

Nos. A07-1975 and A07-2070

State of Minnesota
In Supreme Court

Greg Siewert, *et al.*,

Respondents,

v.

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

Appellant.

**BRIEF, ADDENDUM AND APPENDIX OF
APPELLANT NORTHERN STATES POWER COMPANY**

BRIGGS AND MORGAN P.A.
Timothy R. Thornton (#109630)
Kevin M. Decker (#314341)
Christianne A. Riopel (#348247)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

*Attorneys for Appellant
Northern States Power Company*

MAHLER LAW OFFICE
William D. Mahler
202 Ironwood Square
300 Third Avenue S.E.
Rochester, MN 55904
(507) 282-7070

BIRD, JACOBSEN & STEVENS P.C.
Charles A. Bird
305 Ironwood Square
300 Third Avenue S.E.
Rochester, MN 55904
(507) 282-1503

*Attorneys for Respondents
Greg Siewert, et al.*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
STATEMENT OF LEGAL ISSUES	4
STATEMENT OF THE CASE.....	6
STATEMENT OF FACTS.....	8
A. The Regulation Of Utility Services And Charges.....	8
B. The Siewerts' Claims	10
ARGUMENT	15
I. INTERLOCUTORY REVIEW IS PROPER.....	15
II. STANDARD OF REVIEW	16
III. THE FILED RATE DOCTRINE INSULATES THE UTILITY REGULATORY REGIME FROM JUDICIAL INTERFERENCE	16
A. The Filed Rate Doctrine Circumscribes Judicial Authority	17
1. AT&T v. Central Office Telephone, Inc	19
2. Hoffman v. Northern States Power Co.	20
B. The Filed Rate Doctrine Trumps This Litigation	22
IV. THE MPUC'S PRIMARY JURISDICTION MUST BE RESPECTED	28
A. The Doctrine Compels Deference.....	28
B. The MPUC Possesses The Capacity To Resolve Electric Service Complaints	30
C. The Siewerts' Claims Should Be Referred To The MPUC	35
V. THE CASE CANNOT SURVIVE THE STATUTE OF REPOSE	40
A. Minn. Stat. § 541.051	41
B. "Improvement To Real Property" Status	42
C. NSP's Distribution System Improves Real Property	44
D. The Appellate Court's Missteps.....	46
E. The Siewerts' Claims Are Fatally Tardy	50
CONCLUSION	50

TABLE OF AUTHORITIES

CASES

<i>Arkansas Louisiana Gas Co. v. Hall</i> , 453 U.S. 571 (1981).....	18
<i>AT&T v. Central Office Telephone, Inc.</i> , 524 U.S. 214 (1998).....	Passim
<i>Capitol Supply Co. v. City of St. Paul</i> , 316 N.W.2d 554 (Minn. 1982)	43
<i>Central Office Tel., Inc. v. AT&T</i> , 108 F.3d 981 (9th Cir. 1997)	19
<i>Chicago & Alton R. Co. v. Kirby</i> , 225 U.S. 155, 32 S. Ct. 648, 56 L. Ed. 1033 (1912).....	20, 26
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504 (1992).....	25
<i>Citizens Sec. Mut. Ins. Co. v. General Elec. Corp.</i> , 394 N.W.2d 167 (Minn. Ct. App. 1986).....	42
<i>CSX Transp., Inc. v. Easterwood</i> , 507 U.S. 658 (1993).....	25
<i>Dakota v. BWBR Architects</i> , 645 N.W.2d 487 (Minn. Ct. App. 2002).....	41, 50
<i>Davis v. Cornwell</i> , 264 U.S. 560, 44 S. Ct. 410, 68 L. Ed. 848 (1924).....	20, 26
<i>Ebert v. South Jersey Gas Co.</i> , 723 A.2d 599 (N.J. 1999)	46
<i>Far East Conference v. United States</i> , 342 U.S. 570 (1952).....	28-29
<i>Forster v. R.J. Reynolds Tobacco Co.</i> , 437 N.W.2d 655 (Minn. 1989)	25-26

<i>Hoffman v. N. States Power Co.</i> , 764 N.W.2d 34 (Minn. 2009)	Passim
<i>Hunt v. Nevada State Bank</i> , 285 Minn. 77, 172 N.W.2d 292 (1969)	15
<i>Imports, Etc., Ltd. v. ABF Freight Sys., Inc.</i> , 162 F.3d 528 (8th Cir. 1998)	18
<i>In re Excess Surplus Status of Blue Cross and Blue Shield of Minn.</i> , 624 N.W.2d 264 (Minn. 2001)	38
<i>Kastner v. Star Trails Ass'n</i> , 646 N.W.2d 235 (Minn. 2002)	15
<i>Kemp v. Allis-Chalmers Corp.</i> , 390 N.W.2d 848 (Minn. Ct. App. 1986).....	42
<i>Keogh v. Chicago & Northwestern Railway Co.</i> , 260 U.S. 156 (1922).....	17-18, 24
<i>Kloster-Madsen, Inc. v. Taft's, Inc.</i> , 226 N.W.2d 603 (Minn. 1975)	42
<i>Lederman v. Cragun's Pine Beach Resort</i> , 247 F.3d 812 (8th Cir. 2001)	43
<i>Lietz v. N. States Power Co.</i> , 718 N.W.2d 865 (Minn. 2006)	5, 43, 47
<i>Louisville & Nashville Railroad v. Maxwell</i> , 237 U.S. 94 (1915).....	17
<i>Lovgren v. Peoples Elec. Co.</i> , 368 N.W.2d 16 (Minn. Ct. App. 1985).....	42
<i>MCI Communications Corp. v. AT&T</i> , 496 F.2d 214 (3d Cir. 1974)	30
<i>Minneapolis Street Ry. Co. v. City of Minneapolis</i> , 86 N.W.2d 657 (Minn. 1957)	9
<i>Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.</i> , 341 U.S. 246 (1951).....	17-18

<i>Montaup Elec. Co. v. Ohio Brass Corp.</i> , 561 F. Supp. 740 (D. R.I. 1983)	45
<i>Mora-San Miguel Elec. Coop., Inc. v. Hicks & Ragland Consulting & Eng'g</i> , 598 P. 2d 218 (N.M. App. 1979)	45
<i>N. States Power Co. v. City of Oakdale</i> , 588 N.W.2d 534 (Minn. Ct. App. 1999).....	9
<i>Pacific Indem. Co. v. Thompson-Yaeger, Inc.</i> , 260 N.W.2d 548 (Minn. 1977)	5, 42, 44-45
<i>Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n</i> , 369 N.W.2d 530 (Minn. 1985)	18
<i>Ricci v. Chicago Mercantile Exchange</i> , 409 U.S. 289 (1973).....	29
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236 (1959).....	25
<i>Schermer v. State Farm Fire & Cas. Co.</i> , 721 N.W.2d 307 (Minn. 2006)	Passim
<i>Siewert v. N. States Power Co.</i> , 757 N.W.2d 909 (Minn. Ct. App. 2008).....	Passim
<i>State by Pollution Control Agency v. United States Steel Corp.</i> , 307 Minn. 374, 240 N.W.2d 316 (1976)	28
<i>State Farm Fire & Cas. v. Aquila, Inc.</i> , 718 N.W.2d 879 (Minn. 2006)	Passim
<i>United States v. W. Pac. R. R. Co.</i> , 352 U.S. 59 (1956).....	5, 28
<i>Watson by Hanson v. Metropolitan Transit Comm'n</i> , 553 N.W.2d 406 (Minn. 1996)	16
<i>Weston v. McWilliams & Assocs., Inc.</i> , 716 N.W.2d 634 (Minn. 2006)	15, 41

STATUTES, RULES & REGULATIONS

1994 Minn. Laws, Ch. 573 34

Minn. R. 7826.0300..... 31, 36

Minn. Stat. § 216A.05 9

Minn. Stat. § 216B.01 8

Minn. Stat. § 216B.02 19, 23, 31

Minn. Stat. § 216B.03 36

Minn. Stat. § 216B.05 9, 31

Minn. Stat. § 216B.09 9, 31

Minn. Stat. § 216B.16 36

Minn. Stat. § 216B.17 31-33

Minn. Stat. § 216B.029 8, 11, 31

Minn. Stat. § 326B.35 11-12, 31

Minn. Stat. § 541.051 Passim

INTRODUCTION

Respondents Greg and Harlan Siewert are father and son dairy farmers disappointed with their herd's milk production and seeking to blame the electrical distribution system of Northern States Power Company ("NSP"). Importantly, NSP is not accused of violating its regulatory tariff setting forth the utility's obligations as approved by the Minnesota Public Utilities Commission ("MPUC"). Instead, the Siewerts want to have a jury of laypersons hold NSP accountable for failing to design, install, operate, and maintain a different electrical distribution system that satisfies the discredited theories of the Siewerts' "experts." Not only would such an approach to utility regulation upend NSP's performance of tariff-based duties, the result would vest randomly selected jurors with ultimate authority over the most complex aspects of retail energy supply.

Hoffman v. Northern States Power Co. has already cast the die. 764 N.W.2d 34 (Minn. 2009). This Court applied the filed rate doctrine to preclude claims that would require NSP to provide services beyond those called for by the utility's regulatorily-approved tariffs. *Id.* at 44-45. The decision establishes that the duties to which a regulated utility can be held are defined by and limited to the tariff.

