

CASE NO. A09-572

STATE OF MINNESOTA
IN SUPREME COURT

City of Cohasset

Appellant,

vs.

Minnesota Power,
An Operating Division of ALLETE, Inc.,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUES

- I. Whether the City of Cohasset may require Minnesota Power to obtain a franchise or permit to operate the Boswell Gas Pipeline.

The Court of Appeals¹ and the District Court both held “no”.

Apposite Statutes, Rules, and Cases:

Minn. Stat. § 216B.36

Minn. Stat. § 216B.02, subd. 4

Minn. Stat. § 301B.01

City of Saint Paul v. Northern States Power Co., 462 N.W.2d 379 (Minn. 1990)

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

- II. If Cohasset’s franchise requirements do not apply to Minnesota Power’s operation of the Boswell Gas Pipeline, whether any other requirements from the City of Cohasset are allowed.

The Court of Appeals and the District Court both held that the Boswell Gas Pipeline was not subject to the City of Cohasset’s police powers.

Apposite Statutes, Rules, and Cases:

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

Minn. Stat. § 216B.36

Minn. Stat. § 216G.02

¹ *City of Cohasset v. Minnesota Power*, 776 N.W.2d 776 (Minn. Ct. App. Jan. 12, 2010); Appellant’s Addendum at 1 (“Appellant’s Add.”).

I. STATEMENT OF THE CASE AND FACTS

A. Background

Minnesota Power filed an application with the Minnesota Public Utilities Commission (“MPUC”) on June 5, 2008 requesting a route permit for the Boswell Gas Pipeline in MPUC Docket No. E015/GP-08-586. *See* Appellant’s Appendix (“Appellant’s App.”) at 45; Complaint ¶ 8. The Boswell Gas Pipeline has a 10.75 inch outside diameter and has the capacity for 974 pounds per square inch. Appellant’s Appendix at 45; Complaint ¶ 9. The Boswell Gas Pipeline serves only Minnesota Power’s Boswell Energy Center and the stated purpose is to ignite the coal plant, thereby replacing the fuel oil ignition currently employed at the Boswell Energy Center. Appellant’s App. at 44-45; Complaint ¶¶ 7, 10. Minnesota Power has connected the Boswell Gas Pipeline to the Great Lakes Gas Transmission Company natural gas pipeline. Appellant’s App. at 45; Complaint ¶ 8. The MPUC approved Minnesota Power’s proposed route for the Boswell Gas Pipeline in an order dated September 17, 2008 in MPUC Docket No. E015/GP-08-586. Appellant’s App. at 68-80. Minnesota Power sent the MPUC a letter in the same docket on December 29, 2008 with written certification that the construction of the Boswell Pipeline has been completed in compliance with all listed route permit conditions and that Minnesota Power received no complaints during the construction of the pipeline. Respondent’s Appendix (“Respondent’s App.”) at 1. Minnesota Power began fully operating the pipeline in the summer of 2009 after receipt of the appropriate air permit amendment from the

Minnesota Pollution Control Agency (“MPCA”) to ignite the Boswell Energy Center with cleaner natural gas.² Respondent’s App. at 2-6.

After filing its complaint on September 8, 2008, the City of Cohasset enacted Ordinance No. 44 dated September 23, 2008 and entitled: “Requiring a Franchise and the Payment of a Franchise Fee for the Operation of a Designated Pipeline.” Appellant’s Add. at 39-42. The ordinance is intended to apply to any pipeline that meets the definition of a pipeline in Minn. Stat. § 216G.02, subd. 1 and for which a person must obtain a route permit from the MPUC. Appellant’s Add. at 40. In addition, if a person (not defined under the ordinance or limited to public utilities) wants to “own, construct, maintain, or operate a Designated Pipeline within the City of Cohasset” it must be pursuant to a franchise granted by the City of Cohasset. Appellant’s Add. at 40.

