

CASE NOS. A07-1975 & A07-2070

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STATE OF MINNESOTA  
IN SUPREME COURT

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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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**BRIEF OF RESPONDENTS**

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## STATEMENT OF THE LEGAL ISSUES

1. Does the filed rate doctrine bar respondents' damage and injunction claims?

The Court of Appeals ruled that the filed rate doctrine did not preclude damage claims, but held that it barred the injunction claim.

**Most apposite authorities:**

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

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

review denied (Minn. April 29, 1992)

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

2007)

2. Did the trial court abuse its discretion in refusing to refer the claims for damages and abatement of a nuisance to the Minnesota Public Utilities Commission (MPUC)?

The Court of Appeals ruled that the primary jurisdiction doctrine did not bar the damage claim. It did not address the injunction claim.

**Most apposite authorities:**

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

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

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

App. 2004)

Petition of Minnesota Power for Authority to Change Its Schedule of Rates for

Retail Elec. Serv., 545 N.W.2d 49, 51 (Minn. Ct. App. 1996)

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

The Court of Appeals ruled that the statute of repose did not apply.

**Most apposite authorities:**

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

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

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

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

## STATEMENT OF THE CASE

The respondents are Wabasha County dairy farmers. Appellant, hereafter “NSP”, has distributed electricity to their farm since 1989 when the Respondents moved there. In March 2004, their farm was tested for stray voltage. A high level of current was flowing into the dairy facilities. This lawsuit was commenced in June 2004 seeking damages based on negligence, strict liability, trespass and nuisance. An amended complaint requested an injunction requiring the NSP to abate the nuisance.

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

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

NSP moved for summary judgment based upon 1) statute of repose, 2) filed rate and 3) primary jurisdiction. The District Court denied all of NSP’s motions but dismissed respondents’ trespass claim.<sup>1</sup>

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<sup>1</sup> Respondents filed a notice of review regarding this dismissal, but withdrew that request in the Court of Appeals after NSP agreed with respondents that the right to appeal that dismissal later is preserved.

This appeal follows the District Court's certification on the issues of statute of repose, filed rate and primary jurisdiction.

The Court of Appeals affirmed the District Court on the statute of repose issue, affirmed on the claim for damages under both the filed rate and primary jurisdiction doctrines, but held that the claim for abatement was barred by the filed rate doctrine.

## INTRODUCTION

The Court of Appeals must be affirmed regarding the claim for compensatory damages. Hoffman v. Northern States Power Co., 764 N.W.2d 34 (Minn. 2009) dictates this result. Respondents sued appellant in tort, not for violation of the contract for services or anything else in the tariff. The tort claims are for nuisance, negligence and strict liability. These claims are not derivative of the contract for electrical services. The filed rate doctrine does not abrogate common law duties of care.

Respondents do not challenge the reasonableness of the rates they were charged for electricity, nor do they seek a rebate of any previously paid bill. Respondents do not request that the court determine some other hypothetical rate that would be charged if some other service were provided. Respondents do not seek to retroactively reallocate rates among different customers.

Respondents do not seek to add new terms to the tariff. The legal duties breached by NSP are not a function of violating the tariff but are instead imposed by statutes and common law.

Respondents seek to recover damages that were suffered only by them and which are measured by their economic loss, an enormous loss not suffered by any other customer of NSP. Respondents' damages are not calculated, either directly or indirectly, by reference to the filed rate. Thus, there is no discrimination regarding rates.

The phenomenon of stray voltage caused cattle deaths and disease, and loss of milk production, endangering the existence of the respondents' dairy operation. Stray voltage came onto respondents' farm from NSP's distribution system. This was caused

by the negligent acts and omissions of NSP. Stray voltage is not sold and it is not metered. It is not wanted by the respondents and is not part of the contract between the parties. There is no filed tariff that governs stray voltage.

There are no ambiguous terms in the tariff for the Minnesota Public Utilities Commission (MPUC) to interpret, as in Hoffman. Nor is there any need for the MPUC to wrestle retrospectively with knotty issues relating to rate-setting. Because of this, there are no issues related to either justiciability or separation of powers that implicate the filed rate or primary jurisdiction doctrines. Instead, the fact issues that will predominate at trial are best suited for judicial decision-making, and don't require any special expertise of the members of the MPUC. These issues relate to measurement of electric current over the relevant cow contact gradients in existence at the respondents' farm (master electrician and electrical engineering experts), the particular susceptibility and sensitivity of the respondents' livestock to electric current (dairy science and veterinarian testimony), ruling out other potential causes of damage (animal nutrition, milking equipment, livestock housing, farm management experts), negligence of NSP, causation (dairy science and veterinary experts) and evaluation of economic loss (agricultural economist experts).

The Court of Appeals should be reversed on its holding that abatement of the nuisance is barred by the filed rate doctrine. Again, Hoffman dictates the result. The only issue for which MPUC input may arguably be needed involves fixing the problem if the trial court determines that a nuisance exists and orders abatement. Determination that a nuisance exists and ordering it abated are inherently judicial functions. This is because

the same fact issues that predominate in the compensatory damage aspect of the case also predominate in the injunction phase – all of the same experts and issues are involved in determining whether an ongoing nuisance requiring abatement exists.

The trial court should have discretion to seek input from the MPUC as to the best method of abatement, but that would be after the trial on compensatory damages, after it is determined that a nuisance causing damage is ongoing, and after the trial court orders abatement. Input regarding the best method of abatement may, in the discretion of the trial court, come from a variety of sources, including NSP, respondents' electrical experts or the MPUC.

## **STATEMENT OF FACTS**

### **A. THE SIEWERT FAMILY FARM.**

Harlan and Greg Siewert are father and son. RA 553-557. By 1989, they owned about 150-200 cows together. They moved to the new farm in 1989 and the milking herd is housed in a freestall barn and milked in a parlor. RA 558. The cows have access to water in the freestall barn all day where there are five waterers. RA 561, 566. There is a separate facility for the dry cows. RA 600. Electric current can access the cows through many contact points, including waterers. RA 601.

### **B. HERD HEALTH PROBLEMS EXPERIENCED BY THE SIEWERTS.**

After 1990, milk production did not increase as expected and then decreased dramatically in 1999. RA 436. Over the years on the main farm, the cow numbers began dropping. They had 400 cows in November 2002, but by 2005 only had 341 resulting in a death loss of 20-25% annually. RA 561-563.

The respondents hired experts to find out what was wrong. The vets could not explain the high cow death rates. RA 616. One thing that was common was intestinal bleeding. RA 616, 621. There was no BVD (bovine viral diarrhea) or coronavirus. RA 616. They had some cryptosporidium problems with the calves. Id. The water never tested positive for crypto. RA 620. There was no real problem with milk fever, ketosis or IBR (infectious bovine rhinotracheitis). RA 622. There has never been an epidemic disease on the farm. RA 617. Instead the cows lacked immune function from exposure to stray voltage and would just die. RA 617, 623. No one could explain why 80-90 calves were dying per year. RA 618. These deaths have been gradually getting worse over time. RA 619.

