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STATE OF MINNESOTA

IN COURT OF APPEALS

City of Cohasset,

Appellant,

vs.

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

Respondent

BRIEF OF *AMICI CURIAE*
LEAGUE OF MINNESOTA CITIES
COALITION OF UTILITY CITIES

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LEGAL ISSUES

I.

Minnesota law provides that a public utility furnishing utility services or occupying streets, highways, or other public property within a municipality may be required to obtain a franchise or license. Is a public utility subject to a city's franchise and licensing authority if it operates a natural-gas pipeline that crosses two county highways and the natural gas will fire a generating plant that allows the public utility to provide electric service to utility customers?

> The district court held that Minnesota Power was exempt from the City's franchise and licensing authority because it will not use the natural-gas pipeline to provide natural-gas service to utility customers.

II.

Minnesota law provides that the state pipeline routing permit preempts all zoning, building, or land use rules, regulations, or ordinances of local governments. Does the state pipeline routing permit preempt a city's franchise and licensing rules, regulations, or ordinances?

> The district court did not reach this issue.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The League of Minnesota Cities (League) has a voluntary membership of 830 out of 854 Minnesota cities including the city of Cohasset. The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy development, risk management and advocacy services. The League's mission is to promote excellence in local government through effective advocacy, expert analysis and trusted guidance for all Minnesota cities.

The Coalition of Utility Cities (CUC) is a group of seven cities (Red Wing, Becker, Monticello, Oak Park Heights, Granite Falls, Hoyt Lakes and Cohasset) that host large power plants within their jurisdictions. The CUC formed in 1997 to protect the utility property tax base in host communities and to stem its ongoing erosion. The group has since expanded its mission to address other issues involving utilities that may affect the group.

The League and the CUC have a public interest in this case as representatives of cities throughout the state with an interest in protecting from erosion the municipal power to franchise and to otherwise license public utilities operating natural-gas pipelines within city borders.[1]

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[1] The League and the CUC certify pursuant to Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE AND FACTS

The League and the CUC concur with Appellant's statement of the case and facts.

STANDARD OF REVIEW

The League and the CUC concur with Appellant's statement of the standard of review.

INTRODUCTION

For more than a century, cities in Minnesota and across the United States have regulated utilities operating within their borders by granting franchises and by exercising their police powers. Municipal franchise power has survived multiple changes in utility regulation because the Minnesota Legislature has recognized that cities are conferring benefits to these utilities. The fees associated with utility franchises and other licenses allow cities to recoup some of the costs associated with the presence of a utility and its equipment such as pipelines and to receive compensation for a utility's use of public resources for private gain.

In this case, Minnesota Power is seeking to avoid obtaining a franchise or other license from the city of Cohasset (City). It claims it is not a public utility subject to the City's franchise and licensing powers because it is not planning to use its natural-gas pipeline to provide natural-gas service to utility customers. It also claims that because it is subject to the Minnesota Public Utility Commission's routing authority, it is exempt from the City's franchise and licensing powers. If Minnesota Power is allowed to evade the City's regulatory authority in this manner, it will significantly erode the municipal franchise and licensing powers of all Minnesota cities.

As Minnesota and the nation move forward with addressing climate change, there will be significant changes in how electricity is generated and distributed. Cities may face an increase in the number of large, natural-gas pipelines built within their borders. As a result, it is crucial that cities retain the ability to grant franchises and to exercise their licensing power over natural-gas pipelines located within their borders. And in times of economic hardship like today, it is even more important that Minnesota cities retain these long-standing municipal powers.

The Minnesota Legislature enacted the Public Utilities Commission (PUC) routing process to protect public safety. This process was intended to bring uniformity to pipeline routing. It complements, but does not replace municipal franchise and licensing powers. Utilities should not be allowed to misuse the state process to evade municipal regulatory authority.

ARGUMENT

I. Municipal Franchise and Licensing Powers are Important Means of Municipal Regulation and Provide Means of Compensating the Public when Private Parties Use Public Resources for Private Gain.

More than a century ago, the United States Supreme Court recognized the power of municipalities to regulate utilities by entering into franchise agreements and by exercising their police powers. New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing Manuf'g Co., 115 U.S. 650, 659 (1885). Minnesota courts have also upheld these municipal powers for more than 100 years. Northern States Power Co. v. City of Oakdale, 588 N.W.2d 534, 539 (Minn. Ct. App. 1999) (surveying case law regarding municipal powers with respect to utilities).

