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NO. A09-572

State of Minnesota
In Court of Appeals

City of Cohasset,

Appellant,

vs.

Minnesota Power,
an Operating Division of Allete, Inc.,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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

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STATEMENT OF ISSUES

I.

IS A PUBLIC UTILITY'S INTRACITY GAS PIPELINE EXEMPT FROM CITY LICENSURE IF THE GAS IS NOT SOLD TO THE PUBLIC?

The District Court held "yes" and granted summary judgment against the City's claim that operation of the natural gas pipeline must be subject to its franchise ordinance and to the payment of a franchise fee.

See: Minn. Stat. § 216B.36;

Minn. Stat. § 412.221;

Dairyland Power Cooperative v. Brennan, 82 N.W.2d 56 (Minn. 1957);

Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 353 (Minn. 1949); and

Northern States Power Co. v. City of Oakdale, 588 N.W.2d 534 (Minn. App. 1999).

II.

IS THE CITY'S POWER TO LICENSE PREEMPTED BY STATE OR FEDERAL LAW?

The District Court did not reach this alternative grounds urged below for summary judgment against the City's claims.

See: Minn. Stat. § 216G.02; and

Mississippi Valley Gas Co. v. Gulf Fuels, Inc., 48 FERC ¶ 61178, 1989 WL 262161 (FERC August 2, 1989).

STATEMENT OF THE CASE

The City of Cohasset (“Cohasset”) commenced this action for declaratory and injunctive relief against Minnesota Power, an operating division of Allete, Inc. (“Minnesota Power”) on September 12, 2008. The action was filed with the Itasca County District Court and was assigned to the Honorable Jon Maturi. The action sought to enforce Cohasset’s right to require Minnesota Power to obtain a franchise or other permit to operate a natural gas pipeline that it intended to build entirely within Cohasset’s borders. Appendix (“App.”) 26-37

Minnesota Power responded with a motion to dismiss, which was subsequently treated as a motion for summary judgment given the Court’s consideration of materials outside of the pleadings. Cohasset filed a cross motion for temporary injunction of any operation of the pipeline except in compliance with all terms and conditions of the franchise ordinance or other permits or licenses issued by Cohasset.

The District Court heard argument on the cross motions on December 1, 2008. On January 7, 2009, it granted partial summary judgment dismissing all of Cohasset’s claims except for the promissory estoppel count, which alleged detrimental reliance on Minnesota Power’s assurances that it would use Cohasset’s natural gas utility to supply it with natural gas. Addendum (“Add.”) 1-6. The District Court reasoned that Minnesota Power was not acting as a “public utility”

with respect to the pipeline because it planned to consume all of the gas to ignite its electrical plant, as opposed to using the pipeline to sell gas to the public. Add. 4-5.

On February 26, 2009, the District Court dismissed the promissory estoppel count by stipulation of the parties and then entered final judgment of dismissal on all other counts. The Court denied as moot Cohasset's cross motion for temporary injunction. Add. 7-8.

On April 1, 2009, Cohasset perfected an appeal from the final judgment of February 26, 2009 pursuant to Minn. R. Civ. App. P. 103.03(a). App. 64-66. This judgment also rendered final the previous order for partial summary judgment, which was appealed pursuant to Minn. R. Civ. App. P. 103.03(j). The appeal was timely filed within 60 days of February 26, 2009, pursuant to Minn. R. Civ. App. P. 104.01.

A transcript of the December 1, 2008 proceeding was completed and mailed on April 23, 2009. Pursuant to Minn. R. Civ. App. P. 131.01 Subd. 1, Appellants initial brief is due thirty days from April 23, 2009, plus three days for mailing – i.e., on or before May 26, 2009.

STATEMENT OF FACTS

Plaintiff-Appellant Cohasset is a statutory city with a population of approximately 2,500 located in Itasca County, Minnesota. App. 45 ¶ 2. Defendant Minnesota Power is an operating division of Allete, Inc. According to its 2007 year-end 10Q filing, Minnesota Power provides regulated electric service in northeastern Minnesota to 141,000 retail customers and wholesale electric service to 16 municipalities. Minnesota Power also provides service to large industrial customers. Allete's other businesses include Superior Light & Power, which services Wisconsin customers; a lignite coal mine in North Dakota; and significant real estate holdings in Florida. It is traded on the New York Stock Exchange. Its consolidated operating revenues in 2007 were \$841.7 million. App. 45 ¶ 3.

Minnesota Power operates a coal-fired electric generating plant in Cohasset, Minnesota, which it calls its "Boswell Energy Center." The plant generates 914 MW of power. According to Minnesota Power's website, this is by far its largest generating plant – having more than 4 times the generating capacity of its next largest plant, its 200 MW Taconite Harbor Plant. The Boswell Energy plant employs hundreds of persons, and is the largest employer in Cohasset. App. 46 ¶ 4.

This case concerns Minnesota Power's proposed, and now completed, gas pipeline to connect the Boswell Energy Center with the Great Lakes Gas Transmission Company natural gas pipeline at the town border of Cohasset (the "Pipeline"). The point at which Minnesota Power will take delivery of the gas from Great Lakes is located within Cohasset and is metered. Transcript of Proceedings ("T.") at pp. 8-9. Minnesota Power filed its plans for the Pipeline with the Minnesota Public Utilities Commission ("MPUC"), *see* Affidavit of Susan Harper ("Harper Aff.") Ex. A; App. 40-44 (maps depicting path of pipeline).

The Pipeline was designed for a 10.75 inch outside diameter and a pressure capacity of 974 pounds per square inch. This diameter and capacity were far larger than that comprised by Cohasset's natural gas lines serving its citizens. App. 46 ¶ 6. According to its MPUC filing, Minnesota Power intends the Pipeline to serve the Boswell Energy Center's coal-fired plant. Its stated purpose was to ignite coal in the coal-fired plant, thereby replacing the fuel oil ignition. The Boswell Energy Center will continue to provide electricity to serve Minnesota Power's retail and municipal customers. App. 46 ¶ 7. Minnesota Power's proposal to the MPUC further contemplates "potential future additional uses of natural gas" at the Boswell Energy Center. App. 46 ¶ 7.

The Pipeline was designed to run for 6,900 feet (about 1.3 miles) entirely within the borders of Cohasset. App. 47 ¶ 8. The proposed path of the Pipeline

was to cross underneath Pincherry Road (County Road 88), U.S. Highway 2, the Burlington Northern – Santa Fe Railroad, and 3rd Street North (County Road 87). *See* App. 42 (map depicting Pipeline route and cited public roads). The Pipeline would not parallel any of these roads. Its planned route was to traverse this public property as well as to run through several parcels of privately owned property. App. 47 ¶ 9. Cohasset does not own or maintain any of these county roads. However, it does provide fire protection and is financially responsible for providing contract police protection for any incidents occurring at the point of intersection of these various roads, or for any incident occurring at any segment of the Pipeline. App. 47 ¶ 10.

Although the Pipeline appeared to have been designed in a way to skirt around any Cohasset city streets, the Pipeline project nonetheless benefits from other privileges and services provided by Cohasset. These include fire and police protection, as well as other city services that make the site attractive to Minnesota Power.

Cohasset's 2008 budget for fire protection was \$190,049. The Fire Department has 2 pumper trucks and 25 "volunteer" members, who despite this designation are nonetheless paid a wage for actual time responding to a call. All of Cohasset's firefighters are trained as first responders, given the health concerns posed by, among other things, Minnesota Power's hazardous activities and many

employees. App. 47 ¶ 11. As for police protection, this has been contracted to the Itasca County Sheriff, who is paid by Cohasset for calls to the city. The Sheriff is on call for any incidents occurring along the Pipeline or at the Boswell Energy Center, or on the County Roads to be crossed by the Pipeline, or at any point within Cohasset. The Cohasset Public Safety budget for 2008 was \$17,505. App. 47 ¶ 12.

Cohasset provides a host of administrative services to the property to be traversed by the Pipeline and to the Boswell Energy Plant at the terminus of the Pipeline. These include city administration, zoning, public works, parks, recreation, capital investment, and economic development. The total annual budget of Cohasset in 2008 exceeded \$2.0 million. App. 48 ¶ 13.