Further, when the tariff is not clear or the regulatory issues are complex the MPUC – not a court – has primary jurisdiction to determine the utility's obligations. For that reason, courts defer claims enmeshed in technical, regulated terms and operations to agency expertise. *Id.* at 52. This litigation brims with the same sort of claims that *Hoffman* found to be foreclosed or otherwise inappropriate for judicial resolution.

The court of appeals recognized that “the Siewerts’ claims for relief are barred by the filed-rate doctrine if granting the relief would result in the court directing the scope of the service to be provided.” *Siewert v. N. States Power Co.*, 757 N.W.2d 909, 917 (Minn. Ct. App. 2008). That recognition led to the rejection of injunctive relief: the “unmistakable implication of this claim” would be to subject NSP’s operations to the Siewerts’ demands rather than MPUC oversight. *Id.* Inexplicably, however, the court allowed the Siewerts’ damages request to proceed even though such a remedy shares the same “unmistakable implication” – *i.e.*, holding NSP to duties dictated by the Siewerts rather than the tariff. *See id.* at 917-18.

Enforcement of the filed rate doctrine does not turn upon the particular redress sought. Regardless of how the remedy is characterized, a verdict that would make NSP pay for not adhering to the methods and means for distributing electricity advocated by the Siewerts’ experts would redefine the duties of regulated utilities. Such an effect is exactly what *Hoffman* forecloses. Therefore, this Court should affirm the court of appeals’ repudiation of injunctive relief, but reverse the allowance of damages so that the singular liability theory underlying both remedies is subject to consistent filed rate doctrine treatment.

The court of appeals’ lack of deference to MPUC primary jurisdiction should also be conformed to *Hoffman*. This Court teaches that primary jurisdiction should be respected when a lawsuit involving MPUC-regulated subject matters turns upon technical knowledge and experience because “the legislature entrusted the commission with setting the rates based on the scope of the services NSP was to perform.” *Hoffman*, 764 N.W.2d

at 51. Deferral of the Siewerts' claims to the agency is even more appropriate in this case because the Siewerts seek a fundamental reconfiguration of the electrical distribution system and a re-engineering of system operations. Such a request "requires technical knowledge and experience that makes the tariff construction issue in this case best suited for a first consideration by the MPUC." *Id.*

Finally, the statute of repose (Minn. Stat. § 541.051) offers another basis for reversal. This Court's jurisprudence leave no doubt about NSP's distribution system constituting an "improvement to real property" so as to bring the statute of repose to bear, and the Siewerts' claims arise from that real property improvement. Section 541.051's exception for "maintenance, operation, or inspection" claims cannot save the lawsuit from repose because the Siewerts' complaint and "expert" evidence are premised upon the contention that NSP's distribution facilities are inherently unsafe without regard to maintenance, operation or inspection. And in any event, countenancing such claims would pose the precise filed rate challenges that *Hoffman* turned back.

STATEMENT OF LEGAL ISSUES

[AS CERTIFIED BY THE DISTRICT COURT]

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

Yes. This Court enforces the filed rate doctrine to preclude judicial consideration of the reasonableness of Northern States Power Company's tariff-specified services and to bar the expansion of the performance a utility must provide by means of litigation; the court of appeals acknowledged that rule and rejected injunctive relief, but permitted the damages demand to stand even though the effect of such recourse would be equally disruptive to the regulatory regime and the conduct of NSP's business.

Authorities:

Hoffman v. N. States Power Co.,
764 N.W.2d 34 (Minn. 2009)

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

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

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

Yes. This Court advises that claims requiring the interpretation of complex and technical terms in Northern States Power Company's tariff should be deferred to the prerogative and competence of the Minnesota Public Utilities Commission; the court of appeals, on the other hand, felt that such quintessentially-regulatory disputes should be handled just like any other cause of action.

Authorities:

Hoffman v. N. States Power Co.,
764 N.W.2d 34 (Minn. 2009)

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

United States v. W. Pac. R.R. Co.,
352 U.S. 59 (1956)

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

Yes. Precedents from this Court compel the conclusion that an electrical distribution system is an improvement to real property for Minn. Stat. § 541.051 purposes, and through this litigation the Siewerts take the intrinsic adequacy of that improvement to task; the court of appeals nonetheless held that several of the Siewerts' claims are actually service-related complaints and that others fall under the statutory exception for maintenance, operation, and inspection claims.

Authorities:

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

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

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

STATEMENT OF THE CASE

Pursuant to the tariff filed with and approved by the MPUC, NSP designed and constructed a distribution system that delivers electricity to the Siewert dairy farm, as well as numerous other ratepayers. The Siewerts accuse that system – in place and operative for decades – of exposing their cows to harmful electrical currents. The complaint never alleges that NSP violated the tariff; instead, NSP is blamed for not providing utility services that the Siewerts deem to be more appropriate for their circumstances. In the Siewerts' view, this supposed service and facility failure renders NSP liable for damages and subject to injunctive relief.

NSP moved for summary judgment on several grounds, including the: (1) filed rate doctrine, (2) MPUC primary jurisdiction, and (3) statute of repose, Minn. Stat. § 541.051. The Wabasha County District Court, the Honorable Terrence Walters presiding, denied the motion. *Siewert v. N. States Power Co.*, No. C5-04-498, slip op. (Minn. Dist. Ct. Sept. 20, 2007) (“*Summary Judgment Order*”) (reproduced at A.1-6 of NSP’s Appendix (“A.”)).

NSP sought immediate appellate review by (1) moving to certify questions as important and doubtful; (2) appealing as a matter of right (A07-1975); and (3) petitioning for discretionary review (A07-1973). On October 30, 2007, the district court agreed that prompt appellate guidance was needed. *Siewert v. N. States Power Co.*, No. C5-04-498, slip order (Minn. Dist. Ct. Oct. 30, 2007) (“*Certification Order*”) (A.7). The court of

appeals consolidated the appeal of certified questions (A07-2070) and the appeal as a matter of right (A07-1975). *Id.*¹

The ensuing opinion confirmed that the questions presented had been appropriately certified and concluded the filed rate doctrine barred injunctive relief against NSP's electrical distribution system. *Siewert v. N. States Power Co.*, 757 N.W.2d 909, 915-17 (Minn. Ct. App. 2008). Quizzically, the Siewerts' companion quest for damages was excused from filed rate disposition. The appellate court also declined to yield to MPUC primary jurisdiction and spurned statute of repose enforcement.

NSP petitioned this Court for further review of the filed rate doctrine holding with respect to damages, as well as of the primary jurisdiction and the statute of repose rejections. The petition was granted on February 17, 2009, and this appeal was stayed pending the outcome of *Hoffman v. N. States Power Co.*, 764 N.W.2d 34 (Minn. 2009).

¹ Because "the district court's decision is appealable as a matter of right and [NSP] has perfected two appeals, discretionary review is unnecessary." Accordingly, the petition for discretionary review was dismissed at moot. *Siewert v. N. States Power Co.*, No. A07-1973, slip order (Minn. App. Nov. 6, 2007) (A.8).

STATEMENT OF FACTS

A. The Regulation Of Utility Services And Charges

This litigation strikes at the constitutionally-allocated relationship among the legislature, MPUC, and NSP, as well as the fundamental principles upon which the regulation of retail commerce in electricity are based. The underlying question is whether the distribution of electricity will be comprehensively and consistently overseen by the legislatively-charged agency or subjected to *ad hoc* governance through civil litigation.

NSP is a regulated monopoly authorized to sell energy services in Minnesota. *Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 39 (Minn. 2009). Utilities like NSP conduct business in the paradigmatic context of regulated commerce. *See* Minn. Stat. § 216B.01 (“It is hereby declared to be in the public interest that public utilities be regulated...”). *See Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307, 318 (Minn. 2006) (the electrical utility regulatory scheme is stringent).

To ensure that utility regulation is appropriate and congruous, the legislature vested the MPUC with exclusive authority to “adopt standards for safety, reliability, and service quality for distribution utilities.” Minn. Stat. § 216B.029, subd. 1(a); *Hoffman*, 764 N.W.2d at 43 (“In Chapter 216 the Minnesota Legislature vested extensive power in the MPUC to set and prospectively regulate rates for Minnesota’s public utility companies.”). For “safety, design, construction, and operation of electric distribution facilities,” NSP must comply with regulatory and industry standards. Minn. Stat. § 216B.029, subd. 1(d).

MPUC regulation is realized by the filing and approval of tariffs that set forth the “rates” and “all rules that, in the judgment of the [MPUC], in any manner affect the service or product.” Minn. Stat. § 216B.05, subd. 2. “The services that NSP is obligated to perform for Minnesota customers are set forth under the tariff.” *Hoffman*, 764 N.W.2d at 39. Importantly, the MPUC alone determines the reasonableness of utility tariffs. *See* Minn. Stat. § 216A.05, subd. 2(2) (“The commission shall... review and ascertain the reasonableness of tariffs of rates, fares and charges, or any part or classification thereof[.]”). *See also Hoffman*, 764 N.W.2d at 42 (“[C]ourts are ill-suited to determine the reasonableness of rates established by the agency.”) (quotation omitted).