Somatic cell count (SCC) linear scores kept getting higher. RA 626-627. Milk production went flat in 1998, and the herd health and production got worse every year after that. RA 586. The milk production started slipping down in 2002 from 23,800+ #/cow/year and by January 2005 it was less than 20,000 #/cow/year. RA 433.

In 2004, master electrician Neubauer found 6.6 amps of current. RA 176. The cows continued to lap water after 2004, an abnormal finding. RA 574-575.

A forensic veterinarian, Dr. Andrew Johnson, has opined that stray voltage affects the cows adversely in many ways, including the cows' immunity. RA 8. NSP has, of course, hired experts who dispute everything. NSP has denied negligence, and raises defenses based upon the statute of limitations, that respondents or third parties caused their damages and intervening forces and natural factors were responsible for the damages. RA 667.

On October 10, 2004, Greg Siewert called the MPUC requesting to file a formal stray voltage complaint against NSP. RA 109. The Area Engineer for NSP, was on the farm several times. RA 660-61. She reported the respondents' complaints to the MPUC. RA 661. Despite these facts, MPUC has not initiated a hearing to resolve the issues as it is permitted to do under Minn. Stat. § 216B.17, subd. 1<sup>2</sup>.

### **C. STRAY VOLTAGE AND THE NATIONAL ELECTRIC SAFETY CODE (NEC).**

Electricity runs on a circuit – what goes out of a substation on power distribution lines must come back to the substation. “Stray voltage” describes the phenomena of electric current that is distributed returning to its source on a pathway that comes into contact with an animal – in this case, dairy cows owned by the respondents. RA 133. The National Electric Safety Code recognizes several different types of electric distribution systems, including the multi-grounded wye system that was used on the ZUF-21 circuit serving the respondents' farm. A multi-grounded wye system is cheaper to install initially, but is more unpredictable and unstable over time. RA 22. If the three line phases on this system get out of balance, current increases on the neutral return line causing uncommon, excessive and unpredictable neutral to earth voltages (NEV) and neutral earth currents that can be conducted to a farm. RA 22-23. This happens by, among other things, either lack of maintenance or by continually expanding single phase

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

connections to the three phase system. RA 22-23, 26-28. Because of this, a three phase multi-grounded wye system requires ongoing vigilance and maintenance. RA 23.

Cows are particularly susceptible to electricity because they have much less resistance than human beings. Id. Cows can be permanently injured by such currents, including injury to immune function, which in turn leads to an array of diseases and loss of milk production. RA 10, 12.

The NESC does not endorse the safety of any particular system, but instead merely states minimum requirements. RA 24. Utilities are required to both construct and maintain such a system by observing other “good practices” according to “local conditions known at that time by those responsible for the construction and maintenance of ... the supply lines and equipment.” RA 24. The ZUF-21 circuit was not properly maintained as required to prevent “objectionable flow of current over the grounding conductor.” RA 24.

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

#### **D. CHANGES TO NSP’S DISTRIBUTION SYSTEM.**

Contrary to NSP’s argument, there have been many changes to the equipment comprising the NSP distribution system serving the respondent’s farm since 1960, and NSP has no proof to establish when its electrical distribution system was substantially completed such that any defect causing damage to respondents commenced. NSP refers

to the components of the electrical distribution system which it owns as “our equipment.”  
RA 113.

The conductors for the distribution line servicing the Siewert farm were installed “sometime after 1960.” RA 641. An open delta-open wye 2-phase connection was made at the Siewert farm at an unknown time in the past until it was changed in 2004. This type of connection increases the risk of load imbalance on the system. RA 112-113. The open delta-open wye configuration creates current imbalance and, even with balanced loading, high currents are forced into the primary neutral. RA 106. NSP has no records to identify when this open delta-open wye system was installed. RA 112. However, NSP has records to show that the respondents’ service using that system was overloaded based on the transformer size. RA 114. Up to the spring of 2004, the electric service was an open delta, with a “wild leg” and the three phases at the farm measured out of balance at 121, 22 and 20 on each phase, instead of 120 on each phase (360 degrees total) as a properly balanced three phase system should be. RA 592.

A third phase conductor was added to the line to the Siewert farm in May/June 2004. RA 642. A third segment of the line was installed on an unknown date, which NSP guessed to be “sometime in the 1980’s.” Id. A new 10 KVA transformer, meter pole and secondary wires were installed on the farm by NSP in August 1996. RA 653. NSP relocated a pole for the new milking parlor in 1999. RA 652. NSP installed a neutral isolator on March 22, 2004. RA 646. This was later found to be installed incorrectly. RA 28, 175. A secondary ground lead was installed on April 14, 2004. Id. The NSP transformer was blown out on June 11, 2004. Id. A fuse was replaced on June

19, 2004. A three phase primary conductor was installed in June 2004. Id. At the same time, NSP replaced the “existing neutral wire with 2/0 ASCR bare conductor and a ground conductor and ground rod was installed and each pole from the mainline circuit to the transformer pole.” RA 652. At the same time, the number of ground rod assemblies was increased on the tap from the distribution line to the farm and other unspecified changes were made to the existing assemblies. RA 662.

#### **E. CAUSES OF STRAY VOLTAGE ON THE SIEWERT FARM.**

NSP did not inspect the existing neutral tap line to the farm at the time the neutral line was replaced in 2004. RA 306. The line for ZUF-21 towards Mazeppa (the substation serving the farm) was not properly balanced. RA 307, 311. NSP had complaints about voltage on that line in the past. RA 311.

NSP admits that phase imbalance is a cause of stray voltage. RA 113. NSP admits that the cause of the imbalance is the “number of single phase taps out on that circuit.” RA 7, 307-308. Respondents’ experts agree. RA 7, 27. Beyond the farm towards Mazeppa, the three phase service converts to single phase. RA 27. Since 1989 NSP has added numerous homes and other services to the ZUF-21 line serving the farm, the vast majority of which are single phase customers. RA 1.

The load imbalance changes given the time of day. RA 308-309. It is purely a function of current loading on the distribution circuit. RA 309. NSP internally seeks a load imbalance of not more than 10%. RA 312. The line servicing the farm is out of balance by more than 10% and has been that way ever since Waltz took the regional engineer position in 2002. RA 312. When Waltz found that out in 2002, she requested

load imbalance sheets back to 1999, and it appeared to her that the imbalance problem had been increasing over time. RA 314. There is no evidence that the phase imbalance causing stray voltage at the farm has ever been corrected. RA 25. NSP has presented no evidence to show when the three phases became unbalanced.

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

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

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

NSP indicated that Area Engineers have primary responsibility to address “power quality” concerns. RA 650. NSP’s policy is to do no testing unless a customer calls in with a problem. RA 656. When NSP converted from the open-delta to the three phase in June 2004, voltage went down to .7-.8 volts in the barn. RA 570; 597. The cows still

lapped at the waterers, but it helped. RA 598. When Greg Siewert put his farm on a generator (not using NSP power at all), voltage dropped to .1 volt in the barn and only 60-70 millivolts in the parlor. RA 595. Respondents hired master electrician Larry Neubauer, who recommended an isolation transformer. RA 596. Len Jacobsen from NSP told Greg Siewert that his farm was vulnerable to lightning strikes because it was the highest farm in the area. RA 581. Greg called Jean Waltz from NSP and she refused to help. RA 571-573. The new transformer blew up twice when it was energized, but Waltz ignored the request for help. Id.

