this litigation is, on its face, an improvement to real property pursuant to *State Farm Fire & Cas. v. Aquila*, 718 N.W.2d 879 (Minn. 2006), and the statute of repose precludes: a) the accrual of claims 10 years after improvement construction has been substantially completed; and b) commencement of suit more than two years after injury;
- The challenge to NSP’s tariff-based facilities and services violates the filed rate bar against litigation as applied in *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) and *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307 (Minn. 2006); and
- The comprehensive administrative scheme compels that resolution of this dispute over highly-regulated utility services be deferred to the responsible agency as in *Schermer*.³

³ The Siewerts improvidently filed a Notice of Review of their dismissed trespass claim. The trespass ruling is neither appealable as a matter of right nor a subject of the *Certification Order*.

STATEMENT OF FACTS

I. THE REGULATION OF UTILITY SERVICES AND CHARGES

This litigation strikes at the constitutionally-allocated relationship among the legislature, the Minnesota Public Utilities Commission (“MPUC”), and NSP. The underlying regulatory framework provides the context in which this appeal must be considered.

NSP provides energy services in Minnesota doing business as Xcel Energy. Utilities like NSP operate in the quintessential regulated industry. See Minn. Stat. § 216B.01 (“It is hereby declared to be in the public interest that public utilities be regulated...”). The legislature vested exclusive authority to “adopt standards for safety, reliability, and service quality for distribution utilities” in the MPUC. Minn. Stat. § 216B.029, subd. 1(a). For “safety, design, construction, and operation of electric distribution facilities,” NSP must comply with regulatory and industry standards. Minn. Stat. § 216B.029, subd. 1(d).

NSP is also required to file a tariff setting forth the “rates” and “all rules that, in the judgment of the [MPUC], in any manner affect the service or product.” Minn. Stat. § 216B.05, subd. 2. The MPUC alone determines the reasonableness of energy charges and the services provided in return – *i.e.*, the “rates.” *N. States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 537 (Minn. App. 1999). See Minn. Stat. § 216A.05, subd. 2(2) (“The commission shall... review and ascertain the reasonableness of tariffs of rates, fares and charges, or any part or classification thereof...”).

The tariff establishes the exclusive terms and conditions upon which retail electricity commerce is conducted. Minn. Stat. § 216B.05. NSP can neither distribute nor sell energy except pursuant to the approved tariffs. Minn. Stat. §§ 216B.06, 216B.07.

Tariffs are not just guidelines about pricing and utility-company performance: “Filings made with the [MPUC] by utilities ‘continue in force until amended by the public utility or until changed by the [MPUC].’ The [MPUC’s] decisions ‘command the same regard and are subject to the same tests as enactments of the legislature.’” *City of Oakdale*, 588 N.W.2d at 537 (quoting Minn. Stat. § 216B.09, subd. 3, and *Minneapolis Street Ry. Co. v. City of Minneapolis*, 86 N.W.2d 657, 676 (Minn. 1957)). Because tariffs have the force and effect of law, no claim of right or obligation can supersede or contradict the agency-approved terms for doing business.

The tariff affords protection and advantages to the public and utilities alike, as well as control over electric service pricing. *See, e.g., Computer Tool & Eng’g, Inc. v. N. States Power Co.*, 453 N.W.2d 569, 573 (Minn. App. 1990) (“[a]pproving a liability limitation falls within the ambit of the commission’s broad regulatory power” because constraining utility litigation exposure reduces the cost of energy), *rev. denied* (Minn. May 23, 1990). To ensure services are reliably available to the public at an affordable price, the MPUC carefully balances utility and ratepayer obligations and corresponding charges. The rates are based upon the cost of safely and efficiently providing electric energy, plus a reasonable rate of return. Minn. Stat. § 216B.01.

II. THE FACTS OF THIS CASE

The operative facts are not disputed. As already noted, the dispositive considerations are the age of the system and the overarching regulatory protocol. The other circumstances are just background and context.

The Siewerts are dairy farmers who blame NSP for what they deem to be disappointing herd performance and health. The Siewert cows are said to have experienced harmful exposures to electrical current that somehow impaired milk production. *See, e.g.*, Complaint at ¶ VI (A.15).

The Siewerts moved to their farm in 1989 and began operations the next year. Complaint at ¶ I. Pursuant to the applicable tariff NSP has lit the lights on that property since long before the Siewerts ever flipped a switch. The distribution line that supplies electricity was constructed decades ago; most of the conductors and other distribution components were underbuilt on an existing transmission line in 1960. *See* NSP's Answers to Plaintiffs' Interrogatories Set I, Answers 1-3 (A.20). The real property improvement that supplies the Siewert farm with power has been in place without substantial change and has served its essential purpose since long before the Siewerts started up at that location 18 years ago.

The distribution system is multi-grounded. Electrical systems are grounded "as one of the means of safeguarding employees and the public from injury that may be caused by electrical potential." National Electrical Safety Code (2007) ("NESC") at § 9(090) (§§ 2 and 9 of the NESC are reproduced at A.302). An "effectively grounded" system is "intentionally connected to earth" (NESC at § 2), in order to provide a current

pathway into the ground. As the name describes, a multi-grounded system is connected to the earth at many locations. NESC at § 2 (“Multigrounded/multiple grounded system. A system of conductors in which a neutral conduction is intentionally grounded solidly at specified intervals. A multigrounded or multiple grounded system may or may not be effectively grounded. See: effectively grounded.”).

The NESC standards have been legislatively endorsed as “prima facie evidence of accepted standards of construction for safety to life and property.” Minn. Stat. § 326.243 (emphasis added). Compliance with these standards “for the safety, design, construction, and operation of electric distribution facilities” is mandatory. Minn. Stat. § 216B.029, subd. 1(d) (“Electric distribution utilities shall comply with all applicable governmental and industry standards . . . including Section 326.243.”).

The Siewerts sued NSP in 2004, complaining that distribution system deficiencies have exposed their cattle to so-called “stray voltage” since 1989. *See, e.g.,* Complaint ¶ VI. Through their “expert” Donald Zipse, the Siewerts condemn the facilities that NSP uses to deliver electric energy and the manner in which NSP provides electric services. According to Zipse, different facilities and service procedures would alleviate supposedly harmful bovine exposures to “stray voltage.” *See, e.g.,* 2006 Report of Donald W. Zipse at 50-52 (hereafter “2006 Zipse Report”) (A.100); 2007 Report of Donald W. Zipse at 5 (hereafter “2007 Zipse Report”) (A.114).

Notably, the thrust of Zipse’s opinion was that NSP’s multi-grounded system is, in and of itself, negligent because current pathways to the earth are intentionally provided. 2006 Zipse Report. *See also id.* at 33 (declaring the multi-grounded system to be the

“major cause” of herd injury). Zipse admits, however, that his multi-grounded system criticisms have been repeatedly rejected by the NESC standards panel and that there are “12, 15 years to go before [his views] would be accepted.” Deposition of Donald W. Zipse at 14-15 (A.108).

Scurrying to elude this obvious *Frye-Mack* disqualification for the lack of general acceptance in the relevant scientific community, Zipse has since retooled his system deprecation. He now maintains that the distribution system includes inherent load balancing problems that spawn stray voltage. Affidavit of Donald W. Zipse at ¶ 7 (asserting that the configuration serving the Siewert farm “necessarily causes the phases to become unbalanced *every single day* at multiple times per day in varying levels.”) (emphasis in orig.). To correct this supposed defect, the Siewerts demand a system reconfiguration that would place their farm at the end of the line. 2007 Zipse Report at 5.

In addition to attacking the system itself, the Siewerts blame maintenance and inspection failings for causing electricity to “leak.” Complaint at ¶ 5 (alleging “[n]egligence in failing to adequately test and inspect systems, equipment, and components for said voltage”). As with the system design and operation allegations, the Siewerts insist that NSP should have done something additional or different to reduce on-farm electrical exposures.

Critically, the Siewerts have never identified an instance in which NSP deviated from the MPUC tariff or an incident that violates any MPUC rule or applicable law. As a result, indulging either system design and operation or maintenance claims would take NSP to task for adhering to regulatory obligations, and allowing a jury to consider system

redesign or impose added maintenance or inspection duties would turn over tariff promulgation to a group of laypersons. Because the tariff must be regarded as a legislative enactment, condoning this case would be the equivalent of asking several citizens to enact statutes deemed to better suit a few of their neighbors tastes.

The Siewerts demand damages back to 1989 and injunctive relief going forward. There is no evidence about any electricity levels on the property before 2004. In fact, the Siewerts' veterinarian, Dr. Norb Nigon, investigated the dairy barn in the early 1990s and found no trace of stray voltage. Deposition of Norbert Nigon at 94-97 (A.48). The measurements since 2004 reflect exposures that are far below the generally-accepted thresholds that could have an adverse effect on milk production.

