

NO. A09-364

State of Minnesota
In Court of Appeals

In the Matter of the Application of
 Northern States Power Company d/b/a Xcel Energy
 for Approval of a Mercury Emissions Reduction Plan for the
 Sherburne County Generating Facility's Unit 3

Southern Minnesota Municipal Power Agency,
Relator-Appellant,

vs.

Minnesota Public Utilities Commission,
Respondent-Appellee.

**REPLY BRIEF OF RELATOR-APPELLANT
 SOUTHERN MINNESOTA MUNICIPAL POWER AGENCY**

William E. Flynn (#0030600)
 Paul A. Banker (#256596)
 LINDQUIST & VENNUM PLLP
 4200 IDS Center
 80 South Eighth Street
 Minneapolis, MN 55402
 (612) 371-3211

*Attorneys for Relator-Appellant
 Southern Minnesota Municipal Power Agency*

Lori Swanson, Attorney General
 OFFICE OF THE ATTORNEY GENERAL
 Suite 102, State Capitol
 75 Rev. Martin Luther King, Jr. Blvd.
 St. Paul, MN 55101

Jeanne M. Cochran (#0246116)
 Assistant Attorney General
 OFFICE OF THE ATTORNEY GENERAL
 1100 Bremer Tower
 445 Minnesota Street
 St. Paul, MN 55101-2131
 (651) 296-2106

*Attorneys for Respondent-Appellee
 Minnesota Public Utilities Commission*

(Additional Counsel listed on following page)

Sam Hanson (#0041051)
Michael W. Kaphing (#0389349)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

*Attorneys for Respondent
Northern States Power Company d/b/a Xcel Energy*

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
STANDARD OF REVIEW	2
ARGUMENT	3
I. The Act Does Not Include a Clear Statement That Municipal Utilities Like SMMPA Are Subject to Its Provisions, and Therefore the MPUC Exceeded Its Jurisdiction By Approving the Xcel Plan and Regulating SMMPA.	3
A. Under Minn. Stat. § 216B.01 and <i>Hutchinson</i> , a Municipal Utility Like SMMPA May Only Be Subjected to Regulation Based Upon a Clear Statutory Statement.	3
B. Respondents’ Reliance on the Act’s References to Dry-Scrubbed Units Does Not Overcome the Strong Presumption Set Up By § 216B.01 and <i>Hutchinson</i>	4
II. The Plain Language of the Act is Unambiguous and Compels the Conclusion That Municipal Utilities Like SMMPA Are Not Subject to Its Reach.....	9
A. The Plain Language of the Act is Unambiguous and Does Not Vest the MPUC With Jurisdictional Authority to Regulate Municipal Utilities.....	9
B. Respondents’ Reliance on Legislative History Should Be Ignored.....	11
III. The MPUC Entirely Failed to Consider Important Aspects of the Case Before It and Its Decision Was Therefore Not in Compliance With the Act and Arbitrary and Capricious.....	12
CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n</i> , 358 N.W.2d 639 (Minn. 1984)	2
<i>Harrison ex rel. Harrison v. Harrison</i> , 733 N.W.2d 451 (Minn. 2007)	11
<i>In the Matter of an Investigation Into the Commission's Jurisdiction Over City of Hutchinson's Intrastate Natural Gas Pipeline</i> , 707 N.W.2d 223, 225 (Minn. Ct. App. 2005).....	3, 6
<i>Markwardt v. State Water Res. Bd.</i> , 254 N.W.2d 371, 374 (Minn. 1977)	12
<i>Oanes v. Allstate Ins. Co.</i> , 617 N.W.2d 401 (Minn. 2000)	8
<i>Ruter v. State</i> , 695 N.W.2d 389 (Minn. Ct. App. 2005).....	11
<i>Trout Unlimited, Inc. v. Minn. Dep't of Agric.</i> , 528 N.W.2d 903 (Minn. Ct. App. 1995), <i>review denied</i> (Minn. Apr. 27, 1995)	12
 STATUTES	
Minn. Stat. § 14.69	2
Minn. Stat. § 216B.01	1, 3, 4, 7, 8, 11, 15
Minn. Stat. § 216B.045	7
Minn. Stat. § 216B.045, subd. 3.....	6, 7
Minn. Stat. §§ 216B.068-.685	4
Minn. Stat. § 216B.682, subd. 1.....	5, 10
Minn. Stat. § 216B.682, subd. 2.....	9

