

NO. A09-572

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State of Minnesota  
**In Court of Appeals**

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City of Cohasset,

*Appellant,*

vs.

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

*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## SUMMARY OF ARGUMENT

Minnesota Power has routed 974 pounds of natural gas per square inch through a 1.3-mile long, 10-inch wide pipeline located entirely within Cohasset, and that traverses public roads (the "Pipeline"). Cohasset is charged with the responsibility to provide emergency-first-response, fire, and police protection with respect to the Pipeline. All agree that the Minnesota Public Utilities Commission ("MPUC") decides in the first instance whether the Pipeline can be situated as proposed. At issue is whether Cohasset can subject operation of the Pipeline to a license/franchise, including payment of a fee.

Great issues of law and public policy – such as the extent to which local government can continue to require companies to pay for their use of public resources – should be decided by reading plain statutory language plainly and in the light of governing public policy. Minnesota Power proposes, instead, to decide such issues on the basis of arbitrary verbal formulas manipulated to its advantage and without reference to what the legislature was plainly attempting to accomplish. Thus, Minnesota Power creates a new legal category – "private industrial use" – out of whole cloth and attempts to shield its activities from local licensure by calling what it does "private" and "industrial." Similarly, Minnesota Power attempts to resurrect the thoroughly discredited distinction between "direct" and "indirect." Its Pipeline is not used *directly* to sell electricity to over 100,000 retail

customers, but it is an integral part of the equipment and facilities that furnish electricity to those same retail customers. That the Pipeline is used *indirectly* to effect retail sales by firing up the generating plant is not the kind of distinction that should make a difference.

Cohasset urges the Court to decide the case by focusing on the plain language of the governing statutes. The fair and plain reading of that statutory language, and the underlying public policy judgments reflected in the legislative history, caselaw, and agency rulings, all support holding that cities can continue to do what they have been doing for the past 150 years. And that well-established practice is to license or franchise a private company's use of public resources.

## ARGUMENT

### **I. MINNESOTA POWER PLAINLY ACTS AS A "PUBLIC UTILITY" IN OPERATING THE PIPELINE.**

Minn. Stat. § 216B.36 preserves a city's franchise power over any "public utility" that engages in *either* of two acts. *First*, a public utility that is "furnishing the utility services enumerated in section 216B.02" is subject to franchise. Minn. Stat. § 216B.36 (Reprinted in Addendum to Appellants' Initial Brief ("Add.") at 13). *Second*, a public utility that is "occupying streets, highways, or other public property within a municipality" is subject to franchise. *Id.*

As for the former category of conduct, Minn. Stat. § 216B.02 states that "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 ....” Add. 9.

Minnesota Power asserts that this case “boils down to one simple, uncontestable issue”, which is that the Pipeline is exempt from local ordinance because it is for “Minnesota Power’s own private industrial purposes.” Respondent’s Brief at 5. Yet, the term “private industrial purposes” is nowhere to be found in the governing statutes. As admitted and asserted in Minnesota Power’s own filing with the MPUC, the Pipeline is used to fire up Minnesota Power’s largest electricity generating plant. The Pipeline is a piece of “equipment” and is a “facility” used to furnish retail electrical service to over 100,000 Minnesotans. Under the plain and literal terms of the Minn. Stat. 216B.02, Minnesota Power is acting as a public utility in operating the Pipeline, and this Pipeline activity is subject to Cohasset’s franchise power.

Turning to the second, alternative definition of conduct that exposes Minnesota Power to Cohasset’s franchise power, Minnesota Power acts as a public utility in “occupying streets, highways, or other public property within a municipality.” Its Pipeline most decidedly traverses underneath public property in the form of County Road 88, U.S. Highway 2, and County Road 87. This act triggers Cohasset’s franchise power expressly preserved by Minn. Stat. § 216B.36.

Minnesota Power concedes that *if* the local government's franchise power is triggered by its conduct in Cohasset, the pipeline routing statute vesting routing power with the MPUC does *not* preempt this franchise power under Minn. Stat. § 216G.02 Subd. 4 (reprinted in Appellant's Appendix ("App.") at 94). Because Cohasset's franchise power is triggered by the Pipeline under the plain meaning of the Minn. Stat. § 216B.36, Cohasset's franchise ordinance must be enforced. The District Court's judgment summarily overturning that ordinance should be reversed.

