

CASE NOS. A07-1975 & A07-2070

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Greg Siewert and Harlan Siewert,
d/b/a Siewert Holsteins,

Respondents,

vs.

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

Appellant.

BRIEF OF RESPONDENTS

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STATEMENT OF THE LEGAL ISSUES

1. Does the filed rate doctrine bar Respondents' tort claims?

The District Court ruled that the filed rate doctrine did not preclude common law negligence, nuisance and strict liability claims raised against NSP in this case.

Most apposite authorities:

ZumBerge v. Northern States Power Co., 481 N.W.2d 103 (Minn. Ct. App. 1992)
review denied (Minn. April 29, 1992)

Schmidt v. Northern States Power Co., 742 N.W.2d 294, 2007 WI 136 (Wis.
2007)

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

2. Does the primary jurisdiction doctrine require judicial deference to the Minnesota Public Utilities Commission (MPUC) for the resolution of common law tort claims against NSP?

The District Court ruled that the primary jurisdiction doctrine did not require deference to the MPUC for resolution of common law tort claims.

Most apposite authorities:

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

AAA Striping Services v. Minn. Dept. of Transp., 681 N.W.2d 706 (Minn. Ct.
App. 2004)

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976)

Petition of Minnesota Power for Authority to Change Its Schedule of Rates for
Retail Elec. Serv., 545 N.W.2d 49, 51 (Minn. Ct. App. 1996)

3. Does the statute of repose (Minn. Stat. § 541.051) preclude Respondents' claims?

The district court ruled that the statute of repose did not apply.

Most apposite authorities:

Johnson v. Steele-Waseca Coop. Elec., 469 N.W.2d 517 (Minn. Ct. App. 1991)

Ferguson v. Northern States Power Co., 307 Minn. 26, 239 N.W.2d 190 (1976)

Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988)

Olmanson v. LeSueur Co., 693 N.W.2d 876 (Minn. 2005)

STATEMENT OF THE CASE

The Respondents, Greg and Harlan Siewert, are Wabasha County dairy farmers. Appellant, NSP, has distributed electricity to their farm since 1989 when the Respondents moved there. In late March 2004, Respondents had their farm tested for stray voltage and discovered that extremely high levels of current was flowing into the dairy facilities and injuring the cattle. This lawsuit was commenced on June 23, 2004 seeking damages based on negligence, strict liability, trespass and nuisance. An amended complaint was allowed that requested an injunction requiring the Appellant to abate the nuisance.

Between the date of filing of this lawsuit and the date when the parties filed dispositive motions on July 16, 2007, 59 depositions were taken, including 22 depositions of experts in several states, thousands of documents have been produced and hundreds of thousands of dollars have been spent by both parties.

Appellant did not allege primary jurisdiction as an affirmative defense in its original answer served on July 19, 2004 or its amended Answer served on March 20, 2007. The defense was raised for the first time on July 16, 2007 when Appellant filed a summary judgment motion.

The Appellant moved for summary judgment on numerous grounds, including three affirmative defenses, 1) statute of repose, 2) filed rate and 3) primary jurisdiction.

The District Court denied all of Appellant's motions but dismissed Respondents' trespass claim.¹

This appeal follows the District Court's certification on the issues of statute of repose, filed rate and primary jurisdiction. This court reviews *de novo* a trial court's Order certifying an issue as important and doubtful. Davies v. West Pub. Co., 622 N.W.2d 836 (Minn. Ct. App.2001) *review denied May 29, 2001*.

At the hearing on NSP's motion for certification, the district court indicated that the issues of the filed rate doctrine and primary jurisdiction did not satisfy criteria for certification:

[I]f this motion were based solely on that [statute of repose], that would be the only question sought to be certified, I would be inclined to deny the request."

RA 330.

[E]ven though I don't think the filed rate doctrine or the primary jurisdiction questions are doubtful, nevertheless, if I am going to certify one question, it would seem to make sense to certify all three.

RA 332.

The District Court certified these two issues after requesting input from Respondents' attorneys, who agreed it made sense to certify all three issues if one of them was going to be certified. However, the record should be clear that the district court

¹ Respondents filed a notice of review regarding this dismissal, but withdraw that request. Respondents agree with Appellant that Respondents' trespass claim is not properly before this Court at this time, but reserve the right to raise the issue in any subsequent appeal that may occur.

did not believe that the issues of filed rate and primary jurisdiction were important and doubtful, despite NSP's trumpeting of the court's certification order.

The District Court's decision to certify the statute of repose issue because it was doubtful was incorrect. The requirement that an issue be "doubtful" simply means there is no controlling precedent. Emme v. C.O.M.B., Inc., 418 N.W.2d 176 (Minn. 1988). In Johnson v. Steele-Waseca Coop. Elec., 469 N.W.2d 517 (Minn. App. 1991), *review denied July 24, 1991*, this Court specifically ruled that the public utility's electrical distribution system was not an improvement to real property.

INTRODUCTION

All electricity leaving an electrical substation must return to that substation in order to complete a circuit. Unless that circuit is completed, electricity will not flow. The current leaves the substation on a high voltage line which eventually connects to some electrical "appliance." After exiting the "appliance" that current must return to the substation. The neutral-grounded network provides the returning current two choices. Either it can return via the neutral line, which accounts for the second wire on our electrical poles, or it can return through the ground. These two pathways comprise the grounded-neutral network. Electricity flows through the path of lowest resistance. If there exists more resistance in the neutral line than in the ground, the current will flow through the ground to return to the substation.

Neutral-to-earth voltage or stray voltage will occur when current moves from either the neutral line to the ground or from the ground to the neutral line. It uses a cow as a pathway if that animal happens to bridge the gap between the two. A cow's hooves provide an excellent contact to the earth while standing on wet concrete or mud, while at the same time the cow is contacting the grounded-neutral system consisting of items such as metal stanchions, stalls, feeders, milkers, and waterers. The current simply uses the cow as a pathway in its eventual return to the substation. Apparently very slight voltages can affect cattle. Evidence [has] suggested anything greater than one volt can be catastrophic to a dairy farm.

Schlader v. Interstate Power Co., 591 N.W.2d 10 (Iowa, 1999).

STATEMENT OF FACTS

Appellant Northern States Power (NSP) claims that the facts, other than the “regulatory protocol” and the “age of the system,” don’t matter because they are “just background and context.” App. Brief at 8. The facts of this case do matter and are set out below.

A. THE SIEWERT FAMILY FARM.

Harlan and Greg Siewert are father and son. He has worked on the farm with his father all his life. RA 553-557. By 1989, they owned about 150-200 cows together. They moved to the new farm in 1989 and the milking herd is housed in a freestall barn and milked in a parlor. RA 558. The cows have access to water in the freestall barn all day where there are 5 Ritchie waterers. RA 561, 566. There is a separate facility for the dry cows, which have access to pasture. RA 600. Electric current also accesses the cows through waterers. RA 601.

B. HERD HEALTH PROBLEMS EXPERIENCED BY THE SIEWERTS.

Since 1990, milk production did not increase as expected and then decreased dramatically in 1999. RA 436. Over the years on the main farm, the cow numbers began dropping. They had 400 cows in November 2002, but by 2005 only had 341 resulting in a death loss of 20-25% annually. RA 561-563. The vets could not explain the high cow death rates. RA 616. One thing that was common was intestinal bleeding. RA 616, 621. There was no BVD (bovine viral diarrhea) or coronavirus. RA 616. They had some cryptosporidium problems with the calves. Id. The water never tested positive for

crypto: RA 620. There was no real problem with milk fever, ketosis or IBR. RA 622. There has never been an epidemic disease on the farm. RA 617. Instead the cows lack immune function from exposure to stray voltage and would just die. RA 617, 623. No one could explain why 80-90 calves were dying per year. RA 618. These deaths have been gradually getting worse over time. RA 619.

Somatic cell count (SCC) linear scores kept getting higher. RA 626-627. Milk production went flat in 1998, and the herd health and production got worse every year after that. RA 586. The milk production started slipping down in 2002 from 23,800+ #/cow/year and by January 2005 it was less than 20,000 #/cow/year. RA 433. Master electrician Neubauer found 6.6 amps of current. RA 176. The cows have continued to lap water after 2004, an abnormal finding. RA 574-575.

A forensic veterinarian, Dr. Andrew Johnson, has opined that stray voltage affects the cows adversely in many ways, including the cows' immunity. RA 8.

On October 10, 2004, Greg Siewert called the MPUC requesting to file a formal stray voltage complaint against NSP (Xcel Energy). RA 109. Jean Waltz, the Area Engineer for NSP, was on the Siewert Farm several times. A 40-41. She also reported the Respondents' complaints to Al Bierbaum at the MPUC. A 41. Since that time, MPUC has not, on its own motion, initiated any hearing procedure to resolve the issues against NSP as it is permitted to do under Minn. Stat. § 216B.17, subd. 1².

² Consumer complaints require 50 consumers in order to compel MPUC action. Minn. Stat. § 216B.17, subd. 1. As a consumer, Siewert could not compel the MPUC to initiate a formal investigation and require a hearing, but the MPUC could do this "[O]n its own motion." Id.