Minn. Stat. § 216B.683, subd 1(a)	9
Minn. Stat. § 216B.685	2, 14, 16
Minn. Stat. § 216B.685, subd 1	13, 14
Minn. Stat. § 216B.685, subd. 2	9, 10, 11, 13
Minn. Stat. § 216B.685, subd. 4	13
Minn. Stat. § 216B.6851, subd. 3	9

SUMMARY OF ARGUMENT

Municipal utilities like SMMPA enjoy a unique and protected status under Minnesota law because the Legislature has recognized that municipal utilities are effectively and efficiently regulated by the residents of the municipalities that own and operate them. Accordingly, Minn. Stat. § 216B.01 expressly exempts municipal utilities from regulation *except* where the Legislature clearly states that it is subjecting municipal utilities to regulation. This Court’s decision in *Hutchinson* applied § 216B.01 as a strong presumption against municipal-utility regulation, protecting municipal utilities from the MPUC’s attempted regulation on the basis of generalized and unclear statutory language. Respondents fundamentally fail to deal with the meaning and effect of § 216B.01 and the holding in *Hutchinson*. Instead, they emphasize unspecific statutory language and the laudatory goal of mercury reduction as the ends that justify turning a blind eye to the Minnesota legal authorities that demand more to regulate a municipal utility such as SMMPA. The Act’s references to “dry scrubbed unit[s]” do not meet the exacting standard of § 216B.01. Moreover, Respondents’ resort to legislative history to attempt to justify their position is not warranted given the clear wording of the Act; and, if anything, only points to the lack of specific provisions in the Act necessary to support municipal regulation.

In addition to exceeding its jurisdiction by regulating SMMPA under the Act, the MPUC failed to satisfy important requirements of the Act and its decision is therefore arbitrary and capricious. Before approving a proposed mercury reduction plan, the Act requires the MPUC to consider the competitiveness of customer rates and whether the

plan will impose excessive costs on the utility's customers. But here, the MPUC gave no consideration to the rate impact of the Xcel plan on commercial or industrial ratepayers, and it entirely failed to assess the impact of the plan on the "competitiveness of customer rates," as required under Minn. Stat. § 216B.685. The MPUC's total failure to consider several important aspects of the case presented was an exercise of will, not judgment, and therefore requires reversal.

STANDARD OF REVIEW

This appeal raises two issues: (1) whether the MPUC exceeded its jurisdictional authority by approving Xcel's mercury-reduction plan; and (2) whether the MPUC's approval of that plan was arbitrary and capricious. Each issue calls for a different standard of review. Respondents correctly direct the Court to Minn. Stat. § 14.69, which controls this Court's review of agency decisions. But the MPUC, in particular, errs by suggesting that the Court's review of whether the MPUC exceeded its jurisdiction is entitled to deference and a presumption of correctness.

Clear precedent establishes that Minnesota appellate courts review *de novo* the scope of an agency's jurisdiction. *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984) ("Inasmuch as the major issue on this appeal is whether the MPUC has authority and jurisdiction over an unregulated cooperative utility, the resolution of the issue concerns legal rather than factual considerations. Thus, the court is not bound by the decision of the MPUC and need not defer to 'agency expertise.'"). No deference is due to the MPUC's jurisdictional decision: "[w]hether an agency has jurisdiction over a matter is a legal question, and thus a reviewing court need

not defer to agency expertise on the issue.” *In the Matter of an Investigation Into the Commission’s Jurisdiction Over City of Hutchinson’s Intrastate Natural Gas Pipeline*, 707 N.W.2d 223, 225 (Minn. Ct. App. 2005).