Tariffs are not just guidelines about utility pricing and performance: “Filings made with the [MPUC] by utilities ‘continue in force until amended by the public utility or until changed by the [MPUC].’ The [MPUC’s] decisions ‘command the same regard and are subject to the same tests as enactments of the legislature.’” *N. States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 537 (Minn. Ct. App. 1999) (quoting Minn. Stat. § 216B.09, subd. 3, and *Minneapolis Street Ry. Co. v. City of Minneapolis*, 86 N.W.2d 657, 676 (Minn. 1957)). Because tariffs have the force and effect of law, no claim of right or obligation can supersede or contradict the agency-approved standards pursuant to which a utility does business.

This regulatory regime significantly restricts how NSP does business. Without governmental say-so, other commercial enterprises are free to set prices, to design products and services, and to choose customers. Only the marketplace limits what those businesses can sell and how much they can charge. As a *quid pro quo* for being

subjected to the constraints of regulated commerce, however, a utility's duties to customers are stipulated in the tariff. Simply put, NSP must perform as mandated by the tariff, but NSP cannot be held responsible in civil litigation for failing to provide non-tariff services. *Hoffman*, 764 N.W.2d at 39 (“The services that NSP is obligated to perform for Minnesota customers are set forth under the tariff that NSP files with the MPUC.”).

B. The Siewerts' Claims

The operative facts are not in dispute. The Siewerts moved to their dairy farm in 1989 and began dairy operations the next year. *Siewert*, 757 N.W.2d at 913. “Following their 1989 move, milk production did not meet expectations.” *Id.* Over the years the Siewerts came to believe that their cows were experiencing harmful levels of electric currents and that such exposures somehow impaired milk production and animal health. *Id.*

Pursuant to the applicable tariff, NSP has energized the farmstead and surrounding area for many years. *Id.* The distribution line that supplies electricity was erected decades ago; most of the conductors and other distribution components were underbuilt on an existing transmission line in 1960. *See id.* (“The Siewerts’ Wabasha County farm was connected to the electrical grid in 1960 or shortly thereafter.”). The system that brings power to the Siewert farm has been in place without substantial change and has served its essential purpose since long before the Siewerts milked their first cow at that location.

Critically, the Siewerts are not the only customers supplied with power from the distribution system. Hundreds of others rely on this improvement to real property to illuminate their homes and businesses. Hence, changes at the Siewerts' behest would affect everyone else who is connected to the system.

The utility has exclusive authority over the design and location of standard facilities. *NSP Tariff*, General Rules and Regulations (“*Tariff*”), ¶ 5.1(A) (A.123-25), ¶ 5.3(A)(6) (A.129). Accordingly, the tariff subjects NSP to comprehensive standards: the guiding principle is “good utility practices,” including compliance with the National Electrical Safety Code (“NESC”). *Tariff*, ¶ 5.3(A)(5) (A.129).

The distribution system at issue is multi-grounded. Pursuant to industry standards, electrical systems are grounded “as one of the means of safeguarding employees and the public from injury that may be caused by electrical potential.” NESC at § 9(090) (§§ 2 and 9 of the NESC are reproduced at A.10-32). An “effectively grounded” system is “intentionally connected to earth” in order to provide a current pathway into the ground. NESC at § 2 (A.12). As the name describes, a multi-grounded system allows current to enter the earth at many locations. NESC at § 2 (A.14). (defining “multigrounded/multiple grounded system” as a “system of conductors in which a neutral conduction is intentionally grounded solidly at specified intervals. A multigrounded or multiple grounded system may or may not be effectively grounded. *See*: effectively grounded.”).

These standards promulgated by the NESC have been legislatively endorsed as “prima facie evidence of accepted standards of construction for safety to life and

property.” Minn. Stat. § 326B.35 (emphasis added). NSP is obligated by statute to comply with NESC protocol “for the safety, design, construction, and operation of electric distribution facilities.” Minn. Stat. § 216B.029, subd. 1(d) (“Electric distribution utilities shall comply with all applicable governmental and industry standards . . . including Section 326B.35.”).

In 2004, the Siewerts sued NSP complaining that distribution system deficiencies exposed their cattle to so-called “stray voltage.” *See, e.g.*, Complaint ¶ VI. (A.34-35) The complaint charges that harm caused by electricity escaping from the system into the ground has been ongoing since 1989. The Siewerts’ “expert” Donald Zipse, excoriates the facilities that NSP engineered to distribute electricity and the electrical services that NSP delivers. Through Zipse, the Siewerts argue that a different facility configuration and alternative service procedures would alleviate the supposedly harmful on-farm electrical conditions. *See, e.g.*, 2006 Report of Donald W. Zipse at 50-52 (hereafter “2006 Zipse Report”) (A.88-90); 2007 Report of Donald W. Zipse at 5 (hereafter “2007 Zipse Report”) (A.100).

Notably, Zipse insists that the multi-grounded system (as designed and constructed) is, in and of itself, a basis for imposing liability. The system is said to be inherently defective because current pathways to the earth have been intentionally provided. *See generally* 2006 Zipse Report (A.39-95). *See also id.* at 33 (declaring the multi-grounded system to be the “major cause” of herd injury). Tellingly, Zipse admits that his condemnation of multi-grounded systems has been repeatedly rejected by the

NESC standards panel and that there are “12, 15 years to go before [his views] would be accepted.” Deposition of Donald W. Zipse at 14-15 (A.102).

More recently Zipse has ordained that the distribution system also includes intrinsic load balancing problems that spawn stray voltage. Affidavit of Donald W. Zipse at ¶ 7 (A.105-06). The distribution of energy to downline ratepayers supposedly causes this phase imbalance. *Id.* at ¶ 13 (A.110). Thus Zipse attacks NSP for complying with the statutory obligation to supply electricity to all consumers in the assigned service area.

To correct this supposed design defect, the Siewerts demand that the system be reconfigured to place their farm at the end of the line. 2007 Zipse Report at 5 (A.100). Such a reconstruction of the substations, power lines, switches, breakers, capacitors and transformers would have wide-ranging effects – obviously affecting everyone who relies on the existing infrastructure and imposing substantial additional costs on all ratepayers.

In addition to denouncing the system, the Siewerts fault NSP’s maintenance and inspection practices for causing electricity to flow to the ground. Complaint at ¶ 5 (A.34) (alleging “[n]egligence in failing to adequately test and inspect systems, equipment, and components for said voltage”). As with the design and operation complaints, the Siewerts insist that NSP should have done something additional or different to ensure that electricity remains on the utility’s conductors and not in cow-contact areas.

Critically, the Siewerts have never identified an instance in which NSP deviated from the tariff or an incident that violates any MPUC rule or applicable law. As a result, indulging either system design or operation, maintenance, and inspection claims would

result in the exaction of damages² despite NSP's regulatory adherence. If that were not enough, a jury would be asked to determine distribution system design and construction propriety and to charge NSP with extra-tariff maintenance and inspection duties.

² The Siewerts seek damages back to 1989, yet there is no evidence about any electricity levels on the property before 2004. In fact, the Siewerts' veterinarian, Dr. Norb Nigon, investigated the dairy barn in the early 1990s and found no trace of stray voltage. Deposition of Norbert Nigon at 94-97 (A.120-21). Besides that, the measurements since 2004 reflect exposures that are far below the thresholds which are generally accepted by the scientific community as having the potential to have an adverse effect on milk production.

ARGUMENT

I. INTERLOCUTORY REVIEW IS PROPER

The filed rate, primary jurisdiction, and statute of repose questions are properly answered by the Court pursuant to the *Certification Order*; Minn. R. Civ. App. P. 103.03(j) also affords appellate jurisdiction. The Siewerts did not seek further review of the court of appeals' acceptance of this interlocutory appeal.

Minn. R. Civ. App. P. 103.03(i) authorizes interlocutory review when the district court "certifies [] the question presented [to be] important and doubtful." The court of appeals recognized the importance and doubtfulness of the certified questions: answering any one in the affirmative would terminate the proceedings as well as have state-wide consequences, and the scope of the protections at issue are evolving. *Siewert*, 757 N.W.2d at 914-15. In light of *Hoffman*, the importance of these questions and doubtfulness of the decision below are clear.

Rule 103.03(j) offers an alternative ground for appellate jurisdiction. That procedure authorizes an interlocutory review when a court rejects a jurisdictional, immunity or analogous defense that, if granted, would end the litigation. *See, e.g., Kastner v. Star Trails Ass'n*, 646 N.W.2d 235 (Minn. 2002); *Hunt v. Nevada State Bank*, 285 Minn. 77, 172 N.W.2d 292 (1969). The very purposes of the filed rate doctrine, primary jurisdiction, and the statute of repose are the curtailment of judicial prerogative. *See Hoffman*, 764 N.W.2d at 42 (filed rate doctrine reflects justiciability and separation of powers concerns); *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006) (statute of repose "reflect[s] the legislative conclusion that a point in time

arrives beyond which a potential defendant should be immune from liability for past conduct”) (quotation omitted) (emphasis added).

The regulatory-based doctrines subject NSP to MPUC superintendence while excusing the utility from answering for service-related performance before any tribunal other than the MPUC. Hence these defenses are jurisdictional in nature so as to invoke Rule 103.03(j). The passage of time immunizes improvements to real property from claims based upon those improvements, thereby also qualifying the § 541.051 defense for Rule 103.03(j) review.

II. STANDARD OF REVIEW

Certified questions of law are subject to de novo review. *Hoffman*, 764 N.W.2d at 42; *Watson by Hanson v. Metropolitan Transit Comm'n*, 553 N.W.2d 406, 411 (Minn. 1996).