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

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

home. After the work in 2004 NSP never did any testing to determine if the lines were balanced. RA 500, 502-503, 507-508.

## ARGUMENT

### I. STANDARD OF REVIEW

#### A. FILED RATE DOCTRINE AND STATUTE OF REPOSE.

This matter comes to this Court on appeal from denial of a summary judgment motion. The standard of review is “whether a genuine issue of material fact exists and whether the law was correctly applied.” Art Goebel, Inc. v. North Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1977). A *de novo* standard of review is used to determine whether the district court erred in its examination of the law. Art Goebel, Inc., *supra*, 567 N.W.2d at 515.

#### B. PRIMARY JURISDICTION DOCTRINE.

Review of a district court’s determination of primary jurisdiction is subject to an abuse-of-discretion standard. Hoffman, *supra*, 764 N.W.2d at 48, 52 (whereas certified question in Hoffman was reviewed *de novo*, holding that trial court has discretion to either stay proceedings or dismiss).

### II. THE FILED RATE DOCTRINE DOES NOT APPLY

#### A. INTRODUCTION

NSP claims that the filed rate doctrine bars respondents’ common law tort claims, and cites Hoffman v. Northern States Power Co., 764 N.W.2d 34 (Minn. 2009) and AT&T v. Central Office Tel., Inc., 524 U.S. 214 (1998). Hoffman and AT&T preclude only rate-related suits, and do not preclude common law tort actions. NSP seeks judicial adoption of limitations on tort liability not claimed in its tariff, not authorized by either

the legislature or the MPUC, and which would constitute unprecedented expansion of the filed rate doctrine not recognized by any jurisdiction.

**B. HOFFMAN REQUIRES REJECTION OF THE FILED RATE DOCTRINE**

1. Introduction

The Hoffman court ruled that the threshold question regarding applicability of the doctrine involves determining whether the case is a rate-related suit. The Court dealt separately with the compensatory damages and injunctive relief claims, but only *after* a threshold determination was made that the claims required the court to “evaluate the reasonableness of an MPUC-approved tariff.” Id. at 43.

For reasons set out hereafter, the threshold question – whether this is a rate-related suit - must be answered in the negative. In addition, even if NSP gets beyond the threshold inquiry, the nature of the claims for damages and injunction must be analyzed separately.

It is important to note at the outset that NSP appears to fundamentally misunderstand Hoffman. On at least five occasions, NSP argues that Hoffman requires that all claims for relief are barred because NSP might be required to provide “services” beyond that required by the tariff. NSP brief at 1, 16, 19, 21, and 28. NSP’s legal basis for this argument is a section of the Hoffman decision dealing *only* with the *nature of the claim in that case for injunctive relief*. Id. 764 N.W.2d at 44-45. This argument does not apply to either claim if NSP loses on the threshold question. And, because the claim for damages only seeks money and not any change in the tariff obligations, it is not

precluded by the language at pages 44-45 of Hoffman that NSP so liberally sprinkles throughout its brief.

2. Whether the filed rate doctrine applies at all depends upon the threshold inquiry as to whether this is a rate-related suit – that is, whether the court is required to “evaluate the reasonableness of an MPUC-approved tariff.”

This is not a rate-related suit for either damages or injunctive relief and there is no available regulatory remedy. Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 318-319 (Minn. 2006) (the availability of a regulatory remedy bars a rate-related suit for damages), citing Prentice v. Title Insurance Co., 176 Wis. 2d 714, 500 N.W.2d 658 (1993).

In Hoffman, appellants initiated a breach of contract class action alleging failure to inspect and maintain the point of connection between NSP’s service facilities and each customers’ electrical equipment. 764 N.W.2d at 38. Relief was demanded in the form of compensatory damages and specific performance of the tariff obligations. Id. The claim in this case is not for breach of contract and it is not for a tort claim that is derivative of the contract.

The filed rate doctrine applies to claims challenging the “reasonableness of the rate the MPUC has established for an electrical utility.” Id. at 39. The appellants in Hoffman argued that fires *might* be caused if the point of connection wasn’t maintained, but did not allege that any customers in the class action had been the victim of a fire. Id. Nor did the complaint allege that any third party was hired to do the inspection work. Id. The respondents in this case allege that their “house” was and is on fire. The metaphorical equivalent of the “house on fire” in this case is the cow deaths, calf deaths,

animal disease and suffering, greatly increased expenses, loss of milk production and the slow but sure economic destruction of a family dairy farm caused by an unwanted phenomenon – stray voltage - that is not governed by the tariff and is neither sold nor measured by NSP for any customer.

The services that were allegedly not performed in Hoffman were set out in the tariff filed with the MPUC. Id. The complaint in Hoffman alleged two separate provisions of the tariff that were allegedly violated – (1) requiring that NSP to inspect and maintain “at its own expense” the service conductors from the distribution line to the customer’s service entrance”) and (2) requiring the customer to maintain all wiring and equipment “on the customer’s side of the point of connection.” The complaint alleged breach of NSP’s inspection and maintenance obligations in the tariff and that the breach caused damages in the amount of fair market value for services not received for a six-year period, and demanded injunctive relief because the breach was ongoing. Id. at 41.

In contrast, the respondents’ case is not based upon breach of tariff obligations<sup>3</sup>, or any contractual obligation but instead upon breach of duties required under common law (negligence and strict liability) and the nuisance statute (Minn. Stat. § 561.01). NSP makes much of the fact that the tariff imposes NESC requirements, conceding that compliance with these rules is only *prima facie* evidence of safety. NSP brief at 11-12.

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<sup>3</sup> The law does provide that “Every public utility shall furnish safe, adequate, efficient, and reasonable service . . .” Minn. Stat. § 216B.04. In addition, the NESC requires the use of “good practices.” However, there is nothing in the tariff that speaks to stray voltage or what constitutes safe service in that context. As such, the statute represents a codification of the common law duty of reasonable care in the distribution of electricity.

What NSP misses is that the threshold inquiry – does recovery require looking to a rate set by the MPUC or a tariff obligation imposed by the MPUC that was part of the rate-setting process – must be answered in the negative and the doctrine therefore does not apply to the claims asserted by the respondents. The inquiry should stop there.

The filed rate doctrine is grounded in principles of justiciability, separation of powers, and non-discrimination. 764 N.W.2d at 42, citing Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 312-13 (Minn. 2006). Quoting from Schermer, the Hoffman court wrote that “rate-setting is a legislative function and that the courts are ‘ill-suited’ to determine the reasonableness of rates established by the agency,” and that a “judicial damage award based on a speculative rate that might have been set absent the violation at issue in the case would create discrimination in the rate schedule by compensating some customers but not others.” Id. Attempting to retroactively reallocate rates would require the court to speculate about whether the agency would have approved a lower rate as a reasonable and lawful rate. Id. at 43 (citing Schermer).

