

NO. A09-572

State of Minnesota
In Supreme Court

City of Cohasset,

Appellant,

vs.

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

Respondent.

APPELLANT'S REPLY BRIEF

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ARGUMENT

In the dissent below, Judge Stoneburner stated: “the majority is adding language to the unambiguous language in Minn. Stat. § 216B.36 that authorizes the city to require Minnesota Power to obtain a franchise or permit for its natural gas pipeline that occupies streets, highways, or other public property within the city.” Appellant’s Addendum (“Add.”) A0016. To defend the decisions below, Minnesota Power adds words and new categories to an otherwise plain statute and fails to address Judge Stoneburner’s criticism. Nor can Minnesota Power cite one decision in the history of recorded jurisprudence which permitted private for-profit entities to construct explosive systems through a city and underneath public streets without the consent of the city. Indeed, every case Minnesota Power attempts to cite confirms the power of the city to approve or disapprove such systems.

Finally, given the cursory, if not Delphic nature of the discussion, Minnesota Power attempts to salvage the case with what can best be described as two “throw-away” preemption arguments. *First*, Minnesota Power hints that federal preemption somehow stands in the way of Cohasset’s assertion of jurisdiction. *Second*, Minnesota Power insists, in the face of contrary language, that the pipeline routing statute “plainly” preempts the cities from exercising any franchise or permit power. Cohasset will address these cursory “throw-away” arguments at

sufficient length to clarify the record. Consistent with the half-hearted manner in which each is asserted, neither argument withstands close analysis.

I. MINNESOTA POWER ADDS WORDS TO PLAIN STATUTORY LANGUAGE.

The bedrock premise of Minnesota Power's case is that it is not a "public utility." Such an assertion might surprise the company's Wall Street investors, its 141,000 retail customers, and the regulators who rely on its public utility status to grant Minnesota Power the right to charge higher rates and to realize tax advantages.

This assault on plain speaking prompted Judge Stoneburner to restate the obvious: "Minnesota Power is plainly a public utility under the definition of 'public utility' in section 216B.02, subd. 4. Minnesota Power is plainly furnishing utility services enumerated in section 216B.02, and Minnesota Power's pipeline plainly occupies 'streets, highways, or other public property' within the city." Add. A0016.

As noted in Cohasset's initial brief, three separate statutory sections define this public utility status as triggering an obligation to get a franchise for pipeline operations:

- Minn. Stat. § 216B.36 extends Cohasset's franchise power to "[a]ny public utility furnishing utility services" within the city;

- Minn. Stat. § 216B.36 alternatively extends Cohasset’s franchise power to “[a]ny public utility ... occupying streets, highways, or other public property”; and
- Minn. Stat. § 301B.01 requires any “public service corporation” to obtain a franchise to “construct, maintain, or operate a ... pipe line.”

To escape the force of these sections, Minnesota Power rewrites each statute. Thus, according to Minnesota Power, the city can only require a “*natural gas*” public utility to get a franchise for the operation of a natural gas pipeline. Thus, a pipeline used by a public service corporation for its own “*private industrial use*” is somehow exempt from the franchise requirement. Thus, the pipeline is not absolutely “*essential*” to igniting the electric plant (given the alternative of fuel oil ignition), therefore it is somehow not a part of the company’s public utility operation. These terms are simply made up by Minnesota Power to rationalize its defiance of plain statutory language. In criticizing the majority for adopting this approach, Judge Stoneburner wrote: “The legislature has the power to make the distinctions made by the majority, but I submit this court does not.” Add. A0017.

II. MINNESOTA POWER’S POSITION IS WITHOUT PRECEDENT.

As demonstrated in Cohasset’s initial brief, cities have subjected explosive systems crossing streets within their borders to franchises or permits for the past 3

centuries.¹ In attempted rebuttal, Minnesota Power has cited four cases as confirming its position that “private” pipelines which are not used to sell gas at retail are exempt from the city’s franchise power. In each of these cited cases, the city *approved* the use of public streets for the utility infrastructure at issue.