C. STRAY VOLTAGE AND THE NATIONAL ELECTRIC SAFETY CODE (NESC).

Electricity runs on a circuit – what goes out of a substation on power distribution lines must come back to the substation. “Stray voltage” describes the phenomena of electric current that is distributed returning to its source on a pathway that comes into contact with an animal – in this case, dairy cows owned by the respondents. RA 133. The National Electric Safety Code recognizes several different types of electric distribution systems, including the multi-grounded wye system that was used on the ZUF-21 circuit serving the Respondents’ farm. A multi-grounded wye system is cheaper to install initially, but is more unpredictable and unstable over time. RA 22. If the three line phases on this system get out of balance, current increases on the neutral return line causing uncommon, excessive and unpredictable neutral to earth voltages (NEV) and neutral earth currents that can be conducted to a farm. RA 22-23. This happens by, among other things, either lack of maintenance or by continually expanding single phase connections to the three phase system. RA 22-23, 26-28. Because of this, a three phase multi-grounded wye system requires ongoing vigilance and maintenance. RA 23. Cows are particularly susceptible to electricity, because they have much less resistance than human beings. *Id.* Cows can be permanently injured by such currents, including injury to immune function, which in turn leads to an array of diseases and loss of milk production. RA 10, 12.

The NESC does not endorse the safety of any particular system, but instead merely states minimum requirements. RA 24. Utilities are required to both construct and

maintain such a system by observing other “good practices” according to “local conditions known at that time by those responsible for the construction and maintenance of ... the supply lines and equipment.” RA 24. The ZUF-21 circuit was not properly maintained as required to prevent “objectionable flow of current over the grounding conductor.” RA 24.

NSP’s goal in Minnesota was to maintain stray voltage at ½ volt or less, and that was not the case at the Respondents’ farm. RA 25, 33-34, 429. NSP recognizes that its first obligation in seeking to reduce stray voltage is maintenance of its distribution system. RA 429.

D. CHANGES TO NSP’S DISTRIBUTION SYSTEM.

Contrary to NSP’s argument, there have been many changes to the equipment comprising the NSP distribution system serving the respondent’s farm since 1960, and NSP has no proof to establish when its electrical distribution system was substantially completed such that any defect causing damage to respondents commenced. NSP refers to the components of the electrical distribution system which it owns as “our equipment.” RA 113.

The conductors for the distribution line servicing the Siewert farm were installed “sometime after 1960.” A 21. An open delta-open wye 2-phase connection was made at the Siewert farm at an unknown time in the past until it was changed in 2004. This type of connection increases the risk of load imbalance on the system. RA 112-113. The open delta-open wye configuration creates current unbalance and, even with balanced loading, high currents are forced into the primary neutral. RA 106. NSP has no records to

identify when this open delta-open wye system was installed. RA 112. However, NSP has records to show that the Respondents' service using that system was overloaded based on the transformer size. RA 114. Greg Siewert testified that up to the spring of 2004, the electric service was an open delta, with a "wild leg" and the three phases at the farm measured out of balance at 121, 22 and 20 on each phase, instead of 120 on each phase (360 degrees total) as a properly balanced three phase system should be. RA 592.

A third phase conductor was added to the tap line to the Siewert farm in May/June 2004. A 22. A third segment of the line was installed on an unknown date, which NSP guessed to be "sometime in the 1980's." Id. A new 10 KVA transformer, meter pole and secondary wires were installed on the farm by NSP in August 1996. A 33. NSP relocated a pole for the new milking parlor in 1999. A 32. NSP installed a neutral isolator on March 22, 2004. A 26. This was later found to be installed incorrectly. RA 28, 175. A secondary ground lead was installed on April 14, 2004. Id. The NSP transformer was blown out on June 11, 2004. Id. A fuse was replaced on June 19, 2004. A three phase primary conductor was installed in June 2004. Id. At the same time, NSP replaced the "existing neutral wire with 2/0 ASCR bare conductor and a ground conductor and ground rod was installed and each pole from the mainline circuit to the transformer pole." A 32. At the same time, the number of ground rod assemblies was increased on the tap from the distribution line to the farm and other unspecified changes were made to the existing assemblies. A 42.

E. CAUSES OF STRAY VOLTAGE ON THE SIEWERT FARM.

NSP did not inspect the existing neutral tap line to the farm at the time the neutral line was replaced in 2004. RA 306. Waltz never did a visual inspection at that time. Id. The line for ZUF-21 towards Mazeppa (the substation serving the Siewert farm) was not properly balanced. RA 307, 311. NSP had complaints about voltage on that line in the past. RA 311.

NSP admits that phase imbalance is a cause of stray voltage. RA 113. NSP admits that the cause of the imbalance is the “number of single phase taps out on that circuit.” RA 7, 307-308. Respondents’ experts agree. RA 7, 27. Beyond the respondents’ farm towards Mazeppa, the three phase service converts to single phase. RA 27. Since 1989 NSP has added numerous homes and other services to the ZUF-21 line serving the respondents’ farm, the vast majority of which are single phase customers. RA 1. The load imbalance changes given the time of day. RA 308-309. It is purely a function of current loading on the distribution circuit. RA 309. NSP internally seeks a load imbalance of not more than 10%. RA 312. The line servicing the Siewert farm is out of balance by more than 10% and has been that way ever since Waltz took the regional engineer position in 2002. RA 312. When Waltz found that out in 2002, she requested load imbalance sheets back to 1999, and it appeared to her that the imbalance problem had been increasing over time. RA 314. There is no evidence that the phase imbalance causing stray voltage at the Siewert farm has ever been corrected. RA 25. NSP has presented no evidence to show when the three phases became unbalanced.

Despite being on the Siewert farm from the 1980's forward, no testing was ever done for line imbalance or stray voltage at the Siewert dairy before 2004. RA 25. However, the existing primary neutral was deemed defective in 2004 due to overload of the transformer bank. RA 26. NSP has no idea when that overload in the system first commenced other than to say it was "sometime between when he moved in [1989] and now." In addition, witness Neubauer identified corrosion in the neutral return line caused by lack of maintenance, which impressed significant neutral to earth voltages (10 volts) on the farm. RA 9, 483-488.

Trees were observed growing into the power lines over a period of several years before April 2007 along the ZUF-21 circuit from Zumbro Falls to Mazeppa. RA 172-174. Removal of those trees in April 2007 had the effect of reducing transient current and earth currents. RA 6.

Respondents' experts believed the stray voltage was a function of imbalance due to continued expansion of the line, use of out of date and corroded lines and connectors and the failure of NSP to inspect, test and maintain the lines over time. RA 7, 23-24.

NSP refused to answer interrogatories related to power quality testing. A 28. NSP indicated, however, that Area Engineers have primary responsibility to address "power quality" concerns. A 30. NSP's policy is to do no testing unless a customer calls in with a problem. A 36. When NSP converted from the open-delta to the three phase in June 2004, voltage went down to .7-.8 volts in the barn. RA 570. This occurred in the middle of June 2004. RA 597. The cows still lapped at the waterers, but it helped. RA 598. The cows drank water better until March 2005. RA 599. Jean Waltz told Greg Siewert

that the neutral blocker would not do any good. RA 580. When he put his farm on a generator (not using NSP power at all), voltage dropped to .1 volt in the barn and only 60-70 millivolts in the parlor. RA 595. Larry Neubauer recommended an isolation transformer. RA 596. Len Jacobsen from NSP told Greg Siewert that his farm was very vulnerable to lightning strikes because it was the highest farm in the area. RA 581. Greg called Jean Waltz from NSP and she refused to help. RA 571-573. The new transformer blew up twice when it was energized, but Jean Waltz just ignored the request for help. Id.

NSP's design engineer was Len Jacobsen. He has been on the Siewert farm four times. The first was back in the early 1980's when he designed a move of the transformer to be closer to the barn. RA 500. The second time he was on the farm to do design work was in August of 1996 when he designed electrical service to a mobile home, which included installation of a transformer. RA 501. The next time he did design work was in July of 1999 when he designed movement of another utility pole. RA 502. The last time was in the spring of 2004, when he designed the new electrical service. RA 504. Mr. Jacobsen designed the new installation that was installed in June of 2004. Id. While performing his design duties in 2004, he determined that the existing transformer bank was overloaded and that the size of the primary neutral needed to be increased. This overload took place, according to Mr. Jacobsen, "sometime between when he moved in (1989) and that date (2004), I don't know when". RA 505-506.

No testing for neutral to earth voltage (NEV) was done at any time prior to 2004 following the movement of two utility poles and the addition of the service of the mobile

home. At no time after this additional work was performed did NSP do any testing to determine if the lines were balanced. RA 500, 502-503, 507-508.

NSP personnel did not ask Greg Siewert about whether new equipment had been installed, nor was he ever advised that it was his responsibility to contact NSP when new equipment was installed on his farm. RA 1.

ARGUMENT

I. STANDARD OF REVIEW

A. FILED RATE DOCTRINE AND STATUTE OF REPOSE.

This matter comes to this Court on appeal from denial of a summary judgment motion. The standard of review is “whether a genuine issue of material fact exists and whether the law was correctly applied.” Murphy v. Allina health System, 668 N.W.2d 17, 20 (Minn. Ct. App. 2003), citing Art Goebel, Inc. v. North Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1977). As to determining the facts, this Court is constrained to take a view of the evidence that presumes the facts alleged by the non-moving party are true. Burns v. State, 570 N.W.2d 17, 19 (Minn. Ct. App. 1997). A de novo standard of review is used to determine whether the district court erred in its examination of the law. Art Goebel, Inc., supra, 567 N.W.2d at 515.