**II. COHASSET'S READING OF THE STATUTE IS MORE CONSISTENT WITH THE PUBLIC POLICY CHOICES INTENDED BY THE LEGISLATURE AND REFLECTED IN COURT AND AGENCY RULINGS.**

As indicated in Cohasset's initial brief, the above reading of the statute as preserving local franchise powers is more in accord with legislative intent than is Minnesota Power's self-serving reading. Minnesota preserved the role of cities as the prime regulators of utilities for a half-century longer than the vast majority of states. When Minnesota did empower a statewide utilities commission in 1974, its intent was to cede ratemaking (as opposed to franchising) powers to the State. Moreover, in creating the routing permit procedure and vesting siting power with the MPUC, the Minnesota legislature reaffirmed the continuing involvement of local government, requiring cities to assume first-response powers. The franchise

power provides the cities with a funding mechanism to discharge that intended statutory role. Appellant's Initial Brief at 15-19, 42-44.

“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16. In ascertaining this intent, the Court should presume that the legislature “intends to favor the public interest as against any private interest.” Minn. Stat. § 645.17(5). It is difficult to imagine how the legislature could have intended to insulate a private company like Minnesota Power from any obligation to pay a franchise fee to the city for the public resources its pipeline uses while at the same time imposing on the city an obligation to provide first-response services to the gas pipelines operated by those private companies.

Furthermore, the Court should defer to legislative interpretations of the statute, Minn. Stat. § 645.16(8); should consider the consequences of a particular interpretation, Minn. Stat. § 645.16(6); and should strive to make the entire statute effective and certain, Minn. Stat. § 645.17(2). Minnesota Power ignores that the Minnesota legislature has already promulgated an interpretation of the statutory definition of public utility in this precise context. In particular, Minn. Stat. § 216B.045 Subd. 1 (Add. 11) expressly contemplates the possibility that a “public utility” – i.e., an electric utility and not just a gas utility – would choose to own or operate a local gas pipeline for its own use. Such “public utility” status allows the

electric utility to dispense with the statutory duty to make the pipeline openly accessible by other users wishing to transport gas. Minn. Stat. § 216B.045 Subd. 1, 3. In those circumstances, the electric utility's pipeline is not deemed to be an "intrastate pipeline" under Subdivision 1 and therefore is exempt from the open access obligations defined by Subdivision 3.

In short, the only way that Minnesota Power can deny open access by anyone who wishes to use the Pipeline on a nondiscriminatory basis is to assert its public utility status. If it is truly wearing its "private", nonutility "hat" when it operates the Pipeline, then Minnesota Power cannot dedicate the Pipeline to its own needs. Such a "private" nonutility pipeline owner is obligated to allow open access.

The way to give all these statutes full effect and the way to honor the legislative policy choice that only a *public utility's* pipeline could be dedicated to its own needs with no obligation to serve others is to adopt Cohasset's statutory interpretation. The statutes, legislative interpretations, and legislative policy choices are all reconciled if the Court finds that an electric utility operating a dedicated gas pipeline must do so in a public utility capacity.

Turning next to court interpretations of the statutory definition of "public utility", Minnesota Power cites two Minnesota Supreme Court cases as adopting its proposed interpretation. It places particular emphasis on *Northern Natural Gas*

*Co. v. Minnesota Public Service Commission*, 292 N.W.2d 759 (Minn. 1980).

There, the Court found that a *gas* utility company that serves more than 25 industrial customers is sufficiently serving gas at “retail” to be deemed a public utility subject to the State’s rate regulation. Minnesota Power sees this case as making “retail” sale the key component for conferring public utility status.

This argument is little more than beating a straw-man. Cohasset does not read the “retail” sales component out of the definition of public utility. It simply points out that Minnesota Power has 140,000 retail sales of *electricity* in Minnesota. The Pipeline is one of those pieces of “equipment” and is one of those “facilities” used by the electric utility to effectuate those retail sales. In operating the Pipeline to fire the electricity generating plant, Minnesota Power is “operating ... equipment ... for furnishing at retail ... electric service.” Minn. Stat. § 216B.02 Subd. 4. It is therefore acting as a “public utility” under this statute.

