

CASE NOS. A07-1975 & A07-2070

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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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.*

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**SUPPLEMENTAL BRIEF OF RESPONDENTS**

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Public utilities do not enjoy general tort immunity; they owe a duty of care to the general public. Thus, if a utility company recognizes that its conduct under certain circumstances creates an unreasonable risk of harm to another, it has a duty to take reasonable precautions to prevent that risk of harm from occurring.

Adams v. Northern Ill. Gas Co., 809 N.E.2d 1248, 1269 (Ill. 2004).

The breadth and scope of the change in the law advocated by Northern States Power (NSP) cannot be overstated. Taken to its logical conclusion, NSP's position is that it has no remaining common law tort duties to any member of the public. All such duties are abolished as long as paying monetary damages as the result of a common law negligence action could cause a theoretical future change in rates for electricity. An NSP customer could be electrocuted or have his house burn down through NSP's negligence and there would be no remedy other than pursuing a fix to the underlying problem before the MPUC, even though the MPUC is not required to even open a claim file under existing legislation and rules. This can't be the law.

No court has ever held that common law tort duty to use reasonable care in the distribution of electricity is abolished by the filed-rate doctrine. Nor does Hoffman (743 N.W.2d 751, Minn. Ct. App. 2008) support that extreme position. Hoffman is limited to a claim for *contract* damages arising out of an alleged breach of the service contract imposed by the tariff.<sup>1</sup> The class members in Hoffman sought a rebate of money charged for electricity based on a claim that NSP had failed to provide certain services required in the tariff.

This case is not about services that were not provided. Rather, the case is about damages caused by negligence on the part of the utility distributing electricity to Respondents' dairy. The

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<sup>1</sup> NSP argues that the Court of Appeals relied upon H.J., Inc. v. NW Bell to hold that common law claims for damages were precluded by the filed-rate doctrine. NSP Reply at 7. Not so. H.J. was an anti-trust case where the 8<sup>th</sup> Circuit considered whether or not the MPUC's complicity in fraudulently setting high rates for telephone service was a tort that was governed by the filed-rate doctrine. Because the issue related to the price of electricity and rebates for rates charged, the 8<sup>th</sup> Circuit held that fraud in rate-setting was not an exception to the doctrine.

tariff provision in dispute in Hoffman was ambiguous as to who was to maintain the point of connection. The tariff provided that the utility pays up to the point of connection and the customer pays from the point of connection. The central question in dispute in Hoffman is whether the rate that was approved included the cost of maintaining the point of connection. The class members were not making a claim that NSP's failure to maintain the point of connection caused injury. Only the *risk* of loss was asserted.

In the present case, Respondents are claiming cow deaths and other injury caused by NSP's negligence. The Hoffman Court described the plaintiffs' case as "an attack on tariffs filed with the appropriate regulatory entity." The present action has nothing to do with setting tariff rates nor are Respondents complaining about whether they paid a fair price for electrical services or maintenance. The Respondents are instead complaining about stray voltage, a phenomenon not covered by the tariff. The class members in Hoffman sought contract damages due to NSP's failure to provide a service for which all NSP customers were charged. Respondents, on the other hand, seek compensation for damage to their dairy cattle. Respondents are not asking that the tariff be "interpreted" or the tariff be "enforced" like the Hoffman plaintiffs.

In Hoffman, this Court noted that the claims made by the class members "will inevitably impact the rate-making process between NSP and the MPUC." Id., at 756. In the present case, an award for damages compensating Respondents for their injuries caused by NSP's negligence will not affect the rates being charged to other customers any more than other costs of doing business. Paying damages arising from lawsuits for negligence of a company is an insurable risk and a cost of doing business that is recognized by any company, even a municipality. There is no basis to grant NSP blanket immunity from common law negligence claims.

None of the cases cited by NSP involve claims for injury arising out of electricity harming persons or property. The only Minnesota case remotely considering the effect of this is Computer Tool & Eng'g, Inc. v. NSP, 453 N.W.2d 569, 573 (Minn. Ct. App. 1990) (followed by this Court in ZumBerge v. NSP, 481 N.W.2d 103) wherein this Court enforced a limitation on common law liability in NSP's tariff because it did not violate public policy, did not purport to relieve NSP of all liability under all circumstances, was narrowly drawn and because "liability would remain for all injury not caused by an interruption or disturbance in power."

Other courts have followed this reasoning. No courts have sided with NSP that there is no continued viability of common law tort duties that are not "wholly derivative of the contract." AT & T v. Central Office Tele., Inc., 524 U.S. 214, 226 (rejecting a common law tort claim for tortious-interference because it was "wholly derivative of the contract claim for additional and better services"); Adams v. Northern Ill. Gas Co., 809 N.E.2d 1248, 1263-73 (in gas explosion case, filed-rate doctrine did not preclude common law negligence claim based upon duty to warn even though pipes and fittings causing the leak were owned by the consumer); N'l Food Stores, Inc. v. Union Elec. Co., 494 S.W.2d 379, 381-83 (Mo.App. 1973) (common law negligence liability for loss of perishable goods not limited by tariff provision granting utility right to interrupt service); Schmidt v. NSP, 742 N.W.2d 294, 310-315 (Wis. 2007) (common law tort claims based upon nuisance and negligence not barred by filed-rate doctrine).