The most recent case was before this Court in 1990. *City of St. Paul v. N.S.P. Co.*, 462 N.W.2d 379 (Minn. 1990). In that case, the natural gas pipeline within the city operated by Northern States Power had long been the subject of a city franchise. The question presented in that case was whether Enron and other middlemen could buy gas on the interstate market, pay NSP to ship the gas to large industrial users within the city, and then sell the gas to those end users without obtaining a franchise. This Court required no franchise because Enron’s “only connection to St. Paul is its customer there.” *Id.*, 462 N.W.2d at 383. “[T]he statute [Minn. Stat. ch. 300 conferring the franchise power] appears to be tailored to cover those companies which install the means to supply the power.” *Id.*, at 384-85.

¹ It should be noted in this regard that use of the streets and crossing the streets includes tunneling underneath the street. As noted by this Court in *Village of Blaine v. Independent School District No. 12*, 138 N.W.2d 32, 43 (Minn. 1965), “[t]he public right goes to the full width of the street and extends indefinitely upward and downward so far at least as to prohibit encroachment upon said limits by any person by any means by which the enjoyment of said public right is or may be in any manner hindered or obstructed or made inconvenient or dangerous [quoting *Wheeler v. City of Fort Dodge*, 108 N.W. 1057, 1058 (Iowa 1906)].”

In other words, it was assumed by the Supreme Court that N.S.P.'s operation of the St. Paul pipeline could be subject to the franchise. That pipeline, after all, was operated by a public utility that benefitted from the burdens the pipeline placed on the public – and could fairly be charged a franchise fee. The franchise power was simply not extended beyond public utility operators like N.S.P. (or Minnesota Power) to the Enrons of the world. Middlemen who shipped gas over the pipeline or end users who bought gas over the pipeline could not be forced to get a franchise. But the pipeline operator – NSP in the matter before the Supreme Court in 1990 or Minnesota Power in the present case – clearly could be subject to the franchise power.

One of the public policy issues that troubled the Court in its 1990 decision was the potentially unreasonable restrictions on commerce posed by requiring multiple gas marketers like Enron and multiple end users to get a franchise:

While we do not deem it necessary, therefore, to reach the federal issues raised by the parties in their briefs, it is difficult to envision how the franchise scheme advocated by St. Paul would not pose a very heavy burden on interstate commerce. Though the record does not disclose how many possible sellers of natural gas to end users in St. Paul might exist, either within or without the State of Minnesota, the record does indicate that there are currently eight large end users within St. Paul taking advantage of direct sales from out-of-state suppliers, and these numbers are expected to grow. Thus, the unreasonableness of requiring every seller to acquire a franchise to sell gas within the City of St. Paul becomes apparent. If each seller were required to secure a franchise ... would a seller be encouraged to make a bid to supply such gas without knowing whether it would

receive franchise or not? Would the franchise be adopted in time to complete the sale?

Id., 462 N.W.2d at 385. By contrast, operation of the pipeline itself was clearly an appropriate matter of local concern, including the requirement of a franchise.

[The federal Natural Gas Act] expressly carves out a regulatory role for the States, however, providing that the States retain jurisdiction over intrastate transportation, local distribution and distribution facilities, and over ‘the production or gathering of natural gas.’

Id., 462 N.W.2d at 381 (citing *Northwest Central Pipeline Corp. v. State Corp Comm’n of Kansas*, 489 U.S. 493 (1989)).

In short, *City of St. Paul v. NSP* confirmed the historic power of the cities to require operators of intracity natural gas pipelines to get a franchise and to pay a franchise fee. It did not extend this power to end users and gas marketers who shipped natural gas over that pipeline – though the Court was careful to point out that even these transactions could be included in the franchise fee charged NSP (who would then turn around and build this into the transportation fee charged the gas marketers or end users). *Id.*, 462 N.W.2d at 385.