ARGUMENT

I. INTERLOCUTORY REVIEW IS PROPER

The district court's statute of repose, filed rate and primary jurisdiction conclusions are properly before the Court pursuant to the *Certification Order*; appellate jurisdiction is also afforded by Minn. R. Civ. App. P. 103.03(j).

A. *Certification Order* Jurisdiction

Minn. R. Civ. App. P. 103.03(i) authorizes the interlocutory appeal of orders denying summary judgment when the district court "certifies [] the question presented [to be] important and doubtful." The statute of repose, filed rate and primary jurisdiction conclusions below are exceedingly "important" and the district court's decision is palpably "doubtful."

"A question is increasingly important if it has statewide impact, reversal is likely, lengthy proceedings will be terminated, and a district court's incorrect ruling will inflict substantial harm on the parties." *Davies v. West Publishing Co.*, 622 N.W.2d 836, 840 (Minn. App. 2001) (emphasis added). *See also Engler v. Wehmas*, 633 N.W.2d 868, 871 (Minn. App. 2001). Not all "importance" factors are created equal. *Id.* The paramount consideration is "the potential to terminate or significantly reduce further proceedings." *Jostens, Inc. v. Federated Mut. Ins. Co.*, 612 N.W.2d 878, 884 (Minn. 2000).

The second Rule 103.03(i) consideration – doubtfulness – is satisfied "if there is no controlling precedent." *Jostens*, 612 N.W.2d at 884-85 (citation omitted). "A question that is doubtful need not be one of first impression, but it should be one on

which there is substantial ground for a difference of opinion.” *Fedziuk v. Comm’r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005) (citing *Jostens*, 612 N.W.2d at 885).

1. Statute of repose applicability is “important” and “doubtful”

The district court’s refusal to apply Minn. Stat. § 541.051 is indisputably “important”: just like the statute of limitations considered in *Davies*, bringing the statute of repose to bear would “greatly reduce the length and complexity of the proceedings.” *Davies*, 622 N.W.2d at 840. If NSP’s distribution system is an improvement to real property, the statute of repose would preclude this litigation. *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 642 (Minn. 2006) (the statute of repose “provides certainty and finality with a bright line bar to liability”). The answer to that question has far-reaching ramifications for utilities and ratepayers throughout Minnesota.

“Importance” is also evident because immunity from suit is implicated:

A statute [of repose] is intended to terminate the possibility of liability after a defined period of time, regardless of the potential plaintiff’s lack of knowledge of his or her cause of action. Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct.

Id. (quoting 51 Am. Jur. 2d *Limitations of Actions* § 18 (2000)) (emphasis added).

Finally, the district court’s improvement-to-real-property approach is likely to be set straight. Judge Walters reasoned:

Because the defendant retained ownership and control of its electrical distribution system and because the equipment that is the focus of this litigation is part of a larger distribution system installed for the benefit of the defendant, the court concludes the electrical distribution system on plaintiffs’ farm does not constitute an ‘improvement to real property’ within the meaning of MS 541.051.

Summary Judgment Order at 3. That assessment disregarded the § 541.051 factors recently reaffirmed in *State Farm Fire and Casualty v. Aquila, Inc.*, 718 N.W.2d 879, 884-85 (Minn. 2006) and *Lietz v. Northern States Power Co.*, 718 N.W.2d 865, 869 (Minn. 2006). Those cases held that ownership and relationship to broader system are not relevant to the improvement to real property determination.

The § 541.051 conclusion is equally “doubtful.” Even the district court acknowledged that *Aquila* did not give a “ringing endorsement” to the rationale employed. *Summary Judgment Order* at 3 (A.3) (following *Johnson v. Steele-Waseca Co-op. Elec.*, 469 N.W.2d 517 (Minn. App. 1991)). In fact, the supreme court acknowledged doubt about this very issue and invited a challenge to the reasoning followed below: “[w]e leave for another day the wisdom of applying *Johnson* to the statute at issue and note only that here *Johnson* is inapplicable.” *Aquila*, 718 N.W.2d at 885 n.1. There is anything but compelling precedent supporting of the summary judgment order.

2. Filed rate determinations are “important” and “doubtful”

The consequence of filed rate doctrine applicability to the Siewerts’ tariff challenge could not be more “important” for Rule 103.03(i) purposes. An appellate pronouncement removing these claims from the judicial realm would “terminate or significantly reduce further proceedings.” *Jostens*, 612 N.W.2d at 884. Because civil litigation over stray voltage would come to an end, the impact of a reversal would be even more significant than the ramifications found to be sufficiently “important” in

Davies and *Engler* in which appellate guidance merely had the potential of narrowing those proceedings.

The decision below is patently “doubtful.” The sole basis for filed rate rejection was a 1976 case that never mentions the filed rates or tariffs. *Summary Judgment Order* at 5 (citing *Ferguson v. N. States Power Co.*, 239 N.W.2d 190 (Minn. 1976)). Yet only last year the supreme court left no doubt about the doctrine’s preclusive effect on civil litigation and the applicability of that bar in the utility regulatory regime. *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307 (Minn. 2006). Even if this Court gave credence to the reasoning below, the absence of apposite and authoritative support for the *Summary Judgment Order* cannot be gainsaid.

3. Primary jurisdiction is “important” and “doubtful”

As with filed rates, the rejection of primary jurisdiction is “important” because reversal would “greatly reduce the length and complexity of the proceedings.” *Davies*, 622 N.W.2d at 840. Deferring resolution of the utility service issues presented by the Siewerts’ complaint – e.g., is there something fundamentally wrong with the tariff-mandated electrical distribution system? – to the administrative agency created for that exact purpose would unquestionably limit the length and complexity of and probably end the judicial proceedings.

The arrogation of MPUC primary jurisdiction is also “doubtful.” Again, there is no controlling authority delineating – and certainly none circumscribing – the primary jurisdiction of utility agencies in the wake of *Schermer*’s direction that disputes over regulated commerce should be deferred to the regulatory authority. *Schermer* specified

that the “sole source of relief” for claims with tariff implications is afforded by the administrative process. 721 N.W.2d at 319. Separation of powers considerations required the judiciary to stand down. *Id.* The same result is certainly called for in the more “stringently” regulated utility field. *Id.*

B. Appellate Jurisdiction Regardless Of The Certification Below

In addition to Rule 103.03(i) review, Rule 103.03(j) authorizes an interlocutory appeal when a district court rejects a jurisdictional, immunity or analogous defense that, if granted, would end the litigation. *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); *Hunt v. Nevada State Bank*, 285 Minn. 77, 172 N.W.2d 292 (1969).

Like the defenses at issue in *Janssen*, *Hunt*, *McGowan* and *Kastner*, the statute of repose and filed rate and primary jurisdiction doctrines curtail judicial prerogative. When an improvement to real property has been in existence long enough, the statute of repose prevents civil liability from coming into being. *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006) (“A statute [of repose] is intended to terminate the possibility of liability after a defined period of time. . . . Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct.”) (quotation omitted) (emphasis added). The statute of repose has greater passage of time effects than a statute of limitations: claims are obviated before they can accrue. *Id.*

The filed rate doctrine also averts litigation by incapacitating courts from entertaining challenges to the reasonableness or lawfulness of regulated rates and associated services. *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998); *Schermer v State Farm Fire and Cas. Co.*, 721 N.W.2d 307, 314 (Minn. 2006). The constraint on district court jurisdiction effected by filed rates reflects the separation of powers concerns upon which the doctrine is based, as well as the statutory nature of the tariff itself. *Schermer*, 721 N.W.2d at 314-15. See also *N. States Power Co. v. City of St. Paul*, 99 N.W.2d 207, 211 (Minn. 1959) (“[P]rescribing or fixing rates for a public utility involves a legislative function which may not be usurped by the courts.”); *City of Oakdale*, 588 N.W.2d at 537 (citation omitted) (MPUC decisions command the same regard as legislative enactments).

The primary jurisdiction doctrine similarly removes tariff protests from the courthouse. Regulatory agencies are vested with responsibility “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.” *Roedler v. United States Dep’t of Energy*, No. CIV. 98-1843, 1999 WL 1627346 at *16 (D. Minn. Dec. 23, 1999) (A.179). When utility prices or services are challenged, “[t]he purposes behind the doctrine of primary jurisdiction are evident.” *Id.*

These doctrines protect NSP from being haled before any tribunal other than the MPUC and, hence, are jurisdictional in nature so as to invoke Rule 103.03(j). NSP should not be “compelled . . . to take up the burden of litigation in this state that might otherwise be avoided.” *Hunt*, 285 Minn. at 89, 172 N.W.2d at 300.