III. THE FILED RATE DOCTRINE INSULATES THE UTILITY REGULATORY REGIME FROM JUDICIAL INTERFERENCE

“Claims that seek to expand services beyond what is provided for in the tariff ... indirectly challenge the reasonableness of the filed rates, and the filed rate doctrine bars the judiciary from considering such claims.” *Hoffman*, 764 N.W.2d at 44. The Siewerts directly challenge the adequacy of facilities and services provided pursuant to NSP’s tariffs. In order to prevail the Siewerts must subject NSP to liability for not employing different means and mechanisms to deliver electricity. In other words, the Siewerts would have NSP be accountable in law and in equity for failing to render more expansive

services than the tariff requires. The fate of such claims was apparent prior to *Hoffman*; their demise is now *a fait accompli*.

A. The Filed Rate Doctrine Circumscribes Judicial Authority

The relationship between a regulated utility (like NSP) and ratepayers (like the Siewerts) is subject to pervasive regulatory oversight. The governing bond is the tariff that is filed with, and thereafter approved, administered, and revised by the responsible agency. *Hoffman*, 764 N.W.2d at 39. See *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 222-24 (1998); *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

Administrative authority over tariff-based subject matters is plenary, giving rise to the filed rate doctrine first articulated almost a century ago in *Louisville & Nashville Railroad v. Maxwell*, 237 U.S. 94 (1915), only to be sharpened by *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), and subsequent decisions. The doctrine's applicability to NSP's distribution of electricity is beyond doubt. *Hoffman*, 764 N.W.2d at 43. See *Schermer*, 721 N.W.2d at 318.

In bringing the doctrine to bear on the regulated commerce of this state, the Court paid heed to the twin principles that animate the regulatory scheme: separation of powers and justiciability. *Id.* at 314. The allocation of authority prescribed by the legislature recognizes "that regulatory agencies have special expertise, investigative capacities and experience and familiarity with the regulated industry that enable them to consider the whole picture regarding the reasonableness of a proposed rate, whereas the courts are ill-

suiting to second-guess the decisions of regulatory agencies.” *Id.* at 312 (quotation omitted).

On top of that, “the regulation of rates is an ‘intricate ongoing process’ and interference by a court ‘may set in motion an ever-widening set of consequences and adjustments’ which courts are powerless to address.” *Id.* at 315 (quoting *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm’n*, 369 N.W.2d 530, 535 (Minn. 1985)). Thus, “[i]n order to uphold the regulatory scheme enacted by the Legislature, [this Court has] conclude[d] that the [legislatively-designated agency] serves as the plaintiff’s sole source of relief.” *Id.* at 319 (quotations and citation omitted) (emphasis added).

The filed rate spells out utility obligations that can only be changed by the entity with the requisite authority – the regulatory agency itself. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981). “[N]ot even a court can authorize commerce in the commodity on other terms.” *Montana-Dakota Utils. Co.*, 341 U.S. at 251-52. This insulation from judicial interference endures no matter how a claim implicating tariff-based duties is styled: “The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.” *Keogh*, 260 U.S. at 163. *See Schermer*, 721 N.W.2d at 311 (“[B]ecause we conclude that the filed rate doctrine bars the Class’s claims, we need not reach the issue of whether the Class otherwise had valid statutory or common law claims.”) (emphasis added).

Critically, “[t]he filed rate doctrine does not apply to rates alone, but to any terms or practices that might affect the rates as well.” *Imports, Etc., Ltd. v. ABF Freight Sys., Inc.*, 162 F.3d 528, 530 (8th Cir. 1998) (citing *AT&T*, 524 U.S. at 222). Consistent with

that axiom, the statutory definition of “rate” is not limited to prices, but instead includes “every compensation, charge ... and any rules, practices or contracts.” Minn. Stat. § 216B.02, subd. 5. Hence, the tariff plots the metes and bounds of the standards applicable to a regulated utility’s distribution of electricity. “If the services requested in the litigation are not part of the original tariff obligations, the courts cannot, consistent with the filed rate doctrine, require performance of those services.” *Hoffman*, 764 N.W.2d at 45.

Two precedents in particular – *AT&T v. Central Office Telephone, Inc.* and *Hoffman v. Northern States Power Co.* – demarcate the regulatory boundaries that this litigation threatens to transgress.

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

AT&T arose out of a dispute between the provider (AT&T) and a reseller (Central Office) of long-distance telecommunications services. 524 U.S. at 216-20. Central Office complained about the services received. *Id.* at 220. Although the tariff prescribed AT&T’s obligations, the district court turned a blind eye to the filed rate ramifications and allowed a jury to assess damages. *Id.* at 216-20.

The Ninth Circuit affirmed the verdict without regard to the tariff, believing that “this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing.” *Central Office Tel., Inc. v. AT&T*, 108 F.3d 981, 990 (9th Cir. 1997). The Supreme Court saw it the other way, holding that challenges to tariff-required services offend the filed rate doctrine just as much as attacks on tariff-approved pricing:

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

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

Notably, the tariff made the services at issue a matter of AT&T discretion:

whereas [Central Office] asks to enforce a guarantee that orders would be provisioned within 30 to 90 days, the tariff leaves it up to [AT&T] to "establis[h] and confir[m]" a due date for provisioning, requires that [AT&T] merely make "every reasonable effort" to meet that due date, and if it fails gives the customer no recourse except to "cancel the order without penalty or payment of nonrecurring charges."

Id. at 225. Nonetheless, because the tariff specifies the only duties for which a regulated utility can be held accountable and the lawsuit sought redress against AT&T for failing to provide services beyond those specified in the tariff, Central Office's claims were obviated by the filed rate doctrine. *Id.* at 228.

2. ***Hoffman v. Northern States Power Co.***

Hoffman leaves the Court with little new to do in this case: the doctrine, defendant, agency, tariff, and regulatory implications are all the same. The *Hoffman* plaintiffs sued NSP for failure to provide inspection and maintenance services supposedly necessary to minimize the risk of electrical fires. 764 N.W.2d at 39. The complaint sought compensatory damages and injunctive relief.

This Court refused to allow the litigation to proceed, cautioning that the judiciary's role in rate-related disputes is restricted to enforcing "the clear terms of an agency-approved tariff." *Id.* at 44. When the terms are straightforward, "[j]udicial enforcement of the ... tariff ... cannot be said to infringe upon the discretionary authority vested in the agency." *Id.* But the scope of a utility's obligation when the tariff is not clear is for the MPUC, not the courts, to decide.

Like in *AT&T*, *Hoffman* confirmed the filed rate doctrine's preclusion of "[c]laims that seek to expand services beyond what is provided for in the tariff [because they] indirectly challenge the reasonableness of the filed rates." *Id.* Thus "[i]f the services requested in the litigation are not part of the original tariff obligations, the courts cannot, consistent with the filed rate doctrine, require performance of those services." *Id.* at 45.

Because the *Hoffman* appeal came before this Court in the context of a Rule 12 motion, allegations about the tariff requiring NSP to provide point-of-connection services were assumed to be true. *Id.* at 45-46. Referencing that supposed tariff justification, the Court allowed the injunctive relief claim to survive. *Id.* at 45-46. The quest for an equitable remedy would, however, be filed-rate barred if the plaintiffs could not demonstrate that the tariff called for such services. *Id.* at 45-46 ("If the services requested in the litigation are not part of the original tariff obligations, the courts cannot, consistent with the filed rate doctrine, require performance of those services.").³

³ Damages were thrown out because such a remedy would amount to a refund of rates paid, a decidedly improper filed rate result. *Id.* at 47-48. The pursuit of injunctive relief was ultimately consigned to the MPUC process.

B. The Filed Rate Doctrine Trumps This Litigation

Unlike the *Hoffman* plaintiffs, the Siewerts do not pretend to seek enforcement of clearly-defined tariff duties. Instead this lawsuit would fundamentally alter utility obligations by making NSP pay damages as determined by a jury and distribute electricity as enjoined by a court. Simply put, non-regulators would be empowered to decide which services and facilities the Siewerts should receive and how much NSP must pay for not having provided those services, regardless of – indeed, in spite of – the tariff. Such a proceeding would inject the judiciary, and ultimately jurors, directly into the legislative and executive functions of promulgating and administering utility regulations – arousing the exact separation-of-powers and justiciability concerns that the filed rate doctrine was formulated to quell. *See, e.g., Schermer*, 721 N.W.2d at 315 (proscribing judicial interference in tariff-related matters).

As required by the tariff, NSP installs, operates, and maintains standard facilities. *See Tariff*, at §§ 2.1, 5.1, 5.2, 5.3 (A.122-37). “The Company will provide permanent service at the standard voltage and phase available in the area to the service location designated by the Company. The Company reserves the right to designate the type of facilities to be installed either overhead or underground.” *Tariff* at § 5.1 (A.123). *See AT&T*, 524 U.S. at 225, 228 (regulated entity enabled to exercise discretion regarding the provision of tariff-required services). The prerequisites for extending, enlarging, or changing the “distribution or other facilities for supplying electric service” are specified in the tariff. *Tariff* at § 5.2 (A.127-28).