Natural gas service is provided within Cohasset by a municipal utility owned and operated by Cohasset. The system was built in 1997 with the encouragement of Minnesota Power, whose affiliate, Superior Light & Gas, was engaged to construct it. The charges for natural gas services in 2008 were budgeted at \$1,423,775. App. 48 ¶ 14. Minnesota Power represented that it had a long-term need for significant natural gas purchases that would be made through this recently-constructed utility. In addition, Cohasset, on Minnesota Power's advice, built a large-capacity 6 inch pipe from the border station in anticipation of Minnesota Power's use of same to service its Boswell plant. This is the only 6

inch pipe in the City system and was constructed for the specific purpose of serving Minnesota Power's needs. App. 48 ¶ 15.

Minnesota Power abruptly changed its mind after Cohasset had invested in and completed this project. On April 22, 2008, without prior notice or explanation, Minnesota Power informed Cohasset that it would not serve its Boswell Energy Center with natural gas from Cohasset's utility. Rather, Minnesota Power stated its intent to construct its own pipeline. Minnesota Power offered to pay no fee to compensate Cohasset for the privileges and benefits of operating that pipeline within the borders of Cohasset. App. 48 ¶ 16.

On May 23, 2008, Cohasset provided formal notice to Minnesota Power that it believed the proposed Pipeline was subject to Cohasset's franchise power. App. 49 ¶ 17. Thereafter, Minnesota Power persisted with this project despite repeated notice from Cohasset that the Pipeline must be subject to a franchise, including payment of a franchise fee. On June 5, 2008, Minnesota Power filed an application with the MPUC to route the Pipeline via the path proposed in App. 40-44; *see Harper Aff. Ex. A*. On June 12, 2008, the Cohasset City Council met with Minnesota Power representatives to convey its position that the Pipeline required a franchise. Minnesota Power representatives indicated a willingness to discuss the matter. However, on June 17, 2008, Minnesota Power's counsel provided formal

notice that Minnesota Power's position was that the City had no franchise authority because of "preemption" by the MPUC routing permit process. App. 49 ¶¶ 18-20.

Minnesota Power proceeded with its routing permit application, which was expedited via an appeal for a partial exemption from some procedures pursuant to Minn. Admin. R. 7852.0300 Subp. 3 (reprinted in App. 72). In response to solicitation of public comment, Cohasset filed comments making no objection to the routing of the Pipeline, but reserving all rights to object to the operation of the Pipeline in derogation of the city's franchise power. App. 49 ¶ 20; Harper Aff. Ex. B. Minnesota Power responded with comments seeking a finding of preemption. App. 49 ¶ 21; Harper Aff. Ex. C.

On September 2, 2008, MPUC staff issued a report that did not make the preemption decision demanded by Minnesota Power. Affidavit of Corey J. Ayling ("Ayling Aff.") Ex. C at p. 4 ¶18. This report was adopted by the MPUC in its September 17, 2008 order. Ayling Aff. Ex. D. The MPUC, like Cohasset, deemed the franchise issue independent and separate from the routing decision.

18. Based on the three comment letters, EFP staff concludes that the franchise assertion supplied in comment by the city of Cohasset is not applicable and independent to the partial exemption pipeline routing procedures. Local franchise requirements are not considered criteria used by the Commission in determining whether to grant a partial exemption from the pipeline route selection procedures.

Ayling Aff. Ex. D at p. 4 ¶ 18.

On September 17, 2008, the MPUC granted Minnesota Power's application for a routing permit and partial exemption. App. 51-63. The MPUC permit directed Minnesota Power to "comply with all federal, state, county, and local rules and regulation." App. 57 ¶ D(8). On September 23, 2008, Cohasset promulgated an ordinance requiring high pressure pipelines, such as those to be built by Minnesota Power, to be subject to a franchise and a franchise fee. Add. 23-25; Ayling Aff. ¶ 6 & Ex. F.

By the time of the December 1, 2008 hearing, Minnesota Power had completed construction of the Pipeline, subject to finalizing some items such as tie-ins and associated electrical equipment. Pipeline operations – the subject of the requested injunction – had not yet commenced; Minnesota Power at that time was awaiting approval of the environmental permits necessary to operate the burners in the Boswell Energy Plant connected by the Pipeline. T. at 21-22.

On January 7, 2009, the District Court issued an order granting partial summary judgment dismissing all but Cohasset's promissory estoppel claims. Add. 1-6. The District Court reasoned that Minnesota Power was not a "public utility" subject to Cohasset's franchise power because the Pipeline would not furnish natural gas service to the public. Add. 4-5. The promissory estoppel claim was preserved for trial, Add. 3, but was later

dismissed by stipulation of both parties, Add. 7-8. The District Court entered final judgment on February 26, 2009, Add. 7-8; this appeal ensued, App. 64-6.

ARGUMENT

Two of the fundamental powers of government are the power to license and the power to assess private companies for the use of public resources. There is no question under well-settled Minnesota law that cities enjoy the power to require an operator of an explosive intracity gas pipeline to get a franchise or a permit. Minn. Stat. § 216B.36. And cities enjoy the concomitant power to exact a fee to help pay for the public costs caused by these operations. Minnesota Power's technical arguments ignore the following fundamental policy codified in plain statutory text: the need to preserve the police powers of the public to regulate private actors who benefit from public resources.

Here, Minnesota Power will operate and to benefit from a high pressure gas pipeline that is routed entirely within Cohasset and that traverses public roads. In operating the Pipeline, Minnesota Power will rely on Cohasset to provide emergency first response service, to pay for fire and police protection, and to provide the public infrastructure essential to ongoing Pipeline operations. If the Pipeline explodes, Cohasset's citizens will be the ones affected, and Cohasset's professionals will be the ones on the scene first. Cohasset should be able to do what cities have always done in these circumstances: make the private company get a permit and pay for it.

The technical argument that led the District Court astray was the claimed exemption from regulation for using the gas Pipeline *indirectly* to sell service to the public – *by firing up a coal plant that generated electricity for sale* – instead of *directly* to sell service to the public – *by selling the actual gas to the public*. Such an argument elevates form over substance. It is clear that Minnesota Power acted as a public utility in building the Pipeline and should be subject to the conceded power of cities to license the pipelines of public utilities. Moreover, whether the explosive pipeline that helps itself to public resources is used to sell gas or is used as a “private” supply line for Minnesota Power is immaterial. The Pipeline poses the same risks and costs to the public in either event; the need for a permit is just as compelling in both cases. That property is “private” has never been a defense to reasonable regulation by the public.

This error was a ruling of law that can be reviewed and duly corrected by this Court *de novo*. Minnesota Power’s back-up argument that the historic licensing power of cities has been preempted by state and federal law similarly misreads the text, intent, and judicial construction of the governing statutes.

This Court should restore the cities to their historic powers by reversing the summary judgment granted against Cohasset and by remanding for further proceedings.

I. STANDARD OF REVIEW.

Summary judgment based upon the construction of a statute is a question of law subject to *de novo* review by the Court of Appeals. See *Washington Mutual Bank, F.A. v. Elfelt*, 756 N.W.2d 501, 505-06 (Minn. App. 2008), *review denied* (Dec. 16, 2008). The District Court decision was premised on its reading of statute and its rulings were entirely ones of law. “On appeal, this court need not defer to the trial court’s conclusion when reviewing questions of law.” *County of Lake v. Courtney*, 451 N.W.2d 338, 341 (Minn. App. 1990), *review denied* (Minn. April 13, 1990).

II. AN INTRACITY GAS PIPELINE IS SUBJECT TO CITY LICENSURE WHETHER OR NOT THE GAS IS SOLD TO THE PUBLIC.

Whether or not Minnesota Power uses the Pipeline to sell gas to the public has little jurisdictional significance, other than its implication for rate and service obligations not at issue in this case. What is significant is that Minnesota Power has run a highly explosive Pipeline entirely within Cohasset; that the Pipeline traverses public roads; and that the Pipeline benefits from public services without paying for them.

For Minnesota Power – an investor-owned utility that will use the Pipeline as part of the infrastructure necessary to sell electricity to over 100,000 Minnesotans – to define itself as anything other than a “public utility” defies

common sense. Indeed, Minnesota Power does not hesitate to seize the “public utility” mantle when it suits its interest – in obtaining the MPUC permit to route the Pipeline; in citing Pipeline costs and improvement costs for its Boswell plant as justification for higher electric rates; and in claiming an exemption of the Pipeline and other Boswell improvement costs from local personal property taxes.