Respondents are not seeking to determine the reasonableness of rates determined by the agency. The respondents are perfectly happy with their electricity bills. Nor are respondents seeking to have the court determine a hypothetical rate that would be charged if some other service had been provided. Respondents are not seeking to retroactively “reallocate” rates among different customers. Respondents are only seeking to recover their own catastrophic damages, none of which have been suffered by others, damages which are not a function of the filed rate for electricity.

Thus, the threshold and dispositive issue to decide is whether the claims made in this case are “challenges that require courts to evaluate the reasonableness of an MPUC-approved tariff.” 764 N.W.2d at 43. Because the answer to that question is “no,” the analysis should end there and the trial court should be affirmed.

3. The filed rate doctrine does not abrogate common law claims or other statutory claims.

Only if the answer to that threshold question is “yes” would it be necessary for this Court to expand its analysis to determine the next question: Whether the doctrine applies to the “nature of the [plaintiffs’] claims,” which in this case are damages and abatement of a nuisance. *Id.* Because the claims in this case are grounded not in the filed tariff, but instead upon common law duties of care and upon the nuisance statute, the second question must also be answered “no.”

This case does not involve any tariff-related issues, but instead merely the application of common law principles of ordinary care and damages arising out of an inherently dangerous activity – the distribution of electricity. Remedies for breach of such common law duties are a normal, insurable risk of doing business.

The “filed rate tariff” of NSP does not purport to limit liability for any common law claims asserted in this case. NSP’s only effort to disclaim tort liability in its tariff was for “continuity of service”, which does not apply to the facts of this case as a matter of law ZumBerge v. Northern States Power Co., 481 N.W.2d 103, 106(Minn. Ct. App. 1992).

NSP seeks unprecedented expansion of the filed rate doctrine to preclude common law claims for damages. This argument is unsupported in either the law or the record before this Court. The Court of Appeals long-ago concluded that NSP's attempt at limiting tort liability in its tariff does not provide immunity for NSP in stray voltage cases. ZumBerge v. Northern States Power, 481 N.W.2d 103, 106 (Minn. Ct. App. 1992) (stating that liability for torts "would remain for all injury not caused by an interruption or disturbance in power").

Cases from other jurisdictions that allow liability for torts to be disclaimed by public utilities require that such liability be expressly disclaimed in the tariff and be narrowly drawn to permit liability in cases of willful or gross conduct. See, Houston Lighting & Power Co. v. Auchan USA, Inc., 995 S.W.2d 668 (Tex. 1999) (canvassing case law on this subject). Courts retain the right to disallow limitations on tort liability as violating public policy. Computer Tool & Engineering, Inc. v. Northern States Power Co., 453 N.W.2d 569, 573 (Minn. Ct. App. 1990) (limitation on liability in NSP's tariff does not violate public policy where it does not purport to relieve NSP from all negligence under all conceivable circumstances, and holding that liability would remain for all injury outside of court's narrow interpretation of tariff); Ransome v. Wisconsin Elec. Pwr. Co., 87 Wis. 2d 605, 625, 275 N.W.2d 641, 650 (Wis. 1979) (citing public policy considerations that apply and imposing liability on electric utility for damages from electric shock); Southwestern Pub. Serv. Co. v. Artesia Alfalfa Grower's Ass'n, 67 N.M. 108, 353 P.2d 62, 68-71 (1960); Adams v. Northern Illinois Gas Co., 809 N.E.2d 1248, 1263-74 (Ill. 2004) (limitation on common law liability expressly claimed in tariff

narrowly construed against utility). Some courts hold that no limitations on liability may be claimed absent express authority given to the governing agency in the enabling legislation. McNally v. Pittsburg Mfg. Corp. v. Western Union Tel. Co., 186 Kan. 709, 353 P.2d 199, 203-05 (1960).

NSP is plainly wrong in its assertion that, as long as it complies with the safety rules included in the statutes, rules and “tariffs”, it cannot be held liable for violation of common law tort duties. The same argument was unanimously rejected by the Wisconsin Supreme Court. Schmidt v. Northern States Power Co., 742 N.W.2d 294, 311-315 (Wis. 2007) (holding that filed rate doctrine does not bar common law tort claims for stray voltage)<sup>4</sup>. See, also, Hoffman v. Wisc. Elec. Power Co., 262 Wis. 2d 264, 278, 664 N.W.2d 55, 62 (Wis. 2003) (legislation giving a utilities commission jurisdiction over electricity does not abolish the duty arising out of common law negligence and that “it is a well-established rule that the enactment of safety statutes or legislation giving a commission jurisdiction over a certain activity does not abolish the duty arising under common-law negligence”).

The law in Minnesota is the same. Wendinger v. Forst Farms, Inc., 662 N.W.2d 546, 554 (Minn. Ct. App. 2003) (while failure to comply with safety statute may be evidence of negligence per se, the inverse proposition is not true – that compliance with a

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<sup>4</sup> In Wisconsin, NSP filed a “stray voltage tariff” which purported to permit neutral to earth currents up to 1 milliamp (1 mA) as part of normal service. Schmidt v. Northern States Power Co., 742 N.W.2d 294, 311 (Wis. 2007). NSP has not filed such a tariff in Minnesota. Even with the existence of a tariff purportedly permitting current up to 1 mA, which NSP argued was not exceeded, the Wisconsin Supreme Court did not relieve NSP of its common law duty of ordinary care. Id. at 313-314.

safety statute precludes a finding of negligence – because compliance with a statutory standard “is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions.”)

In addition, statutes do not change the common law unless the legislative purpose to do so is clear, unambiguous and peremptory. Hoffman v. Wisconsin Electric Power Co., supra, 262 Wis. 2d at 279, 664 N.W.2d at 62-63 (rejecting claim that utility regulatory statute abrogated common-law duties of care in stray voltage case). Again, Minnesota law is the same. Nelson v. Productive Alternatives, Inc., 715 N.W.2d 452, 455 (Minn. 2006) (statutes should not be interpreted to overrule common law unless done so explicitly and “legislation will not be interpreted to supplant, impair, or restrict equity’s normal function as an aid to complete justice”).

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

The Minnesota Constitution and sound public policy do not support the notion that persons or property can be damaged by electricity and the victims left with no remedy whatsoever. In Schermer v. State Farm Fire and Cas. Co., 721 N.W.2d 307 (Minn.

2006), the Court held that the Constitution’s guarantee of “a certain remedy in the laws for all injuries or wrongs” was satisfied because the regulatory scheme involved in the establishment of insurance rates was a reasonable substitute for the common law claim for refund of premiums that the Class had alleged were unfairly charged. Respondents do not seek refunds for amounts paid for electricity. MPUC cannot provide a “reasonable substitute” for tort damages representing losses to respondents’ dairy enterprise caused by NSP’s negligence and nuisance.