NSP has no discretion regarding pricing: the tariff specifies how much ratepayers can be charged. *Hoffman*, 764 N.W.2d at 43. And as a regulated utility, NSP must provide electricity to every customer in the assigned service area. *Id.* at 39. No one can be denied service or be billed other than as prescribed by the tariff or receive different services in exchange for the MPUC-approved charges. *Hoffman*, 764 N.W.2d at 46-47.

Since the Siewerts do not accuse NSP of failing to deliver tariff-required services or otherwise violating the tariff, this lawsuit is about tasks and facilities that the Siewerts believe should have been included in the tariff or should have been provided without regard to the tariff. For instance, the Siewerts contended from the outset that the tariff-approved multi-grounded distribution system is inherently defective. More recently, the Siewerts insist that the distribution system should be balanced differently and that their farm should have been placed at the end of the line.

Either theory premises redress on the presumption that NSP should have deviated from the tariff by providing the Siewerts with non-standard distribution system services and facilities. This is a classic example of the meddling that the filed rate doctrine proscribes. *See, e.g., AT&T*, 524 U.S. at 224 (rejecting extra-tariff service complaints). *See also* Minn. Stat. § 216B.02 (“rates” include “practices”).

The court of appeals acknowledged the correct standard by which regulated utility performance must be measured but failed to apply that metric to the Siewerts’ claim for damages: “the scope of service cannot be directed by a court and must be left to the MPUC”; hence “the Siewerts’ claims for relief are barred by the filed-rate doctrine if granting the relief would result in the court directing the scope of the service to be

provided.” *Siewert*, 757 N.W.2d at 917. The decision below recognized that injunctive relief would judicially direct the scope of NSP’s service obligations: “Even if it were within the court’s competency to engineer an appropriate electrical solution to the problem, the legislature has specifically delegated to the MPUC the responsibility to make these practical and policy determinations.” *Id.* (citation omitted).

When it came to damages, however, the appellate court put the cart before the horse by deeming the payment of damages not to constitute a “service” and therefore allowing the liability assessment to be presented to a jury. *Id.* at 917-18. The court overlooked that an award of either damages or injunctive relief would be predicated upon identical liability findings: different electrical distribution services should have been afforded, and NSP is liable for failing to provide those services. The preclusion of injunctive relief perfectly reflects the incompatibility of these liability predicates with the filed rate doctrine; yet in assessing the damages demand the court of appeals passed over the liability half of the equation. *See id.*

Regardless of whether the source of the requested relief is equitable or legal, the Siewerts’ complaint makes “[c]laims that seek to expand services [and facilities] beyond what is provided for in the tariff.” *Hoffman*, 764 N.W.2d at 44. And no matter if the complaint about tariff-specified services is by way of contract or tort, statutory or common law, such recourse is precluded by the filed rate doctrine. *See, e.g., Keogh*, 260 U.S. at 163; *Schermer*, 721 N.W.2d at 311.

The court of appeals may have deemed damages to encroach less than injunctive relief upon MPUC authority, but damage actions pose equally powerful regulatory

effects. The Supreme Court has repeatedly warned that “[state] regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). See also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (“Legal duties imposed on railroads by the common law fall within the scope of” federal statute preempting state “law, rule, regulation, order or standard[s].”).

This Court embraced that view in *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989), rejecting tort-based damages as tantamount to a “state-imposed regulatory scheme superimposed on the [existing] scheme.” *Id.* at 659 (citing *San Diego Bldg.*, 359 U.S. at 247). The Court recognized that such damage actions would “effectively dismantle” the regulatory plan. *Id.* (citation omitted). Thus, contrary to the rationale below, holding NSP liable for damages for breach of common law duties not specified in the tariff would perforce have regulatory implications, thereby bringing filed rate doctrine limitations on judicial prerogative to bear. *Hoffman*, 764 N.W.2d at 46-47.

Long before *Hoffman* was decided, the courts came to understand that the regulatory domain had to be guarded against lawsuits that would have the effect of infringing upon administrative oversight. In *AT&T* (as in this case) the plaintiff challenged the services, but there (as here) the tariff established what the regulated entity was obligated to provide. 524 U.S. at 224-25. The demand for different services was

turned back in *AT&T* for the same reasons that the Siewerts' demand for "better" distribution system services and facilities cannot proceed: for constitutional reasons the legislature placed the promulgation of the duties enforceable in regulated commerce beyond judicial purview.

The same rationale was employed in *Chicago & Alton Railroad Co. v. Kirby* and *Davis v. Cornwell*, both cited in *AT&T*. Claims based upon a railroad's failure to ship by a faster train were precluded in *Kirby* because the tariff did not call for such service. 225 U.S. at 163. The provision of different transportation alternatives in spite of tariff silence would have afforded the dissatisfied shipper "an undue advantage." *Id. Davis* similarly invalidated attempts to secure services other than those required by the tariff. 264 U.S. at 562. The principle is simple: if the service is not clearly mandated by the tariff, a claim based upon the failure to provide that service is not for judicial resolution. *Hoffman*, 764 N.W.2d at 44.

Countenancing the Siewerts' lawsuit would subject NSP to liability for providing tariff-specified standard services and facilities. Such an impingement upon MPUC authority would "effectively dismantle" the regulatory order intended by the legislature. *See Forster*, 437 N.W.2d at 659. The separation of powers complications posed by such an exercise are precisely why the filed rate doctrine was formulated. The court of appeals agreed as to injunctive relief, leaving this Court to confirm that a damages remedy in the circumstances of this litigation would likewise inject the judiciary into an "intricate ongoing process' and interference by a court 'may set in motion an ever-widening set of consequences and adjustments' which courts are powerless to address." *Schermer*, 721

N.W.2d. at 315. *Hoffman* sounds the death knell for no less than all of the Siewerts' claims.

IV. THE MPUC'S PRIMARY JURISDICTION MUST BE RESPECTED

The only way that this case could survive filed rate preclusion would be if the Siewerts' causes of action could be deemed to seek enforcement of clearly articulated tariff obligations. *Hoffman*, 764 N.W.2d at 44. But even if the Siewerts had tied NSP's liability to tariff breaches, the primary jurisdiction doctrine counsels against trial-by-jury in the first instance. As in *Hoffman*, the administrative experts at the MPUC are uniquely qualified to assess and resolve tariff-based complaints. Importantly, only the agency can evaluate the impact of what the Siewerts are seeking on the state-wide energy distribution system and regulatory scheme. If any aspect of this case remains after the filed rate doctrine is given effect, the pervasive regulatory implications require deferral to the MPUC.

A. The Doctrine Compels Deference

Primary jurisdiction maintains the proper relationship (and promotes coordination) between the courts and administrative authorities charged with specific regulatory duties. *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 62-64 (1956); *Hoffman*, 764 N.W.2d at 48; *State by Pollution Control Agency v. United States Steel Corp.*, 307 Minn. 374, 380, 240 N.W.2d 316, 319 (1976). The doctrine directs courts to defer certain disputes involving regulated commerce to agencies that are better equipped to resolve those issues due to the regulators' "specialization, [] insight gained through experience, and [] more flexible procedure." *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). Deference to the administrative process is appropriate for the resolution of fact questions within the specialized competence of governmental agencies even if the

answers will ultimately “serve as a premise for legal consequences to be judicially defined.” *Id.* at 574. Standing down in favor of agency primary jurisdiction is especially warranted when “an issue before the court requires the particular competence and expertise of the agency.” *Hoffman*, 764 N.W.2d at 48.

A controlling primary jurisdiction consideration is “whether the case rais[es] issues of fact not within the conventional experience of judges, or whether the case requires the exercise of administrative discretion.” *Hoffman*, 764 N.W.2d at 49-50 (quotations omitted). *See Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299-300 (1973) (deferral to primary jurisdiction is proper when the subject matter “is ... at least arguably protected or regulated by ... [a] regulatory statute”).

The *Hoffman* complaint charged that NSP’s electrical services were deficient, which caused the Court to turn to the tariff as the measure of the utility’s responsibility. Giving effect to the tariff, “and therefore defin[ing] NSP’s obligations,” required an interpretation of “technical terms relating to particular electrical utility equipment.” *Hoffman*, 764 N.W.2d at 50. Since construing the meaning of technical terms and discerning the function of electrical equipment were prerequisites to the determination of whether NSP had failed to perform, the Court concluded that MPUC expertise would “provide much-needed perspective for the construction of the NSP tariff,” especially considering that “the legislature entrusted the commission with setting the rates based on the scope of the services NSP was to perform.” *Id.* at 51. Therefore, the dispute was sent to the MPUC.

Hoffman discussed with approval *MCI Communications Corp. v. AT&T*, 496 F.2d 214 (3d Cir. 1974), which deferred a dispute over tariff-based service obligations to the regulatory agency. *Id.* The *MCI* court recognized that “agency expertise was needed to interpret precisely which ... services were owed under the” tariff. *Id.* The agency was in the best position to handle uncertainty about the scope of tariff duties because “the nature of the issue involved a ‘comparative evaluation of complex technical, economic and policy factors as well as consideration of the public interest.’” *Id.* (quoting *MCI*, 496 F.2d at 222). The service obligation determination in *Hoffman* similarly required technical knowledge and experience – an undertaking best left to the MPUC. 764 N.W.2d at 51. The issues in this case are equally complex, involving the distribution and cost of electricity throughout Minnesota, and thus the need for MPUC guidance is equally compelling.