In order to ensure that burden is avoided, this Court must step in. Both Minn. R. Civ. App. 103.03(i) and 103.03(j) afford the necessary appellate jurisdiction.

II. STANDARD OF REVIEW

This appeal concerns judicial authority over matters that the legislature placed exclusively in the administrative realm. Such jurisdictional determinations are subject to de novo review. *Reed v. Albaaj*, 723 N.W.2d 50, 55 (Minn. App. 2006). *See Prof'l. Fiduciary, Inc. v. Silverman*, 713 N.W.2d 67, 70 (Minn. App. 2006) (certified legal questions subject to de novo review). Consequently, “an appellate court need not give deference to a trial court’s decision.” *Frost-Benco Elec. Ass’n v. Minn. Pub. Utils. Comm’n*, 358 N.W.2d 639, 642 (Minn. 1984).

III. THE CASE DOES NOT SURVIVE THE STATUTE OF REPOSE

The Siewerts do not pretend that the delivery of electricity to their farm does not improve the property, and they cannot dispute that the allegedly-defective distribution system was substantially completed more than 10 years before any stray voltage claims could have accrued. Plus, there is no question that the poles, wires, switches and transformers were being used for their intended purposes – the distribution of electricity – for decades before the Siewerts’ 1989 occupation of the farm. Because the Siewerts’ claims could not accrue more than 10 years after the distribution system was functional and because suit was not brought within two years of discovering alleged injuries, the strict Minn. Stat § 541.051 time limitations doom this action.

A. Minn. Stat. § 541.051

The legislature imposed bright-line timeliness requirements upon claims arising out of improvements to real property. The statute that lays tardy claims to rest “is intended to terminate the possibility of liability after a defined period of time Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct.” *Weston*, 716 N.W.2d at 641 (Minn. 2006) (quotation omitted). Accordingly, actions based upon unsafe and defective improvements to real property are subject to temporal vitiation. Minn. Stat. § 541.051, subd. 1; *Kemp v. Allis-Chalmers Corp.*, 390 N.W.2d 848, 850 (Minn. App. 1986) (electrical transformer, switchgear and connecting cable constitute improvements to real property and were therefore subject to § 541.051 time limits); *Fagerlie v. City of Willmar*, 435 N.W.2d 641, 643 (Minn. App. 1989).

The statute of repose prevents causes of action from even accruing after the improvement has been substantially completed for 10 years. Minn. Stat. § 541.051, subd. 1. The lawsuit-terminus decade commences when installation is sufficient to enable the improvement to be used for its intended purpose – in this case the distribution of electricity to the Siewert farm. *Id.* Even claims that accrue during the 10 year period of repose must be brought within two years of injury discovery. Minn. Stat. § 541.051, subd. 1. Knowing the cause of the injury is not necessary; rather, awareness of the harm by itself starts the two years. *See Dakota v. BWBR Architects*, 645 N.W.2d 487, 492 (Minn. App. 2002) (“[I]t is knowledge of the injury, not the defect, which triggers

[§ 541.051's two-year] statute of limitations.”), *rev. denied* (Minn. Aug. 20, 2002) (citation omitted).

B. “Improvement To Real Property” Status

1. The common sense “improvement to real property” definition.

Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 554 (Minn. 1977) announced Minnesota’s “common sense” approach to improvement-to-real-property determinations. Since the plain meaning of statutory language, rather than a “technical legal construction,” must be given effect, the supreme court adopted the following dictionary definition:

“a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.”

Id. (quoting *Kloster-Madsen, Inc. v. Tafi’s, Inc.*, 226 N.W.2d 603, 607 (Minn. 1975) (citing Webster’s Third New International Dictionary 1138 (1971)). Applying the common sense standard to a furnace, *Pacific Indemnity* concluded that the fire-causing fixture “constituted, as a matter of law, the construction of an improvement to real property.” *Id.* at 554.

In the wake of *Pacific Indemnity* this Court has routinely employed the specified classification to determine that electrical components are real property improvements. *See Kemp*, 390 N.W.2d at 850 (electrical transformer, switchgear and connecting cable); *Citizens Sec. Mut. Ins. Co. v. General Elec. Corp.*, 394 N.W.2d 167, 170 (Minn. App. 1986) (light fixtures and ballasts), *rev. denied* (Minn. Nov. 26, 1986); *Lovgren v. Peoples*

Elēc. Co., 368 N.W.2d 16, 18 (Minn. App. 1985) (transformer vault), *rev'd on other grounds*, 380 N.W.2d 791, 793 (Minn. 1986).

In a 2-1 divergence from consistent precedent, this Court temporarily confused the improvement-to-real-property standard in a 1991 stray voltage appeal. Inexplicably, *Pacific Indemnity* and its progeny were ignored in favor of a methodology that was made up for the litigation in *Johnson v. Steele-Waseca Cooperative Electric*, 469 N.W.2d 517 (Minn. App. 1991). *Johnson* eluded the controlling considerations – *i.e.*, (1) whether the installation involved the expenditure of labor or money; (2) whether the facility is a permanent addition to or betterment of real property; and (3) whether the amenity enhanced real property capital value – in favor of assessing the improvement’s association with the utility and inclusion in a larger distribution system. *Id.* at 519-20 (denying improvement to real property treatment because the supposed cause of plaintiffs’ stray voltage problems was “an addition to [the utility’s] distribution system” under the utility’s ownership and control).

The emphatic *Johnson* dissent correctly observed that the majority had gone off the statutory track:

The majority concludes that, because respondent maintains control of the pole and transformer installed on appellant’s property, the pole and transformer do not constitute an improvement to real property under Minn. Stat. § 541.051 (1988). There is nothing in section 541.051 that suggests its application is limited to suits against those who install or create an improvement to real property and surrender control of it.

...

There is nothing in Minn. Stat. § 541.051 or the supreme court’s interpretation of section 541.051 that suggests that the application of the

term “improvement to real property” to any physical structure should depend on the ownership or control of the physical structure.

Id. at 521-22 (Peterson, J., dissenting).⁴

Fortunately, for a number of years *Johnson* did not lead subsequent appellate decisions astray. Section 541.051 was consistently applied to protect owners and controllers of real property improvements. *See, e.g., Lederman v. Cragun’s Pine Beach Resort*, 247 F.3d 812 (8th Cir. 2001) (trench dug to install communications cable qualified for Minn. Stat. § 541.051 time limits on negligent excavation claims against both controlling entities – the resort owner and the utility); *Nemechek v. City of Byron*, No. C4-99-1052, 1999 WL 1138441 (Minn. App. Dec. 14, 1999) (A.154) (negligent design and construction claims against a city owned and controlled storm sewer that flooded private residence were time barred); *Fisher v. County of Rock*, 580 N.W.2d 510 (Minn. App. 1998), *rev’d on other grounds*, 596 N.W.2d 646 (Minn. 1999) (barring auto crash claims on a county-owned bridge where the installation of guardrails could have prevented harm); *LaFave v. Frankfort Township*, No. CO-96-1485, 1997 WL 30682 (Minn. App. Jan. 28, 1997) (A.150) (negligent design, construction, maintenance and

⁴ The supreme court’s statutory interpretation guidance should have prevented the *Johnson* misstep. The *Pacific Indemnity* court declared a prior version of the statute unconstitutional because contractors were protected from suits, but property owners and suppliers were not. *Id.* at 555. The statute failed to pass constitutional muster because only certain defendants achieved repose based upon status characteristics such as ownership, which is exactly the consideration that drove the result in *Johnson*. In 1980, the legislature cured the defect by covering owners and materials suppliers with the statutory time limits. *See Weston*, 716 N.W.2d at 643 n.4 (citing Act of April 7, 1980, ch. 518, §§ 2-4, 1980 Minn. Laws 595, 596).

signage claims against township that controlled the roadway site of a single vehicle crash barred).

Precedent both before and after *Johnson* establishes that a relationship with or connection to a broader system does not negate improvement-to-real-property status or application of § 541.051 time limits. *See, e.g., Capitol Supply Co. v. City of St. Paul*, 316 N.W.2d 554 (Minn. 1982) (storm sewer system owned and controlled by city); *Nemechek*, 1999 WL 1138441; *LaFave*, 1997 WL 30682; *Kemp*, 390 N.W.2d at 851 (finding cable installed as a part of electrical system to be an improvement and observing that “the distinction between portions of the whole and the whole itself has never been used in Minnesota for the purpose of determining whether the unit is an improvement to real property.”). In short, *Johnson* was an obvious departure from well-established jurisprudence.