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

4. Because respondents do not seek any refund of the filed rate, the claim for damages survives summary judgment.

Regarding compensatory damages, the Court in Hoffman held that courts do not have power to refund any portion of the filed rate. 764 N.W.2d at 46. This is true for

two reasons: (1) Measuring damages with reference to the filed rate interferes with the schedule of rates approved by the agency and would constitute a retroactive rate adjustment contrary to separation of powers principles and (2) judicial interference with approved rates would create a discriminatory rate schedule among customers. The Court noted that Schermer barred damages for “breach of agency approved tariff provisions.” Id. at 47. Hoffman declared that appellants’ artful claim that they were seeking compensatory damages based “upon the fair market value of inspection and maintenance services” is the same thing as seeking “benefit of the bargain” damages and is essentially the same as a claim of an overcharge for services actually performed. Id. “These damages are measured as the difference between what the appellants actually paid for the performance of the service not received and the presumably lesser amount they would have paid had the services not been required in the tariff.” Id. Because of this, the measure of damages in Hoffman was “inextricably linked to the filed rate.” Id. The Court held that the judiciary is not competent to engage in “rate analysis” and consistent with separation of powers, “should not encroach on this legislative function.” Id.

In this case, respondents are not requesting damages in any way measured by the difference in the value of the services provided. Measuring the economic loss to the respondents’ farm business due to cow and calf deaths and diseases of livestock, and resulting loss of milk production and increased expenses is a judicial function, one that the MPUC is not equipped to decide and certainly wasn’t on the commissioner’s minds in setting electricity rates. Awarding damages is not discriminatory because there is no proof that every person is getting the same amount of either stray voltage or damage from

stray voltage. Indeed, the phenomenon of stray voltage, because it is neither sold, measured and can never be proven to be the same for all customers and not amenable to analysis using the concept of discrimination.

5. Abatement of a nuisance is not a “service” that increases NSP’s tariff obligations.

In analyzing respondents’ prayer for relief, the Court of Appeals mistakenly focused on one part of a disjunctive request that NSP cease the nuisance “and/or an order compelling [NSP] to reconstruct the distribution lines to reduce or eliminate stray current.” Siewert v. Northern States Power Co., 757 N.W.2d 909, 917 (Minn. Ct. App. 2008). The Court of Appeals was concerned with the part of the prayer that asked that the court order that NSP “reconstruct the distribution lines.” Id.

This analysis is wrong for several reasons. First, it ignores the other parts of the prayer for relief – requesting that the court simply order NSP to stop the nuisance without telling NSP how to do it. The Court of Appeals never addressed that part of the disjunctive request. Respondents are entitled to an answer to that question. The trial court could order a stop to the nuisance of stray voltage, and leave it to NSP and the MPUC to figure out how to do that. Second, if this Court answers the threshold question (whether this is a rate-related suit for damages) “no”, then the filed rate doctrine doesn’t apply to the abatement claim, and the analysis shifts to the primary jurisdiction doctrine. The Court of Appeals never considered primary jurisdiction as it relates to the claim for abatement.

Regarding injunctive relief, the Hoffman Court rejected NSP's argument that the filed rate doctrine bars even judicial enforcement of clear tariff language. Id at 44 and n. 5. The Court did this because the legislature did not vest exclusive jurisdiction in the agency. Id. "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", citing ICOM Holding, Inc. v. MCI Worldcom, Inc. 238 F.3d 219, 222-23 (2d Cir. 2009). Id. ICOM Holding was a breach of contract claim where that court cited A.T.&T. v. Cent. Off Tel 524 U.S. 214, 223 (1998) to the effect that "rates do not exist in isolation... they have meaning only when one knows the services to which they are attached. Any claim for excessive services can be couched as a claim for inadequate services and vice-versa." "If the services requested in the litigation are not part of the original tariff obligation, the courts cannot, consistent with the filed rate doctrine, require performance of those services." Id. at 45. Consequently, whether the filed rate doctrine bars the claim for injunctive relief depends on whether NSP seeks to (1) enforce the language of the tariff or (2) whether they seek to add to the terms of the tariff. Id.

If anything, respondents are seeking to enforce the law that NSP must provide "safe service" and use "good practices," both of which are merely codifications of common law duties of due care. Otherwise, there are no specific tariff provisions that respondents seek to enforce or add. NSP claims, if it is forced to stop unwanted electricity from flowing over respondents' land and injuring and killing cows, that means increased "service" and a new tariff obligation. The fact that the remedy may involve

NSP fixing its lines and properly maintaining them does not equate with respondents getting *better* service than their neighbors. Respondents are unlike other customers on the same line because electricity is destroying their business. This is because stray voltage is a fickle phenomenon, striking every customer on the same distribution line differently depending upon their circumstances and which changes from month to month, day to day, minute to minute, and even second to second.

Nor does offering an equitable remedy equate to adding terms to the tariff. Instead, respondents merely seek enforcement of common law duties to use reasonable care in the distribution of electricity so as to not injure animals and put them out of business.

Under the Court of Appeals analysis, trial courts, after finding that a nuisance exists, would be powerless to oversee a solution. Because the MPUC doesn't have to act if there are not at least 50 persons who complain, there is no guaranteed relief from ongoing electric shock and cow deaths. Victims would be compelled to file periodic lawsuits to recover damages for the ongoing nuisance. That would be an absurd result.

NSP claims AT&T v. Central Office Tel., Inc., 524 U.S. 214 supports its argument that because new "services" are required, then the case must be dismissed. AT&T was based upon Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922). The result in Keogh was premised upon the fact that the regulatory agency provided a remedy to the plaintiff. Schermer, *supra*, citing Prentice v. Title Ins. Co., 176 Wis. 2d 714, 722, 500 N.W.2d 658, 661 (1993) (availability of regulatory remedy barred private rate-related

anti-trust suit for damages). The respondents in this case made a complaint in 2004 and the MPUC has offered no remedy up to the date of this writing.

The Supreme Court of Wisconsin, in Schmidt v. Northern States Power Co., 2007 WI 136, 305 Wis. 2d 538, 742 N.W.2d 294 (Wis. 2007) had little difficulty dispatching NSP's argument based upon the AT&T case. The Court held (742 N.W.2d at 312):

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

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

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

The tariff does not govern, however, the entirety of the relationship between the common carrier and its customers.... The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the

services covered by the tariff. It does not serve as a shield against all actions based in state law.

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

NSP argues that the *method of abating the nuisance* suggested by one of respondents' experts involves changing the configuration of the distribution line; something that NSP argues MPUC may have expertise in determining. This is a red-herring. See, *infra* at pp. 37-39<sup>5</sup>

The Court of Appeals in ZumBerge v. Northern States Power Co., 481 N.W.2d 103 (Minn. Ct. App. 1992) dismissed NSP's challenge based upon the claim that the service NSP provided "naturally" resulted in neutral to earth voltage which was the same as the stray voltage that all customers were required to accept. This is the same argument NSP makes now – that the respondents are seeking a different level of service with enhanced facilities. This Court disagreed:

NSP's assertion that the two are synonymous contradicts the company's concession that stray voltage is a controllable phenomena. *Consequently, equating unavoidable, but relatively innocuous, neutral-to-earth voltage with stray voltage in the dairy barn is like equating a tiger loose on the street to one properly caged and controlled.* We therefore find that the stray voltage was not caused by the ZumBerges' "use of service" as that phrase is used in the rate tariff, and that the tariff, interpreted narrowly, does not bar recovery in this matter.