ARGUMENT

- I. **The Act Does Not Include a Clear Statement That Municipal Utilities Like SMMPA Are Subject to Its Provisions, and Therefore the MPUC Exceeded Its Jurisdiction By Approving the Xcel Plan and Regulating SMMPA.**
 - A. **Under Minn. Stat. § 216B.01 and *Hutchinson*, a Municipal Utility Like SMMPA May Only Be Subjected to Regulation Based Upon a Clear Statutory Statement.**

The first provision of Chapter 216B, which governs Minnesota’s regulation of utilities, draws a critical regulatory distinction between public and municipal utilities. While declaring it “to be in the public interest that *public utilities* be regulated as hereinafter provided in order to provide the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates,” Minn. Stat. § 216B.01 then sets municipal utilities apart and excludes them from Minnesota’s regulatory scheme. (Emphasis added.) Section 216B.01 provides:

Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them . . . it is deemed unnecessary to subject such utilities to regulation under this chapter *except as specifically provided herein*.

(Emphasis added.)

As this Court concluded in *Hutchinson*, “the language of section 216B.01 is clear on its face. It mandates that municipal utilities are exempted from regulation under chapter 216B, ‘except as specifically provided herein.’” 707 N.W.2d at 227. Section

216B.01 thus sets up a heavy interpretive presumption that the Legislature does not intend to subject municipal utilities to regulation unless it specifically provides for their regulation.

The statutes on which the MPUC relied do not meet this exacting clear-statement standard. The MPUC approved the Xcel mercury-reduction plan for Sherco 3 as a whole, including SMMPA's interest, on the basis of Minn. Stat. §§ 216B.068-.685. But none of the provisions of the Act ever reference municipal utilities, though the Legislature could have easily done so, and has specifically subjected municipal utilities to regulation elsewhere in Chapter 216B. There is no clear statement in the Act extending the MPUC's jurisdiction to municipal utilities like SMMPA. To the contrary, and as discussed in greater detail below, the plain language of the Act makes clear that it only gives the MPUC jurisdiction over public utilities, excluding SMMPA by definition. Even the MPUC expressly recognized that the Act does not regulate municipal utilities like SMMPA: "SMMPA is correct that, as a joint-action agency [made up of municipal utilities], *it is not subject to the Mercury Reduction Act.*" (SMMPA Addendum, 4.) (Hereinafter ADD 4.) (Emphasis added.)¹

B. Respondents' Reliance on the Act's References to Dry-Scrubbed Units Does Not Overcome the Strong Presumption Set Up By § 216B.01 and *Hutchinson*.

In response to the clear obstacle that § 216B.01 and *Hutchinson* present to affirming the MPUC's exercise of jurisdiction over SMMPA, Respondents focus

¹ Notably, Xcel does not cite § 216B.01 once in its brief, and Xcel similarly devotes no meaningful discussion to the binding and precedential *Hutchinson* decision.

narrowly on the Act's references to a "dry scrubbed unit" as the grant of jurisdiction to the MPUC, while ignoring the ownership condition tied to this term. (NSP Brief, pp. 5, 10-12; MPUC Brief, pp. 14-15.) According to the Respondents, because the Act's multi-layered definition of a dry-scrubbed unit is broad enough to include the Sherco 3 power plant, and because the Act references the development of mercury reduction plans for dry-scrubbed units, the MPUC had jurisdiction to regulate SMMPA.

However, the Act does not, as suggested by Respondents' rephrasing of the statutory language, require that a mercury emissions reduction plan for each dry-scrubbed unit be developed and submitted to the MPCA and MPUC. (NSP Brief, p. 5; MPUC Brief, p. 15.) Rather, the Act directs itself to a particular class of utilities – a public utility that *owns* a dry-scrubbed unit at a qualifying facility. See Minn. Stat. § 216B.682, subd. 1. Thus Xcel's statement that "the legislature granted the MPUC the authority to review and approve a mercury emissions plan for each targeted dry scrubbed unit," (NSP Brief, p.10) is not accurate. Under the Act, the MPUC's authority extends only to "each dry scrubbed unit owned and operated by the [public] utility." Minn. Stat. § 216B.682, subd. 1. As the text of the Act makes clear, the Act's maximum regulatory scope is tied to the scope of a public utility's ownership. Where a public utility's ownership ceases so does the MPUC's jurisdiction.