The other Minnesota case cited by Minnesota Power is *Northern States Power Co. v. City of Granite Falls*, 242 N.W. 714 (Minn. 1932). There, Granite Falls contracted with NSP to connect its lines to the city’s hydroelectric plant. The Court refused to define this contract as a de facto franchise, which would have been prohibited by the city’s charter restrictions on franchises. Thus, the Court

denied an *ultra vires* challenge to the City's consent that NSP make use of city streets to run lines to the City's plant. The Court noted that NSP had not been granted the right to "furnish electric energy to inhabitants of the city or other customers outside it." *Id.*, 242 N.W. at 716.

Here, by contrast, the city did *not* consent to the use of streets to run an explosive high pressure natural gas pipeline through the city. And here Minnesota Power is making use of this public benefit to fire a power plant for retail sale of electricity to persons inside and outside Cohasset. Such a measure cannot be forced upon the City and is subject to the franchise power. As in the 1990 case, this 1932 case assumes the City's longstanding right to approve or disapprove operation of an intracity utility infrastructure that crossed public roads.

Minnesota Power further cites two foreign decisions for the proposition that pipeline operations which do not deliver gas to the public are not subject to city approval and permit/franchise fees. Each case confirms the power of the city to approve such operation.

In *Central Wisconsin Power Co. v. Wisconsin Traction, Light, Heat & Power Co.*, 209 N.W. 755 (Wis. 1926), the City of Clintonville contracted with the public utility to supply Clintonville with electrical energy, and in the process to make use of city streets. Clintonville used that energy to supply the needs of the public. When the public utility failed to deliver power on numerous occasions, the

city made arrangements to supplement by buying power from a second public utility. The first public utility sued, claiming it had the franchise to supply this city. The Wisconsin Supreme Court held that the first utility had acquired no exclusive franchise right to serve the public in Clintonville, but had simply obtained the contractual right to sell power to Clintonville, which in turn sold power to the public at retail.

This Wisconsin case has no application to the present circumstances. Clintonville had agreed to allow the first public utility to use its streets to put the infrastructure in to supply Clintonville with wholesale power. The right of the city to approve or disapprove the arrangement was a given. Here, Minnesota Power has arrogated to itself the right to operate a gas pipeline over the objections of the city, even though the gas line runs entirely through the city, crosses public streets, and helps itself (free of charge) to city services in the form of emergency first response, fire, and police protection. In Clintonville, the first public utility simply sold power to the city; here, Minnesota Power does operate on a retail basis to sell power inside and outside of Cohasset – and the pipeline at issue is used as part and parcel of these retail sales.

Turning next to *State ex rel. Grant v. City of Coffeyville*, 28 P.2d 1032 (Kan. 1934), the city ran an electric light plant, which it used to furnish electricity to its citizens. The city contracted with a natural gas company to supply natural gas to

fire its electric plant and to heat two city buildings. It became dissatisfied with the natural gas company, so it contracted with a new natural gas company to fire the electric plant and the two city buildings that used natural gas for heat. Apparently, the first natural gas company was displeased by this switch and persuaded the county attorney to challenge the action as *ultra vires* in a quo warranto action. The theory of the challenge was that the gas contract was a franchise to run pipelines in city streets and therefore had to be accomplished by ordinance. The natural gas contracts had been accomplished by resolution.

The Kansas Supreme Court construed the Kansas franchise statute as applying only to use of streets “in connection with some service to the inhabitants of the city, as by furnishing them with artificial or natural gas, with electric current, with transportation facilities, and with facilities for communication.” *Id.* 28 P.2d at 1034. Because all the city did was to buy gas from the natural gas company, it did not have to pass a franchise ordinance.

Once again, Minnesota Power has attempted to support a right to act over the objections of the city by citing a case which confirmed the right of the city to approve or disapprove the operation. The City of Coffeyville granted the gas company the right to install and operate its pipeline. Here, Cohasset has not granted Minnesota Power the right to operate its pipeline and Minnesota Power asserts the right to overrule and ignore the Cohasset’s wishes. It has not cited one

case supporting this veto power. Furthermore, Minnesota Power's pipeline is used "in connection with some service to the inhabitants of the city." Unlike the gas company in Coffeyville, Minnesota Power does more than simply pipe gas to a plant. It uses that pipe and plant to serve electricity at retail to thousands of end users within and outside of Cohasset.