The most sensible construction of Minn. Stat. § 216B.36 is that Minnesota Power is a “public utility” that is “furnishing utility services” or is “occupying streets” or “public property” “within a municipality”, and that it may therefore be required to obtain a franchise from the City of Cohasset under the express provisions of the statute. But even if Minnesota Power is permitted to deny the reality of its public utility status, Cohasset has other well- settled bases in statute and in Minnesota law for requiring a permit – and charging a fee – for this kind of hazardous operation. As a statutory city, Cohasset enjoys the power to provide for the general welfare by requiring an operator of 1,000 pounds per square inch of high pressure gas that crosses underneath public roads to get a permit. Minn. Stat. §§ 412.211; 412.221 Subd. 6, 17, 23, 32 (reprinted in Add. 16-21).

A. **Historical Development and Current Status of Municipal Franchise Power.**

“Historically, cities have regulated utilities both by [franchise] agreement and through exercise of the police power.” *Northern States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 539 (Minn. App. 1999). Natural gas lines may not

operate in a city without a franchise from that city. *Village of Blaine v. Independent School District No. 12*, 138 N.W.2d 32, 38 (Minn. 1965) (“*Blaine II*”). Municipal franchises were the earliest form of public utilities oversight. *Cf. Davidson v. County Commissioners of Ramsey County*, 18 Minn. 482, 18 Gil. 432, 1872 WL 3324 (Minn. 1872) (applying the Kent treatise’s definition of franchise to railroads).¹

For over 100 years, Minneapolis and St. Paul have regulated natural gas pipelines within their cities via franchise ordinances that required the pipeline to pay fees for the burdens they place on public safety and rights of way.² Over the

¹ The long-standing historical practice dating back to the 19th century is that to commence certain kinds of operations within a city, such as electric service or the construction of gas pipelines, a private company needed to acquire a franchise from the city council. The franchise would set terms of operations and rates, and would provide for a fee to the city. *See generally* C. PHILLIPS, *THE ECONOMICS OF REGULATION* 66-88 (1969). The earliest use of gas for lighting was in Manchester, England in 1804; the first public lighting company in the United States was organized in Baltimore in 1816. 1 D. WILCOX, *MUNICIPAL FRANCHISES* § 246 at p. 533 (1910). By 1850, there were 30 plants manufacturing gas in American cities, and cities such as Atlanta strictly regulated prices. *Id.* at p. 534.

² Gas pipelines presented special safety issues requiring gas franchises to take care to “protect the property of the city and the property and lives of the people against the dangers inherent in the distribution of gas.” 1 D. WILCOX, *supra*, § 246 at p. 537. Minneapolis has regulated gas pipelines via franchise ordinances since 1870, *see id.* § 254, and starting in 1900 St. Paul exacted a minimum franchise fee of 5% of gross receipts, *see id.* § 255. The St. Paul ordinance regulated impurities in the gas, regulated price and service conditions, and required the company to remove pipes in the event of certain roadwork. *Id.* at § 255. Minneapolis adopted safety ordinances in 1894 regulating the manufacture, measurement, and quality of the gas supplied in the city. *Id.* § 254 at pp. 574-75. The cities of Minneapolis and St. Anthony both provided for the option of the city to purchase the gas utility at the end of the franchise term for cost. *Id.* § 254 at pp. 573-74.

course of the 20th century, most states shifted the regulation of utility safety, operations, and rates to statewide public utility commissions.³ Minnesota did not join this trend until 1974, when cities such as Minneapolis lost their ratemaking powers. However, the legislature expressly preserved the right of cities to continue to condition utility operations on a franchise. Minn. Stat. § 216B.36.⁴

³ The growing size of the utilities beyond city borders and problems of unequal bargaining power and corruption led reformers in New York (Governor Charles Evans Hughes) and Wisconsin (Senator LaFollete) to spearhead the formation of powerful state commissions to regulate the utilities. See Sharfman, *Commission Regulation of Public Utilities: A Survey of Legislation*, in 53 ANNALS OF AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1 (1914); Wilcox, *Effects of State Regulation upon the Municipal Ownership Movement*, in 53 ANNALS OF AMERICAN ACADEMY OF POLITICAL SCIENCE 71 (1914).

By 1920, rate regulation in most states had largely been ceded from cities to state public utilities commissions, with the municipal franchise power surviving thereafter as a means for conditioning the right to construct, maintain, expand, and operate the utility system. See Colton & Sheehan, *Raising Local Government Revenue Through Utility Franchise Charges: If the Fee Fits, Foot It*, 21 THE URBAN LAWYER 58-60 (Winter 1989); Note, Halbert, *Municipal Law – Utility Franchise Fees*, 18 U. ARK. LITTLE ROCK L.J. 259, 263-64 (1996); C. PHILLIPS, *supra*, at pp. 86-88 (economic regulation of utilities done by state commissions; city franchises continue to regulate use of streets).

⁴ The savings provision of the statute reads:

Any public utility furnishing utility services enumerated in section 216B.02 or occupying streets, highways, or other public property within a municipality may be required to obtain a license, permit, right, or franchise in accordance with the terms, conditions, and limitations of regulatory acts of the municipality, including the placing of distribution lines and facilities underground. Under the license, permit, right, or franchise, the utility may be obligated by any municipality to pay to the municipality fees to raise revenues or defray increased municipal costs accruing as a result of utility operations, or both. The fee may include but is not limited to a sum of money based upon gross operating revenues or gross earnings from its operations in the municipality so long as the public utility shall continue to

Since the 1974 legislation, many cities continue to condition the operation of electric utilities and gas pipelines on compliance with a franchise ordinance. In 1996, the Public Service Department (now known as the Office of Energy Security), in response to 1995 legislation, prepared an investigative report on municipal franchises that was submitted to the legislature. The agency found that the continuing public policy justification for franchises and franchise fees was “to compensate the municipality for use of a public property for private gain.” MINNESOTA DEPARTMENT OF PUBLIC SERVICE, *Report to the Minnesota Legislature on Franchise Fees and Public, Educational and Government (PEG) Access* (Feb. 15, 1996) (hereafter the “DPS Report”) p. 1. The public property included “rights of way under city streets, the easements in private properties, ditches along roads and highways, etc.” *Id.*⁵

operate in the municipality, unless upon request of the public utility it is expressly released from the obligation at anytime by such municipality....

Minn. Stat. § 216B.36.

⁵ The responses to the Department’s survey revealed that in 1994, Minneapolis charged over \$11 million in franchise fees for electrical and gas utilities, and St. Paul charged over \$10 million in such fees. A total of 209 cities assessed franchise fees on cable communication companies; 11 cities assessed franchise fees on natural gas utilities; and 14 cities assessed franchise fees on electric utilities. MINN. DEPT. PUB. SERV., *supra*, pp. 2-3. Minnesota Power paid Duluth a franchise fee of \$700,000 in 1994. *Id.* at p. 3. Cities of the size of Cohasset (1,000 to 5,000 range) collected franchise fees of as low as \$400 and as high as \$108,000 for electrical service; the sole city that of this size that agreed to report its gas franchise fee for that year was Lake City, citing a fee of \$34,581. *Id.* at 3-4.

In sum, while the responsibility for ratemaking and overall regulatory control of public utilities has shifted to the state and federal levels of government, the cities continue to use the franchise power to require those utilities to pay for their use of rights of way and other public resources.

B. Minnesota Power is a Public Utility Subject to Cohasset's Franchise Power.

By virtue of the plain language of Minn. Stat. § 216B.36 (reprinted in Add. 13), the holdings of the Minnesota courts, and sound public policy, Cohasset clearly enjoys the power to subject the Pipeline to a franchise. The Court below erred by focusing on the general definition of “public utility” in Minn. Stat. § 216B.02 Subd. 4 (reprinted in Add. 9). The District Court read this general statute in isolation from other statutes and governing law to exempt Minnesota Power’s pipeline from the franchise power:

‘Public utility’ means persons operating, maintaining, or controlling in this state equipment or facilities for furnishing at retail natural, manufactured, or mixed gas or electric service to or for the public or engaged in the production and retail sale thereof....

Minn. Stat. § 216B.02 Subd. 4.