B. The MPUC Possesses The Capacity To Resolve Electric Service Complaints

Exactly like in *Hoffman*, the MPUC possesses unique perspective and expertise regarding electrical distribution services, equipment, and costs. An important question that caused the *Hoffman* court to look to the MPUC for answers was the scope of NSP’s obligation to “maintain certain equipment.” 764 N.W.2d at 45, 50. This case would put the suitability and maintenance of NSP electrical equipment on trial, and no tribunal is better suited to analyze such complaints and fashion appropriate solutions than the MPUC. In fact, MPUC jurisdiction to assess “stray voltage” cases could not be clearer.

The MPUC is vested with ultimate power to oversee electric-utility service standards and rates. Minn. Stat. §§ 216B.05, subd. 2(2); 216B.09 and 216B.16, subd. 1. “Service” includes “the installation, removal, or repair of equipment or facilities for delivering or measuring ... electricity.” Minn. Stat. § 216B.02, subd. 6. The regulation of “rates” includes responsibility for “rules, practices or contracts” as well as “compensation” and “charges.” Minn. Stat. § 216B.02, subd. 5.

The statutory delegation to the MPUC includes the authority to set “service standards or requirements governing any current or voltage originating from the practice of grounding of electrical systems.” Minn. Stat. §216B.09, subd. 2. To effectuate that charge, the MPUC has promulgated rules governing the construction and replacement of electrical facilities, requiring – for instance – NESC compliance. Minn. R. 7826.0300. *See* Minn. Stat. §§ 216B.029(1)(d) and 326B.35.

The legislature has also designated the agency as the arbiter of service-related-complaints:

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

Minn. Stat. § 216B.17, subd. 1.

In sum, the MPUC has primary responsibility for handling disputes over rates and tariffs, the provision of electrical services, and the construction and maintenance of distribution facilities. The resolution of the Siewerts’ claims necessarily comes down to

whether NSP discharged the utility's obligations to ratepayers by complying with the tariff and regulatory and industry standards or whether NSP can be held accountable for failing to reconstruct the system and reorder operations to satisfy the Siewerts' perceived needs. Such issues unquestionably fall within the MPUC's jurisdiction. The very nature of this case "requires the exercise of administrative discretion." *Hoffman*, 764 N.W.2d at 49-50 (quotation omitted).

If that were not enough reason to defer, the MPUC regards "handling complaints related to stray voltage and currents in the earth" as one of the agency's "primary duties."⁴ The MPUC has repeatedly exercised § 216B.17 jurisdiction to probe and resolve stray voltage complaints that are indistinguishable from the Siewerts' allegations.

For instance, several farmers turned to the MPUC in *In re Complaint Against Lake Region Coop. Elec. Ass'n*, No. E-119/C-92-318, 1992 WL 678528, at *1 (Minn. P.U.C. June 4, 1992) ("*Order Requiring Answer to Complaint*") (A.138-39); *In re Complaint Against Lake Region Coop. Elec. Ass'n*, No. E-119/C-92-318, 1992 WL 474705 at *2 (Minn. P.U.C. Nov. 17, 1992) ("*Order Initiating Investigation*") (A.141). The utility's distribution of electricity was said to be impairing herd health and productive capacity. *Order Initiating Investigation*, 1992 WL 474705, at *2 (A.141-42).

Among other things, the installation of isolating devices and the relocation of facilities – exactly the thrust of the Siewerts' request for injunctive relief – were sought.

⁴ See <http://www.puc.state.mn.us/PUC/aboutus/general-information/utility-regulation/index.html>.

Order Requiring Answer to Complaint, 1992 WL 678528 at *1 (A.138). The farmers also wanted a “more complete investigations into the electrical environment of their dairy herds,” including specific electrical tests that encompassed “measurements and analysis of ground currents, DC currents and amperage.” *Order Initiating Investigation*, 1992 WL 474705 at *2-3 (A.141-43).

The MPUC had no hesitation about resolving the dispute because stray voltage grievances are “complaints about the service standards and practices” of electrical utilities. *Order Requiring Answer to Complaint*, 1992 WL 678528 at *1 (A.138). The agency recognized that § 216B.17

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

Order Initiating Investigation, 1992 WL 474705 at *2 (emphasis added) (A.142). The “adequacy” of NSP services and the “standards and practices” governing NSP distribution systems on and around the Siewerts’ farm are exactly the issues in this case.

In response to another stray voltage complaint, the MPUC exercised authority and expertise (1) to assess whether distribution system reconfigurations would be appropriate to address farmer concerns, (2) to weigh the costs and benefits of various system reconfigurations and (3) to work with the utility on development and implementation of an action plan. *In re Formal Complaint by Donald and Jeanine Wolbeck Regarding Stray Voltage Against Sauk Center Water, Light and Power Comm’n*, No. E-308/C-92-

1146 and *In re Inquiry into Distrib. Sys. Issues Potentially Affecting Service Quality*, No. E-308/C1-96-1483 (Minn. P.U.C. Dec. 18, 1996) (“*Wolbeck*”) (A.146-55). The Siewerts present these same issues.

Not only does the MPUC exercise jurisdiction over particular stray voltage complaints, the legislature directed the agency to assemble a team of science advisors to investigate and advise regarding the effects of farm electrical conditions on dairy cow production and health. 1994 Minn. Laws, Ch. 573 (A.156-60). The science advisors issued a universally accepted Final Report (A.161-207) in 1998 and two subsequent research papers in 1999. Despite being asked to recommend corrective actions, the science advisors found none to be necessary. *Id.* at 38 (A.198) (“At the present time, there is no basis for altering the PUC-approved standards by which electric utilities distribute power into or in the vicinity at individual dairy farms.”).

The legislature’s reliance upon the MPUC to oversee and to receive interdisciplinary scientific stray voltage studies is significant for two reasons. First, the lawmakers obviously viewed the questions posed by stray voltage to be within the purview of the MPUC: the science advisors’ findings and recommendations were referred to the agency for use and implementation. Second, the legislature recognized scientific expertise to be necessary because stray voltage is a complex phenomenon requiring specialized knowledge and training. The MPUC is the entity with the requisite technical wherewithal.

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

In light of this Court's jurisprudence, the legislature's directives, the MPUC's experience, and the nature of Siewerts' claims, this case indisputably "rais[es] issues of fact not within the conventional experience of judges [and] requires the exercise of administrative discretion." *Hoffman*, 764 N.W.2d at 49-50 (quotations omitted).

For instance, the Siewerts contend that the multi-grounded distribution system employed throughout the state – indeed the country – to deliver electricity is fundamentally flawed and must be rebuilt. The Siewerts' experts insist that the fix requires either the elimination of the multiple current pathways to the ground or the readjustment of load balances and the placement of the Siewert farm at the end of the line. Assessing electrical distribution system design and construction as well as the cost of such projects falls squarely within the ambit of MPUC expertise and authority. Minn. Stat. §§ 216B.02, 216B.17. *See Hoffman*, 764 N.W.2d at 50 (primary jurisdiction applied because the case required construction of "technical terms relating to particular electrical utility equipment").

The agency has consistently made determinations about system suitability. *See, e.g., Wolbeck*. The assessment of whether the existing designs pose stray voltage and ground current risks and the selection of what, if any, remedial measures might be appropriate are daunting engineering issues with significant regulatory ramifications. The questions and threats posed by the entire distribution system are manifestly more complicated and far-reaching than any concerns raised by the points of connection in *Hoffman*. The agency's knowledge and experience – repeatedly endorsed by the

legislature – render the MPUC much more qualified to make the initial call regarding the validity of the Siewerts’ condemnation of the electricity supply infrastructure.

Moreover, judicial decisions about installation deficiencies and line reconfigurations would necessarily corrupt MPUC policy uniformity, reliability, and safety – particularly if the courts were to order or financially compel NSP to depart from mandatory NESC requirements. *See* Minn. R. 7826.0300. Such interference would also hinder MPUC regulatory authority and flexibility, not only over system design, but also for rate setting.

A decision about one aspect of the tariff cannot be made without considering all the other factors (including energy pricing effects). Minn. Stat. §§ 216B.03 and 216B.16, subd. 6. The award of damages would compel certain electrical service alterations (by virtue of economic coercion) outside of the MPUC rate-making process in which all ramifications of such changes would otherwise be weighed. As in *Hoffman*, the MPUC is best qualified and statutorily charged to make the most accurate and nuanced assessment about distribution system efficacy, as well as the associated costs and benefits. 764 N.W.2d at 47, 51.

Without the benefit of *Hoffman*, the court of appeals declined to defer to MPUC primary jurisdiction. *Siewert*, 757 N.W.2d at 919-20. The appellate court cited three rationalizations: (1) the MPUC cannot award damages, (2) the questions presented are not beyond the wisdom of judges, and (3) the issues do not require “the exercise of administrative discretion or create an administrative need for uniformity and

consistency.” *Id.* at 920 (quotation omitted). The panel was misguided then and, in light of *Hoffman*, is certainly wrong now.

The concern about damages unavailability assumes that an MPUC referral would end the judicial inquiry; *Hoffman* shows otherwise. Deferring to the MPUC simply gives the experts in electrical distribution a chance to exercise administrative prerogative and discretion over disputed regulatory issues. *Hoffman*, 764 N.W.2d at 51 (referring claim “first to the agency”). If, as expected, the MPUC were to debunk the Siewerts’ theories, then the litigation would likely terminate. If, on the other hand, the MPUC were to be swayed by the Siewerts’ novel ideas, the case could proceed in the appropriate forum. *See id.* (“Upon referral of this claim to the agency, the court has discretion to dismiss the action or simply stay it.”). Hence, the MPUC’s capacity to award damages is beside the point.