In sum, each of the cases cited by Minnesota Power confirms the right of the City to approve or disapprove the operation of a pipeline or other utility infrastructure that crosses public streets. As found by this Court in its 1990 *NSP* decision, the operator of a pipeline must get a franchise – something operators have done since the nineteenth century. Middlemen and end users who do not operate the pipeline are in a different position.

In contrast to the complete lack of precedent to support Minnesota Power's position, Cohasset has cited three centuries of a past practice in which Minnesota cities subject explosive pipeline systems to a franchise. Initial Brief at 22-23. Indeed, a similar attempt to evade this franchise power was rebuked by this Court in *Village of Blaine v. Independent School*, 138 N.W.2d 32 (Minn. 1965) (hereafter, "*Blaine II*"). There the multi-city school located in Blaine attempted to circumvent natural gas service from the utility franchised by Blaine by connecting a pipe to the neighboring Circle Pines' system. To facilitate this evasion, Circle Pines deeded to the school the adjoining Circle Pines land through which the pipe

ran. This Court affirmed Blaine's right to approve or disapprove such an operation, and affirmed a permanent injunction against this service. "[T]he type of utilities here involved may not operate in cities and villages without franchises from those cities and villages." *Blaine II*, 138 N.W.2d at 38.

In its initial review of the *Blaine* case on an appeal from the temporary injunction proceedings, this Court rejected the school's contention that its pipeline was exempt from the franchise requirement because it made no special use of streets. This Court held that a franchise was necessary not only for crossing streets, but also for anything else that is required to operate a utility.

Thus a franchise must be obtained not only to lay pipes to conduct gas across or over the boundaries of the village, or over its streets, alleys, and public grounds if necessary, but also to do all other things required to establish and to operate a utility.

Village of Blaine v. Independent School District No. 12, 121 N.W.2d 183, 190 (Minn. 1963) (hereafter, "*Blaine I*").²

² Remarkably, Minnesota Power attempts to construe this portion of the *Blaine I* decision as requiring it to do *all* the things that a public utility normally does before it can be subject to a franchise. Thus, the mere operation of a pipeline is not enough. In this regard, Minnesota Power relies on the following sentences immediately preceding the passage quoted above:

It would seem that a franchise is necessary in order to 'operate' in a municipality. To 'operate,' the utility must not only lay pipes and install equipment, but also must provide service, collect charges, and do other things necessary to conduct a utility business.

Blaine I, 121 N.W.2d at 189-90. But the passage quoted in the text above this footnote makes clear that the Court was not requiring the utility to do *all* of these things before it

In sum, Minnesota Power has cited *no* case in which a Court has allowed the pipeline company to operate an explosive intracity pipeline over the objections of the City. The closest similar fact pattern is contained in the *Blaine* cases. Like Minnesota Power here, the school district and Circle Pines concocted an elaborate set of gymnastic maneuvers to evade Blaine's franchise power. Ultimately, this Court held in two decisions that the private gas line connecting the school to service across the town border required a franchise. That is the appropriate result here. There is *nothing* in the statutes as written and there is *no* precedent to support Minnesota Power's position.

had to get a franchise. Rather, performing *any* of these essential functions triggered the franchise power. Indeed, the school did not perform all these functions – it simply consumed gas on the “private industrial” basis that Minnesota Power claims exempts the whole arrangement from the franchise power. Yet, this Court required a franchise in this situation because performing some of the functions implicated the city's broad sovereign rights.

The furnishing of heat, light, power, and gas also is properly within the scope of the police power and therefore subject to control and regulation by a municipality. Permitting unfranchised utilities to operate competitively in any city or village would foreclose governmental control of these essential services and thereby endanger the prosperity, health, welfare, and safety of those living within the municipal boundaries.