Just as importantly, even if § 216B.682's threshold definitions and the Act's references to mercury-reduction plans for dry-scrubbed units were not expressly tied to *public* utility ownership and operation, they would not compel the conclusion that SMMPA's interest in Sherco 3 is subject to the regulatory requirements of the Act. To

subject municipal utilities like SMMPA to the Act's regulatory requirements, significantly more specificity is demanded under Minnesota law. The Act's provision cannot merely be neutral or silent as to ownership, but rather must affirmatively, specifically provide for municipal regulation. On this point, the facts of *Hutchinson* are especially important.

In *Hutchinson*, the Court considered whether the MPUC had jurisdiction to regulate an underground natural-gas pipeline constructed by the Hutchinson Utilities Commission ("HUC"), a municipal utility. The MPUC asserted jurisdiction over the municipal-utility pipeline pursuant to Minn. Stat. § 216B.045, subd. 3, which states that "[e]very owner or operator of an intrastate pipeline shall offer intrastate pipeline transportation services by contract on an open access, nondiscriminatory basis." (Emphasis added.) The MPUC concluded that jurisdiction over HUC was proper under § 216B.045, subd. 3, because: the HUC pipeline was an intrastate pipeline; the statute provides jurisdiction over "every owner or operator" of an intrastate pipeline; and the statute specifically excluded public utilities from its scope and made no mention of municipal utilities. *Hutchinson*, 707 N.W.2d at 226. This Court disagreed. Despite the direct statutory language of § 216B.045, subd. 3, the Court concluded that § 216B.045 was not clear or specific enough to subject municipal utilities to its reach. *Id.* at 227. As the Court concluded, "none of the provisions cited by respondent as bases for jurisdiction specifically provide for regulation of municipal utilities." *Id.* It is this exacting standard of specificity that must be applied here.

The statutory language that the MPUC relied on to assert jurisdiction over SMMPA is significantly less specific than the statutory language that the Court considered and found wanting in *Hutchinson*. Unlike *Hutchinson*, the statutory language here does not purport to subject “every” dry-scrubbed unit in the state to its scope. Nor does the Act expressly exclude one class of utility from its reach and implicitly leave municipal utilities within its scope. Thus, when compared, here there is even less of a justification for subjecting municipal utilities like SMMPA to MPUC jurisdiction than there was for HUC under § 216B.045, subd. 3. The arguments made by the MPUC in this appeal are exactly the arguments that failed in *Hutchinson* in the face of the exacting clear-statement rule established by § 216B.01; and they fail here, as well.

The MPUC attempts to distinguish away *Hutchinson* on two grounds. First, the MPUC contends that *Hutchinson* is distinguishable because *Hutchinson* involved the interpretation of Minn. Stat. § 216B.045, not the Act. (MPUC Brief, p. 19.) But this argument is easily dismissed. In *Hutchinson*, the Court squarely addressed the level of statutory specificity required under § 216B.01 to subject a municipal utility to regulation, the exact issue presented by this appeal. That the statute the MPUC relied on to exercise jurisdiction in *Hutchinson* is different than the Act that the MPUC relied on to exercise jurisdiction over SMMPA is of no consequence.

The MPUC also contends that *Hutchinson* does not control the outcome of this case because in *Hutchinson*, the pipeline that the MPUC attempted to regulate was solely owned by a municipal utility and was not a pipeline jointly owned by a public utility and municipal utility, like Sherco 3. (MPUC Brief, p. 20.) But the MPUC fails to explain

why this distinction makes any difference. Regardless of whether a facility to be regulated is wholly or jointly owned, the MPUC's attempted regulation of that facility constitutes the regulation of the municipal utility—an issue squarely governed by § 216B.01 and *Hutchinson*. Indeed, § 216B.01 nowhere states that the level of specificity required is different depending on whether the facility that the MPUC attempts to regulate is partially or wholly owned by a municipal utility. Contrary to the MPUC's argument, the standard established by the plain text of § 216B.01 applies whenever the regulation of a municipal utility is contemplated. This is especially true here, where the Act in question is expressly limited to assets that a public utility owns.