While critical of particular kinds of franchise fee arrangements, the Department did not recommend that the legislature repeal the cities’ franchise powers, nor has the legislature done anything to circumscribe the power since receiving the Department’s report in February 2006. *See id.* at 18-21. Indeed the Department confirmed that the “authority to manage local rights-of-way”, and the attendant franchise power, “must remain with local government.” *Id.* at 21.

Yet, Minnesota Power is a “public utility” even viewing this statutory definition in isolation. Here, Minnesota Power is operating equipment in the form of the Pipeline (among other things) to furnish *electric* power at retail. That satisfies the literal definition of “public utility” contained in Minn. Stat. § 216B.02 Subd. 4.

The District Court agreed that Minnesota Power was an electric utility, but reasoned that the dedication of the Pipeline to help ignition at the Boswell Energy Center (and the forbearance from any retail sale of the natural gas) rendered Minnesota Power a non-utility for the purpose of the Pipeline. However, the definition quoted above does not permit the utility to segregate different parts of its infrastructure into “utility” and “non-utility” equipment. Minnesota Power is, to be sure, not a gas utility. But it is an electric utility, and everything used to furnish electricity for retail sale – including the Pipeline used to ignite the generating units at the Boswell plant – that are subject to the franchise power.

Moreover, the District Court focused on the incorrect statute. The specific statutes that reference and preserve the city’s franchise power make clear that the Pipeline is precisely the kind of infrastructure that is subject to a franchise. Minn. Stat. § 216B.36 is written in the disjunctive to subject a public utility to the franchise power if it is a “public utility furnishing ... utility services within the

city.”⁶ But the statute also permits the “public utility” to be franchised if it is “occupying streets, highways, or other public property within a municipality.” This second definition is clearly met here.⁷

The Pipeline will pass underneath the following “streets” or “highways” or “public property”: U.S. Highway 2 and CSAH 87. To be sure, both roads are maintained by Itasca County, rather than by Cohasset. But the statute does not require the affected highways to be owned or maintained by the city; it simply triggers the franchise obligation if the Pipeline is to be “occupying streets, highways, or other public property within a municipality.” These two roads are “streets” or “highways” that are within the municipality of Cohasset; and they are “public property within a municipality.”

Analogous circumstances were presented in the *Oakdale* case decided by the Minnesota Court of Appeals in 1999. There, NSP proposed to run new overhead electric power lines along State Highways 5 and 120 to serve Imation’s facility in Oakdale, Minnesota. Oakdale asserted the right to require those lines to be placed

⁶ This first alternative definition is met here because Minnesota Power furnishes electrical service to Cohasset residents.

⁷ The terms of Minn. Stat. § 301B.01, an alternative statute which preserves the franchise power, are also met. Minnesota Power is a “corporation” “formed for these purposes” – i.e., the statutorily enumerated services of operating internal improvements. Such a corporation may not “construct, maintain, or operate a ... pipe line” without “first obtaining from the city a franchise.” Minn. Stat. § 301B.01 (reprinted in Add. 14).

underground. Even though the lines were not located along Oakdale city roads, they nonetheless implicated the City's legitimate regulatory interest regarding power lines within its city borders. The Court held that under Minn. Stat. § 216B.36, Oakdale had "the power to require electric distribution line undergrounding either through a franchise or through reasonable exercise of its police powers." *Oakdale*, 588 N.W.2d at 539. The Court of Appeals rejected NSP's contention that this franchise power had somehow been repealed by the statewide system of utility regulation.

Indeed, Minnesota courts have not taken kindly to attempts to circumvent the franchise power by deliberately routing pipes away from city lands. Thus the Supreme Court rejected the attempt by a utility to circumvent Blaine's franchise powers by running the gas pipeline entirely within Circle Pines, including the connection point. *Blaine II*, 138 N.W.2d at 32. The customer (in this case a school district) was located entirely within Blaine. Noting that all of the utility's gas was consumed in Blaine, the Court upheld Blaine's right to require a franchise. Quoting an earlier decision of the Iowa Supreme Court, the Minnesota Court noted: "If this process were allowed, then the ...[utility] would have all the rights it would have under a franchise without having procured one vote of the people, as required by the aforesaid section of the [Iowa] statute. Such a nullification of the

statute will not be countenanced by an equity court.” *Id.* at 43 (quoting *Town of Ackley v. Central States Elec. Co.*, 214 N.W. 879, 880 (Iowa 1927)).

While the Pipeline is not used to sell gas to the public, it is an integral part of the materials and supplies that are necessary to provide electric service to the public. Therefore, it can be factored into the cost basis that Minnesota Power uses to calculate rates. *See* Hanson & Davies, *Judicial Review of Rate of Return Calculations*, 8 Wm. MITCHELL L. REV. 499, 501 (1982) (cost of furnishing utility service includes labor, materials and supplies, taxes, insurance, and depreciation); Minn. Stat. § 216B.16 Subd. 6 (rates must consider cost of furnishing the service and reasonable return to utility); *Minnegasco v. MPUC*, 549 N.W.2d 904 (Minn. 1996) (rate basis includes costs of furnishing service including even depreciation and financing costs; but does not include good will).⁸

It is nonsense, then, from the perspective of public utilities law to point to an important and tangible part of the cost of delivering service to the public – the Pipeline that ignites the generator – and to call it a non-utility endeavor of the company exempt from regulation. *Cf.* McQUILLIN, THE LAW OF MUNICIPAL

⁸ The Court of Appeals can take judicial notice of the Form 10Q filed by Allete, Minnesota Power’s parent corporation, on May 1, 2009. Page 15, note 6 of the document references an April 3, 2009 MPUC approval of Minnesota Power’s retail rate filing and estimates a overall rate increase of 4.5%. Emissions reduction plans for Boswell units 1, 2, 3, and 4 are discussed at pages 28-29. Allete notes that the MPUC has approved a cash return on construction work in progress during the construction phase and Minnesota Power has filed a petition with the MPUC for cost recovery.

CORPORATIONS §34:7 (2009) (“the term ‘public utility’ has a broader meaning than that of mere physical equipment; ... the term refers to the entire business, including both the plant and its operation”). Public utilities, do, to be sure, get involved in areas of endeavor that are wholly divorced from their core public nature and that are unregulated. *See generally* Knapp, *Effective State Regulation of Energy Utility Diversification*, 136 U. PA. L. REV. 1677 (1988) (utilities attracted to wholly unrelated, unregulated fields like insurance, banking, and real estate, though under the federal Public Utility Holding Company Act of 1935 such side ventures may be limited). Here, it is apparent from Minnesota Power’s website and public filings that it is involved in Florida real estate. Such endeavors are not part and parcel of the cost of delivering electric service and are not so regulated; a pipeline that helps ignite generators to sell retail electric service clearly is.

Indeed, in defining a particular endeavor as that of a “public utility” the courts have not focused on one factor in isolation – such as whether the particular equipment involved is used directly in the sale of service to the public. As stressed by the Ohio Supreme Court, what matters is whether the company remains affected with the public interest.

A corporation that serves such a substantial part of the public as to make its rates, charges and methods of operations a matter of public concern, welfare and interest subjects itself to regulation by the duly constituted governmental authority.... Thus, changing the purpose clause of its charter, refraining from use of the right of eminent domain, avoiding a holding out to serve the public generally and

selling only to select consumers by private contract could be employed as subterfuges by many public utility companies. If the business is still affected with a public interest, it remains a public utility.

Industrial Gas Co. v. Public Utilities Commission of Ohio, 21 N.E.2d 166, 168 (Ohio 1939); *accord*, *City of Maumee v. Public Utilities Commission of Ohio*, 800 N.E.2d 1154, 1157 (Ohio 2004):

A public utility is an enterprise with the following characteristics and functions: (1) it provides essential goods or services that the general public has a right to demand from the utility, (2) it conducts its operation in such a manner as to be a matter of public concern, and (3) it occupies a monopolistic or oligopolistic position in the marketplace....

See also Northern Natural Gas Co. v. Iowa Utilities Board, 679 N.W.2d 629, 633 (Iowa 2004) (reject focus on whom is served gas in defining “public utility”; instead, court looks to “the nature of the actual operations conducted and its effect on the public interest”).