Typically, when Minnesota Power enters into a franchise agreement with a municipality, the municipality grants Minnesota Power the right and privilege to construct, operate and maintain poles, wires, and other equipment necessary for transmitting and distributing electricity to retail customers within that municipality. Minnesota Power has an obligation to serve the residents in those municipalities as part

² The MPCA’s air permit amendment for Boswell Energy Center that allowed igniting coal with natural gas was dated August 12, 2009. The full permit is available at: http://www.pca.state.mn.us/index.php?option=com_docman&task=doc_download&gid=1503&Itemid=.

of Minnesota Power's assigned electric service territory. *See* Minn. Stat. § 216B.37. In addition, some municipalities require Minnesota Power pay a franchise fee; however, in every case Minnesota Power is just the collector of that fee from those retail electric customers in a particular municipality. For example, in the City of Little Falls, all Minnesota Power residential electric customers pay an additional \$1.00 per month on their electric bills and commercial and industrial customers pay \$5.00 per month on their electric bills.³ Minnesota Power collects this money on behalf of the City of Little Falls, but neither receives any compensation nor pays the franchise fee itself.

With the Boswell Gas Pipeline the imposition of a franchise will not result in any retail customers being provided gas service since Minnesota Power is not selling natural gas nor obligated to sell natural gas and likewise any franchise fee would not come from customers since there are none — but directly from Minnesota Power. Minnesota Power constructing, operating, and owning its pipeline to serve its own generation facility is not providing a utility service for the public. The Boswell Gas Pipeline is being used to serve Minnesota Power's own private industrial purposes.

B. Proceedings Below

Cohasset began the proceeding that is the subject of this appeal on September 8, 2008 by filing a complaint ("Complaint") with the Itasca County District Court. Appellant's App. at 43-54. Cohasset brought this action alleging that Minnesota Power,

³ *See* MPUC Docket No. E015/M-03-1669, Order dated December 12, 2003.

an operating division of ALLETE, Inc., is required to obtain a gas franchise or other permit from Cohasset to operate a natural gas pipeline that would only serve Minnesota Power's Boswell Energy Center in Cohasset, Minnesota. Cohasset claimed that the right to a gas franchise is provided in Minn. Stat. § 216B.36, among other statutes. Appellant's App. at 48-49; Complaint ¶ 25 (citing Minn. Stat. §§ 216B.36, 216B.02, subd. 4; Minn. Stat. §§ 301B.01, 02; Minn. Stat. § 412.321). Cohasset's Complaint did not cite to Minn. Stat. §§ 412.211 and 412.221. Minnesota Power denied that Minn. Stat. § 216B.36 and other statutes cited by Cohasset applied to its pipeline and denied that Cohasset has the legal basis to require Minnesota Power to obtain a gas franchise.

On January 7, 2009, the District Court issued an order dismissing Cohasset's claims against Minnesota Power related to Cohasset's attempt to impose a franchise fee on Minnesota Power's recently constructed natural gas pipeline to serve its Boswell Energy Center. Appellant's Add. at 18-23. The District Court agreed with Minnesota Power's arguments and held that because Minnesota Power does not furnish natural gas service it is not a natural gas utility under Minn. Stat. § 216B.36. Therefore, the District Court concluded that since Minnesota Power is not a natural gas utility the pipeline is not subject to Cohasset's franchise power nor to any franchise fee. Based on that legal conclusion, the District Court granted Minnesota Power's motion for summary judgment. The parties stipulated to dismissal of Cohasset's remaining claim and the District Court entered final judgment on February 26, 2009. Appellant's Add. at 24-25.

Cohasset appealed the District Court's decision. The Court of Appeals affirmed the District Court's decision finding the "the district court did not err in granting summary judgment in favor of respondent." Appellant's Add. at 1-17; *City of Cohasset v. Minnesota Power ("Cohasset")*, 776 N.W.2d 776, 784 (Minn. Ct. App. 2010).

II. STANDARD OF REVIEW

The Court of Appeals affirmed the District Court's granting of summary judgment in favor of Minnesota Power. When reviewing a summary judgment, this Court reviews: (1) whether there are any genuine issues of material fact, and (2) whether the lower courts erred in their application of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Here, the material facts are not in dispute. The issue before this Court is whether the lower courts correctly applied the law, including Minnesota statutes, which this Court reviews de novo. *Ryan v. ITT Life Ins. Corp.*, 450 N.W.2d 126, 128 (Minn.1990).