Here, the MPUC's exercise of jurisdiction over SMMPA cannot be affirmed without expressly overruling *Hutchinson*, a departure from recent precedent that is unwarranted and not argued for by the Respondents. *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000) (observing that “the doctrine of *stare decisis* directs that we adhere to former decisions in order that there might be stability in the law” and noting that the Court was “extremely reluctant to overrule [its] previous cases”).

Because the Act does not include the clear statement required under § 216B.01, the MPUC was without jurisdiction to approve the Xcel plan as applied to SMMPA's interest in Sherco 3.

II. The Plain Language of the Act is Unambiguous and Compels the Conclusion That Municipal Utilities Like SMMPA Are Not Subject to Its Reach.

A. The Plain Language of the Act is Unambiguous and Does Not Vest the MPUC With Jurisdictional Authority to Regulate Municipal Utilities.

The plain language of the Act's operative provisions, when taken as a whole, unambiguously demonstrates that the Act only regulates public utilities, nowhere bringing municipal utilities like SMMPA within its reach. Recognizing the Act's repeated references to public utilities and the assets owned by public utilities, Respondents argue to the Court that these references only mean that the public utility is the entity required to develop and file a mercury-reduction plan on behalf of the municipal utility and nothing more.

But Respondents' reading is strained and at odds with the Act as a whole. The Act does not merely require public utilities to develop and file mercury reduction plans with the MPUC. *See* Minn. Stat. § 216B.682, subd. 2. The Act's application to public utilities is much more holistic than the Respondents allow. For example, Minn. Stat. § 216B.683, subd 1(a), permits a "public utility . . . [to] file for approval of [an] emissions-reduction rate rider[]." Minn. Stat. § 216B.685, subd. 2, directs the MPUC to consider whether a proposed plan imposes excessive costs on the public utility's customers. And Minn. Stat. § 216B.6851, subd. 3, permits "[a] public utility" to elect be regulated under § 216B.6851 under certain circumstances. The Act's repeated and specific imposition of regulatory requirements on public utilities is entirely inconsistent with Respondents' contention that the Act should still be read to implicitly regulate municipal utilities like SMMPA.

When construed together with these sections of the Act, the provisions requiring “public utilit[ies]” that “own” dry-scrubbed units to develop and submit a mercury reduction plan cannot be read as Respondents advocate. The clear intent of the Legislature was to regulate public utilities and their ownership interests in targeted units, not municipal utilities. Indeed, if the Legislature intended to subject municipal utilities to regulation under the Act, it would have given municipal utilities at least some role in the development and submission of mercury-reduction plans that would so directly impact their operations.

Minn. Stat. § 216B.685, subd. 2, is particularly revealing of the Legislature’s intent. That provision governs the MPUC’s approval of mercury-reduction plans and directs the MPUC to consider whether a plan “would impose excessive costs on *the utility’s* customers.” (Emphasis added.) Used in that subdivision, “the utility[.]” is a clear reference to the public utility required to file the plan under § 216B.682. The Act’s use of the singular possessive term “utility’s” in § 216B.685, subd. 2, is no accident, and clearly only directs the MPUC to consider the rate impact of a proposed plan on *the public utility’s customers*, not a municipal utility’s customers. When incorporated with Respondents’ proposed reading of the Act the result would be that the Legislature: intended public utilities to develop and file mercury-reduction plans on behalf of municipal utilities; intended to regulate municipal utilities on the basis of public-utility-developed plans; and intended that the MPUC give *no consideration* to the rate impact on municipal utilities and their ratepayers that would be so directly regulated and impacted by the Act. The Legislature could not have intended this illogical and incongruous result.

The plain language of § 216B.685, subd. 2, confirms that the Legislature only intended to regulate public utilities under the Act.