2. *Lietz and Aquila show the way*

Recently, however, *Johnson* was briefly resuscitated. Out of the blue, this Court relied on *Johnson* to apply an incorrect improvement-to-real-property test. This time the supreme court stepped in to correct the error and reaffirm *Pacific Indemnity*. *See State Farm Fire and Casualty v. Aquila, Inc.*, 718 N.W.2d 879, 885 (Minn. 2006); *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 869 (Minn. 2006). These decisions confirm that ownership, control, and relationship to a broader distribution system have no bearing on the improvement analysis. Instead, facilities like the system that provides electrical service to the Siewert farm constitute “improvements to real property” as defined by § 541.051 without regard to ownership.

Lietz addressed the question of whether a utility pole anchor that was being sunk to construct a cable television system was an improvement to real property. 718 N.W.2d at 869. A contractor was making the installation; the system was owned by the cable TV provider; and the guy wire from the anchor was going to be attached to a pole owned by NSP. Tragically, the burrowing shaft struck an NSP gas line; the escaping gas later exploded. *Id.* at 868.

Despite a welter of ownership issues implicating the contractor, the cable TV company and NSP (in two different capacities), the *Lietz* court employed the *Pacific Indemnity* analysis to assess Minn. Stat. § 541.051 applicability. *Id.* at 869. Improvement-to-real-property status was determined even though the utility pole anchor was not being installed for the sole benefit of the plaintiffs or their property.

The anchor, which was going to stabilize the pole so cables could be hung, was unquestionably a mere addition to a larger system. *Id.* at 869 (“installation of the anchor was part of a project [] to construct a fiber-optic communication system in the area.”). In fact, it is unclear, and apparently irrelevant, whether the *Lietz* plaintiffs would even utilize cable services. If this partially-installed steel rod that was a small component of a nascent cable TV project constituted an improvement to real property, then there can be no doubt that NSP’s miles-long electrical distribution system must be similarly regarded.

Pacific Indemnity’s “common sense” approach was applied with equal force in *Aquila*, 718 N.W.2d at 884 (citing *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 451 (Minn. 1988) and *Pacific Indemnity*, 260 N.W.2d at 554). The *Aquila* plaintiffs sued the owner and operator and the installer of a gas pipeline network for explosion damages.

The distribution system was found to be an improvement to real property because (1) the pipeline involved “the expenditure of labor or money;” (2) the installation represented a “permanent addition to or betterment of real property” rather than an “ordinary repair;” and (3) the system enhanced the capital value of the property being served. *Id* at 884-85 (quotation omitted).

Aquila explicitly denounced the *Johnson* rationale. 718 N.W.2d at 884-85. A determination based upon the defendant’s relationship to the property was rejected because “neither the relevant statutory language nor this court’s interpretation of the phrase ‘improvement to real property’ indicates a subjective analysis leading to different results for different owners. In other words, under the statute, an object is either an ‘improvement to real property’ or it is not.” *Id.* (emphasis added).

Remarkably, the supreme court actually invited *Johnson* to be challenged: “[w]e leave for another day the wisdom of applying *Johnson* to the statute at issue and note only that here *Johnson* is inapplicable.” *Id* at 885 n.1. That day has dawned.

C. Minn. Stat. § 541.051 Must Be Brought To Bear

1. Defective improvement-to-real-property contentions

Each of the *Pacific Indemnity* factors establishes that the allegedly harmful electric distribution system – the gravamen of Siewerts’ claims – is an improvement to real property pursuant to *Pacific Indemnity*, *Aquila* and *Lietz*.

First, installing the system indisputably involved the expenditure of labor and money. The *Aquila* gas system satisfied this factor because the installation involved 4,075 feet of pipe, valves and fixtures, and cost more than \$21,000. *Aquila*, 718 N.W.2d

at 884. Similarly, the distribution line about which the Siewerts complain spans many miles from Zumbro Falls to Mazeppa and includes cables, switch gear and transformers. There can be no doubt about the installation involving significant cost and effort.

Second, the system can be regarded as nothing other than a “permanent addition or betterment of real property.” The *Aquila* facility satisfied this factor because the defective gas lines replaced an earlier system, and after being constructed the new pipes served the property for 10 years. *Id.* The Siewerts do not dispute that NSP’s distribution system was a permanent addition long before the 1980s, and the supply of electricity clearly benefited the property for decades prior to the Siewerts’ arrival. If the parcel did not have electric service a modern farm could not even have been contemplated. An electrical distribution system that is in place and functioning for decades is unquestionably permanent, and energizing rural Minnesota certainly bettered the electrified properties.

Finally, NSP’s installation “enhance[s] the capital value” of the Siewerts’ farm as well as the property of every other customer for whom the system supplies electric energy. *Aquila* did not require specific evidence of capital value enhancement. *Aquila*, 718 N.W.2d at 884. Rather, the court relied on “common sense” to conclude that replacing old pipes with a new, safer and maintenance-free system “increases the value of the real property the system serves.” *Id.* The same is true for the Siewerts: the electrical apparatus enhancement of farm capital worth by “increas[ing] the value of the property the system serves” is self evident. *Id.* Without electricity, the Siewerts could not turn on the lights, much less conduct a dairy operation.

The indisputable satisfaction of the applicable improvement-to-real-property standards made no difference below because the district court eschewed a *Pacific Indemnity / Aquila / Lietz* analysis in favor of the disavowed *Johnson* paralogism:

Because [NSP] retained ownership and control of its electrical distribution system and because the equipment that is the focus of this litigation is part of a larger distribution system installed for the benefit of [NSP], the court concludes the electrical distribution system on plaintiffs' farm does not constitute an 'improvement to real property' within the meaning of MS 541.051.

Summary Judgment Order at 3 (emphasis added).

Despite recognizing that the supreme court had sounded far less than a "ringing endorsement of *Johnson*," the district court follows the statutory misinterpretation that had been acknowledged and discounted in *Aquila*. In fact, the *Summary Judgment Order* and the court of appeals opinion that *Aquila* reversed practically mirror one another:

[I]t is clear that the gas pipeline was owned and controlled by *Aquila* and served the utility's distribution purposes by enabling *Aquila* to deliver natural gas to the residents of the trailer park. We therefore hold that *Johnson* controls, and we conclude that with respect to *Aquila*, the gas pipeline was not an improvement to real property under Minn. Stat. § 541.051 but an addition to the utility's distribution system.

State Farm & Casualty v. Aquila, Inc., 697 N.W.2d 636, 642 (Minn. App. 2005) (emphasis added), *rev'd by Aquila*, 718 N.W. 2d at 884-85. If this statute-of-repose evaluation could not pass muster in *Aquila*, then Judge Walters's similarly-flawed reasoning is equally incapable of holding up.

Decisions applying similar repose statutes in other jurisdictions confirm that facilities of the type installed to bring electricity to the Siewerts are properly regarded as "improvements to real property." In fact, several courts have employed the exact same

Webster's Dictionary definition that Minnesota adopted in *Pacific Indemnity* to conclude that electrical distribution facilities must be regarded as improvements to real property.

For example, the "improvement" definition was cited by a New Mexico appellate court in holding that "[t]he installation of [a] power line was a physical improvement which came within the intent and design of [the New Mexico statute of repose]" because "a given parcel of land which has electrical service available is more valuable than a comparable parcel without such service." *Mora-San Miguel Elec. Coop., Inc. v. Hicks & Ragland Consulting & Eng'g*, 598 P. 2d 218, 220 (N.M. App. 1979).

The federal district court in Rhode Island similarly invoked statute of repose in an electrical line context:

It cannot be gainsaid that the erection of electrical transmission lines comprises a permanent addition to real property; that such a project involves the expenditure of labor and of money; and that completion thereof makes the property more useful or valuable. . . . [The utility] uses the line in providing a precious and utilitarian commodity—electricity to its customers.

Montaup Elec. Co. v. Ohio Brass Corp., 561 F. Supp. 740, 748-49 (D. R.I. 1983) (citing Webster's Third New International Dictionary 1138 (1971)).⁵

The New Jersey Supreme Court's reasoning in an underground gas line case is particularly enlightening: "Simply stated, a house with a source of energy for heat and

⁵ More recently, a Massachusetts federal court used the same definition to determine that an electrical utility pole constituted an improvement to real property for statute of repose purposes because the structure "adds value to the property in which it sits by facilitating the delivery of electric power to customers on the adjacent land." *Brown v. United States*, -- F. Supp. 2d --, 2007 WL 2791363 at *7 (D. Mass. Sept. 26, 2007) (A.134).

air conditioning is worth more than one without such a source. A gas line, although it serves as a conduit, also is a valuable improvement.” *Ebert v. South Jersey Gas Co.*, 723 A.2d 599, 601 (N.J. 1999). The court recognized that “an underground utility line can be both an extension of a utility distribution system and an improvement to the property it serves.” *Id.*

When the governing improvement-to-real-property definition is given effect there can be no doubt: the distribution system that brings electricity to the Siewert farm absolutely qualifies for § 541.051 treatment.⁶

⁶ Jurisdictions applying other “improvement to real property” tests concur. For example, several courts, including the Fourth Circuit and Maryland’s highest court, apply the following definition from Black’s Law Dictionary to assess whether facilities constitute “improvements”:

[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally has reference to buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc. An expenditure to extend the useful life of an asset or to improve its performance over that of the original asset. Such expenditures are capitalized as part of the asset’s cost.