The Minnesota courts, in considering whether an entity is a public utility, have focused on its “public character.” *Dairyland Power Cooperative v. Brennan*, 82 N.W.2d 56, 61 (Minn. 1957) (defining as “public utility” a utility with only wholesale and no retail sales). In addition to considering whether the company serves and solicits the people of the community in which it operates (something which Minnesota Power does as an electricity provider), the Minnesota Supreme Court considered whether the company had monopoly power and whether it had

the power of eminent domain. *Id.* Minnesota Power enjoys an exclusive electric territory over Cohasset and enjoys the power of eminent domain. *See* Minn. Stat. § 222.36, 117.025, 301B.02.

Defining the Pipeline as being operated by a “public utility”, then, follows from the plain language of Minn. Stat. § 216B.36 and from the rulings of the Minnesota courts. This result is also in accord with sound policy. The purpose, after all, of the franchise power is to enable the public to grant public benefits “to those whom it deems best qualified and who willingly subject themselves to the control vested in the municipality.” *Village of Blaine v. Ind. Sch. Dist. No. 12*, 121 N.W.2d 183, 190 (Minn. 1963) (“*Blaine I*”). Whether or not the 1.3 miles of Pipeline is used to sell gas at retail, each foot is a matter of grave public concern. This is a 10.75 inch pipeline carrying close to 1,000 pounds of highly flammable gas per square inch. If there is any public safety or fire problem along the Pipeline, it will affect the citizens of Cohasset and it will be responded to by firefighters, police, and first responders paid for by Cohasset. The hundreds of workers who work with the gas at the receiving end at the Boswell plant are also doing so within the confines of Cohasset and their safety must be guarded in part by the City of Cohasset.

The regulatory interest of the city whose citizens are affected most by the Pipeline and who pays for the services that benefit the Pipeline is compelling. The

desire of such a city to exact a fair franchise fee for a benefit conferred on Minnesota Power that, in turn, carries such risks and attends such potential costs to the City is entirely reasonable. *See* DPS Report, *supra* page 18, at p. 1 (policy purpose of franchise is “to compensate the municipality for use of a public property for private gain”).

Indeed, Minnesota Power does not hesitate to embrace its public utility mission and nature when this suits its purposes. Thus, its application for the Pipeline’s routing permit described itself as a public utility,

Minnesota Power is an investor-owned electric utility headquartered in Duluth, Minnesota. Minnesota Power supplies retail electric service to 135,000 retail customers and wholesale electric service to 16 municipalities in a 26,000-square-mile electric service territory located in northeastern Minnesota.

Harper Aff. Ex. A at p. v. And, as noted above, *see supra* note 8, its public utility status will enable it to build the cost of the Pipeline into its rate basis. Finally, the only way that Minnesota Power can escape the legal obligation to make the Pipeline openly accessible by others is to define itself as a “public utility.” That is, if the Pipeline is “owned or operated by a public utility”, then Minnesota Power can dedicate the Pipeline to its own needs and is not required to allow others to use the Pipeline. Minn. Stat. §216B.045 Subd. 1 (reprinted in Add. 11).⁹

⁹ Under Minn. Stat. § 216B.045 Subd. 3, an owner or operator of an intrastate pipeline “shall offer intrastate pipeline transportation services by contract on an open access, nondiscriminatory basis.” However, if the owner/operator is a “public

In short, in every context save one – the applicability of Cohasset’s franchise power – Minnesota Power is happy to embrace its public utility status in operating the Pipeline. It is this status that allows it to build the cost of the Pipeline into rates, to sell its petition for a routing permit to the MPUC, and to keep others from exercising their rights to open access. This estops Minnesota Power from denying its public utility status to escape the franchise ordinance.

In sum, by virtue of plain statutory language, the holdings of the Minnesota courts, and sound public policy, Cohasset clearly enjoys the power to subject the Pipeline to a franchise.

C. Even if Minnesota Power were not a Public Utility, its Pipeline Would still be Subject to Cohasset’s Licensing Power.

Minnesota Power led the District Court astray by persuading it to assume that cities are powerless to regulate the private pipelines of private, non-utility companies. Yet, the regulatory significance of whether a high pressure pipeline is operated by a public utility or by some completely private industrial user has nothing to do with the franchise power. Natural gas public utilities have a host of duties to the public, such as providing service to anyone who wants to buy from the line, setting regulated rates, and terminating or abandoning service in an approved manner. Minn. Stat. § 216B.045.

utility” it is not an “intrastate pipeline” and does not, therefore, incur this open access duty. Minn. Stat. § 216B.045 Subd. 1.

Cohasset, however, is not seeking to regulate rates or how the gas is sold. Indeed, those are the powers of the MPUC and were ceded from the cities as part of the 1974 reform. It suffices for the present purpose to note that all of the parties agree that Minnesota Power is not a *natural gas* utility, and no one is seeking to regulate it as such.

What is relevant is that the thousand pounds of high pressure natural gas does not know whether it is being owned and operated by a public utility, or by some private industrial end user, or by a public utility that wants to analogize itself to a private industrial end user. The public policy purposes for which city licensure power is sought is the same in all instances: the need to provide and pay for emergency first response, fire protection, police protection, and other services to the Pipeline.

What troubled the District Court was that if the Pipeline is defined as non-public-utility property, the city had no regulatory “hook” to require licensure. As noted by the Court, cities “possess only those powers that are conferred by statute or implied as necessary to carry out legislatively conferred powers.” Add. 4. Thus, the District Court’s assumption was that if the statutory grounds for franchising the Pipeline as part of the city’s historic power over public utilities were not applicable, then there was no other basis left for asserting regulatory power.

As was urged by counsel at oral argument below, T. 16-17, Cohasset is a statutory city with broad police powers. *See* Minn. Stat. § 412.016 Subd. 1. A private pipeline with a thousand pounds of explosive gas implicates those powers. In particular, statutory cities enjoy the following relevant powers:

412.211. GENERAL STATUTORY CITY POWERS.

Every city shall be a municipal corporation having the powers and rights and being subject to the duties of municipal corporations at common law.

Minn. Stat. § 412.211 (Add. 16). Given the broad municipal powers recognized by the Minnesota courts at common law, this is a broad statutory confirmation and grant of municipal power. *See Oakdale*, 588 N.W.2d at 539.

The Minnesota Supreme Court has defined the “imposition of license fees” by the city as “one of the great functions of government.” *Minneapolis St. Ry. Co. v. City of Minneapolis*, 40 N.W.2d 353, 360 (Minn. 1949). The “relinquishment of the power to discharge that function can be derived only from explicit and unequivocal language that is so free from ambiguity as to leave no room for construction.” *Id.*

One searches the Minnesota Statutes in vain for any indication that private owners of gas pipelines enjoy the right to operate and possibly explode those pipelines free from the bothersome need to get and to pay for a permit. Indeed, the specific powers of a statutory city council clearly include the licensure of

hazardous intracity activities – and are far from the unambiguous divestiture of city power required by the Supreme Court.

412.221 SPECIFIC POWERS OF COUNCIL.

Subd. 6. Streets; sewers; sidewalks; public grounds. ... [The council] shall have power by ordinance to regulate the use of streets and other public grounds

Subd. 17. Fire prevention. ... [The council] shall have power to adopt such ordinances as are reasonable and expedient to prevent, control, or extinguish fires.

Subd. 23. Nuisances. The council shall have power by ordinance to define nuisances and provide for their prevention or abatement.

Subd. 32. General welfare. The council shall have power to provide for the government and good order of the city, ... the protection of public and private property, the benefit of residence, trade and commerce, and the promotion of health, safety, order, convenience, and the general welfare by such ordinances not inconsistent with the Constitution and laws of the United States or of this state as it shall deem expedient.

Minn. Stat. §§ 412.211; 412.221 Subd. 6, 17, 23, 32 (Add. 16-21).

A franchise ordinance requiring the Pipeline owner-operator to get a franchise and to pay a fee as a condition for traversing streets and public grounds; as a means of controlling fires by funding first response and fire suppression; as a means of responding to and suppressing the nuisance of the Pipeline's hazardous activity; and to protect property and public safety is authorized by the above-quoted statutes.

The common law of municipalities incorporated by the statute define the city's police powers as even broader than its franchise powers – and this Court has held that Minn. Stat. § 216B.36 preserved both sets of powers. *Oakdale*, 588 N.W.2d at 539-42. The Court stressed the hazard presented by the overhead lines as implicating the city's police power to require under-grounding. *Id.* at 542. Similarly, the danger to the public of high pressure gas clearly implicates Cohasset's right to condition Pipeline operation on payment of fees that will require Minnesota Power to reimburse for the benefits conferred by fire, police, and first response protections.