B. PRIMARY JURISDICTION DOCTRINE.

Review of a district court’s determination of primary jurisdiction is subject to an abuse-of-discretion standard. Env’tl. Tech. Council v. Sierra Club, 98 F.3d 774, 779 (4th Cir. 1996), cert den., 512 U.S. 1103, 117 S.Ct. 2478, 138 L.Ed.2d 987 (1997). This standard of review derives from the district court’s exercise of discretion in structuring and coordinating administrative and judicial proceedings. *Id.* at 789 n. 24.

II. THE STATUTE OF REPOSE DOES NOT BAR RESPONDENT'S CLAIMS.

Minn. Stat. § 541.051 does not bar Respondents' claims for at least seven reasons: First, even if the electrical distribution system is considered an improvement to real property, the statute does not apply to claims based on negligence in the maintenance, operation or inspection of the real property improvement against the owner of the improvement which has been alleged and proven. Second, Minn. Stat. § 541.051(e) excludes claims against suppliers of any equipment installed upon real property from the two year statute of limitations and the ten year statute of repose. Third, the electrical distribution system that supplies electricity to customers on ZUF-21 is not an "improvement to real property" as that term is used Minn. Stat. § 541.051 and as interpreted by this Court. Johnson v. Steele-Waseca Coop. Elec., 469 N.W.2d 517 (Minn. Ct. App. 1991), *review denied July 24, 1991*. Fourth, because NSP's electrical distribution system constantly is changing as new customers are added to the line or existing customers request different levels of electricity to serve them, the claim by NSP that ten years has lapsed since the completion of the electrical distribution line was completed is unproven. Fifth, Appellant modified Respondents' electrical service in 1996 by adding a transformer and electrical service to a mobile home which increased levels of stray voltage within the ten year statute of repose. Sixth, Appellant fraudulently concealed from Respondents the fact that its distribution lines were not balanced which greatly increased the risk of stray voltage, especially with the type of electrical service to Respondents' dairy. Seventh, the doctrine of continuing torts precludes the application of Minn. Stat. § 541.051.

The District Court rejected Appellant's statute of repose defense based solely upon the holding of Johnson and certified this issue because of the "wisdom" comment found in footnote 1 in State Farm and Cas. v. Aquila, Inc., 718 N.W.2d 879, 885 (Minn. 2006). The District Court did not address in his Order the numerous other reasons presented by Respondents why the statute of repose does not apply, as set out herein.

A. MINN. STAT. § 541.051 DOES NOT APPLY TO CLAIMS BASED ON NEGLIGENT MAINTENANCE, OPERATION AND INSPECTION

Minn. Stat. § 541.051(d) excludes claims based on negligent maintenance, operation or inspection from the statute of repose.

Respondents alleged in their Complaint that Appellant was negligent in the maintenance, operation and inspection of its electrical distribution system (ZUF-21). RA 424 at ¶V.

In response to Appellant's Summary Judgment and Frye-Mack challenges to Respondents' experts, Respondents submitted substantial and compelling evidence to support its negligence and nuisance claims, unlike the Plaintiffs in Aquila. (Plaintiffs' Response to Defendant's Summary Judgment motion dated August 13, 2007 pages 14-18, Plaintiffs' Memorandum Opposing Motions to Exclude Testimony of Plaintiffs' Experts under Frye-Mack dated August 13, 2007, pp. 4-9, 32-53, Affidavit of Donald Zipse dated August 13, 2007 (RA 20-171), Affidavit of Lawrence Neubauer dated August 13, 2007 (RA 3-7) and the Affidavit of Dr. Andrew Johnson dated August 9, 2007 (RA 8-19)). Affidavits were also submitted by residents along the ZUF-21 to

establish Appellant's failure to keep tree branches out of the power lines which resulted in increased levels of ground current. RA 172 and RA 173.

Appellant takes the position that it has no duty to provide electricity to its customers in a safe manner.⁴ Both common law and statutory law require this. Minn. Stat. § 216B.04 (requiring utilities to provide safe, adequate, efficient, and reasonable service); Steinbrecher v. McLeod Co-op Power Ass'n, 392 N.W.2d 709, 712 (Minn. Ct. App. 1986) (calling Ferguson v. Northern States Power Co., 307 Minn. 26, 239 N.W.2d 190 (1976) the "definitive" decision in Minnesota on the liability of power companies to and stating that "as the risk increases so does the standard of care."). As long as electricity runs through power lines to the end user, according to NSP, it has no further obligation in damages to its customers or the public at large no matter what the hazard or harm done to people or property. This is directly contrary to long established common law principles of tort liability in Minnesota. Id.

This Court has described stray voltage in a dairy barn as like a "tiger loose on the street" that NSP has a duty to control. ZumBerge v. NSP, 481 N.W.2d 103 (Minn. Ct. App. 1992).

Owners and possessors, such as Appellant, have a common law obligation, not governed by the 10-year statute of repose, to inspect and maintain their property once construction is completed. Olmanson v. LeSueur Co., 693 N.W.2d 876, 880-881 (Minn.

⁴ Appellant argued to the District Court that "There simply is no fact issue for the jury to consider regarding the accepted standard of care applicable to negligent maintenance or operation claims against a regulated utility." (Appellant's Summary Judgment Motion Reply Memorandum at p. 7).

2005). Minnesota law requires a utility to make “reasonable inspections.” Wilson v. Home Gas Co., 125 N.W.2d 725, 732 (Minn. 1964); Ruberg v. Skelly Oil Co., 297 N.W.2d 746, 751 (Minn. 1980) (utility that owns or controls service lines has ongoing duty to inspect and maintain even without notice of defect.) See also: Fabbrizi v. Village of Hibbing, 66 N.W.2d 7, 9-10 (Minn. 1954).

In addition to the statutory and common law duties to use reasonable care in the sale and transmission of electricity in a safe manner, this duty is also mandated by the filed tariff and the NESC.

Appellant argues that it is only obligated in its tariff to provide standard facilities to Respondents. “Standard facilities” are defined as “those facilities whose design or location constitute the reasonable and prudent, least cost alternative that is consistent with the existing electric system configuration, will meet the needs of the company’s customers and will retain system reliability and performance under the circumstances.” NSP Tariff, General Rules and Regulations, Section 5.3 A(5). Obviously Plaintiffs were not provided standard facilities as their needs clearly were not met, nor did the facilities “maintain system reliability and performance”. Further, NSP did not follow “good utility practices” nor comply with the National Electric Safety Code. RA 23 at ¶ 9.

The NESC has several important references to issues in this case, and there is evidence that NSP committed and omitted acts that violated the minimum industry standard set forth in that document. The Handbook for NESC Rule 92D (1993) explains that:

Installations near milking areas that are known to present specific problems (such as milking barns without adequate voltage gradient control...) may need special attention to limit damage to equipment or uncomfortable conditions for personnel or animals.

RA 635.

The NESC also commands that grounds “shall be so arranged that under normal circumstances there will be no objectionable flow of current.” Because, as NSP acknowledges, the multi-grounded wye system is designed to discharge current into the earth, it is especially important for Appellant to know if it is discharging “objectionable currents” into the earth. Appellant installed a two-phase delta system into this dairy, knowing it was fundamentally prone to discharge high levels of neutral current into the dairy (RA 110) and has failed to inspect or maintain its unbalanced system on the three phases, a system it acknowledges contributes to increased neutral to earth voltage. RA 303-315, 434-443.

NESC Rule 96C requires grounding not less than four grounds per 1.6 km (mile) of the entire line. There is no requirement to install a ground rod in the front yard of a dairy, as was done in this case. This violated Rule 92D which indicates that grounds “shall be so arranged that under normal circumstances there will be no objectionable flow of current.” RA 635.

Appellant’s interpretation of the NESC stands common sense on its head. Knowing that it had installed a system designed to discharge current into the earth, knowing that its system was prone to being unbalanced, then finding in 1999 and continuing later that it was unbalanced and knowing that this condition contributed to

stray voltage, Appellant did no testing to determine if its system was discharging objectionable currents on to the respondents' property, but instead waited for Respondents' to complain and institute a lawsuit – and then claim that the claims are tardy. Rule 214(A)(3) of the 2002 NESC mandates:

A. When in Service...

3. Tests. When considered necessary, lines and equipment shall be subjected to practical tests to determine required maintenance.

There is no evidence that any tests were conducted for Respondents' dairy or anywhere close to the dairy, to determine whether there was "required maintenance" due to the multi-grounded neutral wye system that Appellant knew was designed to discharge current into Respondents' farm and into the earth generally. This, according to Respondents' experts, would require that the connectors joining the neutral wires from Respondents' barn to the road be checked and tested to determine if there was corrosion or other improper connection. RA 6-10 at ¶¶ 7, 10; RA 27-28 at ¶¶ 13-14. Even after Neubauer conducted tests to establish that the neutral line from the farmstead to the road was corroded, Appellant never either inspected the line or conducted any tests on the line before completely replacing it. RA 6 at ¶ 7; RA 305-306, 430.