Id. at 107 (emphasis added).

Permitting the respondents' claims for damages and ordering abatement would not provide them with "an enhanced distribution service", but would instead merely give

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<sup>5</sup> Since NSP's Summary Judgment was denied, NSP has voluntarily made substantial changes to the electrical distribution system on the ZUF-21 line which in large part follows the suggested "fix" made by respondents' expert, Donald Zipse.

them what the law requires – safe and reliable electric service that does not injure their property.

### **III. PRIMARY JURISDICTION DOCTRINE DOES NOT APPLY; IF IT DOES, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO REFER THE CASE TO THE MPUC**

#### **A. INTRODUCTION.**

The doctrine of primary jurisdiction is a (1) judicially created doctrine that is concerned with the orderly and sensible coordination of the work of agencies and courts, (2) that seeks to strike a proper relationship between the courts and agencies, especially if an issue before the courts requires the particular competence and expertise of the agency. Hoffman, 764 N.W.2d at 48. It is a “prudential measure” where, even if the court has jurisdiction, the court can “put off the judicial proceedings for a time” to allow “the parties to seek resolution of those issues in the agency before resuming the litigation in court.” Id. at 49. The court can either stay or dismiss proceedings in court pending the outcome before the agency, but only if the parties “would not be unfairly disadvantaged.” Id.

Factors to be considered under Minnesota law are (1) whether the legislature explicitly granted the agency exclusive jurisdiction and (2) whether the issues raised are “inherently judicial.” Id. Hoffman answered the first question. The MPUC does not have exclusive jurisdiction over tariff interpretation and enforcement. Id. at 49.

The next question is whether the issues raised are inherently judicial. Id. at 49. Does the case raise “issues of fact not within the conventional experience of judges” or whether the case “requires the exercise of administrative discretion.” Id. at 49-50.

Because the tariff in Hoffman was ambiguous and open to interpretation, agency expertise was required to construe technical terms that “are used in a peculiar and technical sense” and “extrinsic evidence is necessary to determine their meaning and proper application.” Id. at 50.

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

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

tort theories of recovery. In the Matter of a Complaint against Lake Region Coop. Elec.

Ass'n, Docket No. E-119/C-92-318:

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

RA 316 (emphasis added).

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

NSP's filed tariff gives no authority for the MPUC to resolve disputes between NSP and its customers except that the MPUC is available to "mediate" disputes. NSP Electric Rate Book, § 11, 4.3. RA 639.

MPUC has no authority to investigate or hold a hearing on individual consumer complaints, unless it does so "on its own motion." Minn. Stat. § 216B.17. (requiring a minimum of 50 consumers of a utility to make a complaint before an investigation and hearing is conducted). MPUC is aware of this proceeding and has declined thus far to intervene on its own motion.

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

**B. THE CLAIM FOR DAMAGES IS INHERENTLY JUDICIAL.**

This case doesn't require any input from the MPUC as it relates to the damages claim. The fact issues that will predominate are (1) specific levels of exposure of the respondents' cows and calves to electricity given well-known laws of physics (electrical engineering testimony), (2) the particular susceptibility and sensitivity of respondents' cattle to electric current (veterinary medicine testimony), (3) ruling out other potential causes of damage (nutrition experts, milking machine experts, livestock housing experts), (4) causation (forensic testimony from dairy scientists, veterinarians), (5) whether NSP was negligent in its maintenance and inspection of the lines and in failing to ward of the danger (6) economic loss (agricultural economist testimony). These are issues for which the courts are particularly well-suited to decide.

Respondents' claim is first and foremost a claim for monetary damages arising out of negligence, nuisance and other common law tort theories of relief, long cognizable in the district courts of this state. Determining "just compensation" for damages does not invoke the doctrine of primary jurisdiction. City of Rochester, supra, 483 N.W.2d at 481;

(holding that determination of damages is “not a matter uniquely suited to the MPUC’s abilities” and rejecting MPUC’s petition to intervene in district court proceedings). MPUC has no jurisdiction to provide a monetary remedy to the respondents for common law claims for damages.

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

Utility companies have tried to get purely common-law damage claims referred to administrative agencies, but such attempts have been rejected by the courts without exception. Consumer’s Guild of America, Inc. v. Illinois Bell Tel. Co., 103 Ill.App.3d

959, 431 N.E.2d 1047 (Ill. App. 1981) (“the fact that the regulation of utility service is exclusively in the PUC’s jurisdiction does not remove from the court’s jurisdiction an action for damages based upon a failure of service, any more than the PUC’s power to promulgate safety regulations prohibits the courts from hearing a claim for personal injuries resulting from unsafe utility equipment”); Indiana Michigan Power Co. v. Runge, 717 N.E.2d 216 (Ind. App. 1999) (in case alleging damages due to electrical surges and electric magnetic forces, primary jurisdiction doctrine inapplicable); Michigan Basic Property Ins. Ass’n v. Detroit Edison Co., 240 Mich. App. 524, 534-35, 618 N.W.2d 32, 37-38 (Mich. App. 2000) (common law tort claims not governed by doctrine of primary jurisdiction).

**C. THE CLAIM FOR ABATEMENT OF NUISANCE IS INHERENTLY JUDICIAL.**

As it relates to the nuisance claim, the courts are, again, in the best position to make the initial determination as to whether a nuisance exists. This involves all of the same issues as set out above, with the exception of a past economic loss expert. Whether a particular level of electric current is causing ongoing damage to the respondents by causing death and disease to livestock and adversely impacting milk production are issues for the court to decide. It is a judicial decision as to whether NSP was negligent. It is a court decision as to whether NSP is required to abate the nuisance. It is only as the question about *how to fix the problem* that the trial court may need the expertise of the agency. As to that question, respondents are not opposed to the trial court considering transfer to the agency for some help in trying to determine how to abate the nuisance.

Certainly a factor in the trial court's discretion has to be the timing of the request that the matter be referred to an agency. In this case, the parties spent hundreds of thousands of dollars on attorneys fees and expenses before NSP first raised the issue as part of dispositive motions just before trial. Case law conflicts as to whether the doctrine can be waived<sup>6</sup> (2 Richard J. Pierce, Jr. Administrative Law Treatise, § 14 (4<sup>th</sup> ed. 2002)), but typically the courts have not resorted to the doctrine when it has not been raised by the parties until late in lengthy and expensive proceedings. The doctrine should be invoked sparingly as it results in added expense and delay. AAA Striping, supra, 681 N.W.2d at 714. This is particularly true where the administrative agency offers no remedy for a complaint, because there is no reason to seek administrative relief before going to the courts. Id. at 714-715.