In touting judicial competence and discounting MPUC prowess, the appellate court misjudged the regulatory import of the matters raised by this lawsuit. Divining and implementing MPUC intent for energizing the state and ensuring reasonable consumer costs and a fair utility rate of return are beyond the competence of the courts. A redesign of the distribution system would reshuffle the regulatory deck from an operational and logistical standpoint, as well as prompt significant rate reconsideration so that NSP could recoup the costs of the new facilities and service. If the Siewerts were to convince a jury that NSP should be providing a distribution system different than the facilities and methods contemplated by the MPUC-approved tariff, the consequences would fundamentally alter the sale and supply of electricity throughout the state – especially in

rural Minnesota – without regard to MPUC authority and policy. The potential regulatory and policy impact of the Siewerts' claims is exactly why courts defer to the primary jurisdiction of agencies.

Finally, this Court has rejected outright the contention that tariff interpretation is inherently judicial. *Hoffman*, 764 N.W.2d at 50. The *Hoffman* plaintiffs' claims called for MPUC primary jurisdiction because resolution

requires technical knowledge and experience that makes the tariff construction issue in this case best suited for a first consideration by the MPUC. Because the scope of [the utility's] services is dependent upon technical, undefined terms in the tariff, agency expertise will provide much-needed perspective for the construction of the NSP tariff. Moreover, the MPUC is in the best position to consider these questions, as the legislature entrusted the commission with setting the rates based on the scope of the services NSP was to perform.

Id. at 51 (emphasis added). The MPUC, not the courts, has the expertise to determine whether a regulatory-mandated service obligation failure caused harmful stray voltage. The court of appeals was wrong to assume otherwise.

As in *Hoffman*, this Court should defer to the MPUC's interpretation and application of the agency's enabling legislation and NSP's tariff. *In re Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 277-78 (Minn. 2001) (like primary jurisdiction, deference to agency interpretation is grounded in the principle of separation of powers). Resolution of the Siewerts' injunctive and monetary claims requires a comprehensive evaluation of the safety, reliability, quality, and cost of NSP's distribution system. The MPUC is eminently qualified to sort out such issues: the agency has the singular technical, engineering, scientific, and economic capability to produce a

resolution that is appropriate for the circumstances of this case and mindful of the distribution and pricing of electricity throughout the state.

V. THE CASE CANNOT SURVIVE THE STATUTE OF REPOSE

The filed rate doctrine dispatches all claims in this case; if not, any remaining issues should go to the MPUC on primary jurisdiction grounds. Should any cause of action pass that regulatory gauntlet, it would succumb to Minn. Stat. § 541.051 repose.

The statute of repose provides in pertinent part:

[N]o action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal ... arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.

Minn. Stat. § 541.051, subd. 1 (emphasis added).

The facilities that bring electricity to the Siewert farm certainly improve the property, and the allegedly-defective distribution system was substantially completed more than 10 years before any stray voltage could have reached a Siewert cow. Because causes of action against NSP cannot accrue more than 10 years after the distribution system was functional, and because suit was not brought within two years of when any alleged injuries were discovered, the strict time limitations of Minn. Stat § 541.051 close the courthouse door on this lawsuit.

The court of appeals declined to enforce the period of repose because certain claims were deemed to be service-based rather than improvement-based and because the other claims were supposedly saved by the exception for maintenance, operation, and inspection complaints. Neither rationalization is well founded. This Court enforces

§ 541.051 when the damages are causally connected to the improvement regardless of how the claim is styled, and – as demonstrated on preceding pages – any challenge to the maintenance, operation, and inspection of NSP’s distribution system would be stopped in its tracks by the filed rate doctrine. Thus, in addition to regulated commerce infirmities, the opinion below errs on § 541.051 grounds.

A. Minn. Stat. § 541.051

Section 541.051 imposes bright-line timeliness requirements upon claims arising out of improvements to real property. The statute “is intended to terminate the possibility of liability after a defined period of time Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct.” *Weston*, 716 N.W.2d at 641 (quotation omitted). Accordingly, actions based upon unsafe and defective improvements to real property are subject to temporal vitiation. Minn. Stat. § 541.051, subd. 1.

The statute of repose prevents the accrual of causes of action 10 years after the improvement has been substantially completed. Minn. Stat. § 541.051, subd. 1. The clock starts ticking when installation is sufficiently constructed to enable the improvement to be used for its intended purpose – in this case, the distribution of electricity to the property that became the Siewert farm. *Id.* And claims that accrue during the 10-year period of repose must be brought within two years of discovery. Minn. Stat. § 541.051, subd. 1. Knowing the cause of the injury is not necessary; rather, awareness of the harm alone starts the two years. *See Dakota v. BWBR Architects*, 645 N.W.2d 487, 492 (Minn. Ct. App. 2002) (“[I]t is knowledge of the injury, not the defect,

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

B. "Improvement To Real Property" Status

Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 554 (Minn. 1977) announced Minnesota's "common sense" approach to improvement-to-real-property determinations. Rather than a "technical legal construction," the statutory language was given plain meaning effect:

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

Id. (quoting *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 226 N.W.2d 603, 607 (Minn. 1975) (citing Webster's Third New International Dictionary 1138 (1971))). Assessing a furnace's status through the prism of this common sense definition, this Court concluded that the installation "constituted, as a matter of law, the construction of an improvement to real property." *Id.* at 554.

In the wake of *Pacific Indemnity* Minnesota courts have routinely regarded electrical components as real property improvements. *See Kemp v. Allis-Chalmers Corp.*, 390 N.W.2d 848, 850 (Minn. Ct. App. 1986) (electrical transformer, switchgear, and connecting cable); *Citizens Sec. Mut. Ins. Co. v. General Elec. Corp.*, 394 N.W.2d 167, 170 (Minn. Ct. App. 1986) (light fixtures and ballasts), *rev. denied* (Minn. Nov. 26, 1986); *Lovgren v. Peoples Elec. Co.*, 368 N.W.2d 16, 18 (Minn. Ct. App. 1985) (transformer vault), *rev'd on other grounds*, 380 N.W.2d 791, 793 (Minn. 1986). Other

utility-related features have also been subject to § 541.051 limitations. *See, e.g., Lederman v. Cragun's Pine Beach Resort*, 247 F.3d 812 (8th Cir. 2001) (trench for communications cable); *Capitol Supply Co. v. City of St. Paul*, 316 N.W.2d 554 (Minn. 1982) (storm sewer system owned and controlled by city).

Two recent decisions from this Court confirm an electric distribution system's § 541.051 status: *State Farm Fire & Casualty v. Aquila, Inc.*, 718 N.W.2d 879, 885 (Minn. 2006), and *Lietz v. Northern States Power Co.*, 718 N.W.2d 865, 869 (Minn. 2006). *Lietz* addressed a utility pole anchor that was being sunk for a cable television system project. 718 N.W.2d at 869. The burrowing shaft struck an NSP gas line, and the escaping gas exploded. *Id.* at 868. Section 541.051 time-barred the action because the project improved the real property and the lawsuit was filed more than two years after the accident. *Id.* at 871-73. Hence claims related to a nascent communication distribution system were subject to repose.

Pacific Indemnity's "common sense" approach was applied with equal force in *Aquila*. The *Aquila* plaintiffs sued both the owner/operator and the installer of a gas pipeline network that caused an explosion. 718 N.W.2d at 881-82. The distribution system was found to be an improvement to real property because (1) the pipeline involved "the expenditure of labor or money;" (2) the installation represented a "permanent addition to or betterment of real property" rather than an "ordinary repair;" and (3) the system enhanced the capital value of the property being served. *Id.* at 884-85 (quotation omitted).

C. NSP's Distribution System Improves Real Property

The court of appeals did not rule on “improvement to real property” grounds, but each of the *Pacific Indemnity* factors establishes that the allegedly harmful electric distribution system – the gravamen of the Siewerts’ claims – improves real property.

First, installing the system indisputably involved the expenditure of labor and money. The *Aquila* gas lines satisfied this factor because the installation involved 4,075 feet of pipe, valves, and fixtures, and cost more than \$21,000. 718 N.W.2d at 884. Similarly, the distribution line about which the Siewerts complain spans many miles from Zumbro Falls to Mazeppa and includes substations, poles, cables, switch gear, and transformers. The expenditure of labor and money to construct this capital intensive project is obvious.

Second, the system could not be anything other than a “permanent addition or betterment of real property.” *Id.* The *Aquila* facility was a permanent betterment because the defectively-installed gas lines replaced an earlier system, and after being installed the new pipes served the property for 10 years. *Id.* The Siewerts do not dispute that NSP’s distribution system was permanent as early as the 1960s, and the supply of electricity clearly benefited the property for decades before the Siewerts’ arrival. *Siewert*, 757 N.W.2d at 913. If the parcel did not have electric service a modern farm could not even have been contemplated. An electrical distribution system that has long been in place and functioning is unquestionably permanent, and energizing rural Minnesota certainly bettered the benefited properties.