At bottom, Minnesota Power's objections are semantic – its criticism is that the arrangement here is not the traditional franchise arrangement where the city charges a percentage of the revenues collected from the public for the use of the infrastructure. But, as noted by the Court in *Oakdale*, Minn. Stat. § 216B.36 preserves not just the “franchise power” but also the city's police power to issue a “license” or a “permit” for the hazardous activity and to charge an appropriate licensure fee. What matters is that the activity is hazardous and is subject to city regulation; whether that regulation is called a *permit* for a “private” gas line or a *franchise* of “public” utility infrastructure is irrelevant.

Cities may require permits (and permit fees) for private gas lines and public utility gas lines alike. *See, e.g., Oakdale*, 588 N.W.2d at 539 (utility's “private”

wires dedicated to one industrial customer still subject to city's police power to require underground burial). *City of St. Paul v. Northern States Power*, 462 N.W.2d 379 (Minn. 1990) ("private" use of pipeline to serve large end user still subject to franchise power, though pipeline company rather than end user is the proper subject of the franchise power); *Blaine I*, 121 N.W.2d at 191 (Minn. 1963) (private gas pipeline serving only one large end user in city still subject to city franchise power).

Indeed, cities have historically regulated utilities through the use of police powers that include not just the franchise power, but also the licensing power. *Oakdale*, 588 N.W.2d at 539. A large explosive natural gas pipeline, to the extent it is privately owned rather than operated by a public utility, is an activity implicating the public safety that, at a minimum, can be licensed and charged fees by the city pursuant to the city's police powers. *Cf. State ex rel. City of Minneapolis v. St. Paul, M. & M. Ry. Co.*, 108 N.W. 261 (1906) (equipment's crossing of public streets implicates city's right to require safety devices reasonably necessary for the protection of the public; requiring expenditures by the company crossing the streets is not a taking of property but a legitimate exercise of the city's police powers).

The relevant question, then, is not the "private" nature of the Pipeline but whether the pipeline takes advantage of public services for which it should pay,

and whether city enjoys the power to regulate a potentially hazardous commercial activity within its borders. Clearly the city has such power, given the broad sweep of the city's police powers recognized in *Oakdale*, 588 N.W.2d at 539. The source of the city's power is not the "private" or "public" label one places on the Pipeline, but public health and safety issues implicated by the Pipeline being licensed/franchised and assessed fees. Thus, in upholding the exercise of city regulations above and beyond that specified in the utility franchise, the Minnesota Supreme Court recognized the city's broad right to promote the general welfare. *Minneapolis St. Ry. Co. v. City of Minneapolis*, 40 N.W.2d 353, 358 (Minn. 1949).

A city exercises police power within its jurisdiction practically the same extent as the state itself. This power is not confined to the narrow limits of precedents based on conditions of a past era. Rather, it is a power which changes to meet changing conditions, which call for revised regulations to promote the health, safety, morals, or general welfare of the public.

Id. (quoting *City of Duluth v. Cervený*, 16 N.W.2d 779, 783 (Minn. 1944)). Accordingly, the Minnesota Supreme Court is "committed to a liberal interpretation of charter provisions as to the exercise of police power by municipalities concerning matters peculiarly subject to local regulation." *Minneapolis St. Ry. Co.*, 40 N.W.2d at 358 (quoting *Duluth*, 16 N.W.2d at 783).

The District Court was concerned that Cohasset not misuse its police powers to create a profit center, citing *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn. 1987) for the proposition that "raising revenue is not an acceptable use

of a city's police power." Add. 6. This misquotes the Supreme Court, which distinguished between illegitimate use of police powers to generate revenues and legitimate use of police powers "to recover the costs of regulation." *Country Joe*, 560 N.W.2d at 686. Here, the city is charged with the following regulatory duties to the distinct and considerable benefit of Minnesota Power's Pipeline: emergency first response, fire protection, and police protection. Its franchise fee is directed at recovering the cost of the benefits conferred by these important duties.

Nor was the District Court correct in pointing to an easy alternative means of recovering these costs pursuant to tax levies under Minn. Stat. § 368.85 Subd. 6. Add. 6. These tax levies consist of real property taxes on certain defined fire protection districts. Yet, Minnesota Power does not own real property – it owns the Pipeline. And the Pipeline itself is not subject to personal property taxes if it comes within the pollution remediation exemption. *See* Minn. Stat. § 272.02 Subd. 10. Even to the extent it can be subject to some kind of local tax, Minnesota Power's Pipeline will benefit from the lower rates of taxation resulting from the utility industry's successful lobbying.¹⁰

¹⁰ Historically cities benefitted from the ability to subject the personal property of public utilities to property taxes. *See* Minn. Stat. § 272.01; Research Department, Minnesota House of Representatives, PRIMER ON MINNESOTA'S PROPERTY TAXATION OF ELECTRIC UTILITIES (Oct. 2006) (hereafter cited as "House Research Report"). However, "[o]ver the past two decades, the legislature has granted many tax exemptions for the attached machinery and other personal property at newly constructed facilities. These exemptions have been adopted in response to requests

In short, Cohasset labors under an entirely unfunded statutory mandate to provide emergency first response to the Pipeline. *See* Minn. Stat. § 299J.10. The City also provides fire and police protection. Minnesota Power and its 140,000 customers outside Cohasset, who also benefit from the Pipeline, are happy to let Cohasset bear the public safety burdens created by the enormous amount of flammable high pressure gas piped within Cohasset. The City should be able to charge a private, for-profit entity like Minnesota Power for its use of public roads and public safety services through the one means available: a franchise fee rationally tied to the amount of gas being pumped through the city's environs.

The "private" nature of the Pipeline does not, therefore, limit Cohasset's right to license it and to charge licensing fees. The franchise/licensing power is limited not by the label Minnesota Power wishes to attach to the Pipeline, but by the reasonableness of its exercise. *See Country Joe*, 560 N.W.2d at 686. Thus, Minnesota Power's attempt to define the Pipeline as "private" as opposed to part of its "public utility" mission is a distinction without a difference. Cohasset enjoys

from companies proposing to build new electric generating facilities in Minnesota...." House Research Report p. 8 (emphasis in original).

The Pipeline is part of a \$200 million project to improve the Boswell Energy Center. The new personal property and machinery installed for this project has been exempted from personal property taxes as installed for the purpose of pollution control. *See* Minn. Stat. § 272.02 Subd. 10. Yet, the facility and the attendant personal property benefit from Cohasset's services and infrastructure. What older personal property there is that remains subject to taxation will benefit from legislative reclassification that significantly lower the rate of taxation. *See, e.g.*, Minn. Stat. § 216B.1646.

the police power to regulate it and there is no regulatory exemption for “private” pipelines articulated in the Minnesota Statutes.

III. THE HISTORIC MUNICIPAL LICENSING POWER IS NOT PREEMPTED BY STATE OR BY FEDERAL LAW.

The Court of Appeals may affirm on the basis of “an alternative argument if there are sufficient facts on the record for the appellate court to consider the alternative theory.” *State v. Bunce*, 669 N.W.2d 394, 400 (Minn. App. 2003), *review denied* (Dec. 16, 2003) (citing *State v. Grunig*, 660 N.W.2d 134 (Minn. 2003)). Here, the District Court granted Minnesota Power relief on its theory that it was not a “public utility” subject to Cohasset’s franchise and police powers. The District Court therefore did not reach Minnesota Power’s alternative theory that municipal regulation was preempted by state and federal law. Given that the contention was briefed below and presents pure issues of law, this Court should now reach and decide the preemption issue, as opposed to remanding it to the District Court.

A careful reading of the governing statutes, legislative history, and available precedent compel a finding of *no preemption*.

A. The Franchise/Licensing Power is not “Preempted” by Minn. Stat. § 216G.02.

A pipeline of the size at issue here (i.e., more than 275 pounds per square inch of pressure) cannot be constructed without a “routing permit” from the

MPUC. Minn. Stat. § 216G.02 Subd. 1, 2 (App. 92-3). The legislature instructed the MPUC to promulgate rules on specified items to be addressed in overseeing the routing of high pressure pipelines, none of which concern city franchises. Rather, the MPUC's focus is on considering alternative routes, giving notice to interested parties, holding hearings, and considering environmental factors. Minn. Stat. § 216G.02 Subd. 3 (App. 93).