Further complicating Appellant's blind reliance on the NESC is NESC, section 1, Rules 012 and 015:

012. General Rules

A. All electric supply and communication line and equipment shall be designed, constructed operated and maintained to meet the requirements of these rules.

* * *

C. For all particulars not specified in these rules, construction and maintenance should be done in accordance with accepted good practice for the given local conditions known at the time by those responsible for the construction or maintenance of the communication or supply lines and equipment.

015. Intent

B. The word "should" indicates provisions that are normally and generally practical for the specified conditions. However, where the word "should" is used it is recognized that, in certain instances, additional local conditions not specified herein may make those provisions impractical. When this occurs, the difference in conditions shall be appropriately recognized and Rule 12 shall be met.

The record amply reflects Appellant's actual knowledge that its grounded wye network was "designed" to discharge electricity into the earth. (Appellant's Memorandum in Support of its Motion for Summary Judgment, pp. 3-6). The record also reflects that Appellant should have knowledge that dairies were particularly vulnerable to such discharge of electricity. RA 53-55. Yet, Appellant did no testing to evaluate its level of discharge, and did nothing to ameliorate the effects of increasing neutral currents dumping into the dairy or into the earth, despite growing its distribution line for single phase customers that it knew would imbalance the system, cause 50% of the neutral current from single phase customers to return through the earth (RA 284) and increase the risk to those same dairy customers who were already at risk.

Appellant argues that, in the absence of a specific reference to stray current in the tariff, it has no liability for harmful levels of stray voltage that exist. That argument is gutted by Minn. Stat. § 216B.04, Ferguson and the NESC rules.

Appellant's attempt to blur its duty to provide electricity in a safe manner by citing the filed tariff and using it as a dark cave to seek refuge in must be rejected.

B. THE PROPERTY THAT DISTRIBUTED ELECTRICITY ON ZUF-21 (WIRES, POLES, CONNECTIONS, TRANSFORMERS) IS EQUIPMENT SUPPLIED BY APPELLANT, THEREFORE MINN. STAT. § 541.051 DOES NOT APPLY.

The Minnesota state legislature amended Minn. Stat. § 541.051 in 1990 by adding subparagraph (e) which provides: "The limitations prescribed in this section do not apply to the manufacturer or *supplier of any equipment* or machinery installed upon real property." Italics supplied. Because NSP's supplied equipment in the form of lines, poles, transformers, connections and other devices as part of the distribution system, the statute of repose does not apply.

Johnson v. Steele-Waseca Coop. Elec., 469 N.W.2d 517 (Minn. Ct. App. 1991), *review denied July 24, 1991* was decided under the 1988 version of the statute, at a time when there was no exception for machinery or equipment. In Johnson, this Court referred to the electrical coop's property as "electrical distribution equipment" and wrestled with the question of whether such equipment was part of the improvement to real property. *Id.* at 519. The legislature answered that question in 1990 by adopting 541.051, subd. 1(e), excluding machinery and equipment from the effect of the statute of repose. In State Farm and Cas. v. Aquila, Inc., 718 N.W.2d 879 (Minn. 2006), the Minnesota Supreme Court discussed Johnson and also referred to the "electrical equipment" involved in that case.

Appellant's Area Engineer, Jean Waltz, referred to the electrical system serving Respondents' dairy as "our equipment". RA 113

Appellant insisted that electrical step-down, load tap and line transformers were "capital equipment" in NSP v. Commissioner of Revenue, 571 N.W.2d 543 (Minn. 1997) and the Minnesota Supreme Court agreed. See also: In Southern Minnesota Beet Sugar Coop v. County of Renville, 737 N.W.2d 545 (Minn. 2007) (discussing distinction between real property and equipment.)

Because the wires, poles, connections and transformers that make up ZUF-21 are the equipment that allows electricity to be distributed to Appellant's customers, including Respondents, claims against the supplier of this equipment (Appellant), the operation of which causes harm, are not governed by Minn. Stat. § 541.051.

C. THE ELECTRICAL DISTRIBUTION LINE BETWEEN ZUMBRO FALLS AND MAZEPPA IS NOT AN "IMPROVEMENT TO REAL PROPERTY".

NSP requests this Court to reverse its decision on this identical issue reached in Johnson v. Steele-Waseca Coop Electric, 469 N.W.2d 517 (Minn. Ct. App. 1991) *review denied July 24, 1991*. The legal issue raised and answered in the negative in Johnson was as follows: "Is electrical distribution equipment installed upon a land owner's property, but owned by the utility, an improvement to real property under Minn. Stat. § 541.051?" The Johnson Court reasoned that, because the electrical distribution equipment installed on Johnson's farm continued to be owned and maintained by the power coop and continued to serve the distribution purposes of the coop, it was not an improvement to real property as applied under Minn. Stat. § 541.051.

Evidence of the Minnesota's Supreme Court's interpretation of the term "improvement to real property" as applied under Minn. Stat. § 541.051 is found in the Supreme Court decision of Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988). In that case, the Supreme Court held that "the statutory limitation period (Minn. Stat. § 541.051) is designed to eliminate suits against architects, designers and contractors who have completed the work, turned the improvement to real property over to the owners, and no longer have any interest or control in it." (emphasis supplied). See also: Red Wing Motel Investors v. Red Wing Fire Dept., 552 N.W.2d 295 (Minn. Ct. App. 1996) *review denied Oct. 29, 1996* and Ritter v. Abbey-Etna Mach. Co., 483 N.W.2d 91, 93-94 &n.2 (Minn. Ct. App. 1992) *review denied June 10, 1992*. (discussing legislature intent as to scope as limiting statute's application to improvements that have been turned over to owner and abandonment of any further interest or control.)

In the present case, NSP has not completed the improvement to real property because it continually is adding single phase customers, changing equipment and changing the amount of power, has not turned over ownership and continues to have an interest and exclusive control in the electrical distribution line.

The Supreme Court had a recent opportunity to overrule Johnson in State Farm and Cas. v. Aquila, Inc., 718 N.W.2d 879, 885 n. 1 (Minn. 2006) but specifically declined to do so. Instead, it noted its agreement with the Court of Appeals' dissent that the improvement at issue in Johnson (electrical distribution system) was not an improvement to real property as applied under Minn. Stat. § 541.051 because it was part of a larger distribution system installed for the benefit of the power coop. Id.

Respondents are not taking the bait offered by the Appellant by claiming that providing electricity to a dairy farm is not beneficial. The “common sense” analysis is not focused on whether electricity is beneficial to a dairy farm⁵. Instead, the question is whether equipment making up NSP’s constantly changing electrical distribution system that it owns and exclusively controls, maintains, inspects and operates for its own profit should be considered an improvement to real property as applied under Minn. Stat. § 541.051.

Because of Appellant’s continued ownership and control of its electrical distribution equipment, Sartori dictates that the distribution line is not the type of construction that is covered by the statute of repose. See also: Turner v. Marble-Picker, Inc., 233 S.E.2d 773 (Ga. 1977) (erection of power pole and attached equipment not an improvement to real property); Smith v. Westinghouse Elec-Corp., 732 P.2d 466 (Okla. 1987) (electric transformer not an improvement to real property); Atlanta Gas Light Co. v. City of Atlanta, 287 N.W.2d 229 (Ga. 1981) (utility company’s underground gas line not an improvement to real property but rather an extension of utility’s distribution systems).

Cases cited by the Appellant, Capital Supply v. City of St. Paul, 316 N.W.2d 554 (Minn. 1982) and Nemechek v. City of Byron, 1999 WL 1138441 (Minn. Ct. App. 1999), relating to storm sewers are distinguishable. Municipalities do not sell the water that is

⁵ It should be noted that Respondents can operate their dairy operation entirely by use of their own diesel powered generator without any electricity from NSP. For example, the farm was run entirely on generator-produced electricity for substantial periods of time in 2004 while the new electrical system was installed.

drained by the permanent, concrete underground sewer pipes, nor is it a part of the municipality's water distribution system.

Appellant cites Kemp v. Allis-Chalmers Corp., 390 N.W.2d 848 (Minn. Ct. App. 1986) and Lovgren v. Peoples Elec. Co., Inc., 368 N.W.2d 16 (Minn. Ct. App. 1985) to support its position. These cases were distinguished by the Court of Appeals in Aquila as follows:

We recognize that in Kemp v. Allis-Chalmers Corp., we said that “[a]n electrical transformer is an improvement to real property for the purposes of the statute.” 390 N.W.2d 848, 850 (Minn.App.1986) (citing Lovgren v. Peoples Elec. Co., 380 N.W.2d 791, 794-95 n. 5 (Minn.1986)). But Kemp is of questionable authority as applied here, because the improvement at issue in Kemp was not a transformer, but electrical cables clamped to a starter compartment of a waste gas fan located inside a pellet plant. Kemp, 390 N.W.2d at 849. It is not clear from the opinion even if a transformer was part of an improvement or involved in the plaintiff's injury. And Kemp's citation of Lovgren is not entirely on point, because the improvement at issue in Lovgren was a not a transformer, but a transformer vault, located inside of a steel mill. Lovgren, 380 N.W.2d at 793. In any event, in neither Kemp nor Lovgren was there a showing that a utility owned the improvement at issue, or that the improvement was part of a utility-owned distribution network. Therefore we conclude that neither case conflicts with our reading of the court's holding in Johnson.