Blaine I, 121 N.W.2d at 191.

III. MINNESOTA POWER'S POLICY ARGUMENTS ARE UNAVAILING.

Minnesota Power rejects Cohasset's reading of the governing statutes as leading to "absurd" results. The fear, apparently, is that unscrupulous cities will bootstrap this Court's ruling in Cohasset's favor to pile franchise fee upon franchise fee on large, well-financed utilities like Minnesota Power. Given the present-day fiscal realities outlined by the *amicus curiae* League of Minnesota Cities, one wonders whether the prospect of new revenue streams for cities is truly a problem. Be that as it may, Minnesota Power's policy arguments should be rejected for at least two reasons.

First, where, as here, the statutory text is clear, the Court does not have the public policy discretion to add new words. *See Hyatt v. Anoka Police Department*, 691 N.W.2d 824, 828 (Minn. 2005) (generally the Court has not "allowed an absurdity analysis to override the plain meaning of a statute"); *Chanhassen Estates Residents Assoc. v. City of Chanhassen*, 342 N.W.2d 335, 339 (Minn. 1984) ("When the words of a statute ... in their application to an existing situation are clear and free from ambiguity, judicial construction is inappropriate").

Second, the parade of horrors imagined by Minnesota Power is not likely to result from a well-crafted decision from this Court upholding the franchise power in the particular circumstances at bar. This is not a hard case that is likely to make bad law. In requiring Minnesota Power to pay a franchise fee for operating a

highly explosive intracity natural gas pipeline that crosses public roads, this Court will simply continue a practice in this State that dates back to the 1880s. And in so doing, the Court will be providing the funding source for the emergency first response statutory mandate the legislature placed on cities in the Pipeline Safety Act of 1987. And, most importantly, in so doing the Court will be doing nothing more than enforcing the plain policy choices made by the legislature in plain statutory text.

Nor is there truly much danger of new, previously undreamed-of franchises resulting from this Court's decision. In the nightmare scenario painted by Minnesota Power, cities will begin to require franchises for *de minimis* incursions onto public ways – such as an electric utility running a water pipe underneath a street or a gas utility stringing a dedicated electric wire to its property. But cities may only charge *de minimis* fees for these *de minimis* incursions. Cities have no interest in pursuing such absurdities. And any attempt by the cities to overcharge for *de minimis* incursions will be struck down by the courts. *Cf. Minneapolis Street Railway Co. v. City of Minneapolis*, 52 N.W.2d 120 (Minn. 1952) (quadrupling of license fee assessed on each streetcar struck down as bearing no relation to the costs shown to be incurred by the city in the exercise of its statutory power to regulate, control, and supervise the operation of the street railway); *Crescent Oil Co. v. City of Minneapolis*, 225 N.W. 904 (Minn. 1929) (\$100 yearly

fee on filling stations unreasonable, even considering the city's right to derive some measure of incidental revenue from the license).

By the logic employed by Minnesota Power, one might just as well hesitate to define a recovery for defamation or for government retaliation for fear that some creative future litigant will sue public officials for making a trivial rude remark. The plaintiff's lack of any prospect for recovering meaningful damages, and the courts' ability to define reasonable *de minimis* exceptions, already deter such suits.

Minnesota Power's policy argument also misses the mark because it anticipates an issue that is not before the Court even in the present case – the reasonable amount of the franchise fee. Unlike the *de minimis* cases imagined by Minnesota Power, the burdens presented by the high pressure, highly explosive Pipeline here are hardly *de minimis*. Cohasset will be justified in charging a fee commensurate to the burdens imposed on the public by the Pipeline, to the revenue purposes and formulas allowed by Minn. Stat. § 216B.36, and to the City's right under its police powers to set “a license fee large enough to operate as a restraint upon the number of persons who might otherwise engage therein.” *See Ramaley v. City of St. Paul*, 33 N.W.2d 19, 21-22 (Minn. 1948). The precise amount of that fee is not yet known given the need to develop the record further. The issue now before the court is the city's ability to require a franchise and to charge a franchise fee. Minnesota Power's anticipation of an issue that has not yet been litigated and

free floating fear that the fee will be too high are matters of pure speculation, and hardly constitute the kind of compelling policy consideration that would override plain statutory language and precedent.