III. ARGUMENT

This case boils down to one simple, uncontestable issue. When Minnesota Power constructs, operates and owns its pipeline to serve its own facility, Minnesota Power is not providing a natural gas utility service for the public. The pipeline is being used only to serve Minnesota Power's own private industrial purposes and therefore is not subject to the City of Cohasset's gas franchise ordinance enacted in September 2008. The Court of Appeals' decision should be affirmed because:

- the Court of Appeals correctly found that Minnesota Power is not a natural gas public utility;

- the Court of Appeals correctly decided that the City of Cohasset lacks statutory authority to impose a franchise on Minnesota Power’s natural gas pipeline; and
- the Court of Appeal’s decision is a reasoned application of the law.

A. **Minnesota Power is Not a Natural Gas Public Utility**

Minnesota Power provides state regulated electric service in northeastern Minnesota to 141,000 retail customers and federally regulated wholesale electric service to 16 municipalities. However, as the District Court and Court of Appeals both recognized, Minnesota Power does not now and does not intend to furnish natural gas service to the public. *Cohasset*, 776 N.W.2d at 781. Minnesota Power constructed this pipeline for its own private use. As Cohasset concedes: “Minnesota Power is, to be sure, not a gas utility.” *See* Appellant’s Brief at 16 (“Appellant’s Br.”).

Under Minn. Stat. § 216B.36, a public utility may be required to obtain a franchise if it is either: (1) furnishing the utility services enumerated under Minn. Stat. § 216B.02 or (2) occupying streets, highways, or other public property within a municipality. The plain statutory language applies this provision only to an entity that is a “public utility”:

Any **public utility** furnishing the 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...

Minn. Stat. § 216B.36.⁴ For the reasons discussed below, Minnesota Power does not meet the definition of a public utility for purposes of the City's gas franchise delegated authority under Minn. Stat. § 216B.36.

First, if Minnesota Power wanted to claim "public utility" status by virtue of owning and operating a natural gas pipeline it could not under Minnesota statutes. A public utility is defined in Minn. Stat. § 216B.02, subd. 4 as persons or corporations "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..." (emphasis added). On its face this statute clearly differentiates between furnishing gas service at retail versus furnishing electric service at retail and to be a "public utility", service must be provided "for the public." The definition of either providing electric or gas service at retail limits Minnesota Power's status to just an electric public utility. This is a substantive legal and regulatory distinction that Minnesota Power "is not using the pipeline to furnish gas to the public; it is not collecting charges or doing the things necessary to conduct a utility business as a natural gas public utility." *Cohasset*, 776 N.W.2d at 783.

⁴ Other language in Minn. Stat. § 216B.36 expands the definition of public utility for purposes of that section to "a cooperative electric association organized under chapter 308A that furnishes utility services within the municipality." As discussed above, the key is that a cooperative electric association provides electric utility services in that municipality.

In deciding what constitutes a public utility, the key holding is whether an entity provides service to the public. In *Northern Natural Gas Co. v. Minnesota Public Service Commission*, 292 N.W.2d 759 (Minn. 1980), this Court upheld the Minnesota Public Service Commission's (now the MPUC) determination that Northern Natural Gas was a public utility under Minn. Stat. § 216B.02, subd. 4 because it sold gas to industrial customers. The Court stated:

In the absence of a showing that an entity falls within an exception listed in section 216B.02, subd. 4, an entity which furnishes natural gas at retail is a public utility. We hold that Northern, while furnishing natural gas at retail to these direct sale customers, falls within the definition of "public utility" and may therefore be regulated by the Public Service Commission.

Id., 292 N.W.2d at 764. However, the Court of Appeals properly found that the natural gas "pipeline...is not 'furnishing' electricity to the public. Rather it is serving respondent's infrastructure. Because it is not 'furnishing' electricity to the public, it is not subject to the franchise power enumerated in section 216B.36." *Cohasset*, 776 N.W.2d at 780.