Finally, NSP's installation "enhance[s] the capital value" of the Siewerts' farm as well as the property of every other customer to whom the system supplies energy. *Aquila* did not require specific evidence of capital value enhancement. 718 N.W.2d at 884. Rather, the Court concluded as a matter of common sense that a reliable supply of energy "increases the value of the real property the system serves." *Id.* The same is true for the Siewerts: the electrical infrastructure undoubtedly enhances farm capital worth. Without electricity, the Siewerts could not turn on the lights, much less milk hundreds of cows.

Other courts applying similar statutes of repose confirm that facilities of the type installed to bring electricity to the Siewerts are properly regarded as "improvements to real property." For example, the exact same Webster's Dictionary definition that *Pacific Indemnity* adopted was cited by a New Mexico appellate court in holding that "[t]he installation of [a] power line was a physical improvement which came within the intent and design of [the New Mexico statute of repose]" because "a given parcel of land which has electrical service available is more valuable than a comparable parcel without such service." *Mora-San Miguel Elec. Coop., Inc. v. Hicks & Ragland Consulting & Eng'g*, 598 P. 2d 218, 220 (N.M. App. 1979).

The federal district court in Rhode Island came to a similar result:

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

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

The New Jersey Supreme Court's assessment of an underground gas line is particularly apt: "Simply stated, a house with a source of energy for heat and air conditioning is worth more than one without such a source. A gas line, although it serves as a conduit, also is a valuable improvement." *Ebert v. South Jersey Gas Co.*, 723 A.2d 599, 601 (N.J. 1999). The court recognized that "an underground utility line can be both an extension of a utility distribution system and an improvement to the property it serves." *Id.*

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

D. The Appellate Court's Missteps

The court of appeals skipped the "improvement" analysis, reasoning that the Siewerts' claims escape the statute of repose disposition because (1) the strict liability, nuisance, and failure to warn allegations are tied to NSP's service, not the real-property-improving distribution system, and (2) the remaining negligence accusations come under the exception for maintenance, operation, and inspection. *Siewert*, 757 N.W.2d at 922-23. As to the former rationale, this Court has already rejected attempts to plead around "improvement to real property" status by ignoring the true cause of damages; as to the latter, the Siewerts' case is fundamentally based upon the alleged unsuitability of a distribution system that allows current to flow into the earth – not some failure to maintain an otherwise appropriate system. And regardless, *Hoffman* precludes a finding that NSP should have performed differently than as prescribed by the tariff.

By its terms § 541.051 applies to damages “arising out of” an improvement to real property. The Siewerts cannot avoid the statute of repose simply by ignoring the “improvement” aspect of a particular claim when the damages are manifestly tied to the improvement.

Similar to the Siewerts, the *Lietz* plaintiff sought to avoid repose by pleading “negligent construction activities” rather than blaming the defective improvement. 718 N.W.2d at 871. The complaint alleged “negligence after the gas line strike prevented those in danger from being warned” and that “negligence prevented the gas from being turned off in time to avert an explosion.” *Id.* at 872. Refusing to indulge the pleading stratagem, this Court focused on whether the defective improvement was, in fact, causally related to the injuries sustained. *Id.* Because the damages arose out of an improvement to real property, the statute of repose barred the claims. *Id.* at 872-73.

The same rationale controlled in *Aquila*: the statute of repose prevailed because gas line explosion damages were causally related to a real property improvement. 718 N.W.2d at 885. The defective gas lines had remained intact until a sewer line was serviced for cleaning. *Id.* Nonetheless, the Court reasoned that “if all the pipelines were installed correctly, the cleaning of the sewage line would not have led to the gas leak. Therefore, ... the [improvement] is causally related to the claimed damages.” *Id.* Like in *Lietz*, the statute laid the explosion victims’ causes of action to rest because the damages could be said to “arise out of” the improvement.

The Siewerts unequivocally accuse NSP’s distribution system – as installed – of being the root cause of the decreased milk production and impaired bovine health.

While the experts mention NSP's subsequent maintenance and operation, the Siewerts are adamant about the alleged harm stemming, in the first instance, from the system as built. *See, e.g.*, 2006 Zipse Report at 30-33, 50-52 (A.68-71, 88-90). *Accord Aquila*, 718 N.W.2d at 885. The so-called expert opinions insist that the design and installation of the multigrounded system would harm cattle regardless of what NSP might do after the electricity began to flow. That fundamental tie to the improvement renders statute of repose applicability unavoidable. The court of appeals' contrary ruling cannot pass § 541.051 muster.

The decision below also missed the mark by invoking the "maintenance, operation, and inspection" exception. The Siewerts' case has always been about what are said to be unpreventable flaws in the industry-standard distribution system. According to the Siewerts, NSP's lines, switches, breakers, and transformers can never be safe because current is allowed to escape from the primary system. Hence, electrical conditions supposedly experienced by the cows would be attributable to the improvement itself, without regard to maintenance, operation, or inspection.

Aquila warns that the § 541.051(1)(d) exception applies "only in exceptional circumstances." 718 N.W.2d at 886 (quotation and citation omitted). And "the burden of proving the exception lies with the parties who seek to claim the benefit of the exception." *Id.*

The Siewerts have not begun to carry that burden or to show exceptional circumstances. Importantly, the exception applies only to negligent maintenance, operation or inspection, requiring the Siewerts to produce proof that NSP both had and

breached a duty to perform as dictated by the Siewerts. Yet the Siewerts do not reference a single tariff provision authorizing, much less requiring, NSP to do anything more than provide the very services that have been rendered since 1989. Since NSP is not charged with failing to perform as required by the tariff, the filed rate doctrine bars claims based upon negligent maintenance, operation or inspection. *Hoffman*, 764 N.W.2d at 44-45 (courts allowed to resolve tariff-related complaints only when obligations in question are clearly established by the regulations).

Without the benefit of *Hoffman* the court of appeals apparently did not appreciate that the Siewerts would have to assert filed-rate-proof claims before the § 541.051(1)(d) exception could apply. But *Hoffman* has now made clear that the tariff establishes NSP's service duties, as well as defines the maintenance, operation, and inspection standard of care.

The Siewerts have failed to identify any applicable tariff duty, the scope of that duty, or NSP's breach of that duty. As a result, the only measure of system maintenance, operation, and inspection performance (*i.e.*, tariff compliance) has not been put at issue. *Hoffman*, 764 N.W.2d at 44-45. Lacking any support for a finding of tariff noncompliance, the Siewerts' "allegations are mere averments and are not sufficient to survive summary judgment." *Aquila*, 718 N.W.2d at 888.

Even if there were a question about service adequacy, as demonstrated above, the responsible agency – not a jury – must provide the answer. Tariff construction is an administrative, not judicial, determination, and utility regulation cannot be deputed to jurors. Accordingly, the court of appeals' § 541.051 conclusion cannot stand.

E. The Siewerts' Claims Are Fatally Tardy

Because the § 541.051(1)(d) exception cannot rescue the Siewerts' claims, their causes of action must have accrued within 10 years of when the system began distributing electricity, and this litigation would have been timely only if commenced within two years of the discovery of any injury. Minn. Stat. § 541.051. This lawsuit is hopelessly late: the 10-year period of repose passed long before the Siewerts bought the farm; and even if the repose clock could still have been ticking when they arrived, the two-year statute of limitations was triggered in 1989 when diminished milk production and impaired animal health were supposedly encountered. The limitation period begins to run not when the cause of the injury is determined; rather the operative event is the discovery of harm. *Dakota*, 645 N.W.2d at 492 (“[I]t is knowledge of the injury, not the defect, which triggers [§ 541.051’s two-year] statute of limitations.”).

The time restrictions specified in Minn. Stat. § 541.051 were enacted to protect the owners of real property improvement from having to defend against stale claims like these. The time for repose has long since elapsed.

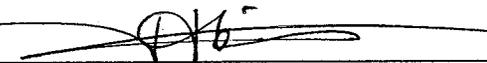
CONCLUSION

Hoffman delineated clear standards for when a tariff-filing utility like NSP can be liable for performance failures within the scope of the regulatory scheme. The court of appeals correctly rejected the Siewerts' injunctive relief request, but missed the call on damages which pose the exact same regulatory effect. The appellate court also failed to anticipate this Court's intent to refer tariff-related disputes to the MPUC. Finally, the statute of repose time requirements were improperly frustrated by “service” distinctions

that have carried no weight with this Court and with a “maintenance, operation, and inspection” exception that succumbs to *Hoffman*’s filed rate pronouncements.

Dated: July 21, 2009

~~BRIGGS AND MORGAN, P.A.~~

By: 

Timothy R. Thornton (#109630)

Kevin M. Decker (#314341)

Christianne A. Riopel (#348247)

2200 IDS Center

80 South Eighth Street

Minneapolis, Minnesota 55402

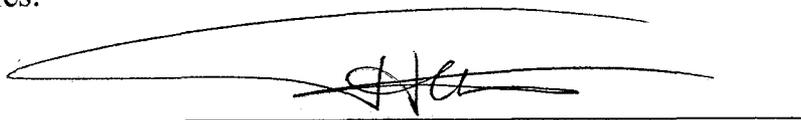
(612) 977-8400

**ATTORNEYS FOR NORTHERN
STATES POWER COMPANY**

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Northern States Power Company d/b/a Xcel Energy certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a)(1) in that it is, printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains less than 14,000 words, excluding the Table of Contents and Table of Authorities.

Dated: July 21, 2009

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

Timothy R. Thornton