Pippin v. Reilly Indus., Inc., No. 02-1782, 64 Fed. Appx. 382, 385 (4th Cir. 2003) (A.174-78) (emphasis added) (quoting *Rose v. Fox Pool Corp.*, 335 Md. 351, 643 A.2d 906, 918 (1994) (citing, inter alia, Black’s Law Dictionary 757 (6th ed. 1990)). The *Pippin* court affirmed a district court conclusion that a “utility pole is practically in Black’s Law Dictionary as an improvement to real property.” *Id.* at 387. Accordingly, Maryland’s statute of repose precluded a wrongful death and survival action on behalf of a truck driver who collided with a pole that had been installed 20 years before. *Id.*

2. The inspection and maintenance exception does not apply

Recognizing § 541.051's preclusive effect, the Siewerts recently reordered their argument in an attempt to wedge their claims into the narrow statutory exception for negligent maintenance, operation, or inspection of improvements to real property. Minn. Stat. § 541.051, subd. 1 (d).

But § 541.051(1)(d)'s exception does not nullify statute of repose time limits in this case. The *Aquila* court warned that subdivision 1(d) applies “only in exceptional circumstances.” *Id.* at 886 (quotation and citation omitted).⁷ And “the burden of proving the exception lies with the parties who seek to claim the benefit of the exception.” *Id.*

The Siewerts have not begun carry the burden. They fail to reference a single tariff provision that would authorize, much less require, NSP to do anything more than provide the services that were rendered from 1989 to the present. As a result, qualification for the § 541.051(1)(d) exception is foreclosed by the filed rate doctrine (discussed more fully below as a separate impediment to this lawsuit). The doctrine generally establishes that a public utility is only obligated to provide the services that are specified in a state commission-approved tariff. Importantly, a utility is prohibited from affording any service that is not specified by the tariff. *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951) (“[N]ot even a court can authorize

⁷ The *Aquila* court refers to subdivision 1(c), but the exception was subsequently renumbered to 1(d).

commerce in the commodity on other terms.”). Since NSP can only furnish the services dictated by the tariff, compliance with maintenance and inspection obligations must be measured against the tariff. In fact, the delivery of extra services to the Siewerts, but not others, would constitute illegal rate-payer discrimination. *Computer Tool & Eng’g, Inc.*, 453 N.W.2d at 572-73.

Because the Siewerts have failed to identify any applicable tariff duty, the scope of that duty, or how NSP failed to perform, there is no fact issue regarding the accepted standard of care against which negligent system maintenance or inspection allegations could be assessed. The regulations must define that duty.

And even if there were a question about service adequacy, as demonstrated below, that answer is for the responsible agency – not a jury – to provide. Tariff enforcement is an administrative, not judicial, determination, and tariff alteration cannot be placed in the hands of jurors. The Siewerts’ “allegations are mere averments and are not sufficient to survive summary judgment.” *Aquila*, 718 N.W.2d at 888. The 10-year statute of repose laid this lawsuit to rest before it began. *Id.* at 886-88.

3. The Siewerts’ claims are fatally tardy

Because the Siewerts are not saved by § 541.051(1)(d), in order for a cause of action to have accrued injuries would have had to have been discovered within 10 years of when the system began providing electricity, and this litigation would have been timely only if commenced within two years of that awareness. Minn. Stat. § 541.051. This lawsuit is hopelessly late: the 10-year repose was effected long before the Siewerts bought the farm; and even if that clock was still ticking when they arrived, the two-year

statute of limitations was triggered in 1989 when diminished milk production and impaired animal health are said to have been experienced. The limitation period begins to run not when the cause of the injury is recognized; rather the operative event is the discovery of harm. *Dakota*, 645 N.W.2d at 492 (“[I]t is knowledge of the injury, not the defect, which triggers [§ 541.051’s two-year] statute of limitations.”).

The time restrictions imposed by Minn. Stat. § 541.051 were enacted to preclude exactly these types of claims. The Siewerts’ lawsuit is incurably tardy; the litigation green light condoned by the district court must be switched to red.

IV. THE FILED RATE DOCTRINE TRUMPS THIS LITIGATION

Even if the statute of repose did not prevent the Siewerts’ claims from accruing their lawsuit would still not be for the courts. Filed rates operate as more than just an impediment to the Siewerts’ attempt to invoke the statute of repose exception for maintenance and inspection. Instead, the doctrine places all complaints about utility service and facility performance before the MPUC. The doctrine effectuates the legislative determination that the judiciary is not the branch suited to referee disputes over the distribution of electric energy. A comprehensive regulatory regime was created for that purpose.

From beginning to end, the Siewerts condemn the service and facilities that NSP provides pursuant to MPUC-approved tariffs. The filed rate implications are manifest. Lacking jurisdiction, the district court should have entered summary judgment.

A. The Filed Rate Doctrine Restricts Judicial Authority

The relationship between a regulated utility, like NSP, and ratepayers, like the Siewerts, is subject to pervasive governmental oversight. The governing bond is the tariff that is filed with, and thereafter approved, administered, and revised by the responsible agency. See *AT&T*, 524 U.S. at 222-24; *Montana-Dakota Utils. Co.*, 341 U.S. at 251; *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994); *Computer Tool & Eng'g, Inc.*, 453 N.W.2d at 573.

Administrative authority over tariff-based matters is plenary. The resulting filed rate doctrine was articulated (originally for interstate shipping) almost a century ago:

Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 97 (1915) (emphasis added).

The doctrine recognizes “that regulatory 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 (quoting *Wegoland*, 27 F.3d at 20-21). The jurisdictional implications reach beyond the federal realm: “[T]he rationale underlying

the filed rate doctrine has also been applied to rates filed with state agencies.” *Schermer*, 721 N.W.2d at 312.

Once rates are administratively approved, the doctrine precludes deviation. A tariff must be regarded as having the same effect as a statutory enactment; the filed rate controls until changed by the only entity with the requisite authority – the regulatory agency. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981). “[N]ot even a court can authorize commerce in the commodity on other terms.” *Montana-Dakota Utils. Co.*, 341 U.S. at 251-52. *See also City of Oakdale*, 588 N.W.2d at 537 (citation omitted) (“Filings made with the [MPUC] by utilities ‘continue in force until amended by the public utility or until changed by the [MPUC]. The [MPUC’s] decisions ‘command the same regard and are subject to the same tests as enactments of the legislature.’”). This regulatory force enfeebles the judiciary:

[T]he right to a reasonable rate is the right to the rate which the Commission files or fixes, and [] except for review of the Commission’s orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.

Montana-Dakota Utils. Co., 341 U.S. at 251-52 (emphasis added).

Critically, “[t]he filed rate doctrine does not apply to rates alone, but to any terms or practices that might affect the rates as well.” *Imports, Etc., Ltd. v. ABF Freight Sys., Inc.*, 162 F.3d 528, 530 (8th Cir. 1998) (citing *AT&T*, 524 U.S. at 222). That inclusion is necessary because “[r]ates . . . have meaning only when one knows the services to which they are attached.” *AT&T*, 524 U.S. at 223. Accordingly, the statutory definition of

“rate” encompasses “every compensation, charge . . . and any rules, practices, or contracts.” Minn. Stat. § 216B.02, subd. 5. *See* Minn. R. 7825.3100, subp. 14.

Two precedents particularly – *AT&T v. Central Office Tel., Inc.* and *Schermer v. State Fire & Cas Co.* – are instructive.

1. *AT&T v. Central Office Tel., Inc.*

AT&T arose out of a dispute between the provider (AT&T) and a reseller (Central Office) of long-distance telecommunications services. 524 U.S. at 216-20. Central Office complained about the services received; in particular, order fillings and account billings were late and other service options were not delivered. *Id.* at 220. Although AT&T’s obligations were established by the tariff, the district court turned a blind eye to filed rate ramifications and allowed the case to go to verdict. *Id.* at 216-20. AT&T was hit for over \$1 million. *Id.* at 221.

The Ninth Circuit upheld the lost profits award without regard to published tariff, believing that “this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing.” 108 F.3d 981, 990 (9th Cir. 1997). The Supreme Court saw it the other way:

Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. “If ‘discrimination in charges’ does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge. . . . An unreasonable ‘discrimination in charges,’ that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.”