State Farm Fire & Cas. Co. v. Aquila, Inc., 697 N.W.2d 636, 641-642 (Minn. Ct. App. 1985).

The cryptic comment found in footnote 1 in Aquila, 718 N.W.2d at 885 about the “wisdom of applying Johnson to the statute at issue”, which was the sole reason for the District Court's certification of any issue involved in this appeal, should be left to the

Minnesota Supreme Court to clarify. RA 319-336. The Johnson case mandates affirmance of the District Court's ruling on the issue of the statute of repose.

D. THE ELECTRICAL DISTRIBUTION SYSTEM IS NOT SUBSTANTIALLY COMPLETED, MAKING MINN. STAT. § 541.051 INAPPLICABLE.

Appellant has the burden to prove that the harm caused to the Siewert dairy arose from improvement to real property that existed more than 10 years before the lawsuit was commenced before it can assert the statute of repose as a defense. Rather than meet this burden, Appellants vigorously deny that its system was any way defective. This bipolar predicament dooms Appellant's statute of repose defense.

In State Farm and Cas. v. Aquila, Inc., 718 N.W.2d 879 (Minn. 2006) the Minnesota Supreme Court held that:

Aquila was required to demonstrate that the statute of repose found at Minn. Stat. § subd. 1(a) applied to Aquila by presenting evidence that the natural gas pipeline system qualified as "an improvement to real property" and that the incident in question rose out of the "defective and unsafe" condition of the system.

Id. at 886.

In every case cited by Appellants on this issue, the legal dispute was whether the fixture was to be considered an improvement to real property under Minn. Stat. § 541.051 and the defect was conceded to exist more than 10 years before commencement of the lawsuit. No such concession is made in this case.

One of many distinguishing aspects of the electrical distribution system at issue in this case from fixtures deemed as "improvements to real property" in other cases is the

dynamic and ever-changing nature of the NSP's ZUF 21 distribution system. In the cases cited by Appellant, the injury was caused by a specific defect in construction resulting from a discrete negligent act occurring on a specific date in the past that is more than ten years before suit was commenced. (Weston – negligent design/leak in building, Kemp – negligent design/exploding switch gear; Dakota – negligent construction/leak in building; Fagerlie – negligently designed waste water treatment plant; Pacific Indemnity – negligent installation of furnace.)

Respondents do not claim nor must they prove that, *at the time the NSP installed the distribution system*, there were any defects in the wires, poles, anchors, connections or transformers. Respondents do allege, and have placed substantial evidence in the record to establish that over time NSP added more single phase customers to the ZUF-21 distribution line, fundamentally changing the alleged “improvement to real property” – the ZUF 21 line from Zumbro Falls to Mazeppa. NSP also added substantial equipment to the Respondents' tap in 1996 and 1999, which increased levels of stray voltage on the farm. These undisputed facts, coupled with Appellant's admitted failure to inspect, maintain and operate its electrical distribution system so as to keep it balanced and free of corrosion allowed massive amounts of current to pass through Respondents' dairy facilities and cattle over an extended period of time. Taney v. ISD No. 624., 673 N.W.2d 497 (Minn. Ct. App. 2004), *review denied March 30, 2004.*

Appellant has failed to establish, as Aquila requires, the date when the improvement to real property that caused damage to respondents began to exist on its distribution line. Because NSP is unwilling to even admit that a defect exists, much less

establish when the improvement that caused that defect commenced, it cannot meet its burden of proof to establish foundation for the statute of repose defense it seeks to invoke.

A statute of repose does not provide immunity to a party who designs or constructs an improvement to real property, even if originally installed more than ten years prior to suit if, in the intervening period, the designer or contractor commits further acts of negligence that result in harm. Olmanson, supra. This is the difference between an original tort causing immediate, continuous or delayed harm and a situation involving continued acts that alter the initial improvement so as to cause harm to consumers.

E. APPELLANT'S MODIFICATION OF RESPONDENTS' ELECTRICAL SERVICE IN 1996 AND 1999 LIMIT THE APPLICATION OF THE STATUTE OF REPOSE.

Since 1990 when the Respondents began to use the dairy barn, NSP modified the Respondents' tap on two occasions. In 1996 a new pole and transformer were installed to provide power to a trailer home and in 1999 another pole and transformer were installed on the farm. NSP failed to do any testing or inspection of the neutral return line after the installations were done to determine if the system was balanced, if a larger primary neutral needed to be installed, whether the neutral return connections were corroded and whether the new installations resulted in unacceptably high levels of stray voltage entering the barn. The inadequacy of the primary neutral at the time these installations were made is established by the fact that when the system was tested for stray voltage in the spring of 2004 by NSP, a much larger primary neutral was installed to replace the

primary neutral that had been used in the past because the transformer bank was overloaded. The design engineer, Len Jacobsen, who was solely responsible for and who actually designed all modifications to the electrical system on the Siewert farm before 2004, admitted that it was necessary to install a larger return neutral in 2004 because the “transformer bank was overloaded.” Mr. Jacobsen could not say how long the transformer bank had been overloaded other than it was between “when he moved in (1989) and now (2004)”. RA 499-508.

Milk production at the Siewert dairy began to level off shortly after the new service to the mobile home was installed and then dropped precipitously starting in 1999. RA 436.

Respondents’ veterinarian, Dr. Norbert Nigon testified that in the “mid-'90s, mid to late '90s” the herd became “very thin” and “were dying”;

...we just had these cows would get thin on him, and especially in the late '90s, especially the last four to five years that I worked down there, we just had these cows, they would get thin, they would get, say they have lameness problems and basically they would go down, they could not get up. And they would either die or I would euthanize them. And we had way above normal levels that I would consider death losses.

RA 386, 388.

The evidence indicates that after the Appellant modified the Respondents’ electrical system, the herd declined in health and milk production. If the installation of an additional transformer represents an improvement to real property, the statute of repose for damages arising after the modification of the electrical system does not apply. Taney v. ISD No. 624., 673 N.W.2d 497 (Minn. Ct. App. 2004), *review denied March 30, 2004*;

Matter v. Nelson, 478 N.W.2d 211 (Minn. Ct. App. 1991) (construction of a swale within the statute of repose considered a separate “improvement to real property”).

F. APPELLANT FRAUDULENTLY CONCEALED THE FACT THAT ITS POWER LINES WERE UNBALANCED WHICH RESULTED IN HIGHER LEVELS OF STRAY VOLTAGE.

As outlined in the Affidavits of Larry Neubauer and Donald Zipse dated August 13, 2007, the phase conductors along ZUF-21 were unbalanced which led to higher levels of stray voltage being generated. RA 3, 20. This fact was admitted by NSP’s regional engineer, Jean Waltz, during her deposition taken on May 10, 2006. Jean Waltz testified that when she became the regional engineer for NSP in 2002 she immediately recognized that the three phase distribution lines were significantly out of balance, that this condition increased stray voltage (NEV), and that she had no idea when this condition started. RA 304, 312. NSP was aware of the Minnesota Department of Commerce’s directions (served upon Appellant in April 2000) that 50% of return current from single phase taps (like those west of the Respondents’ dairy) was returning over the earth to the substation (to the east of the Respondents’ dairy). RA 280 at p. 4. Appellant was aware of this phenomenon. RA 292.

Individuals, such as Respondents have no way of knowing whether power lines are balanced or the consequences of having the lines unbalanced. Ferguson, supra.

This fraudulent concealment of the defects of Appellant’s electrical distribution system makes Minn. Stat. § 541.051 inapplicable (stating in the first sentence “[E]xcept where fraud is involved”). Appellant cannot be permitted to brazenly ignore its affirmative duty to inspect and maintain by allowing electricity to be distributed along an

unbalanced system for an unknown number of years causing increased levels of stray voltage to be generated, conceal the facts from its customers, and then claim to be entitled to protection from the statute of repose. IDS 197 v. W. R. Grace Co., 752 F.Supp. 286 (Minn. US Dist. Ct., 4th Div. 1990.; Richfield Bank & Trust Co. v. Sjugren, 244 N.W.2d 648, 650 (Minn. 1976).

G. THE DOCTRINE OF CONTINUING TORT PRECLUDES APPLICATION OF MINN. STAT. § 541.051.

As noted above, because Appellant's distribution system, ZUF-21, continues to expand and change, the date for "substantial completion" had not occurred 10 years before this suit commenced. Similarly, the ten year statute of repose and the two year statute of limitations do not apply because of the continuing nature of Appellant's tortious conduct. The issue of statute of limitations was not certified by the District Court and is not properly before this Court, notwithstanding Appellant's improper argument on this issue. App.'s Br. at 31-32. Minnesota has long recognized the doctrine of continuing tort as delaying the accrual of the cause of action. Citizens for a Safe Grant v. Lone Oak Sportsman's Club, Inc., 624 N.W.2d 796, 803 (Minn. Ct. App. 2001); NSP v. Franklin, 265 Minn. 391, 397, 122 N.W.2d 26, 30-31 (Minn. 1963). See also: Heeg v. Hawkeye Tri-County REC, 512 N.W.2d 558 (Ia. 1984) (confirming rule that continuing stray voltage tolls statute of limitations for injury from new shocks to cows). Unlike Iowa, Minnesota allows recovery for the entire period of damage and not just six years before the suit was filed. Sigurdson v. Isanti County, 448 N.W.2d 62, 66 (Minn. 1989).