If anything, *Northern Natural Gas* is instructive for repudiating Minnesota Power’s narrow approach to the statutory definition of public utility. Direct sales to a few dozen large users is not the standard understanding of a “retail” sale; at first blush it strikes one as a “wholesale” rather than as a “retail” sale. But what the Court stressed was to avoid formulaic tests that limit the definition to some arbitrarily narrow and traditional definition of “retail” sale. The definition and the legal result must not depend on a “rigid” test but on “the particular facts in each

case and emphasizing the public character of electric service.” *Northern Natural Gas*, 292 N.W.2d at 763. Here, given the public nature of electric service and the use of the Pipeline as equipment integral to making many thousands of retail sales of electric service, it is appropriate to define the Pipeline as a “public utility” activity of Minnesota Power.

What Minnesota Power is really arguing, at bottom, is that the Pipeline is too *indirectly* involved in retail sales to be deemed to be part and parcel of Minnesota Power’s retail, public-utility mission. In Minnesota Power’s view, only *direct* retail use of the Pipeline for gas sales to the public suffices to make the Pipeline a retail, public utility activity. Yet, the words “direct” or “indirect” nowhere appear in the statute; and the cases cited by Cohasset in its initial brief at pages 21-26 all stress a functional, flexible test that assesses the public interest involved in the particular activity.

Indeed, the direct/indirect distinction is an arbitrarily fuzzy one doomed to impractical application and justly repudiated by courts in a number of contexts. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 815-19 (2000) (label of “direct” or “indirect” is arbitrary and does not further the analysis); *Boos v. Barry*, 485 U.S. 312, 331 (1988) (the direct/indirect distinction is a fuzzy one that has been rejected in Commerce Clause analysis); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (overruling direct/indirect test in commerce clause cases as formulaic;

adopting more functional test); 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-4 (3d ed. 2000) (defining burden on interstate commerce as “direct” or “indirect” only serves to mask the analysis).

The second decision cited by Minnesota Power is *City of Saint Paul v. Northern States Power Company*, 462 N.W.2d 379 (Minn. 1990). There, the Court found that a gas pipeline within a city was subject to a franchise, but that end users who purchase gas from brokerage companies like Enron and hired the pipeline to transport the gas need not obtain a franchise. Here, it is the Pipeline operation that Cohasset wishes to subject to a franchise. The *NSP* decision not only approves of franchising pipelines, but approves of calculating the franchise fee on the basis of all gas shipped along the pipeline, including the gas shipped by Enron to end users in the city. *NSP*, 462 N.W.2d at 385.

Minnesota Power once again lays great stress on the retail uses of the Pipeline as a factor that triggers the franchise power. But it once again ignores that Cohasset has satisfied the retail use component by relying on Minnesota Power’s use of the Pipeline as a piece of equipment or as a facility involved in providing retail sale of electricity.

Finally, agency interpretations support Cohasset’s definition of public utility. As indicated in Cohasset’s initial brief at pp. 41-42, the MPUC’s routing permit required Minnesota Power to obey local regulations. In addition, MPUC

rules expressly defer to franchises granted by cities. Minn. Admin. R. 7852.0300 Subp. 1(I).

In sum, Cohasset's definition of "public utility" accords with the plain meaning of the statutory definition, with legislative intent, and with applicable court and agency interpretations. Minnesota Power's attempt to insulate from regulation a Pipeline facility that is clearly integral to the production of electricity for retail sale is wholly arbitrary and self-serving.

**III. EVEN IF MINNESOTA POWER WERE NOT ACTING AS A PUBLIC UTILITY, ITS PIPELINE WOULD STILL BE SUBJECT TO COHASSET'S POLICE POWERS TO LICENSE.**

As indicated in Cohasset's initial brief, explosive natural gas pipelines that use public resources are not favored creatures of the law exempt from all regulation. Whether the owner/operator is a public utility, a private nonutility, or a public utility acting in some kind of nonutility capacity, the Pipeline presents the same public policy concerns. The city's power to license that Pipeline is broader than its franchise power because it applies to utilities and non-utilities alike. Cohasset Initial Brief at pp. 28-37.