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

NSP argues that, because one of respondents' experts suggested a method of abating the nuisance involving reconfiguration of the distribution system, then the *entire case* must be referred to MPUC. The law doesn't support this argument. The district court may entertain suits for both damages and injunctive relief arising out of a private

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<sup>6</sup> The District Court did not address respondents' claim that NSP waived this defense.

nuisance. Minn. Stat. § 561.01 (allowing an “action” for both damages and injunctive relief as a result of nuisance). An “action” refers to a judicial proceeding. Brown v. Cannon Falls Township, 723 N.W.2d 31, 42 (Minn. Ct. App. 2006) (citing Minn. Stat. § 645.45(2), which defines “action” as any *in-court proceeding*). Chapter 216B, on the other hand, authorizes no means for consumers to obtain either monetary relief or to force abatement of such nuisances.

If the doctrine applies at all, it would only apply to the claim for abatement of the nuisance. That claim for relief would likely be heard after the damages trial. See, Allen v. Wisconsin Public Service Corp., 279 Wis. 2d 488, 504-05, 694 N.W.2d 420, 428-29 (Wis. Ct. App. 2005) (noting that injunctive relief is not inconsistent with damages in a continuing nuisance case and may be sought from court after jury renders damages verdict); Hoffman v. Wis. Elec. Pwr. Co., 664 N.W.2d 55 62 (Wis. 2003) . Minnesota law is in accord. Rosenberg v. Heritage Renovations, LLC, 685 N.W.2d 320, 327-28 (Minn. 2004) (despite claim that Chapter 82 was a comprehensive and mandatory statutory scheme governing real estate brokers and salespersons, court held that statutes in derogation of the common law are strictly construed, and legislation will not be interpreted to supplant, impair, or restrict equity's normal function as an aid to complete justice).

#### **IV. THE STATUTE OF REPOSE DOES NOT BAR SIEWERTS’ TORT CLAIMS**

Minn. Stat. § 541.051 does not bar respondents’ claims for at least seven reasons: First, the electrical distribution system that supplies electricity to customers on ZUF-21 is not an “improvement to real property” as that term is used Minn. Stat. § 541.051 and as

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

**A. SIEWERTS' NUISANCE, STRICT LIABILITY AND FAILURE TO WARN CLAIMS ARE BASED ON HARMFUL ELECTRICAL SERVICE AND NOT A DEFECTIVE "IMPROVEMENT"**

In 1991, the Minnesota Court of Appeals ruled that a farmer's stray voltage claim against the utility was not affected by Minn.Stat. §541.051 because the utility's system

for distributing electricity was not an improvement to real property. Johnson v. Steele-Waseca Coop Elec., 469 N.W.2d 517 (Minn.Ct.App. 1991), *review denied* July 24, 1991.

The Court of Appeals correctly followed the same analysis in the present case. Like the farmer in Johnson, Siewerts are not claiming any defect in the physical equipment (poles, wires, transformers) owned and exclusively controlled by NSP. Instead, Siewerts' complaint is directed at the service of distributing electricity which caused the harm. See: State Farm and Cas. v. Aquila, Inc., 718 N.W.2d 879 885 at n. 1 (Minn. 2006) (distinguishing Johnson from claim based on gas line that had been defectively installed.)

The Court of Appeals noted that four of the six claims alleged by Siewerts are based on negligence and the two others are based on strict liability and nuisance. Because the strict liability, nuisance and failure to warn negligence claims all plainly implicate a service and not an individual defective electrical component, then they fall squarely within the Johnson rationale. This fact distinguishes the nature of the claims made in this case from those alleged in Lietz and Aquila.

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

This court interpreted the term “improvement to real property” as applied under Minn. Stat. § 541.051 is found in Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988). “The statutory limitation period (Minn. Stat. § 541.051) is designed to eliminate suits against architects, designers and contractors who have completed the work, turned the improvement to real property over to the owners, and no longer have any interest or control in it.” (emphasis supplied). Id. at 454

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

The other three negligence based claims were not barred by Minn.Stat. §541.051 as held by the Court of Appeals because of subdivision 1(d) of the repose statute which excludes claims resulting from negligence in the maintenance, operation or inspection of the real property improvement as discussed below.

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

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

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

Hoffman holds that “when the tariff is construed in the light most favorable to appellants (Hoffman), NSP bears a duty to maintain...”distribution lines.” Hoffman v. NSP Co., 764 N.W.2d 34, 45 (Minn. 2009).

NSP’s regional engineer, Jean Waltz, admitted in her deposition taken on May 10, 2006 that when she became the regional engineer for NSP in 2002 she immediately recognized that the three phase distribution lines were significantly out of balance, that this condition increased stray voltage (NEV), and that she had no idea when the condition started. RA 302, 312.

Based on this Court’s declaration of NSP’s duty to maintain its’ distribution lines and NSP’s admission that it breached this duty, an exception under Minn.Stat S541.0541(d) is established.

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

submitted by residents along the ZUF-21 to establish NSP's failure to keep tree branches out of the power lines which resulted in increased levels of ground current. RA 172 and RA 173.

NSP is incorrect in its assertion that Siewerts "insist that the design and installation of the multi-grounded system would harm cattle regardless of what NSP might do after the electricity began to flow." See: App. Brief, p. 48. Siewert submitted extensive evidence to establish that it was NSP's failure to properly balance the electrical current near the distribution lines (maintenance, operation and inspection) that was the cause of substantial amounts of ground current to escape from the distribution lines and enter the Siewerts' dairy facility.

The Court of Appeals also rejected the claim again being made by NSP that because "Siewerts have failed to identify any applicable tariff duty, the scope of that duty or NSP's breach of that duty, then tariff compliance has not been put at issue." See: App. Brief, p. 49. "Minnesota courts have long rejected the argument that a Plaintiff must establish a regulatory or statutory violation to establish a duty element." Siewert, Id. at 923.

NSP has a duty to provide electricity to its customers in a safe manner. Both common law and statutory law require this. Minn. Stat. § 216B.04 (requiring utilities to provide safe, adequate, efficient, and reasonable service); Steinbrecher v. McLeod Co-op Power Ass'n, 392 N.W.2d 709, 712 (Minn. Ct. App. 1986) (calling Ferguson v. Northern States Power Co., 307 Minn. 26, 239 N.W.2d 190 (1976) the "definitive" decision in

Minnesota on the liability of power companies to and stating that “as the risk increases so does the standard of care.”).

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

Owners and possessors, such as NSP, have a common law obligation, not governed by the 10-year statute of repose, to inspect and maintain their property once construction is completed. Olmanson v. LeSueur Co., 693 N.W.2d 876, 880-881 (Minn. 2005). Minnesota law requires a utility to make “reasonable inspections.” Wilson v. Home Gas Co., 125 N.W.2d 725, 732 (Minn. 1964); Ruberg v. Skelly Oil Co., 297 N.W.2d 746, 751 (Minn. 1980) (utility that owns or controls service lines has ongoing duty to inspect and maintain even without notice of defect.) See also: Fabbrizi v. Village of Hibbing, 66 N.W.2d 7, 9-10 (Minn. 1954).

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

return through the earth (RA 284) and increase the risk to those same dairy customers who were already at risk.