Appellant in effect argues that it has obtained a prescriptive easement to distribute harmful levels of stray current across Respondents' property by passage of time. In order to obtain a prescriptive easement, Appellant would need to prove by clear and convincing evidence that its use of Respondents' dairy as part of its grounding system was actual, open, continuous, exclusive and hostile for 15 years. Rogers v. Moore, 603 N.W.2d 650 (Minn. 1999); Heuer v. Co. of Aitkin, 645 N.W.2d 753 (Minn. Ct. App. 2002). Whereas Appellant's use of Respondents' property clearly was actual and continuous, it was not open or hostile. To the contrary, the record demonstrates, in fact, that Appellant fraudulently concealed from Respondents that the operation of its distribution line allowed very high levels of current to pass through Respondents' dairy facility and cattle.

III. THE FILED RATE DOCTRINE DOES NOT APPLY

A. INTRODUCTION

NSP claims that the filed rate doctrine bars Respondents' common law tort claims, and cites Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307 (Minn. 2006) and AT&T v. Central Office Tel., Inc., 524 U.S. 214 (1998) in support of its position. To the contrary, Schermer and AT&T preclude only rate-related suits, and do not preclude common law tort actions. NSP seeks judicial adoption of limitations on tort liability not claimed in its tariff, not authorized by either the legislature or the MPUC, and which would constitute unprecedented expansion of the filed rate doctrine not recognized by any jurisdiction.

NSP claims that "the district court apparently intends to ask a jury to determine what services and facilities NSP should provide regardless of – indeed, in spite of – the

tariff.” App. Br. at 38. This is not true. Instead, the court will be asking the jury if NSP violated common law duties of ordinary care (not excluded in the tariff), if it violated the nuisance statute (Minn. Stat. § 561.01), and to assess damages for violations that are found. NSP has already conceded in this Court that stray voltage is a controllable phenomenon. ZumBerge v. Northern States Power Co., 481 N.W.2d 103 107 (Minn. Ct. App. 1992). The case does not involve any tariff-related issues, but instead merely the application of common law principles of ordinary care and damages arising out of an inherently dangerous activity – the distribution of electricity.

The “filed rate tariff” of NSP does not purport to limit liability for any common law claims asserted in this case. NSP’s only effort to disclaim tort liability in its tariff was for “continuity of service”, which does not apply to the facts of this case as a matter of law (ZumBerge). To the extent the courts have allowed limitations on tort liability, such limitations must be based upon a (1) comprehensive regulatory scheme, (2) must be claimed in the tariff, (3) must be very narrowly drawn to avoid violating public policy and (4) must not eliminate any remedy that would violate the constitution. NSP’s claimed limitation meets none of these requirements. There is no basis for the Court to expand the filed rate doctrine as Appellant urges.

B. THE FILED RATE DOCTRINE DOES NOT APPLY TO COMMON LAW TORT CLAIMS

NSP claims that the filed rate doctrine “places all complaints about utility service and facility performance before the MPUC”. App. Br. at 32. This argument is unsupported in either the law or the record before this Court. This Court has already

concluded that NSP's attempt at limiting tort liability in its tariff does not provide immunity for NSP in stray voltage cases. ZumBerge v. Northern States Power, 481 N.W.2d 103, 106 (Minn. Ct. App. 1992) (stating that liability for torts "would remain for all injury not caused by an interruption or disturbance in power").

NSP is plainly wrong in its assertion that, as long as it complies with the safety rules included in the statutes, rules and "tariffs", it cannot be held liable for violation of common law tort duties. Hoffman v. Wisconsin Elec. Power Co., 262 Wis. 2d 264, 278, 664 N.W.2d 55, 62 (Wis. 2003) (holding in stray voltage case that "it is a well-established rule that the enactment of safety statutes or legislation giving a commission jurisdiction over a certain activity does not abolish the duty arising under common-law negligence"). The law in Minnesota is the same. Wendinger v. Forst Farms, Inc., 662 N.W.2d 546, 554 (Minn. Ct. App. 2003) (while failure to comply with safety statute may be evidence of negligence per se, the inverse proposition is not true – that compliance with a safety statute precludes a finding of negligence – because compliance with a statutory standard "is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions."

In addition, statutes do not change the common law unless the legislative purpose to do so is clear, unambiguous and preemptory. Hoffman v. Wisconsin Electric Power Co., supra, 262 Wis. 2d at 279, 664 N.W.2d at 62-63 (rejecting claim that utility regulatory statute abrogated common-law duties of care in stray voltage case). Again, Minnesota law is the same. Nelson v. Productive Alternatives, Inc., 715 N.W.2d 452, 455 (Minn. 2006) (statutes should not be interpreted to overrule common law unless done

so explicitly and “legislation will not be interpreted to supplant, impair, or restrict equity’s normal function as an aid to complete justice”).

Cases from other jurisdictions that allow liability for torts to be disclaimed by public utilities require that such liability be expressly disclaimed in the tariff and be narrowly drawn to permit liability in cases of willful or gross conduct. See, Houston Lighting & Power Co. v. Auchan USA, Inc., 995 S.W.2d 668 (Tex. 1999) (canvassing case law on this subject). Courts retain the right to disallow limitations on tort liability as violating public policy. Computer Tool & Engineering, Inc. v. Northern States Power Co., 453 N.W.2d 569, 573 (Minn. Ct. App. 1990) (limitation on liability in NSP’s tariff does not violate public policy where it does not purport to relieve NSP from all negligence under all conceivable circumstances, and holding that liability would remain for all injury outside of court’s narrow interpretation of tariff); Ransome v. Wisconsin Elec. Pwr. Co., 87 Wis. 2d 605, 625, 275 N.W.2d 641, 650 (Wis. 1979) (citing public policy considerations that apply and imposing liability on electric utility for damages from electric shock); Southwestern Pub. Serv. Co. v. Artesia Alfalfa Grower’s Ass’n, 67 N.M. 108, 353 P.2d 62, 68-71 (1960). Some courts hold that no limitations on liability may be claimed absent express authority given to the governing agency in the enabling legislation. McNally v. Pittsburg Mfg. Corp. v. Western Union Tel. Co., 186 Kan. 709, 353 P.2d 199, 203-05 (1960).

NSP recently presented the identical argument to the Wisconsin Supreme Court. It was unanimously rejected. Schmidt v. Northern States Power Co., 742 N.W.2d 294, 311-315 (Wis. 2007) (holding that filed rate doctrine does not bar common law tort

claims for stray voltage)⁶: See, also, Hoffman v. Wisc. Elec. Power Co., 262 Wis. 2d 264, 278, 664 N.W.2d 55, 62 (2003) (legislation giving a utilities commission jurisdiction over electricity does not abolish the duty arising out of common law negligence).

Minnesota has no statute, rule or case that exonerates electric utilities from liability for either personal injury or property damage arising out of contact with electricity. Nowhere in the language of chapter 216B of Minnesota Statutes is common-law negligence, with respect to stray voltage, changed or altered. Neither the legislature nor the MPUC provided authority for NSP to change the common law. All of the regulatory cases cited by NSP involve contracts that were allegedly violated with respect to *prices or services directly tied to those prices*, and none involve claims for property damage arising out of defects in the services provided.

The Minnesota Constitution and public policy considerations mitigate against the notion that persons or property can be damaged by electricity and the victims are left with no remedy whatsoever. In Schermer v. State Farm Fire and Cas. Co., 721 N.W.2d 307 (Minn. 2006), the Minnesota Supreme Court held that the Constitution's guarantee of "a certain remedy in the laws for all injuries or wrongs" was satisfied because the regulatory scheme involved in the establishment of insurance rates was a reasonable substitute for the common law claim for refund of premiums that the Class had alleged were unfairly

⁶ In Wisconsin, NSP filed a "stray voltage tariff" which purported to permit neutral to earth currents up to 1 milliamp (1 mA) as part of normal service. Schmidt v. Northern States Power Co., 742 N.W.2d 294, 311 (Wis. 2007). NSP has not filed such a tariff in Minnesota. Even with the existence of a tariff purportedly permitting current up to 1 mA, which NSP argued was not exceeded, the Wisconsin Supreme Court did not relieve NSP of its common law duty of ordinary care. Id. at 313-314.

charged. Respondents do not seek refunds for amounts paid for electricity. MPUC cannot provide a “reasonable substitute” for tort damages representing losses to Respondents’ dairy enterprise caused by Appellant’s negligence and nuisance.