Minnesota Power does not take issue with these assertions. Instead, it claims that only exercise of the more narrow municipal franchise power is preserved from the preemptive sweep of Minn. Stat. § 216G.02 Subd. 4. The broad right to subject non-utilities to the requirement of a license and a license fee

to operate an explosive high pressure pipeline is, Minnesota Power claims, preempted by the following language:

**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.

Nowhere does this statute distinguish between a “franchise” granted to a public utility and a “license” granted to a nonutility. The distinction, rather, is between *zoning* regulations and other regulations. Only zoning regulations are preempted. Minnesota Power admits that a “franchise” issued to a public utility is not a “zoning” regulation and therefore is not preempted by the statute. An identical “license” issued to a nonutility is similarly distinct from a “zoning” regulation. The difference between a franchise and a license is not in the nature of the regulation, but in the legal status of the regulated party. But the preemption statute only speaks to the nature of the regulation and does not mention the legal status of the regulated party as the relevant factor in defining the scope of preemption.

Nor does Minnesota Power explain what possible public policy is served by exempting non-utilities from municipal licensing. Why would the presumably

better-funded, more accountable, heavily-regulated public utility be required to pay a franchise fee? Why would a nonutility be a better candidate for an exemption from regulation? It uses the same public resources and requires the same emergency-first-response service that a similarly situated public utility pipeline uses and requires. The nonutility's general freedom from regulation and accountability are factors that militate in favor of more rather than less regulation. What possible rational policy is served by such a distinction, other than to provide a windfall to the nonutility?

In *St. Paul v. NSP*, 462 N.W.2d at 379, the public policy justification for freeing end users from a franchise requirement was the deregulatory natural gas policy of the federal government that encouraged such unbundled direct sales and the ability of the city to protect itself by charging the pipeline operator a franchise fee for all gas transported within the city. No comparable federal policy is present here, nor is there an alternative candidate to whom to issue a franchise. Indeed in *NSP*, the very pipeline activity at issue here was subject to the City's franchise/licensing power. At best, the *NSP* case might permit Minnesota Power to argue (albeit with some considerable stretching) that its end use facility – the Boswell Energy Center as opposed to the Pipeline – should be exempt from franchise or licensing. But that is not at issue here. What is at issue here is whether the city can, like Minnesota cities have done since the late 19<sup>th</sup> Century,

require franchise/licensing of an explosive pipeline running through the city and traversing public roads.

In short, Minnesota Power's analysis bears little relation to actual statutory text and contains no policy justification. It is wholly formulaic, manipulating language and legal categories to reach the desired result of being held exempt from the duty to pay the public a fee for the public resources that Minnesota Power uses. Yet, in an epigram that has been attributed to Justice Warren, "It is the spirit and not the form of law that keeps justice alive."

## CONCLUSION

Because the Pipeline operations are plainly a public-utility activity subject to the City's franchise power; because such a plain reading of statutory language is in accord with public policy as expressed in the statutes, legislative history, caselaw, and agency rulings; and because regardless of public utility status, the City enjoys the historic power to license pipelines that traverse public roads and that use public resources, Cohasset may license/franchise the Pipeline and require the payment of fees. This Court should therefore reverse the judgment below and remand for further proceedings.

Dated: July 10, 2009.

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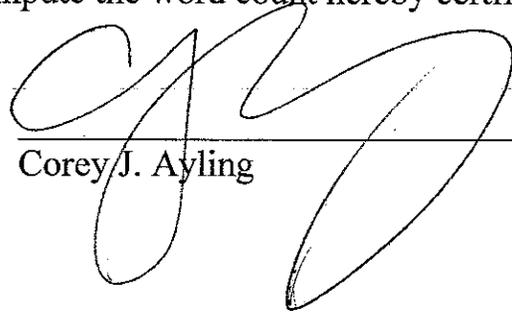
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**CERTIFICATE OF BRIEF LENGTH**

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 3,166 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: July 10, 2009.



Corey J. Ayling