The Minnesota Legislature has codified these long-standing municipal powers. The statutory chapter on utilities explicitly recognizes the right of a municipality to issue a "license, permit, right or franchise" to a public utility and to impose a fee "to raise revenue or defray increased municipal costs accruing as a result of utility operations, or both." Minn. Stat. § 216B.36. Cf. City of Oakdale, 588 N.W.2d at 539.

The Legislature has also recognized municipalities' power to issue franchises in the Public Services Corporation chapter. This statute allows the formation of corporations to supply power, but requires that they obtain a franchise before constructing any pipeline in or upon a "street, alley, or other public ground of a city." Minn. Stat § 301B.01; see also Minn. Stat. § 301B.02.

Municipal franchise power is important because utilities impose burdens on city governments. This is true even when utility lines or pipelines do not cross city streets. The burdens cities face from the presence of utilities can range from minor concerns such as coal dust to serious accidents involving pipeline explosions that can threaten lives throughout the city or region.

When accidents threaten the integrity of a pipeline or when accidents are caused by the pipeline itself, it will be a city's emergency responders that will be called upon to respond. Cities need the capacity to plan for and respond to these incidents. Thus it is vital that cities retain the ability to regulate utilities through franchises or other licenses and to impose fees to support that capacity.

At the end of the 2009 legislative session in May, our state was still facing an approximately $3 billion dollar shortfall between spending and revenues, and our

governor stated his intent to exercise his unallotment powers in July to balance the budget. See *No Special Session, No Government Shutdown – Governor Pawlenty Says He Will Balance State Budget,* Press Release, Office of the Governor (May 14, 2009) at http://www.governor.state.mn.us/mediacenter/pressreleases/PROD009513.html. The Governor will likely balance the budget by again decreasing Local Government Aid (LGA)[2] and by reducing other aid programs like the Utility Valuation Transition Aid[3] to cities.

Cities will still need to provide city services, however, including emergency-response services. Thus, in these times of economic hardship, the ability to impose franchise and licensing fees to recover costs are even more important to cities. This Court should not narrow these important, long-standing municipal powers without clear direction from the Legislature.

The changing nature of energy generation and distribution will also make it increasingly important that cities retain their franchise and licensing powers. As the country and Minnesota move forward with climate-control goals, natural-gas operations will likely increase. See, e.g., James E. Kloeppel, *Substituting Natural Gas For Coal Offers Long-Term Climate Benefits*, News Bureau, University of Illinois at Urbana-

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[2] See, e.g., *Aid Cuts to Local Governments in CY 2003 and* 2004, Information Brief, Minnesota House of Representatives Research Department (February 2004). *Amici* Addendum 1-8.

[3] As a result of changes to the utility valuation process, cities with the CUC and throughout Minnesota lost a significant portion of their property tax base. The Legislature, recognizing the burden these cities face as a result of the presence of utilities, awarded them Utility Valuation Transition Aid. See Utility Valuation Transition Aid 2009, Minnesota Department of Revenue, Property Tax Division (July 31, 2008). *Amici* Addendum 9.

Champaign (July 3, 2002) at http://news.illinois.edu/scitips/ 02/ 0703fuels. html. There will likely be other changes involving new energy technology as Minnesota has adopted one of the strongest renewable-energy standards in the country. See Minn. Laws 2007, Ch. 3 (adopting Minnesota's renewable-energy standard). Thus, many cities may see new energy infrastructure, including underground infrastructure, built within their borders. With all of these changes on the horizon, it is essential that cities be allowed to continue exercising their franchise and licensing powers.

A. A Utility Should Not Be Allowed to Evade a City's Franchise and Licensing Powers By Disclaiming Part of Its Operations

Minnesota Power attempts to evade the City's franchise and licensing powers by arguing that even though it is a public utility that provides electric service inside of and outside of the City, it is not a public utility within the City's boundaries because it will not use its natural-gas pipeline to provide natural-gas service to utility customers. It is undisputed, however, that the purpose of the natural-gas pipeline that is located within the City is to fire Minnesota Power's electricity generating plant which is also located within the City. See Appellant's Brief at 5. And this generating plant, in turn, makes it possible for Minnesota Power to provide electric service as a public utility. Allowing a utility company to disclaim part of its operations in order to pick and choose its status as a public utility in this manner is at odds with Minnesota law, and it is bad public policy.