Adams comprehensively discusses all of the issues raised in this appeal – tort versus contract liability, federal cases discussing the topic, relationship of the common-law claim to the tariff, rules of interpretation concerning legislative intent, and public policy considerations. The Adams court held (Id. at 1265):

[T]he effect of a tariff on a particular claim depends upon the nature of the claim and the specific terms of the tariff. If the claim is one that implicates the provisions of the tariff, then the tariff controls according to its terms, which may either limit relief available or bar a claim entirely. But if the claim is unrelated to the tariff, then the claim is not limited or barred. In other words, merely because a tariff exists does not necessarily mean that a claim is barred.

This is in accord with Justice Rehnquist's concurring opinion in Central Office that not all state law claims are precluded by the filed-rate doctrine, but instead only "those suits that alter the terms and conditions of the tariff." 524 U.S. at 229-31.<sup>2</sup>

NSP, in spite of prior invitation, has not been able to identify any price, term or service that is implicated by the claim for damages in this case. As previously noted, NSP's claim of preferential services is premised solely upon a claim that curing the problem at the Siewert farm through injunction might involve some restructuring of its lines. Respondent's br. at 45. There is no factual record in this case to support NSP's unstated assumption that every customer receives the same level of stray voltage or that the Siewerts are seeking a level of stray voltage different from any other customer. Stray voltage is not part of the contract for services. NSP does not measure it and does not sell it. No one wants it. There is no tariff relating to stray voltage. Contrary to NSP's allegation, Respondents make no "wholesale condemnation of NSP's electric distribution system" (NSP Reply br. at 3), nor do Respondents seek to impose "extra-tariff obligations" upon NSP. The damages in this case are not measured by reference to the MPUC approved rate for services, nor based upon unjust enrichment as in Hoffman. The damages in this case have no relationship to the contract or unjust enrichment but are instead measured by damage to cows and loss of milk

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<sup>2</sup> NSP's duty to the public with respect to injury from its operations clearly exists under Minnesota law. Conover v. NSP, 313 N.W.2d 397, 402 (Minn. 1981) (liability exists for negligence in maintenance of utility poles); Miller-Lagro v. NSP, 582 N.W.2d 550, 552-53 (Minn. 1998) (customers of NSP had standing to sue in common law for wrongfully removing trees and for violation of tree statute); ZumBerge v. NSP, 481 N.W.2d 103 (Minn. Ct. App. 1992) (liability for stray voltage to farmers).

production. See: Behr report (RA 433- RA 481) attached in Respondents Appendix filed on January 14, 2008 .

Even cases involving contract claims for damages do not apply the filed-rate doctrine to preclude all state law claims. H.J., Inc. v. NW Bell Tel. Co., 954 F.2d 485, 488 (8<sup>th</sup> Cir. 1992) (limiting applicability of filed-rate doctrine to claims where the measure of damages was based upon the difference between the filed-rate and another rate that would have been approved absent the conduct at issue); In re NOS Comm., MDL No. 1357, 495 F.3d 1052, 1059-62 (9<sup>th</sup> Cir. 2007) (recognizing that some state law claims are preempted by the filed-rate doctrine, but only those claims that attack the filed-rate or require reference to the filed-rate in order to calculate damages).

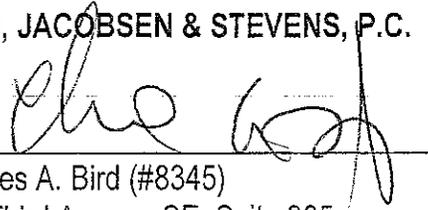
In Hoffman, the concern was, if the points of connection were not properly maintained, a fire might occur. If the MPUC finds that the points of connection must be maintained by the customers, the plaintiffs have suffered no damage. If it finds that NSP has that obligation, then it will require NSP to perform that service and adjust the rates accordingly. The Hoffman plaintiffs have a remedy in a proceeding before the MPUC. Schermer also noted that the legislature specifically limited remedies and gave the DOC authority over the type of retroactive rebates sought by the plaintiffs in that action. Schermer, 721 N.W.2d at 315-17.

In this case, the legislature did not limit remedies for customers harmed by electricity. The legislature did not give the MPUC authority over damage claims arising out of breach of common-law tort duties. Interpreting the filed-rate doctrine as NSP argues would be unconstitutional because there is no reasonable substitute for the damage claims asserted by the Respondents. Schermer, 721 N.W.2d at 316-17 (holding that statute precluding remedies is constitutional only if reasonable substitute is provided by legislature).

Dated: February 19, 2008

**BIRD, JACOBSEN & STEVENS, P.C.**

By

A handwritten signature in black ink, appearing to read 'Charles A. Bird', written over a horizontal line.

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