B. Respondents' Reliance on Legislative History Should Be Ignored.

Respondents' reliance on legislative history is unjustified. Minnesota courts may only consult legislative history in the course of statutory interpretation when a statute is ambiguous. *Harrison ex rel. Harrison v. Harrison*, 733 N.W.2d 451, 453 (Minn. 2007); *Ruter v. State*, 695 N.W.2d 389, 393 (Minn. Ct. App. 2005). That is not the case with regard to the statute in this appeal

Moreover, a thorough review of the entire legislative history, including all of that presented by Respondents, reveals no indication that the Legislature intended to apply the Act to municipal utilities. Indeed, there is absolutely no mention of municipal utilities or municipal ownership throughout the legislative history.

Finally, in the face of § 216B.01, Respondents' reliance on legislative history is telling. For the Court to consider this legislative history it must necessarily conclude that the Act is reasonably susceptible to more than one meaning, which leads to the unavoidable conclusion that the Act does not include the requisite specificity under § 216B.01 to subject municipal utilities like SMMPA to its terms.

Because the plain language of the Act only regulates public utilities, not municipal utilities, the MPUC exceeded its jurisdiction under the Act by approving the Xcel plan. This conclusion is not altered by any legislative history. Moreover, resort to legislative history to divine the Legislature's intent is plainly inconsistent with the clear-statement rule of § 216B.01.

III. The MPUC Entirely Failed to Consider Important Aspects of the Case Before It and Its Decision Was Therefore Not in Compliance With the Act and Arbitrary and Capricious.

Not only did the MPUC exceed its jurisdiction in approving the Xcel plan and regulating SMMPA, the MPUC's decision did not comply with other requirements of the Act and was arbitrary and capricious. An MPUC decision is arbitrary and capricious if the decision represents the MPUC's will rather than its judgment. *Markwardt v. State Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). And a MPUC decision represents its will rather than its judgment where the MPUC entirely failed to consider an important part of the issue before it. *Trout Unlimited, Inc. v. Minn. Dep't of Agric.*, 528 N.W.2d 903, 907 (Minn. Ct. App. 1995), *review denied* (Minn. Apr. 27, 1995).

Here, the MPUC's decision carries the hallmarks of an arbitrary and capricious exercise of the MPUC's will.² The MPUC's decision expressly recognized that the Act does not subject municipal utilities like SMMPA to regulation, but the MPUC nevertheless proceeded to approve the plan, emphasizing that "[t]he Act is clearly

² It is significant that Xcel is forced to refer to statements in staff briefing papers (NSP Brief, p. 17) as a substitute for any reasoned analysis and determinations within the MPUC's written decision. Likewise, the MPUC Brief goes outside the record to discuss matters relating to rate impact on Xcel's and SMMPA's customers (MPUC Brief, p 8-9, 28-29), which if anything, confirms the lack of consideration and deficiencies in the MPUC decision and order below.

designed to achieve rapid reductions in mercury emissions.” (ADD 4.)³ Just as the MPUC ignored the obvious incompatibility between its conclusion that SMMPA is not subject to the Act and its approval of the Xcel plan, the MPUC also ignored several important factors that the Legislature requires it to consider in evaluating a mercury-reduction plan.

Specifically, the MPUC effectively ignored the rate impact of the proposed plan on Xcel’s customers. Minn. Stat. § 216B.685, subd. 2, *required* the MPUC to assess whether the Xcel plan “would impose excessive costs” on the utility’s customers. *See also* Minn. Stat. § 216B.685, subd 1 (requiring the MPUC to consider “competitiveness of customer rates” and the “cost-effectiveness of the utility’s proposed mercury-control initiatives” in evaluating a plan). The customer-rate-impact information that Xcel presented to the MPUC was severely lacking. This information filed by Xcel consisted of the estimated rate impact on only a single class of Xcel’s customers in one year-*i.e.*, the average rate impact for a residential customer in 2010. The total absence of meaningful and specific customer rate-impact information left the MPUC ill-equipped and unable to exercise its judgment within the boundaries of the Act.