The Court of Appeals also noted that the Siewerts have provided sufficient facts to create a triable issue on the question of whether NSP's control, alteration, maintenance or inspection of the distribution system would, under the theory *res ipsa loquitor*, require an inference of fault on its part. Siewerts submitted, in the District Court, "volumes of testimony by the parties, NSP employees, purported experts in the distribution of electricity and others. They offered direct and circumstantial evidence that NSP breached a duty of care in providing electricity and caused the alleged damages." Siewert v. NSP Co., 757 N.W.2d 909 at 924 (Minn.Ct.App. 2008) *rev. granted Feb. 17, 2009*.

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

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

In State Farm and Cas. v. Aquila, Inc., 718 N.W.2d 879 (Minn. 2006), the Minnesota Supreme Court discussed Johnson and also referred to the "electrical equipment" involved in that case.

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

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

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

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

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

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

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

and that the incident in question rose out of the “defective and unsafe” condition of the system.

Id. at 886.

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

One of many distinguishing aspects of the electrical distribution system at issue in this case from fixtures deemed as “improvements to real property” in other cases is the dynamic and ever-changing nature of the NSP’s ZUF 21 distribution system. In the cases cited by NSP, the injury was caused by a specific defect in construction resulting from a discrete negligent act occurring on a specific date in the past that is more than ten years before suit was commenced. (Weston – negligent design/leak in building, Kemp – negligent design/exploding switch gear; Dakota – negligent construction/leak in building; Fagerlie – negligently designed waste water treatment plant; Pacific Indemnity – negligent installation of furnace.)

Respondents do not claim nor must they prove that, *at the time the NSP installed the distribution system*, there were any defects in the service of distributing electricity. Respondents do allege, and have placed substantial evidence in the record to establish that over time NSP added more single phase customers to the ZUF-21 distribution line, fundamentally changing the alleged “improvement to real property” – the ZUF 21 line from Zumbro Falls to Mazeppa. NSP also added additional equipment to the

respondents' tap in 1996 and 1999, which increased levels of stray voltage on the farm. These undisputed facts, coupled with NSP's admitted failure to inspect, maintain and operate its electrical distribution system so as to keep it balanced and free of corrosion allowed massive amounts of current to pass through respondents' dairy facilities and cattle over an extended period of time. Taney v. ISD No. 624., 673 N.W.2d 497 (Minn. Ct. App. 2004), *review denied March 30, 2004*.

NSP has failed to establish, as Aquila requires, the date when the improvement to real property that caused damage to respondents began to exist on its distribution line. Because NSP is unwilling to even admit that a defect exists, much less establish when the improvement that caused that defect commenced, it cannot meet its burden of proof to establish foundation for the statute of repose defense it seeks to invoke.

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

**E. NSP FRAUDULENTLY CONCEALED THE FACT THAT ITS POWER LINES WERE UNBALANCED WHICH RESULTED IN HIGHER LEVELS OF STRAY VOLTAGE.**

As outlined in the Affidavits of Larry Neubauer and Donald Zipse dated August 13, 2007, the phase conductors along ZUF-21 were unbalanced which led to higher levels of stray voltage being generated. RA 3, 20. This fact was admitted by NSP's regional

engineer, Jean Waltz, during her deposition taken on May 10, 2006. Jean Waltz testified that when she became the regional engineer for NSP in 2002 she immediately recognized that the three phase distribution lines were significantly out of balance, that this condition increased stray voltage (NEV), and that she had no idea when this condition started. RA 304, 312. NSP was aware of the Minnesota Department of Commerce's directions (served upon NSP in April 2000) that 50% of return current from single phase taps (like those west of the respondents' dairy) was returning over the earth to the substation (to the east of the respondents' dairy). RA 280 at p. 4.

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

This fraudulent concealment of the defects of NSP's electrical distribution system makes Minn. Stat. § 541.051 inapplicable (stating in the first sentence "[E]xcept where fraud is involved"). NSP cannot be permitted to brazenly ignore its affirmative duty to inspect and maintain by allowing electricity to be distributed along an unbalanced system for an unknown number of years causing increased levels of stray voltage to be generated, conceal the facts from its customers, and then claim to be entitled to protection from the statute of repose. IDS 197 v. W. R. Grace Co., 752 F.Supp. 286 (Minn. US Dist. Ct., 4<sup>th</sup> Div. 1990.); Richfield Bank & Trust Co. v. Sjugren, 244 N.W.2d 648, 650 (Minn. 1976).

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

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

NSP in effect argues that it has obtained a prescriptive easement to distribute harmful levels of stray current across respondents' property by passage of time. In order to obtain a prescriptive easement, NSP would need to prove by clear and convincing evidence that its use of respondents' dairy as part of its grounding system was actual, open, continuous, exclusive and hostile for 15 years. Rogers v. Moore, 603 N.W.2d 650 (Minn. 1999). Whereas NSP's use of respondents' property clearly was actual and continuous, it was not open or hostile. To the contrary, the record demonstrates, in fact, that NSP fraudulently concealed from respondents that the operation of its distribution

line allowed very high levels of current to pass through respondents' dairy facility and cattle.

NSP argues that the statute of limitations bars respondents' claims because not brought within two years of discovery of the injury. See: App. Brief, p. 50. This affirmative legal defense claim was not certified by the District Court, addressed by the Minnesota Court of Appeals nor included in NSP's Petition for Review, therefore NSP's statute of limitation argument is not properly before this Court.

**IV. THE COURT OF APPEALS DECISION THAT THE FILED RATE DOCTRINE BARS THE CLAIM FOR ABATEMENT SHOULD BE REVERSED.**

Respondents requested conditional cross review of the Court of Appeals decision. See Response to Pet. for Rev. at 4-5. For the reasons previously set out herein at pages 27-31 and 37-39, the Court of Appeals decision that the filed rate doctrine bars the claim for abatement should be reversed. The trial court did not abuse its discretion in failing to refer the claim to abate the nuisance to the MPUC.

**CONCLUSION**

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

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

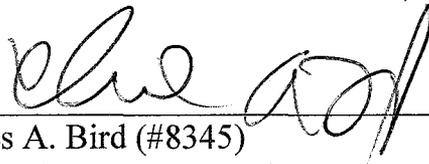
Diverting respondents onto the exit ramp to the MPUC is a bridge to nowhere. The District Court is the proper forum to resolve Respondents' common law tort claims and the District Court did not abuse its discretion in so ruling.

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

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

Dated: August 25, 2009

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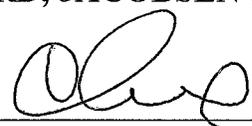
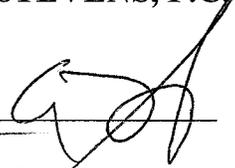
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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies that this brief complies with the requirements of Minn. R. Civ. P. 132.01, subd. 3(a)(1) in that it is printed in a 13 point, proportionately spaced typeface, and contains 13,847 words, excluding the Table of Contents and Table of Authorities. The brief was prepared using Microsoft Word 2007.

Dated: August 25, 2009

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