The City seeks to claim that it is the pipeline itself that is subject to a gas franchise, when the authorizing statutes are limited to public utilities or public service corporations. See Appellant's Add. at 40 (applying ordinance to "Designated Pipelines"). This Court established the clear test for whether an entity is a public utility in *City of Saint Paul v. Northern States Power Co.*, 462 N.W.2d 379, 383 (Minn. 1990). The Court held that a natural gas marketer was not subject to the City of Saint Paul's franchise requirements because it "does not operate a utility within the city for local distribution".

Relying on its previous decision in *Village of Blaine v. Independent School District No. 12, Anoka County*, 121 N.W.2d 183 (Minn. 1963) (“*Blaine I*”), the Court stated that to operate a utility “a company must **both** lay pipes and do those other things necessary to conduct a utility business.” *City of St. Paul*, 462 N.W.2d at 384 (emphasis added).

Under Minnesota Supreme Court precedent, the lynchpin for whether a franchise applies is a finding that a company is selling natural gas to the public, not that gas is flowing through any pipeline within a municipality. If the existence of a pipeline were the only criteria then any pipeline routed through Cohasset could be subject to Cohasset’s new gas franchise ordinance (which was enacted after its lawsuit commenced). *See* Appellant’s Add. at 41-42 (Cohasset ordinance dated September 23, 2008 and effective upon publication). Therefore, for Cohasset’s gas franchise ordinance to be effective and applicable to Minnesota Power would require that Minnesota Power own a pipeline in Cohasset **and** provide retail gas utility service. While as the Court of Appeals’ recognized (*Cohasset*, 776 N.W.2d at 781), the first criterion applies to Minnesota Power, Minnesota Power is not providing service, collecting charges, or doing other things necessary to conduct a gas utility business since Minnesota Power is contracting directly for gas being delivered by Great Lakes Natural Gas Transmission Company, an interstate pipeline company, for Minnesota Power’s own industrial use. Minnesota Power will not be providing retail gas utility service to the public and thus is not subject to Cohasset’s gas franchise ordinance.

Likewise, in *Dairyland Power Cooperative v. Brennan*, 82 N.W.2d 56 (Minn. 1957), the Minnesota Supreme Court held that Dairyland was a public utility and had the power of eminent domain since the Minnesota Legislature had granted that authority to its member electric cooperatives and the functions Dairyland performed for its member electric cooperatives. *Id.* at 61-62. In contrast, Minnesota Power is not performing any public utility functions when it consumes (and does not sell) natural gas from its new pipeline. This conclusion is reinforced by the fact that Minnesota Power has operated its Boswell Energy Center for over 50 years without its own natural gas pipeline. If a ten inch natural gas pipeline was essential to Minnesota Power's electric generation operations (as distribution poles and wires are to delivering electric service to its retail customers) Minnesota Power would have constructed this gas pipeline in conjunction with the development of the electric generating plant. Instead, this pipeline was constructed to reduce emissions from the start-up of the coal generating units and therefore to improve the environment, including in the City of Cohasset.⁵

Furthermore, the MPUC's statutes and rules for siting of pipelines do not require public utility purposes, but instead apply to all persons, including those persons who are

⁵ Minnesota Power's Boswell Unit 3 emission reduction plans discussed on page 46, footnote 14 of Appellant's Brief are separate and distinct from the Boswell Gas Pipeline and Minnesota Power never requested from the MPUC a current return on construction work in progress under Minn. Stat. § 216B.1692 for the pipeline. *See* MPUC Docket No. E015/M-06-1501, Order dated October 26, 2007. Furthermore, the City of Cohasset passed a resolution in support of Minnesota Power's initiative to add new pollution control equipment on Boswell Unit 3. *See* Respondent's App. at 7 (City of Cohasset Resolution 2007-11 dated May 22, 2007).