No court has done what NSP proposes—infer a limitation on tort liability for injury due to contact with electric current neither provided for in the statute, the rules of the agency, nor claimed in the tariff. Schmidt v. Northern States Power Co., supra, 742 N.W.2d at 313 (“Northern States’ creative legal argument” would “expand the filed rate doctrine beyond its original purpose of ensuring non-discriminatory rates and services” and stating that “no authority exists” for this legal position). NSP has not cited a single case where common law tort claims involving injury to persons or animals was precluded by the filed rate doctrine. None exist, except where the limitation on liability was *expressly claimed* in the filed tariff. See, Computer Tool & Eng’g, Inc. v. Northern States Power, supra.; Southwestern Elec. Power Co. v. Grant, 73 S.W.3d 211 (Tex. 2002).

C. SCHERMER AND AT&T GOVERN ONLY “RATE-RELATED” SUITS FOR DAMAGES

1. Schermer

NSP relies upon Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 318-319 (Minn. 2006), citing Prentice v. Title Insurance Co., 176 Wis. 2d 714, 500 N.W.2d 658 (holding that “[u]nder the filed rate doctrine as enunciated in Keogh, the availability of such a regulatory remedy bars a private *rate-related suit for damages*”). Emphasis added. This is not a rate related suit for damages and there is no “available regulatory

remedy.” Moreover, there is nothing in the law that provides the Minnesota Public Utilities Commission (MPUC) with any jurisdiction over disputes of this nature to award damages.

The Respondents are not seeking rate preferences or service preferences that are not accorded to other NSP customers. The Respondents do not complain about rates for electricity or the quality of the electricity they do receive. The Respondents are seeking compensation based on their common law claims which arose out of something they do not want – stray voltage – something they never asked for, did not pay for, and was not metered by NSP. Permitting the Respondents’ claims for damages would neither provide them with an enhanced service for an equivalent price nor give them a “preference or advantage” over other customers. Compensating the Respondents for their losses would not discriminate against other NSP customers or involve the court in rate setting. As such, the Respondents are entitled to pursue their common law claims.

2. AT&T

NSP also claims (App. Br. at 35-37) that AT&T v. Central Office Tel., Inc., 524 U.S. 214 requires that this case be dismissed because NSP’s “services” have to be considered in connection with the tariff. AT&T was based upon Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922). The result in Keogh was premised upon the fact that the regulatory agency provided a remedy to the plaintiff. Schermer, supra, citing Prentice v. Title Ins. Co., 176 Wis. 2d 714, 722, 500 N.W.2d 658, 661 (1993) (availability of regulatory remedy barred private rate-related anti-trust suit for damages).

The Supreme Court of Wisconsin, in Schmidt, supra, had little difficulty dispatching NSP's argument based upon the AT&T case. The Court held (742 N.W.2d at 312):

Unlike the plaintiff in AT&T, the Schmidts do not seek a "privilege" within the meaning of the filed rate doctrine. Central Office sought the benefit of time-constrained provisioning, which was as an added "perk" not available to other customers, whereas the Schmidts seek a common-law duty of ordinary care. The duty of ordinary care is not a "privilege" or "service" that Northern States bestows upon the Schmidts or any of its customers. Northern States tariff cannot undermine that common-law responsibility. * * *

Traditionally, the filed rate doctrine precluded a utility from giving extra-tariff benefits to one customer and not offering the same benefits to another. Stray voltage, however, is not a benefit that the Schmidts or any other customers desire to receive. If Northern States is responsible for the Schmidts' stray voltage, it cannot claim that reducing stray voltage is a "service" or "privilege" that it provides. No authority exists for extending the doctrine to circumstances where a defendant is allegedly responsible for harming the plaintiff, e.g., providing stray voltage, but then claims that eliminating the harm is a "service" or "privilege" within the meaning of the doctrine.

The Wisconsin Supreme Court went on to explain that the tort claim dismissed in AT&T was derivative of the contract claim, which is not the situation in a stray voltage lawsuit. *Id.* at 313. In that regard, the Court discussed favorably Chief Justice Rehnquist's concurrence in AT&T:

The tariff does not govern, however, the entirety of the relationship between the common carrier and its customers.... The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. It does not serve as a shield against all actions based in state law.

AT&T, 524 U.S. at 230-31 (Rehnquist, C.J., concurring).

As in Schmidt, NSP fails to identify any service preference in its appellate brief. Instead, NSP argues that the *method of abating the nuisance* suggested by one of respondents' experts involves changing the configuration of the distribution line; something that NSP argues MPUC may have expertise in determining. This is a red-herring. See, *infra* at pp. 43-45.

D. THE DISTRICT COURT HAS EXCLUSIVE AUTHORITY UNDER THE STATUTE TO ORDER ABATEMENT OF THE NUISANCE.

Respondents' amended complaint seeks damages and equitable relief ("compelling Defendant to cease trespass and nuisance in the form of stray current over and through the property of the Plaintiffs and/or an order compelling Defendant to reconstruct the distribution lines to reduce or eliminate stray current."). RA 423. Appellant argues that, because one of Respondents' experts suggested a method of abating the nuisance involving reconfiguration of the distribution system, then the *entire case* must be referred to MPUC.

However, the language of the nuisance statute destroys NSP's argument:

Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Minn. Stat. § 561.01. Both damages *and* injunctive relief are available under the statute. "Action" refers to judicial proceedings. Brown v. Cannon Falls Township, 723 N.W.2d 31, 42 (Minn. Ct. App. 2006) (citing Minn. Stat. § 645.45(2), which defines "action" as any *in-court proceeding*).

If the doctrine applies at all, it would only apply to the claim for equitable relief (abatement of the nuisance). That claim for relief would likely be heard after the damages trial. See, Allen v. Wisconsin Public Service Corp., 279 Wis. 2d 488, 504-05, 694 N.W.2d 420, 428-29 (Wis. Ct. App. 2005) (noting that injunctive relief is not inconsistent with damages in a continuing nuisance case and may be sought from court after jury renders damages verdict); Hoffman v. Wis. Elec. Pwr. Co., 664 N.W.2d 55 62 (Wis. 2003) .

NSP's argument that damages and equitable abatement claims have been eliminated by implication from Minn. Stat. 216B.08 has no foundation in the law. Rosenberg v. Heritage Renovations, LLC, 685 N.W.2d 320, 327-28 (Minn. 2004) (despite claim that Chapter 82 was a comprehensive and mandatory statutory scheme governing real estate brokers and salespersons, court held that statutes in derogation of the common law are strictly construed, and legislation will not be interpreted to supplant, impair, or restrict equity's normal function as an aid to complete justice). Neither the legislature nor the MPUC provide authority for NSP to change the common law.

The Court in ZumBerge dismissed NSP's challenge based upon the claim that the service NSP provided "naturally" resulted in neutral to earth voltage which was the same as the stray voltage that all customers were required to accept. This is the same argument NSP makes now – that the Plaintiffs are seeking a different level of service with enhanced facilities. This Court disagreed:

NSP's assertion that the two are synonymous contradicts the company's concession that stray voltage is a controllable phenomena. *Consequently, equating unavoidable, but relatively innocuous, neutral-to-earth voltage*

with stray voltage in the dairy barn is like equating a tiger loose on the street to one properly caged and controlled. We therefore find that the stray voltage was not caused by the ZumBerges' "use of service" as that phrase is used in the rate tariff, and that the tariff, interpreted narrowly, does not bar recovery in this matter.

Id. at 107 (emphasis added).

The Respondents are seeking damages and abatement of a nuisance based on common law claims which arose out of the undesirable electric current received from NSP. Permitting the Respondents' claims for damages and ordering abatement would not provide them with "an enhanced distribution service", but would instead merely give them what the law requires – safe and reliable electric service that does not injure their property. Minn. Stat. § 216B.04.

IV. THE TRIAL COURT WAS ACTING WITHIN ITS DISCRETION IN REJECTING THE PRIMARY JURISDICTION DOCTRINE

A. INTRODUCTION.

The doctrine of primary jurisdiction allows a district court to stay its proceedings until an administrative agency can rule upon a matter within its expertise. City of Rochester v. People's Coop. Power Ass'n, 483 N.W.2d 477, 480-81 (Minn. 1992). AAA Striping Services Co. v. Minn. Dept. of Transp., 681 N.W.2d 706, 714 (Minn. Ct. App. 2004). The doctrine is used "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." City of Rochester, supra, 483 N.W.2d at 480. It is a judicially created doctrine concerned with the orderly and sensible coordination of the work of agencies and the courts. AAA Striping, supra, 681 N.W.2d at

713. Court jurisdiction is not ousted, it is merely postponed. Minnesota-Iowa Television Co. v. Watonwan T.V. Imp. Ass'n, 294 N.W.2d 297, 302 (Minn. 1980). The doctrine is not applicable if the issues are inherently judicial, unless the legislation has explicitly granted exclusive jurisdiction to the administrative body. AAA Striping, supra, 681 N.W.2d at 713; City of Rochester, supra, 483 N.W.2d at 480.

Case law conflicts as to whether the doctrine can be waived⁷ (2 Richard J. Pierce, Jr. Administrative Law Treatise, § 14 (4th ed. 2002)), but typically the courts have not resorted to the doctrine when it has not been raised by the parties until late in lengthy and expensive proceedings. The doctrine should be invoked sparingly as it results in added expense and delay. AAA Striping, supra, 681 N.W.2d at 714. This is particularly true where the administrative agency offers no remedy for a complaint, because there is no reason to seek administrative relief before going to the courts. Id. at 714-715.