524 U.S. at 223 (quoting *Competitive Telecomms. Ass'n. v. FCC*, 998 F.2d 1058; 1062 (D.C. Cir. 1993)).

That conclusion means that challenges to services provided pursuant to a tariff offend the filed rate doctrine just as much as attacks on tariff-approved pricing:

In *Chicago & Alton R. Co. v. Kirby*, 225 U.S. 155, 32 S. Ct. 648, 56 L. Ed. 1033 (1912), we rejected a shipper's breach-of-contract claim against a railroad for failure to ship a carload of race horses by a particularly fast train. We held that the contract was invalid as a matter of law because the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train," and therefore the shipper received "an undue advantage . . . that is not one open to others in the same situation." *Id.* at 163, 165, 32 S. Ct. at 649, 650. Similarly, in *Davis v. Cornwell*, 264 U.S. 560, 44 S. Ct. 410, 68 L. Ed. 848 (1924), we invalidated the carrier's agreement to provide the shipper with a number of railroad cars on a specified day; such a special advantage, we said, "is illegal, when not provided for in the tariff." *Id.* at 562, 44 S. Ct. at 410.

524 U.S. at 224 (other citations omitted).

After *AT&T*, the tariff alone must be regarded as the demarcation of a regulated utility's service obligations, and service-based lawsuits – be it a request for additional or different services or something else – are filed-rate barred. Bringing these fundamental principles to bear, the tariff – not utility promises or customer expectations – established the exclusive standard by which AT&T's performance would be measured. The litigation seeking something different than the tariff called for would therefore be precluded. *Id.* at 224-25.

In *AT&T*, for instance, the tariff covered provisioning and billing duties by making those service-related responsibilities a matter of provider discretion:

whereas [Central Office] asks to enforce a guarantee that orders would be provisioned within 30 to 90 days, the tariff leaves it up to [AT&T] to

“establis[h] and confir[m]” a due date for provisioning, requires that petitioner merely make “every reasonable effort” to meet that due date, and if it fails gives the customer no recourse except to “cancel the order without penalty or payment of nonrecurring charges.”

Id. at 225.

The tariff dictated AT&T’s service responsibilities, and the lawsuit called those duties into question. Consequently, the litigation was foreclosed by the filed rate doctrine. *Id.* at 228.

2. Schermer v. State Farm Fire & Cas. Co.

This state’s high court recently reached a similar result in regulated commerce litigation. The *Schermer* plaintiffs filed a class action “alleging that the surcharge that was imposed by [the insurer] on homes whose electrical systems were more than 39 years old was racially discriminatory.” 721 N.W.2d at 309. That classification allegedly resulted in excessive premiums, and the lawsuit sought a refund. At base, the complaint alleged that the class was not receiving the insurance for which its members had paid, but rather was being penalized for occupying the older housing into which minorities are forced by their socio-economic circumstances. *Id.* at 315.

Summary judgment ended the litigation because “the filed rate doctrine prevents a court from retroactively changing a rate that has been filed with and approved by a state regulatory agency.” *Id.* at 309. This Court affirmed. *Id.*

Before the supreme court, plaintiffs disclaimed filed rate applicability “because their challenge is not to the reasonableness of the [Utilities Rating Plan that had been filed with the responsible agency], but to its legality, which is a matter within the peculiar

expertise of courts.” *Id.* at 314. Damages were said to be “judicially ascertainable.” *Id.* Both contentions were repudiated because “the filed rate doctrine should reflect separation of powers and comity considerations [which] the Class’s argument overlooks.” *Id.*

“[T]he regulation 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.” *Id.* at 315 (quoting *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm’n*, 369 N.W.2d 530, 535 (Minn. 1985)). “[I]n order to uphold the regulatory scheme enacted by the Legislature, we conclude that the Insurance Commissioner serves as the plaintiff’s sole source of relief.” *Id.* at 319 (quotations and citation omitted) (emphasis added).⁸

B. The Filed Rate Doctrine Prevails

Despite the filed rate mandate, the district court apparently intends to ask a jury to decide what services and facilities NSP should provide regardless of – indeed, in spite of – the tariff. Such an undertaking would inject the judiciary, and ultimately jurors, directly into the legislative and executive functions of promulgating and administering utility regulations – exactly what the filed rate doctrine was devised to prevent.

⁸ This Court and others have invoked the filed rate doctrine to preclude litigation seeking damages or injunctive relief in the specific context of NSP’s electric tariffs. *See, e.g., Roedler*, 1999 WL 1627346, at *15; *Hilling v. N. States Power Co.*, No. 3-90 CIV 418, 1990 WL 597044, at *2 (D. Minn. Dec. 12, 1990) (A.144-46); *In re Complaint by Shark*, No. A05-21, 2005 WL 3527152, at *3 (Minn. App. Dec. 27, 2005) (A.147-49).

Pursuant to tariff obligations NSP provides standard facilities. See NSP Tariff, General Rules and Regulations (“Tariff”) at §§ 2.1, 5.1, 5.2, 5.3 (A.286). In particular: “The Company will provide permanent service at the standard voltage and phase available in the area to the service location designated by the Company. The Company reserves the right to designate the type of facilities to be installed either overhead or underground.” Tariff at § 5.1. Conditions for extending, enlarging, or changing the “distribution or other facilities for supplying electric service” are specified by the tariff. Tariff at § 5.2.

NSP has not been charged with any specific tariff violation, the Siewerts are not complaining about being denied any tariff-required service. Necessarily then, this lawsuit is about services and facilities that the Siewerts believe should have been included in the tariff or should have been provided without regard to the tariff.

For instance, the Siewerts initially contended that NSP’s use of a multi-grounded system was inherently negligent. More recently the Siewerts insist that the distribution system should be balanced differently and that the system should be reconfigured to put their farm at the end of the line. Either way, the redress sought is premised on the supposition that NSP should have deviated from the tariff by providing the Siewerts with non-standard distribution system services and facilities. This is a paradigmatic example of the judicial meddling proscribed by filed rate doctrine.

The district court simply did not recognize the intrusion upon MPUC prerogative that proceeding with this lawsuit would inflict. The single authority cited below to summarily discount filed rate considerations was *Ferguson v. N. States Power Co.*, 239

N.W.2d 190 (Minn. 1976). *Ferguson* has nothing to do with tariffs, nothing to do with the filed rate bar, and certainly nothing to do with utility accountability for failing to provide non-standard distribution facilities at the behest of two ratepayers.

Lawsuits that encroach upon the administrative oversight of regulated commerce have been repeatedly rejected. In *AT&T* – as in this case – the complainant challenged the services, but there – as here – the tariff exclusively prescribed customer entitlement. 524 U.S. at 224-25. It was of no consequence that the lawsuit objected to services rather than rates because “[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached.” *Id.* at 223. The demand for different provisioning and billing that was turned back in *AT&T* is indistinguishable from the demand for different distribution system services and facilities in this litigation: for constitutional reasons the legislature placed the assessment of such tariff-based obligations beyond judicial purview.

The same rationale applied in *Chicago & Alton R. Co. v. Kirby* and *Davis v. Cornwell*, both cited in *AT&T*. The tariff scheme in *Chicago & Alton* precluded claims based upon a railroad’s failure to ship by fast train because the tariff did not call for such service. 225 U.S. at 163. The provision of different transportation alternatives in spite of tariff silence would have afforded “an undue advantage” to the plaintiff. *Id.* The same was true in *Davis v. Cornwell*, which invalidated attempts to secure services other than those required by the tariff. 264 U.S. at 562. The principle is simple: if the service is not tariff mandated, the claim is not for judicial resolution.

Holding NSP liable for providing the tariff-specified standard services and facilities would impinge upon MPUC authority and effect impermissible rate discrimination by affording the Siewerts unique service from which no other rate buyer benefits. The relief sought calls for judicial interloping into an “‘intricate ongoing process’ and interference by a court [that] ‘may set in motion an ever-widening set of consequences and adjustments’ which courts are powerless to address.” *Schermer*, 721 N.W.2d. at 315.

V. THE MPUC’S PRIMARY JURISDICTION MUST BE RESPECTED

At the very least, jurisdiction over this tariff dispute should be deferred to the agency created for that exact regulatory purpose: the MPUC. The administrative experts are uniquely qualified to assess and act upon the Siewerts’ distribution system complaints; only the agency can evaluate the impact of what the Siewerts are seeking on the state-wide industry and regulatory scheme. The district court must give way to MPUC primary jurisdiction.

A. The Doctrine Compels Deference

The primary jurisdiction is invoked to maintain the proper relationship and promote coordination between the courts and administrative authorities charged with specific regulatory duties. *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 62-64 (1956); *State by Pollution Control Agency v. United States Steel Corp.*, 307 Minn. 374, 380, 240 N.W.2d 316, 319 (1976). The doctrine allows judges “to allocate between courts and agencies the initial responsibility for resolving issues and disputes in a manner that recognizes the differing responsibilities and comparative advantages of agencies and

courts.” Pierce, ADMINISTRATIVE LAW TREATISE, §14.1 at 918 (2002). Like with filed rates, the doctrine is based upon separation of powers and comity considerations.