not public utilities, who want to construct pipelines that meet specific size and pressure thresholds, regardless of ultimate use. *See* Minn. Stat. § 216G.02, subd. 1, Minn. Rules 7852.0200. Under MPUC rules, upon completion of construction of the pipeline, the MPUC's jurisdiction over the pipeline shall be terminated. *See* Minn. Rules 7852.3900. Minnesota Power's statements in its application to the MPUC that the purpose of the pipeline was to provide a source of natural gas for ignition of its electric generating facility is entirely consistent with a conclusion that Minnesota Power is not a public utility for purposes of Cohasset's gas franchise ordinance and state statutes. Minnesota Power is not providing natural gas services to the public and is not acting as a gas public utility.⁶

In addition, Minn. Stat. § 216B.045 is not applicable to this case since the Boswell Gas Pipeline is an industrial connection to Great Lakes Gas Transmission Company's interstate pipeline and not an intrastate pipeline subject to regulation by the MPUC. *See* Appellant's Add. at 19, Findings of Fact ¶ 11. Even if Minn. Stat. § 216B.045 was

⁶ Other courts have reached similar decisions on what entities constitute "public utilities" under each jurisdiction's respective law. *See, e.g., Coastal States Gas Transmission Co., Inc. v. Alabama Public Service Com'n*, 524 So.2d 357 (Ala. 1988) (company, which owned and operated pipelines for sale of natural gas to select customers under private contracts, was not a "public utility"); *Junction Water Co. v. Riddle*, 155 A. 887, 889 (N.J. 1931) (supplying water to own property and neighbors is not a public utility since the public has no right to demand water service); *Wilhite v. Public Service Commission*, 149 S.E.2d 273, 284 (W.Va. 1966) (a natural gas company was not a public utility since it sold gas under private contract and did not hold itself out to such gas to the public); *Llano, Inc. v. Southern Union Gas Co.*, 399 P.2d 646, 653-54 (N.M. 1965) (a natural gas pipeline built to serve one industrial customer did not make the company subject to public utility regulation).

deemed applicable to the pipeline, a question not raised in this dispute, such a classification would not mean Minnesota Power is a gas public utility, just that Minnesota Power would need to offer open access to the extent capacity is available and anyone requesting service would need to pay for those physical facilities. See Minn. Stat. § 216B.045, subd. 3.⁷ Given that the City of Cohasset already has its own municipal gas utility, it is unlikely such a request for gas service would even occur.

B. Minnesota Law Distinguishes Between Gas and Electric Public Utilities

Minnesota law recognizes the ability of an entity to be a “public utility” for electric service, and not a “public utility” for gas. This is the proper characterization in this case. Cohasset asserts that the Court of Appeals mistakenly applied the definition of public utility set forth under Minn. Stat. § 216B.02, subd. 4 in determining that Minnesota Power is not a natural gas public utility and therefore not subject to the City’s proposed franchise ordinance. Appellant’s Br. at 15-16. However, this Court, as well as Minnesota statutes, readily distinguish between different types of utilities and corresponding laws that are applicable. For example, *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307, 314 (Minn. 2006) stated that the filed-rate doctrine has arisen

⁷ Minn. Stat. § 216B.045, subd. 3 states: “Every owner or operator of an intrastate pipeline shall offer intrastate pipeline transportation services by contract on an open access, nondiscriminatory basis. To the extent the intrastate pipeline has available capacity, the owner or operator of the intrastate pipeline must provide firm and interruptible transportation on behalf of any customer. If physical facilities are needed to establish service to a customer, the customer may provide those facilities or the owner or operator of the intrastate pipeline may provide the facilities for a reasonable and compensatory charge.”

primarily in the context “of electric, gas, and telephone utilities”, and not public utilities generically. The Court of Appeals stated in *US West Communications v. City of Redwood Falls*, 558 N.W.2d 512, 515 (Minn. Ct. App. 1997) *rev. denied* (Minn. Apr. 15, 1997), that “we conclude that although these statutes continue to authorize gas and electric franchises, they no longer govern telephone franchises.” The Court of Appeals went on to note:

The city argues that a telephone company is no different from a gas or electric utility. But chapter 216B, governing gas and electric utility service, provides specific authority for municipal franchises. Minn. Stat. § 216B.36 (1996). See *City of St. Paul v. Northern States Power Co.*, 462 N.W.2d 379, 385 (Minn. 1990) (recognizing city’s authority to franchise natural gas utility).