Apart from this ill-founded fear of an avalanche of franchises for trivial incursions, Minnesota Power as well as the Court of Appeals, *see* App. A008, express concern that the principle of a franchise for gas pipeline operation would inevitably lead to the attempt to franchise Minnesota Power's operation of the entire Boswell Energy Center plant in Cohasset. As a threshold matter, Cohasset has allowed that plant to be built without requiring a franchise. Unlike the Pipeline operations, which dramatically changed the status quo and which Cohasset consistently insisted (before, during, and after its construction) must be subject to a franchise, the Boswell Energy Center operation itself can not now be made subject to the franchise power.³

Whether or not a city may require a public utility to obtain some kind of franchise or permit to build and operate a new coal-fired or nuclear energy plant on land within the city is not an issue before the Court. What is before the Court is a clear and limited case where the city's franchise power certainly does apply. Public utilities simply do not build explosive high pressure gas pipelines within a

³ As for new plants, franchises are ultimately a matter of consent. If a public utility is dissatisfied with one city's insistence on a franchise as a condition of building the plant in the city, then the public utility will locate its plant elsewhere. Thus, this is not likely an issue that will have to be reached by a court in the future.

city and run them under public streets without first obtaining a franchise or permit from the city.

IV. MINNESOTA POWER'S "THROW-AWAY" PREEMPTION ARGUMENTS SHOULD BE DISREGARDED.

A. Cohasset's Franchise Powers Are Not Completely Preempted By Plain Statutory Text.

In its alternative holding, the Court of Appeals found that the routing permit statute ousted and preempted Cohasset from exercising its franchise powers over high pressure natural gas lines. Cohasset analyzed the applicable text, legislative history, and rules of statutory construction to conclude otherwise. *See* Initial Brief at pp. 36-49. Minnesota Power confined its response to two pages, *see* Respondent's Brief at pp. 28-29, which limited its argument to the assertion that the plain text of the statute requires complete preemption.

For Cohasset to be ousted from franchise power by the plain text of the statute, that statute must "occupy the field" of regulation. "A state law may fully occupy a particular field of legislation so that there is no room for local regulation." *Minnesota Agricultural Aircraft Assoc. v. Township of Mantrap*, 498 N.W.2d 40, 42 (Minn. App. 1993) (citing *Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 819 (Minn. 1966)).

Here, however, the text of Minn. Stat. § 216G.02 Subd 4 does *not* purport to displace all local regulation of high pressure pipelines. The MPUC is given

“primary”, not “exclusive” jurisdiction, and only *some* kinds of local regulations are preempted – i.e., zoning and land use rules. By thus defining and limiting the scope of preemption, the legislature chose not to occupy the whole field. The Court’s task, then, is to review the text, context, legislative history, legislative intent, and applicable rules of construction to determine if Cohasset’s ordinance and Minn. Stat. § 216G.03 Subd. 4 are “irreconcilable.” *Minnesota Agricultural Aircraft Assoc.*, 498 N.W.2d at 42.

Thus, Minnesota Power’s assertion of complete preemption that allows the MPUC to occupy the field of regulation of high pressure gas pipelines is wrong on its face. That is not what the text of the statute says. By failing to offer any rebuttal to Cohasset’s extensive analysis of the text, meaning, and intent of Minn. Stat. § 216G.02 Subd. 4, Minnesota Power has conceded this issue.

Cohasset stands on its initial brief regarding this issue. Minnesota Power’s summary and wrong-headed plain meaning argument should be rejected.