Primary jurisdiction recognizes that agencies are often better equipped to resolve the issues arising in regulated commerce due to the agencies’ “specialization, [] insight gained through experience, and [] more flexible procedure.” *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952).

To maintain the proper judicial/administrative balance, the doctrine expects that the responsible agency “should not be passed over” when issues presented are not within the conventional experience of judges or when dispute resolution calls for the exercise of administrative discretion. *City of Willmar Municipal Util. Comm’n v. Kandiyohi Co-op. Elec. Power Ass’n*, 452 N.W.2d 699, 703 (Minn. App. 1990) (“*Willmar*”). Simply put, primary jurisdiction is invoked when the subject matter of the litigation “is . . . at least arguably protected or regulated by . . . [a] regulatory statute.” *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299-300 (1973).

While “no fixed formula exists for applying the doctrine of primary jurisdiction,” *Western Pacific*, 352 U.S. at 64, several considerations weigh in favor of deference to the agency. One factor is the extent to which specialized expertise makes the administrative process a preferable issue resolution forum. *Far East Conference*, 342 U.S. at 574. Such specialized knowledge is particularly relevant when the controversy involves the economic relations among stakeholders in a regulated industry and facts peculiar to that business and its history. *Id.* at 573. This case is bristling with disagreements over the

means of delivering electricity and the cost of that undertaking and who should pay the price.

An agency venue is also preferred when the scientific community has not reached a clear consensus on a question. *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981 (1st Cir. 1995). Another factor favoring administrative decision-making is the need for regulatory uniformity and the importance of avoiding judicial impingements on the discharge of agency duties. *Western Pacific*, 352 U.S. at 64.

Significantly, the doctrine does not strip the court of jurisdiction; rather judicial involvement is just postponed, as parties dissatisfied with the administrative result may then bring judicial challenges. *Willmar*, 452 N.W.2d at 73 (citing *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n.*, 294 N.W.2d 297, 302 (Minn. 1980)). Deference to the administrative process is appropriate for the resolution of fact questions within specialized agency competence even if the answers will ultimately “serve as a premise for legal consequences to be judicially defined.” *Far East Conference*, 342 U.S. at 574.

Regardless of whether the MPUC is empowered to decide common law negligence or to award compensatory damages, a court should nonetheless allow the agency to determine the specialized facts underlying the Siewerts' claims. Further, even if a court were equipped to reconcile some factual wrangling, referral of other discrete issues is warranted before the litigation proceeds. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976).

The statutorily-charged agency should be allowed to resolve all issues arising out of regulated conduct when (1) the agency is better suited to answer the question due to specialized knowledge and experience, or (2) when a judicial resolution could undermine uniform regulatory standards or otherwise interfere with the agency's duties. Claims that implicate an electric utility's rates and tariffs, that call into question distribution and delivery obligations, or that challenge the construction and maintenance of electric supply facilities merit deferral to the MPUC.

B. The MPUC Has the Capacity to Resolve these Complaints

A threshold issue is whether the administrative agency has authority over the dispute. MPUC jurisdiction to assess stray voltage claims could not be clearer.

1. The regulation of electric utility rates and service standards

The MPUC is vested with exclusive power to oversee electric-utility service standards and rates. *See Willmar*, 452 N.W.2d at 702 (deference to agency where state statutes refer to agency jurisdiction). Every public utility is required to "furnish safe, adequate, efficient and reasonable service." Minn. Stat. § 216B.04. Section 216B.03 mandates that rates be "just and reasonable." *See also* §§ 216B.16, subd. 4. The obligations are enforced by the MPUC.

The charges and standards that make up the electric tariff are subject to MPUC review. The tariff encompasses the "rates" and "all rules that, in the judgment of the [MPUC], in any manner affect the service or product." Minn. Stat. §216B.05, subd. 2. The authority to approve those criteria is exclusively exercised by the MPUC. Minn.

Stat. §§ 216B.05, subd. 2(2); 216B.09 and 216B.16, subd. 1. *City of Oakdale*, 588 N.W.2d at 537.

The statutory delegation includes the power to set “service standards or requirements governing any current or voltage originating from the practice of grounding of electrical systems . . .” Minn. Stat. §216B.09, subd. 2. Giving effect to that change, the MPUC has promulgated rules governing the construction and replacement of electrical facilities, requiring – for instance – NESC compliance. Minn. R. 7826.0300; *see* Minn. Stat. §§ 216B.029(1)(d) and 326.243.

The MPUC is also empowered alter rates prospectively. Rates are set “in an amount which will equal the sum of the [fair] return to investors and the company’s operating expenses.” *In re N. States Power Gas Utility*, 519 N.W.2d 921, 924 (Minn. App. 1994); *see N. States Power Co. v. Minn. Pub. Utils. Comm’n*, 344 N.W.2d 374, 378 (Minn. 1984). The fair rate of return is the amount necessary to provide “earnings to investors comparable to the earnings from businesses with similar risks and [to allow] the company to maintain its financial integrity and locate new capital.” *In re N. States Power Gas Utility*, 519 N.W.2d at 924.

That determination perforce takes into account utility capital and operational needs. As this Court has recognized, “public regulation of utility rates is an intricate, ongoing process . . .” *In re Complaint by Shark*, No. A05-21, 2005 WL 3527152, at *2 (Minn. App. Dec. 27, 2005) (A.147). An injunction requiring reconfiguration of the distribution system to eliminate multiple grounding or to place the Siewert farm at the end of the line (even though the existing system complies with MPUC construction

requirements) would have a resounding effect on rate reasonableness. Squeezing one side of the tariff balloon means the other end will bulge: a court can only see where a specific case is putting pressure; the agency is charged with keeping track of the whole balloon.

The U.S. Supreme Court's recognition of an agency's primary jurisdiction over the determination of whether napalm-filled steel casings constituted incendiary devices is particularly elucidating:

A tariff is not an abstraction. It embodies an analysis of the costs incurred in the transportation of a certain article and a decision as to how much should, therefore, be charged for carriage of that article in order to produce a fair and reasonable return. Complex and technical cost-allocation and accounting problems must be solved in setting the tariff initially. In the case of "incendiary bombs," since it is expensive to take the elaborate safety precautions necessary to carry such items in safety, evidently there must have been calculation of the costs of handling, supervising and ensuring an inherently dangerous cargo. In other words, there were obviously commercial reasons why a higher tariff was set for incendiary bombs than for, say, lumber. It therefore follows that the decision whether a certain item was intended to be covered by the tariff for incendiary bombs involves an intimate knowledge of these very reasons themselves . . . Do the factors which make for the high costs and therefore high rates on incendiary bombs also call for a high rate on steel casings filled with napalm gel? To answer that question there must be close familiarity with these factors. Such familiarity is possessed not by the courts but by the agency which had the exclusive power to pass on the rate in the first instance.

Western Pacific R.R., 352 U.S. at 166-67. See also *Roedler*, 1999 WL 1627346; *Hilling*, 1990 WL 597044.

2. The MPUC takes charge in stray voltage cases

The MPUC's website boasts of "handling complaints related to stray voltage and currents in the earth" as one of the agency's "primary duties." See

<http://www.puc.state.mn.us/electric/index.htm>. That recognition is consistent with the legislative designation of the agency as the tribunal for service-related-complaint resolution. *See Willmar*, 452 N.W.2d at 703 (agency power to hear petitions favors judicial deference to agency).

Minn. Stat. § 216B.17, subd. 1 provides:

On its own motion or upon a complaint made against any public utility...that any of the rates, tolls, tariffs, charges, or schedules or any joint rate or any...practice, act or omission affecting or relating to the production, transmission, delivery or furnishing of...electricity or any service in connection therewith is in any respect unreasonable, insufficient..., or that any service is inadequate...the commission shall proceed, with notice, to make such investigation as it may deem necessary.

“Service” includes “the installation, removal, or repair of equipment or facilities for delivering or measuring . . . electricity.” Minn. Stat. § 216B.02, subd. 6. Simply put, the MPUC has primary responsibility for handling disputes over rates and tariffs, electric energy delivery and the construction and maintenance of distribution facilities.

The legislature detailed the process for raising protests over the subject matters for which the MPUC is responsible. Complaints may be initiated by petition; notice must be provided to all parties. The agency has broad investigatory powers and can convene hearings to receive evidence. Minn. Stat. § 216B.17, subd. 1.