Id., 558 N.W.2d at 515 n.3.

Another example is provided in Minn. Stat. § 412.321 that allows municipalities, such as the City of Cohasset, to form municipal utilities. Under Minn. Stat. § 412.321, subd. 2 voters may approve either a gas or electric service, or both:

The proposal for the acquisition of the public utility may include authority for distribution only or for generation or production and distribution of a particular utility service or group of services. Approval of the voters shall be obtained under this section before a city purchasing gas or electricity wholesale and distributing it to consumers acquires facilities for the **manufacture of gas or generation of electricity** unless the voters have, within the two previous years, approved a proposal for both generation or production and distribution.

(emphasis added).⁸

⁸ See also, Minn. Stat. § 471.656, subd. 3(c) defining “municipal public utilities” to mean “the provision by a municipality of electricity, natural gas, water, wastewater removal

Regulation for one type of utility service does not lead to an inevitable conclusion that the entity is now subject to regulation for all utility services, including those not provided to the public. The distinction between an entity providing electric service or gas service determines whether the MPUC has rate regulation jurisdiction over that entity and whether certain statutes under the Minnesota Public Utilities Act (Minn. Stat. Ch. 216B) apply, including Minn. Stat. § 216B.36.⁹ As the Minnesota Court of Appeals recently stated in a file-rate doctrine case:

In Minnesota, as elsewhere, the legislature has established a comprehensive structure for regulating utilities and has delegated to an administrative body, the MPUC, the authority for enforcing these regulations. Minn. Stat. §§ 216B.01-.82 (2006). The statute requires each public utility to file public documents on the details of its operations. Minn. Stat. § 216B.05. A public utility must file schedules showing “rates, tolls, tariffs, or charges ... for any service performed....” *Id.*, subd. 1. It must file “all rules that ... in any manner affect the service or product.” *Id.*, subd. 2. It must also file for approval any contracts for electric service “in which the public utility and the customer agree to customer-specific rates, terms, or service conditions not already contained in the approved schedules, tariffs, or rules of the utility.” *Id.*, subd. 2(a). These filings are commonly referred to collectively as the utility's “tariff.” The purposes of regulating the utility providers are “to provide the retail consumers ... with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of public utilities ..., to avoid unnecessary duplication of facilities ... [,] and to minimize disputes between public utilities.” Minn. Stat. § 216B.01.

Siewert v. Northern States Power Co., 757 N.W.2d 909, 916 (Minn. Ct. App. 2008), review granted (Minn. Feb 17, 2009).

and treatment, telecommunications, district heating, or cable television and related services.”

⁹ The Minnesota Supreme Court recognized that certain historic pollution cleanup costs of Interstate Power Company should only be applied to its natural gas customers and not its electric customers. *In re Request of Interstate Power Co. for Auth. to Change its Rates for Gas Service in Minn.*, 574 N.W.2d 408, 414-15 (Minn. 1998).

Since Minnesota Power is not a gas public utility, Minnesota Power does not file a tariff for providing gas service and a plethora of other statutes under the Minnesota Public Utilities Act that regulate natural gas service do not apply to Minnesota Power.¹⁰ *See, e.g.*, Minn. Stat. §§ 216B.16, subds. 7a and 12; 216B.163; 216B.1635; 216B.167; 216B.1675; 216B.241, subd. 1a(a)(1); 216B.242; and 216B.361. Likewise, under the Federal Energy Regulatory Commission's regulations, a "franchised public utility" is "a public utility with a franchise service obligation under state law." 18 C.F.R. §§ 35.43(a)(3) & 35.36(a)(5). Without retail gas customers, Minnesota Power has no natural gas service obligations under Minnesota state law and its natural gas pipeline would not be subject to this federal definition.