The present case turns on the following preemption clause at the end of the above statute:

Subd. 4. Primary responsibility and regulation of route designation. The issuance of a pipeline routing permit under this section and subsequent purchase and use of the route locations is the only site approval required to be obtained by the person owning or constructing the pipeline. The pipeline routing permit supersedes and preempts all zoning, building, or land use rules, regulations, or ordinances promulgated by regional, county, local, and special purpose governments.

Minn. Stat. § 216G.02 Subd. 4 (App. 94). Although the statute's actual text says nothing about the statutory power of cities to exercise the franchise power, Minnesota Power reads this text in the broadest possible fashion as completely preempting any role by the cities in regulating the operation of a pipeline whose routing has been approved by the MPUC. Yet, the text and legislative history compel a far more limited reading. The MPUC has assumed responsibility over the routing of the high pressure pipeline; the cities' right to subject the operation of that pipeline to a franchise remains unaffected.

1. Text.

The text of the statute is remarkable for the narrowness of its drafting. Indeed, it is inapplicable to franchises on its face. The statute “preempts” only “zoning, building, or land use rules, regulations, or ordinances promulgated by regional, county, local, and special purpose governments.” Minn. Stat. § 216G.02 Subd. 4 (App. 94). A franchise ordinance is not a zoning regulation. A franchise ordinance is one form, indeed the oldest form, of regulating utilities. *See Oakdale*, 588 N.W.2d at 539 (“Historically, cities have regulated utilities both by [franchise] agreement and through exercise of police power”); 12 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34:2 at 12-13 (2006 Rev. Ed.) (“Generally, a franchise is defined as a special privilege conferred by the government on individuals or corporations and that does not belong to the citizens of a country generally by common right”). The franchise does not grant any proprietary interest in the street or other property used for the pipeline. *See* 12 E. McQUILLIN, *supra*, § 34:2 at 21 & n.27. The policy concerns transcend land use. As noted by the United States Supreme Court, franchises apply to rights “which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control.” *State of California v. Central Pac. R. Co.*, 127 U.S. 1, 40 (1888).

Apart from being applicable only to zoning regulations, not franchises, the preemption statute is also inapplicable because its preemptive sweep is confined to ordinances. Yet, what Minnesota Power is attempting to preempt here is a *statute*, not a local rule or ordinance. Minn. Stat. § 216B.36 (Add. 13) expressly preserves the right of cities to grant franchises. In short, this is not a preemption case at all because it does not involve a requirement set by a lesser branch of government, such as a state in a federal preemption case, or a city in a state preemption case. Rather, any reviewing court would be required to read two different statutes and to attempt to reconcile them. If they cannot be reconciled, the question is whether the pipeline routing statute was intended to *repeal* the franchise statute.

In deciding the repeal issue, the presumptions are on the side of the city. “[A] later law shall not be construed to repeal an earlier law unless the two laws are irreconcilable.” Minn. Stat. § 645.39. The pipeline routing requirement is reconcilable with the franchise requirement. Cohasset does not challenge the site or routing of the Pipeline. What it challenges is Minnesota Power’s apparent intent to operate a pipeline within the City, and to implicate the privileges and benefits of City services, without being subject to a franchise issued by the City and without paying any franchise fee.

The franchise statute simply requires Minnesota Power, once it has routed the Pipeline in accordance with the standards and procedures of Minn. Stat. §

216G, to abide by a franchise from Cohasset to operate this intra-city pipeline. The conditions imposed by the franchise cannot undercut or change the location and other factors decided in the course of the 216G proceedings. But Cohasset can, at a minimum, set a reasonable franchise term and fee; this would not contradict 216G. In this way, Minn. Stat. §§ 216G.02 and 216B.36 are easily reconcilable.

Furthermore, in construing the text of the statute, the Court may consider “administrative interpretations.” Minn. Stat. § 645.16(8). Here, the MPUC has agreed with Cohasset that the franchise power is irrelevant to its consideration of the routing permit. It refused to accept Minnesota Power’s invitation to construe Cohasset’s assertion of the franchise power as a threat to its power under 216G to oversee routing permits. *Ayling Aff. Ex. D* at p. 4 ¶ 18. Indeed, in previously promulgated rules, the MPUC deferred even the routing permit procedure to lines built or expanded pursuant to previously granted franchises. Minn. Admin. R. 7852.0300 Subp. 1 (I) (App. 71). Far from construing the cities as having been completely ousted from their franchise powers, the MPUC read the statute as preserving and as requiring deference to municipal franchise powers.¹¹

¹¹ The rule reads: “This chapter does not apply to: ... I. natural gas pipelines occupying streets, highways, or other public property within a municipality under rights granted pursuant to a license, permit, right, or franchise that has been granted by the municipality under authority of Minnesota Statutes, section 216B.36; ...” *See* Add. 71.

Indeed, the routing permit issued by the MPUC expressly directs Minnesota Power to abide by Cohasset's "permits or licenses", which would include a franchise:

8. Government Agencies. The permittee shall comply with all federal, state, county, and local rules and regulations. The permittee will work with units of government throughout the process to discuss any particular concerns that may arise

....

F. COMPLIANCE WITH COUNTY, CITY, OR MUNICIPAL PERMITS

The permittee shall comply with all terms and conditions of permits or licenses issued by Itasca County, and local units of government (i.e., townships, cities, and municipalities).

App. 57-8.

2. Legislative History.

Minn. Stat. § 216G.02 was first enacted in 1987, *see* Chapter 353, 1987 Minn. Laws, on the basis of Senate File No. 90, which its sponsor, Senator Novak, termed the "Minnesota Pipeline Safety Act." Ayling Aff. Ex. B (Senate Transportation. Committee Minutes Jan. 22, 1987) at p. 00025. Although the audiotapes of hearings are no longer in existence, minutes and committee reports survive in the State Archives and are attached, in full, to the Ayling Affidavit served and filed below. Ayling Aff. ¶ 2 & Ex. A, B.

There is no mention in the available legislative history of local franchise powers or any need to curtail franchise powers. Rather, the concern was safety, and the legislation was a reaction to the infamous 1986 explosion of a pipeline in Mounds View, Minnesota, which killed two suburban residents outside their home on July 8, 1986. Ayling Aff. Ex. B (Senate Public Utilities and Energy Committee Minutes, Feb. 3 1987 (attaching Minnesota Commission on Pipeline Safety, Findings and Recommendations (Dec. 1986)) pp. 0027-93.

Bill-sponsor Senator Novak made no mention of franchise powers or the need to preempt municipal franchise regulation in explaining the bill. Rather, the concern was to adopt routing procedures and other safety measures to prevent another Mounds View disaster.

Senator Steve Novak gave a brief history on S.F. 90, which sets forth a variety of pipeline safety measures designed to prevent a disaster such as the July 8, 1986 pipeline fire in Mounds View. S.F. 90 provides the creation of the Office of Pipeline Safety within the Department of Public Safety. In addition, the bill provides for a statewide notification center for pipeline emergencies, gives the Environmental Quality Board the authority to designate pipeline routes and requires pipeline operators to file information about the location and operation of pipelines in the state. The bill also would require local governments to develop pipeline emergency response plans.

Ayling Aff Ex. B (Senate Public Utilities and Energy Committee Minutes, Feb. 3, 1987) at p. 00025.

In sum, the legislative history demonstrates that the purpose of preemption was to make the state agency the forum for deciding where to route the pipeline. The concern was to prevent another Mounds View disaster. Zoning ordinances and building permits issued by local governments should not determine where to put the pipeline. Rather, the statute substituted a state-administered process that focused attention on environmental factors, construction methods, and consideration of alternative routes. There was no intent to take cities out of their historic role of issuing franchises and collecting franchise fees with respect to pipelines put into their community.

Indeed, the reports considered by the committee stressed the role of local governments in providing emergency first response and recommended improvements to that response. *See* Ayling Aff. Ex. B (Minutes, Senate Public Utilities and Energy (Feb. 3, 1987) (attaching Minnesota Commission on Pipeline Safety, Findings and Recommendations (Dec. 1986) at p. 00045 (finding that local communities vary in their ability to respond and recommending that all local units of government develop an emergency response plan)). And the final version of the bill required local governments to develop such response plans. Chapter 353 § 31, 1987 Minnesota Laws (codified at Minn. Stat. § 299J.10). It would be perverse to read the legislation as taking away the franchise fees that would allow the local governments to fund this emergency first response.