Section 216B.17 vests the MPUC with jurisdiction to probe and resolve stray voltage complaints that are indistinguishable from the Siewerts’ claims. *In re Complaint Against Lake Region Cooperative Electric Association* involved several farmers’ challenge to the adequacy of utility’s response to stray voltage accusations. *In re Complaint Against Lake Region Coop. Electric Assoc.*, No. E-119/C-92-318, 1992 WL

678528 at *1 (Minn. P.U.C. June 4, 1992) (“*Order Requiring Answer to Complaint*”) (A.172); *In re Complaint Against Lake Region Coop. Electric Assoc.*, No. E-119/C-92-318, 1992 WL 474705 at * 2 (Minn. P.U.C. Nov. 17, 1992) (“*Order Initiating Investigation*”) (A.166). The distribution of electricity was said to be impairing herd health and productive capacity. *Order Initiating Investigation*, 1992 WL 474705 at *2. Among other things, the installation of isolating devices and relocation of facilities were sought – exactly the thrust of the Siewerts’ request for injunctive relief. *Order Requiring Answer to Complaint*, 1992 WL 678528 at *1. The farmers also demanded of the MPUC “more complete investigations into the electrical environment of their dairy herds,” including specific electrical tests that encompassed “measurements and analysis of ground currents, DC currents, and amperage.” *Order Initiating Investigation*, 1992 WL 474705 at *3.

The utility disputed MPUC jurisdiction to no avail. The agency was empowered to decide because stray voltage grievances are “complaints about the service standards and practices” of electrical utilities. *Order Requiring Answer to Complaint*, 1992 WL 678528 at *1.

The Commission has jurisdiction over this proceeding under Minn. Stat. §216B.17. This provision authorizes the Commission to investigate the service standards and practices of any utility . . . The Complaint in this proceeding clearly meets these requirements. It . . . raises serious issues regarding the adequacy of the Company’s service. Indeed, the Complainants’ allegations related directly to the Company’s standards and practices governing its distribution system on and around dairy farms. This falls squarely within the terms of Minn. Stat. § 216B.17, and gives rise to Commission jurisdiction.

Order Initiating Investigation, 1992 WL 474705 at *2 (A.168).

In another matter, the MPUC exercised its authority, as well as its expertise, to (1) assess whether distribution system reconfigurations might be appropriate to address stray voltage concerns, (2) weigh the costs and benefits of various system reconfigurations and (3) work with the utility on development and implementation of an action plan. *In re Formal Complaint by Donald and Jeanine Wolbeck Regarding Stray Voltage Against Sauk Center Water, Light and Power Comm'n*, No. E-308/C-92-1146 and *In re Inquiry into Distrib. Sys. Issues Potentially Affecting Service Quality*, No. E-308/C1-96-1483 (Minn. P.U.C. Dec. 18, 1996) (A.156).

Willmar also recognized the MPUC's authority to decide issues about the distribution of electricity. The Court required MPUC resolution of a dispute over whether electric service has been provided to an annexed area, reasoning as follows:

[T]he determination whether an annexed area has been previously receiving electric service by another utility involves questions regarding the location of existing power lines, capacity and the number of customers in the area. . . . Therefore, we believe the MPUC, which has a more thorough understanding of these questions, is the more appropriate forum . . .

452 N.W.2d at 703.

The agency's stray voltage prerogative and proficiency were also endorsed by the legislative directive for the MPUC to assemble a team of science advisors to investigate and advise regarding the effects of earth currents on dairy cow production and health. 1994 Minn. Laws, Ch. 573 (A.191). The science advisors issued a universally accepted Final Report (A.239) in 1998 and two subsequent research papers in 1999. Notably, despite being asked to make recommendations for corrective actions, the science advisors found none to be necessary.

The legislature's reliance upon the MPUC to oversee and receive inter-disciplinary scientific studies about stray voltage is significant for two reasons. First, the lawmakers obviously viewed the risks posed by stray voltage to be within the purview of the MPUC; the science advisors' findings and recommendations were referred to the agency for use and implementation. Second, the legislature recognized that an expert scientific panel was necessary because stray voltage is a complex phenomenon requiring specialized expertise. The MPUC is the entity with that expertise.

C. The Siewerts' Claims Should Be Referred To The MPUC

The Siewerts raise several claims premised upon issues that are uniquely within the ken of the MPUC. Those questions should be referred to the MPUC for initial answers.

For instance, the Siewerts contend that the multi-grounded distribution system employed throughout the state – indeed the country – to deliver electricity is fundamentally flawed and must be rebuilt either by eliminating multiple grounding or by readjusting load balances and by placing the Siewert farm at the end of the line. The design and construction of electrical distribution systems fall squarely within the ambit of MPUC regulation. *Willmar*, 452 N.W.2d at 703.

The agency has consistently made determinations about system configuration. The assessment of whether the existing designs produce harmful stray voltage and ground currents and the determination of what, if any, remedial measures might be appropriate are patently complicated issues. The agency's knowledge and experience – repeatedly

recognized by the legislature – makes the MPUC much more qualified to make the necessary initial judgments.

Finally, judicial decisions about installation flaws and line reconfigurations would necessarily corrupt the MPUC's distribution-system policy uniformity, reliability and safety – particularly if the courts were to subject NSP to measures that exceed or contradict NESC requirements. *See* Minn. R. 7826.0300. Such interference would also hinder MPUC regulatory authority and flexibility, not only in the area of system design, but also with regard to tariff rates.

The Siewerts' complaints about facility inspection and maintenance should be first addressed by the MPUC. Again, the legislature has empowered the agency to set service standards and to adjudicate service-related complaints. Minn. Stat. § 216B.17, subd. 1. A court decision ordaining different or additional maintenance and inspection duties, specific to the Siewert farm, imperils regulatory uniformity.

To the extent such inspection and maintenance standards were to be applied more broadly, the new requirements would result in different operational costs – directly affecting rates and the tariff. A decision about one aspect of rates can not be made without considering all the other factors including energy prices imposing that might be inflicted by the change. Minn. Stat. §§216B.03 and 216B.16, subd. 6. The MPUC is best positioned by virtue of its knowledge, experience and statutory charge to make the most accurate and nuanced call about distribution system inspection and maintenance, as well as the associated costs and benefits.

In the face of overwhelming considerations favoring the MPUC's primary jurisdiction, the district court once again relied on a single authority – *Ferguson*, 239 N.W.2d 180 (Minn. 1976) – to hold on to this case. *Summary Judgment Order* at 5 (citing *Ferguson*, 239 N.W.2d 180). As with the filed rate determination, the opinion does not support Judge Walters's decision: *Ferguson* is not a primary jurisdiction case. In fact, the words "primary jurisdiction" are never mentioned, and the doctrine is never considered.

This Court should instead defer to MPUC's interpretation and application of its enabling legislation. *In re Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 277-78 (Minn. 2001) (like primary jurisdiction, deference to agency interpretation is grounded in the principle of separation of powers). The agency's assumption of stray voltage assessment responsibility is clear.

In sum, resolution of the Siewerts' injunctive and monetary claims calls for a comprehensive evaluation of the safety, reliability and quality of NSP's distribution system. The MPUC is eminently qualified to sort out such issues; the agency has the singular technical and scientific capability to untangle, rather than slash through, the stray voltage Gordian Knot. Appropriate respect for MPUC expertise and authority compels this Court to rein-in the lower court's jurisdictional transgressions.

CONCLUSION

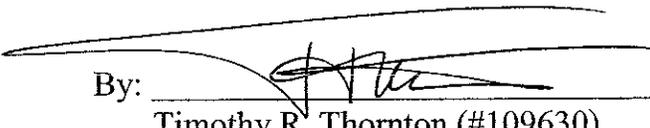
Recognizing the important and doubtful nature of allowing this case to proceed, the lower court properly certified the statute of repose, filed rate and primary jurisdiction doctrine questions in order to receive prompt appellate guidance. Compelled by recent

precedent, the statute of repose must be given effect to preclude claims about a decades-old electrical distribution system's alleged "defects" and belated animal injury complaints.

Not only are the Siewerts' claims time barred, the filed rate doctrine divests the district court of jurisdiction to resolve challenges to tariff-provided services and facilities. At the very least, resolution of such disputes would benefit from the special competence and experience of the MPUC. Either way, this dispute is not for judicial consideration in the first instance.

Dated: December 7, 2007

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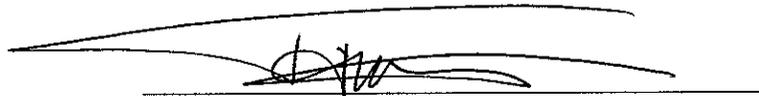
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**ATTORNEYS FOR NORTHERN
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Northern States Power Company d/b/a Xcel Energy 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 less than 14,000 words, excluding the Table of Contents and Table of Authorities.

Dated: December 7, 2007

A handwritten signature in black ink, appearing to read 'T. Thornton', is written over a horizontal line.

Timothy R. Thornton