What clearly applies to Minnesota Power are statutes applicable to electric public utilities. For example, Minnesota statutes establish distinct service territories for providing electric service by electric utilities. *See* Minn. Stat. §§ 216B.37 – 216B.44. Under Minn. Stat. § 216B.38, subd. 5 an electric utility is defined as: "persons, their lessees, trustees, and receivers, separately or jointly, now or hereafter operating, maintaining, or controlling in Minnesota equipment or facilities for providing electric service at retail and which fall within the definition of 'public utility' in section 216B.02, subdivision 4, and includes facilities owned by a municipality or by a cooperative electric association." This definition and its applicability to Minnesota Power demonstrate that

¹⁰ Minnesota Power is permitted to seek rate recovery on fuel costs pursuant to Minn. Stat. § 216B.16, subd. 7(3) for the costs of fuel used in generation of electricity, which includes coal, biomass, and natural gas fuel sources.

Minnesota law distinguishes when public utilities are providing electric service versus gas service. By not furnishing gas service at retail, Minnesota Power is not subject to Cohasset's delegated powers under Minn. Stat. § 216B.36.

Therefore, the Court of Appeal's distinction between Minnesota Power being an electric public utility for purposes of an electric franchise ordinance and not being a natural gas public utility for purposes of a gas franchise ordinance is consistent with Minnesota case law and applicable statutes.

C. Franchises Confer Rights to Serve the Public

The City provides a rich historical analysis of franchises and municipalities application to various factual scenarios. *See* Appellant's Br. at 23. However, the City overlooks an important decision from this Court conferring the powers of a franchise only when the utility is serving the public. In *Northern States Power v. City of Granite Falls*, 242 N.W. 714, 716 (Minn. 1932), the Court held that when a utility company furnished power under contract to a municipality that contract was outside the scope of a franchise authority since the utility company had no right to serve the public. The Court held that.

Franchises, in the sense now important, can come only from government, and in a transaction such as this 'a municipality does not exercise its legislative functions * * * but only its business or proprietary powers, to which the rules and principles of law applicable to contracts and transactions between individuals apply.' *Reed v. City of Anoka*, 85 Minn. 294, 298, 88 N. W. 981, 982. **Plaintiff was not given right and does not otherwise possess it, to use streets or alleys to furnish electric energy to inhabitants of the city or other customers outside it. The contract confers on plaintiff no right to deal with or serve the public.** *Central Wis. Power Co. v. Wis. T., L., H. & P. Co.*, 190 Wis. 557, 209 N.W. 755; *Griffin v.*

Oklahoma Nat. Gas Corp. (C. C. A.) 37 F.(2d) 545; *City of Des Moines v. Welsbach Co.* (C. C. A.) 188 F. 906. There is present no element of franchise, which is 'a special privilege conferred by the government on 'a grantee which does not belong to citizens 'generally by common right.' 4 McQuillin, Mun. Corp. (2d Ed.) § 1739. No franchise being involved, the restrictions in defendant's charter upon its granting of franchises are irrelevant to the present inquiry.

Id. at 716 (emphasis added). The Court determined that when the utility Northern States Power sold power to a municipality, Northern States Power was not conferred the rights of a franchise since the utility was not furnishing power to retail customers. By comparison when Minnesota Power purchases gas for its own consumption Minnesota Power is not subject to a franchise since Minnesota Power is not providing gas services to any customers.¹¹

Not furnishing services to retail customers was the basis for the Minnesota Supreme Court limiting the application of a franchise in *City of St. Paul* despite the public service corporation statute under Minn. Stat. § 300.03 (now § 301B.01). The Court also distinguished its previous *Blaine* decisions:

The facts surrounding this court's analysis of Minn.Stat. ch. 300 in the *Blaine* cases are also distinguishable. In the *Blaine* cases, the question of whether the

¹¹ Cohasset's citation to *Southwestern Electric Power Co. v. Conger*, 280 So.2d 254 (Louis. Ct. App. 1973), *rev. denied* (1973) is inapplicable to this case since Minnesota Power never relied on its status as an electric public utility in obtaining right-of-way for the gas pipeline. Minnesota Power utilized its own property and negotiated for easements with landowners as a private developer. In acquiring all the necessary easements and crossing agreements for its pipeline, Minnesota Power had the same powers as any private citizen, namely it could only acquire easements and crossings through negotiations and compensation to willing landowners. *See* Respondent's App. at 8-9 (Affdavit of Thomas E. Castle dated November 10, 2008, submitted to the District Court on November 11, 2008).

entity supplying the natural gas, the CPUC, was a public utility was not at issue. St. Paul argues that Centran and EGM are utilities operating within the city. To hold that they are would require a very broad definition of “utility,” a definition that would stretch the meaning of section 300.03, section 16.01, and the *Blaine* cases beyond their proper reading.