Minnesota Power provides electric service to over 100,000 retail customers in Northeastern Minnesota. See Appellant's Brief at 4. In its routing application to the Public Utilities Commission, it sets forth the public-utility purposes related to the

pipeline. See Harper Aff. Ex. A at p. v. This type of activity puts Minnesota Power squarely within the definition of a public utility set forth in Minn. Stat § 216B.02.

It is bad public policy to allow a public utility to disavow its legal obligations to a municipality for integral parts of its operations, particularly parts that could pose a danger to the public. The corporate entity that is providing power to Northern Minnesota residents is the same entity that built this pipeline. The pipeline will be an integral part of its provision of electrical service to customers. This natural gas will enable it to continue effectively serving its electrical customers.

The statute allowing the formation of public service corporations to supply energy recognizes that these corporations will need to construct "all requisite...pipes" to deliver power. Minn. Stat. § 301B.01. It also states that no such corporation "may construct, maintain, or operate...a pipeline" without obtaining a franchise. Id. The statute does not exempt or make a distinction for pipelines supplying the fuel necessary to generate energy. Similarly, Minn. Stat. § 216B.36 does not make such an exception either.

Allowing a public utility to disclaim part of its operations in this manner would seriously erode cities' franchise and licensing powers. This result harms cities across the state. As natural-gas use increases, other utilities and industrial consumers of natural gas may follow Minnesota Power's lead and build underground pipelines or other power-related infrastructure through cities without connecting into a franchised operation or obtaining a separate franchise or permit. These pipelines and new infrastructure will still create burdens for cities and will use public resources for private gain. This Court should

not allow Minnesota Power to disclaim part of its operations and to pick and choose its status as a public utility in order to evade the City's franchise and licensing authority.

B. Large Industrial Consumers of Natural Gas Are Subject To Municipal Franchise and Licensing Authority Under Municipal Police Powers

Minnesota Power is not only subject to the City's franchise and licensing authority under Minn. Stat. § 216B.36. It is also subject to the City's franchise and licensing authority as a large industrial consumer of natural gas under municipal police powers. The Minnesota Supreme Court has expressed displeasure with natural-gas customers seeking to avoid municipal franchise fees by connecting to other vendors. Moreover, it has also acknowledged that a utility's natural-gas pipeline may be subject to a franchise fee even if a specific transaction does not involve one of the utility's customers.

The Minnesota Supreme Court expressed its displeasure with natural-gas customers seeking to avoid city franchises in Village of Blaine v. Indep. Sch. Dist. No. 12, Anoka County (Blaine I), 121 N.W. 2d 183, 265 Minn. 9 (Minn. 1963) and Village of Blaine v. Indep. Sch. Dist. No. 12, Anoka County, (Blaine II) 138 N.W. 2d 32, 272 Minn. 343 (Minn. 1965). In these cases, a school district located within Blaine sought to avoid the city's franchise power by building its own pipeline and purchasing natural gas from a utility company in a neighboring city. 138 N.W. 2d at 35-36. The Minnesota Supreme Court rejected this attempt to bypass Blaine's franchise power. Id. at 45.

Minnesota Power is making a similar attempt to avoid Cohasset's franchise and licensing powers. Cohasset's natural-gas system was constructed, in part, because Minnesota Power had expressed interest in purchasing gas from the City's utility. See

Appellant's Brief at 7-8. It even advised the City to build a 6-inch pipe to serve Minnesota Power's natural-gas needs. Id. Yet, when Minnesota Power finally decided to purchase natural gas, it chose to bypass the City's natural-gas system and build its own pipeline. Id. This is the type of situation the Supreme Court sought to avoid through its holding in Blaine II.