B. The Franchise/Licensing Power is not Preempted by Federal Law.

Under some circumstances, the Pipeline might be recognized as an “interstate pipeline” and thus exempt from the local government’s franchise power. Minnesota Power cited to the District Court several cases in which an interstate pipeline was able to “bypass” the local gas franchisee to serve a large local end user. However, calling the Pipeline “interstate” does not make it so. To be an interstate line, it must be designated as such by the Federal Energy Regulatory Commission (“FERC”). Minnesota Power has not petitioned for that designation, nor is it clear it would obtain the designation if did file a petition.

1. The Federal Regulatory Scheme Preserves the Role of State and Local Authorities as the Regulators of Local Distribution.

Minnesota Power imagines a sweeping system of complete federal preemption of state and local regulation of natural gas pipelines that bears no relation to the longstanding federal policy of preserving an important regulatory role for state and local entities. Indeed the 1938 legislation that federalized some aspects of the natural gas industry, specifically preserved broad regulatory powers of state and local authorities. Thus, the Federal Power Commission (now FERC) saw its jurisdiction limited to sales for resale in interstate commerce. Natural Gas Act, Pub. L. No. 75-688, 52 Stat. 821 (1938) (codified at 15 U.S.C. § 717); Stalon

& Lock, *State-Federal Relations in the Economic Regulation of Energy*, 7 YALE J. REG. 427, 475-76 (1990).

In 1954, Congress passed the “Hinshaw Amendment” to the Natural Gas Act to expand the role of the states in natural gas regulation. The Amendment exempted from FERC regulation certain “Hinshaw pipelines,” which receive all of its out-of-state gas from persons “within or at the boundary of a state if all the natural gas so received is ultimately consumed” within the state in which it is received. 15 U.S.C. § 717(c); see *Consumers Energy Co. v. Federal Energy Regulatory Commission*, 226 F.3d 777, 779 (6th Cir. 2000).

In the latter half of the twentieth century, the federal government began to make rate deregulation the national gas policy, though it still preserved the role of state and local governments in regulating local pipelines. The Natural Gas Policy Act of 1978 relieved FERC of most of its responsibilities for pricing gas and put into place a schedule for deregulating all wellhead prices. Pub. L. No. 95-621, 92 Stat. 3351 (1978) (codified at 15 U.S.C. § 3301; see Stalon & Lock, *supra*, 7 YALE J. REG. at 478. In addition, the Act relieved many of the regulatory burdens on interstate pipelines. *Id.*

FERC then took deregulation one step further by unbundling the gas sold and delivered through the interstate pipeline from the cost of transporting that gas. FERC Order 436, promulgated in October 1985, allowed the separate purchase of

gas and transportation, thereby introducing greater competition to both. 50 Fed. Reg. 42,408 (1985); *see also* FERC Order 636, 57 Fed. Reg. 13,267 (1992) (requiring unbundling); *Algonquin Gas Transmission Company*, 96 FERC ¶ 61364, 2001 WL 1154520 (FERC Sept. 28, 2001) (underlying policy is to promote competition to encourage improved gas services at lower costs).

FERC will not, however, assert jurisdiction over *intrastate* pipelines, such as the one built in Cohasset by Minnesota Power. *See, e.g., Mississippi Valley Gas Co. v. Gulf Fuels, Inc.*, 48 FERC ¶ 61178, 1989 WL 262161 (FERC August 2, 1989).

Be that as it may, to invoke federal jurisdiction, it behooved Minnesota Power to treat the Pipeline as an interstate pipeline. Yet, it did not commence FERC proceedings to obtain a certificate of public convenience and necessity to go into the “interstate” pipeline business. 15 U.S.C. § 717f(c). And even if Minnesota Power had such a certificate, it had to serve required notices of its intent to bypass Cohasset and give Cohasset an opportunity to protest. *See, e.g., Hadson Gas Systems, Inc.*, 45 FERC ¶ 61286, 1988 WL 246588 (FERC Nov. 25, 1988). No FERC proceedings were commenced or invoked by Minnesota Power. Absent such an invocation, the Pipeline cannot be defined as interstate.

2. **The Preemption Cases Cited by Minnesota Power are Inapposite because the Pipeline Company in Those Cases Invoked Federal Jurisdiction.**

In view of the above statutory history, the inapplicability of the preemption cases cited by Minnesota Power becomes readily apparent. In each case, the pipeline company commenced the federal proceedings necessary to invoke FERC jurisdiction and to define the pipeline as interstate in nature. *See United Gas Pipeline Company*, 54 FERC ¶ 61201, 1991 WL 265252 (Sept. 25, 1991) (pipeline company files application for certificate of public convenience and necessity for authorization to transport gas to industrial user); *Michigan Consolidated Gas Company v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989) (pipeline company applies for certificate of public convenience to authorize bypass and build pipeline to industrial user); *Michigan Consolidated Gas Company v. FERC*, 883 F.2d 117 (D.C. Cir. 1989) (earlier appeal from same application for certificate of public convenience and necessity); *Board of Water, Light and Sinking Fund Commissioners of the City of Dalton, Georgia v. FERC*, 294 F.3d 1317 (11th Cir. 2002) (appeal from FERC approval of bypass connection).

Minnesota Power has failed to invoke the FERC jurisdiction necessary to raise the federal preemption issue it wishes to assert herein.

3. **Minnesota Power's Application for a State Routing Permit Necessarily Concedes the Intrastate Nature of the Pipeline.**

The MPUC's rules governing the routing permit process expressly provide an exemption for interstate pipelines:

7852.0300 APPLICABILITY OF RULES

Subpart 1. **Exclusions.** This chapter does not apply to:

....

J. any person that proposes to construct or operate an interstate natural gas pipeline under the authority of the federal Natural Gas Act, United States Code, title 15, section 17, et seq.

Minn. Admin. R. 7852.0300 (2007) (Add. 71); *see also* Minn. Stat. § 216G.06 (interstate gas pipelines with eminent domain power not subject to routing permit process) (App. 96).

In short, if Minnesota Power truly believed the Pipeline was an interstate pipeline, it would not have filed its application for a routing permit. Filing for the permit is a concession that the Pipeline is intrastate in nature. The issuance of an order by the MPUC resolves the matter with finality pursuant to the doctrine of judicial estoppel. *See Cf. Pickens v. Soo Line Railroad Co.*, 264 F.3d 773, 779 (8th Cir. 2001) (“Judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation”; the purpose of which ‘is to protect the integrity of the judicial process’) (quoting *Hossaini v. W. Mo. Med. Ctr.*, 140 F.3d 1140, 1142-43 (8th Cir. 1998)), *cert. denied*, 535 U.S. 1057 (2002); *United States v.*

Grap, 368 F.3d 824, 831 (8th Cir. 2004) (estoppel necessary to prevent party from taking “unfair advantage” or from “play[ing] fast and loose” with the courts).

CONCLUSION

For the above-stated reasons, this Court should reverse the judgment below and remand for further proceedings.

Dated: May 26, 2009.

McGRANN SHEA CARNIVAL
STRAUGHN & LAMB, CHARTERED

By _____

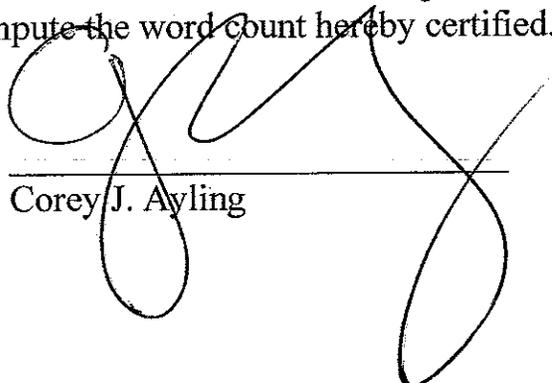
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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.0 Subd. 3 for a brief produced with a proportional font. The length of this brief (exclusive of cover page, table of contents, and table of authorities) is 10,751 words. This brief was prepared using Microsoft Word 2002 XP word processing software, and such software was used to compute the word count hereby certified.

Dated: May 26, 2009.



Corey J. Ayling