B. There Is No Basis To Find Federal Preemption.

In the District Court, Minnesota Power contended that the Pipeline was an interstate pipeline exempt from state and local regulation. Neither the District Court nor the Court of Appeals ruled on this issue, and it has been largely abandoned by Minnesota Power in this Court. However, the issue is referenced at page 24 and footnote 16 of Minnesota’s brief, which notes: “The right of an

industrial user of gas to bypass a local franchise for its own use is well established under federal law.”

Minnesota Power cites 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 Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992) (FERC approves petition to tap two large industrial users into a nearby interstate pipeline, thereby bypassing local gas utility); *Michigan Consolidated Gas Company v. FERC*, 883 F.2d 117 (D.C. Cir. 1989) (appeal from FERC approval of bypass connection), *cert. denied*, 494 U.S. 1079 (1990); *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).

4 The Federal Bypass Cases are Irrelevant Because Cohasset is not Seeking to Require Minnesota Power to use Cohasset’s City-Owned Gas Company.

What the federal bypass cases have in common is an attempt by end users to achieve significant economic advantages by using a special tap line to buy direct from the gas producers, thereby bypassing the markups assessed by the local gas company. The federal policy of deregulation approves such cost-saving measures.

Here Cohasset does indeed own the local gas company and would have preferred to have been engaged by Minnesota Power to serve the Boswell Energy

Center. But Cohasset does not taken the position that Minnesota Power must buy gas from Cohasset's system at a mark-up. In short, the "bypass" envisioned by the federal cases has already occurred: Minnesota Power is able to bypass sale from Cohasset to buy its gas direct via the Pipeline.

What is different here than from the bypass cases cited by Minnesota Power is that the particular pipeline constructed by Minnesota Power is an enormous high pressure line that runs through the course of the city and that crosses public roads. This implicates the city's historic right to condition the operation of the pipeline on a franchise/license and on payment of an appropriate fee. Such powers are matters of local concern and are not preempted by the federal legislation, as was recognized by this Court in *City of St. Paul v. NSP*, 462 N.W.2d at 381 ("[The federal Natural Gas Act] expressly carves out a regulatory role for the States, however, providing that the States retain jurisdiction over intrastate transportation, local distribution and distribution facilities, and over 'the production or gathering of natural gas'").

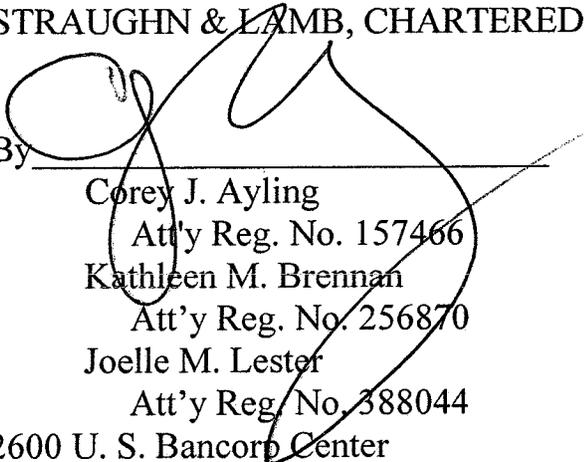
CONCLUSION

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

Dated: June 14, 2010.

McGRANN SHEA CARNIVAL
STRAUGHN & LAMB, CHARTERED

By _____



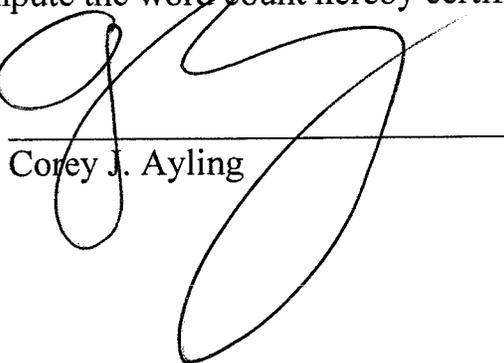
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CERTIFICATE OF BRIEF LENGTH

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 5,641 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: June 14, 2010.



Corey J. Ayling