The fact that the gas is for a utility's own use or that it has "industrial" purposes does not change that outcome. In City of Saint Paul v. Northern States Power Co., 462 N.W.2d 379, 385 (Minn. 1990), the Minnesota Supreme Court pointed out that the city of St. Paul could have imposed a fee for natural gas transported by Northern States Power (NSP) within the city even though NSP was not a party to the sale transaction. Like Minnesota Power, NSP was a public utility for purposes of state statute. The Minnesota Supreme Court held that the franchise fee could apply even when NSP was not acting in that capacity. Id.

To allow a utility to circumvent a city's franchise and licensing powers in this manner would have serious ramifications for cities throughout Minnesota. If Minnesota Power prevails, other utilities or industrial plants within a city's boundaries may decide to build pipelines for their own use following a route that does not parallel or cross city streets to connect to another source not subject to the city's franchise power. If this type of energy infrastructure is constructed within a city, it should be subject to that city's franchise and licensing authority under municipal police powers.

C. The State's Routing Process Should Not Be Misused to Subvert Municipal Franchise And Licensing Powers

When the Minnesota Legislature enacted the state routing process, it was reacting to a serious tragedy – the explosion of a pipeline and the death of two Minnesota citizens. The State sought to enact safety measures to prevent further tragic accidents. See Appellant's Brief at 42-44. The Legislature expressed no intent to eliminate municipal franchise or police powers with respect to utilities.

The language of the preemption clause within the statute authorizing PUC's routing power clarified that the Legislature did not intend to eliminate local franchise or police powers. The statute reads, "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 (emphasis added). By specifically mentioning zoning, building, and land use powers, the Legislature signaled its intent to leave other municipal powers, such as franchise and licensing powers, in place.

Minnesota Power also asserts that because it applied for a PUC permit it is automatically exempt from a local franchise or permit. The permit that the PUC issued, however, specifically states that Minnesota Power shall "comply with all terms and conditions of permits or licenses issued by...local units of government (i.e...cities.)" See Appellant's Appendix at 58. (Paragraph VIII F of permit).

If this Court holds that that the PUC routing permit process preempts a city's franchise and licensing powers, it would allow utilities and other industrial customers to

use the permit process to evade municipal franchise and licensing powers, with significant consequences for Cohasset, members of the CUC and other Minnesota cities. Other utilities or industrial plants could decide to build pipelines that are large enough to fall within the PUC's permitting powers. If a franchise or license has not yet been issued to such a pipeline, the utility or industrial plant could simply do as Minnesota Power has done and file for a permit, and then claim it is exempt from municipal regulatory authority. And even if a franchise has already been issued to such a pipeline, a utility or industrial plant could still argue that the existing franchise is preempted by state law.

The Legislature did not intend such results. The fact that it required local governments to develop pipeline-response plans demonstrates that the Legislature understood municipalities would have continuing involvement with pipelines that are constructed within their city limits. See Minn. Stat. § 299J.10. It only makes sense that the Legislature intended that franchise and licensing fees would remain in place in order to help fund emergency-response costs. This Court should not allow Minnesota Power or other industrial consumers of natural gas to use the PUC permitting process to subvert municipalities' franchise and licensing powers.

CONCLUSION

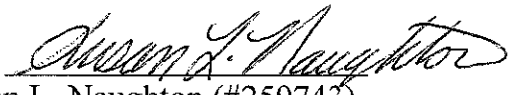
This Court should reject the arguments that Minnesota Power makes to evade the City's franchise and licensing powers because these arguments are inconsistent with the law, and they are bad public policy. A public utility should not be allowed to disavow integral parts of its operations and to pick and choose its status as a public utility in order to evade cities' franchise and licensing authority under state statute. In addition, large industrial consumers of natural gas are also subject to municipal franchise and licensing authority under municipal police powers. And finally, the state's PUC routing process was designed to protect public safety and bring uniformity to routing. It complements, but does not replace municipal franchise and licensing powers.

This Court's decision will have a statewide impact. The League and the CUC urge this Court to protect municipal franchise and licensing powers from erosion because these long-standing powers allow cities to recoup some of the costs associated with the presence of a utility and to receive compensation for a utility's use of public resources for private gain. For all of these reasons, the League and the CUC respectfully request that this Court reverse the trial court's decision.

Dated: June 2, 2009

Respectfully submitted,

LEAGUE OF MINNESOTA CITIES
COALITION OF UTILITY CITIES

By: 

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