³ The MPUC suggests that under the Act it was required to review and approve plans “under a very abbreviated time frame.” (MPUC Brief, pp. 2, 7.) However, that is not accurate. The Act allows the MPUC to extend “any deadline” established under the Act for two extensions of no longer than 12 months. Minn. Stat. § 216B.685, subd. 4. The MPUC is also expressly authorized to “direct the utility to amend and resubmit its proposed plan in light of the record developed on the proposed plan or, at the utility’s option, to file a new plan...” Minn. Stat. § 216 B.685, subd. 2. Thus, the Act grants the MPUC sufficient time to properly carry out its responsibilities.

For instance, the MPUC entirely failed to consider the rate impact of the plan on non-residential customers, and commercial or industrial customers in particular. The MPUC apparently concluded that Xcel's estimate of the rate impact on its residential customers was sufficient to pass muster under § 216B.685. It was not. The Legislature clearly directs the MPUC to consider both the competitiveness of customer rates and the excessiveness of customer costs under a proposed plan. Minn. Stat. § 216B.685, subds. 1, 2. The plain language of these provisions requires the consideration of both a plan's rate impact on all customers and the competitiveness of rates for all customers. The provisions of the Act nowhere indicate that the rate impact for one customer class can serve as a proxy for evaluating the probable rate impact on another customer class, and they cannot reasonably be construed to mean that the MPUC is only required to consider the rate impact of a proposed plan on residential ratepayers. The MPUC's failure to consider the rate impact of the plan on non-residential customer classes was in disregard of the plain language of § 216B.685, as was its failure to evaluate—much less mention—the impact of the plan on the “competitiveness of customer rates.”⁴

Agencies like the MPUC are rightfully charged with making reasoned determinations within the guidelines set out by the Legislature, but they are not given unfettered discretion to ignore those factors which the Legislature requires the agency to

⁴ At the October 23, 2008 hearing, counsel for several Xcel industrial customers stated the obvious when he warned the MPUC that without a breakdown of costs between Xcel and SMMPA, the MPUC does not know what the impact would be on ratepayers and consequently cannot say with any “certainty...that the plan as [proposed] will not impose an excessive cost on my clients or Xcel ratepayers in general.” (SMMPA Appendix, pp. 181-82.)

consider in making those decisions. Here, the MPUC's total failure to consider statutory factors and several important rate-impact aspects of the plan was arbitrary and capricious. The MPUC decision must be reversed as a result.

CONCLUSION

Minn. Stat. § 216B.01 and this Court's precedential decision in *Hutchinson* control this appeal. Those binding legal authorities clearly provide that municipal utilities are not subject to MPUC jurisdiction unless the Legislature specifically provides the MPUC with the authority to regulate them. In this matter, the unambiguous language of the Act does not specifically apply to SMMPA. In fact, the pertinent statutory provisions apply only to public utilities and the assets they own.

In this appeal, Respondents ask the Court to adopt a tortured reading of the Act which under their theory of jurisdiction would have the Court conclude that the Legislature specifically intended to regulate municipal utilities by directing a public utility to develop and file a mercury reduction plan on behalf of the municipal utility, but then also expressly barred the MPUC from reviewing and evaluating the rate impact on the municipal utility customers, even as it directed the MPUC to not approve a filed plan if the rate impact on the public utility's customers was excessive. This is a harsh and illogical conclusion and one for which no basis was articulated in the MPUC's written decision. This Court should reject this strained interpretation and should adopt the only plausible and reasonable interpretation of the Act - that it does not apply to SMMPA and its interest in Sherco 3.

The MPUC also failed to address important aspects of the case before it and particularly the statutorily required factors, as set out in § 216B.685, subds. 1 and 2. In this regard, the MPUC's decision was also an exercise of the MPUC's will, rather than its judgment, and therefore was arbitrary and capricious.

Because the MPUC had no jurisdiction to regulate SMMPA, its decision approving the Xcel plan should be reversed. Alternatively, because the MPUC's approval of the Xcel plan was arbitrary and capricious, the Court should reverse the MPUC's decision and remand this matter back to the MPUC.

Respectfully submitted,

LINDQUIST & VENNUM PLLP

Dated: May 22, 2009

William E. Flynn
William E. Flynn (#0030600)
Paul A. Banker (#256596)
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

*Attorneys for Relator-Appellant Southern
Minnesota Municipal Power Agency*