B. RESPONDENTS ARE CLAIMING MONETARY DAMAGES AND ABATEMENT OF NUISANCE, FOR WHICH THE TRIAL COURT HAS EXCLUSIVE JURISDICTION.

NSP's argues that the complaint of the respondents must first be referred to the MPUC. Respondents claim is first and foremost a claim for monetary damages arising out of negligence, nuisance and other common law tort theories of relief, long cognizable in the district courts of this state. Determining "just compensation" for damages does not invoke the doctrine of primary jurisdiction. City of Rochester, supra, 483 N.W.2d at 481; (holding that determination of damages is "not a matter uniquely suited to the MPUC's

⁷ The District Court did not address Respondents' claim that Appellant waived this defense by not raising it until over three years after the lawsuit was commenced when it included it in its summary judgment motion on July 16, 2007.

abilities” and rejecting MPUC’s petition to intervene in district court proceedings). MPUC has no jurisdiction to provide a monetary remedy to the respondents for common law claims for damages.

While there may be cases where the courts could defer to an agency to answer specific questions related to tariffs, this does not apply to claims for damages arising out of violation of common law tort duties. Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 304-05 (1976). This rule has universal application. See, In Re Discovery Operating, Inc., 216 S.W.3d 898 (Tex. App. 2007) (doctrine of primary jurisdiction not applicable to common-law tort claims including negligence and nuisance); Spear T Ranch, Inc. v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005) (exercise of primary jurisdiction doctrine is inappropriate in actions seeking damages for nuisance and other common law claims); Cummings v. Tripp, 204 Conn. 67, 74-75, 527 A.2d 230, 234 (1987) (plaintiff seeking either damages or injunctive relief for ongoing harm is excepted from requirement to exhaust administrative remedies before seeking equitable intervention of the courts); Magnolia Coal Terminal v. Phillips Oil Co., 576 So.2d 475, 487 (La. 1991) (damage suits of all kinds are the “warp and woof of the caseload of the courts” and the courts’ experience in such matters is as great, if not greater, than that of an administrative agency).

Utility companies have tried to get purely common-law damage claims referred to administrative agencies, but such attempts have been rejected by the courts without exception. Consumer’s Guild of America, Inc. v. Illinois Bell Tel. Co., 103 Ill.App.3d 959, 431 N.E.2d 1047 (Ill. App. 1981) (“the fact that the regulation of utility service is

exclusively in the PUC's jurisdiction does not remove from the court's jurisdiction an action for damages based upon a failure of service, any more than the PUC's power to promulgate safety regulations prohibits the courts from hearing a claim for personal injuries resulting from unsafe utility equipment"); Indiana Michigan Power Co. v. Runge, 717 N.E.2d 216 (Ind. App. 1999) (in case alleging damages due to electrical surges and electric magnetic forces, primary jurisdiction doctrine inapplicable); Michigan Basic Property Ins. Ass'n v. Detroit Edison Co., 240 Mich. App. 524, 534-35, 618 N.W.2d 32, 37-38 (Mich. App. 2000) (common law tort claims not governed by doctrine of primary jurisdiction).

The only reason NSP offers for deferring to MPUC relates to equitable relief aspect of the complaint – that is, the specific corrective action that may be necessary to stop NSP from sending stray voltage on to the respondents' farm and injuring their cattle. NSP's brief focuses solely on this aspect of the claim for relief, ignoring completely the claim for monetary relief. However, the availability of injunctive relief is entirely dependent upon whether the jury finds that there is an ongoing nuisance.

Under the statute, the district court may entertain suits for both damages and injunctive relief arising out of a private nuisance. Minn. Stat. § 561.01 (allowing an "action" for both damages and injunctive relief as a result of nuisance). An "action" refers to a judicial proceeding. Brown v. Cannon Falls Township, 723 N.W.2d 31, 42 (Minn. Ct. App. 2006) (citing Minn. Stat. § 645.45(2), which defines "action" as any *in-court proceeding*). The private nuisance statute authorizes only judicial proceedings for

abatement of nuisances. Chapter 216B, on the other hand, authorizes no means for consumers to obtain either monetary relief or to force abatement of such nuisances.

C. THE MPUC HAS NO AUTHORITY TO PROVIDE A REMEDY FOR COMMON LAW TORT CLAIMS.

The MPUC has no statutory authority to either investigate or provide a remedy for common law tort claims. MPUC's authority is set out at Minn. Stat. § 216B.08: "The commission is hereby vested with the powers, rights, functions, and jurisdiction to regulate in accordance with the provisions of Laws 1974, chapter 429 every public utility as defined herein." As a creature of statute, MPUC only has authority given to it by the legislature. Minnegasco v. MPUC, 549 N.W.2d 904, 907 (Minn. 1996). Any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature. Id. "Neither agencies nor courts may under the guise of statutory interpretation enlarge the agency's powers beyond that which was contemplated by the legislative body." People's Natural Gas Co., v. MPUC, 369 N.W.2d 530, 534 (Minn. 1985). Agency jurisdiction cannot be created by the agency's own acts or by its assumption of jurisdiction. Frost-Benco Elec. Ass'n. v. MPUC, 358 N.W.2d 639, 642 (Minn. 1984).

Any reasonable doubt of existence of any particular power in the MPUC should be resolved against the exercise of such power. Petition of Minnesota Power for Authority to Change Its Schedule of Rates for Retail Elec. Serv., 545 N.W.2d 49, 51 (Minn. Ct. App. 1996). MPUC has rejected similar claims for damages based upon common law

tort theories of recovery. In the Matter of a Complaint against Lake Region Coop. Elec. Ass'n, Docket No. E-119/C-92-318:

The Complainants' allegations that the Cooperative's use of Complainants' private property for distribution of electricity *raises [sic] issues of civil and criminal trespass that are beyond the Commission's jurisdiction and area of expertise*. The Commission's jurisdiction in this matter is based strictly on service quality concerns (standards and practices) and does not extend to the trespass issues raised by Complainants and implied easement explanations offered by the Cooperative. *These issues are properly addressed to the judicial system, which has jurisdiction and expertise regarding these issues*.

RA 316 (emphasis added).

There is no reason to think MPUC would react to nuisance and negligence claims any differently than trespass. The Lake Region matter did not provide any monetary relief for damages caused by stray voltage, but instead dealt with issues related to methods of (1) testing for stray voltage and (2) which party would pay for installation of primary neutral isolation devices.

NSP's filed tariff gives no authority for the MPUC to resolve disputes between NSP and its customers other than to state that the MPUC is available to "mediate" disputes. NSP Electric Rate Book, § 11, 4.3. RA 639.⁸

MPUC has no authority to investigate or hold a hearing on individual consumer complaints, unless it does so "on its own motion." Minn. Stat. § 216B.17. (requiring a

⁸ This particular citation is not part of the summary judgment record. However, it is a public document and thus an exception to the normal rule against citing such information on appeal. Fairview Hosp. v. St. Paul Fire and Marine Ins. Co., 535 N.W.2d 337, 340 n.3 (Minn. 1995). NSP asserts that its tariff has the force of law. App. brief at 7. NSP's tariffs are available online at http://www.xcelenergy.com/docs/Me_Section_11.pdf.

minimum of 50 consumers of a utility to make a complaint before an investigation and hearing is conducted). MPUC is aware of this proceeding and has declined thus far to intervene on its own motion.

In summary, only the trial court has authority to order damages and abatement of the nuisance, but may consider seeking agency input at a point in the proceedings when particular measures are being investigated to abate the nuisance. See, Hoffman v. Wisconsin Elec. Power Co., supra, 262 Wis. 2d at 278, 664 N.W.2d 55, 62 (Wis. 2003). Allen v. Wisconsin Public Service Corp., 279 Wis. 2d 488, 694 N.W.2d 420, 428-29 (Wis. Ct. App. 2005) (approving authority of trial court in stray voltage case to order injunction after damages assessed).

CONCLUSION

The District Court properly denied Appellant's Summary Judgment Motion based on the affirmative defenses of statute of repose, filed rate and primary jurisdiction.

The Legislature never intended, nor has any Appellate Court in this state ruled, that a citizen's constitutional right to access to the courts for civil redress of wrongs based on common law torts committed by a utility be denied based on the filed rate or primary jurisdiction doctrines.

Diverting Respondents onto the exit ramp to the MPUC leads only to a bridge to nowhere. The District Court is the proper forum to resolve Respondents' common law tort claims and the District Court did not abuse its discretion in so ruling.

Because Appellant failed to properly maintain, inspect or operate its electrical equipment which was part of a larger and ever changing distribution system and fraudulently concealed the fact that it was constantly discharging high levels of stray voltage into Respondents' dairy facilities, the statute of repose does not apply to protect Appellant from its wrongdoing.

For the foregoing reasons, the District Court's Order denying Appellant's Summary Judgment Motion must be affirmed.

Dated: January 14, 2008

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CERTIFICATE OF COMPLIANCE

I certify that the above brief complies with the requirements of Minn. R. App. P. 132.01,

in that:

The font is 13-point or larger;

The length of the brief is 13,519 words and was prepared using Microsoft Word 2007.

A handwritten signature in cursive script, appearing to read "Charles A. Bird", written over a horizontal line.

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