While chapter 300 allows a corporation to be formed in order to supply natural gas and requires it to be franchised to do so, the statute appears to be tailored to cover those companies which install the means to supply the power. St. Paul Charter § 16.01 also appears to be so tailored. Thus, an entity, to operate as a 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*, 265 Minn. at 17, 121 N.W.2d at 189-90. Neither Centran nor EGM has laid pipes or installed the necessary equipment. As stated in *Griffin v. Oklahoma Natural Gas Corp.*, 37 F.2d 545, 548 (10th Cir.1930), a case cited in *Blaine I*, 265 Minn. at 17, 121 N.W.2d at 190:

[T]he word “franchise” [as defined by state statute] means a special franchise to establish and maintain a public utility, to use the streets therefor and to **collect compensation for services**, and not an ordinary contract to purchase gas, such as the contracts involved in the instant case, which are expressly authorized by [state law].

Griffin, 37 F.2d at 548. Since Centran and EGM are only engaging in the sale of gas, they are not operating as utilities.

City of Saint Paul, 462 N.W.2d at 384-85 (emphasis added).

Other jurisdictions have similarly limited the applicability of franchises to only when utilities are serving the public.¹² In *Central Wisconsin Power Co. v. Wisconsin*

¹² See also, *Griffin v. Oklahoma Natural Gas Corporation*, 37 F.2d 545, 548 (10th Cir. 1930) (contract by municipality to purchase gas is not within Kansas law relating to franchises); *Washington Fruit & Produce Co v. City of Yakima*, 100 P.2d 8, 11-12 (Wash. 1940) (franchise connotes the right of a public utility to make use of city streets to serve the public generally and not when the city purchases the necessary service from the utility); *Dunmar Investment Company v. Northern Natural Gas Co.*, 176 N.W.2d 4, 7 (Neb. 1970) (no franchise required for laying pipes where there “is no attempt or

Traction Light, Heat & Power Co., 209 N.W. 755 (Wis. 1926), the Wisconsin Supreme Court held:

The city of Clintonville had, prior to the time of entering into the contract, maintained its own plant for the generation of electrical energy. Language could hardly make clearer the intention of the parties, which was that the plaintiff should deliver to the city, a public utility, electrical energy to be distributed by the city to the consumers, and for the purpose of delivering such energy the plaintiff was authorized to erect and maintain the necessary electrical equipment in the streets of the city. Was this a grant of power from the city as agent of the state to furnish light, heat, and power for the public either directly or indirectly? Manifestly, **the plaintiff dealt with the public in no respect whatever. If it can be said under such an arrangement as was here entered into between the city of Clintonville and the plaintiff that the plaintiff furnished light, heat, and power to the public indirectly, that would be equally true of a coal dealer who erected a coal chute for the purpose of delivering coal to the generating plant owned by the city.** The statute expressly declares that a city owning and operating an electrical plant such as the city of Clintonville owned and operated is a public utility, so that we have in this case one public utility dealing with another. In making the contract, the city acted in its proprietary capacity. In its governmental capacity, by the adoption of the ordinance, it permitted the plaintiff to use the streets of the city for the purpose of carrying out its contract with the city as a proprietor. **It did not thereby grant any franchise to the plaintiff to serve the public,** but reserved that function to itself.

The Wisconsin Supreme Court's analysis that a public utility selling electricity to a city is not conferred franchise rights just as "a coal dealer who erected a coal chute for the purpose of delivering coal to the generating plant owned by the city" would not have (or need) such franchise rights squarely rebuts Cohasset's argument that Minnesota Power should be deemed a public utility for this dispute since the new pipeline is "used to ignite the generating units at the Boswell plant..." Appellant's Br. at 16. As the Court of

necessity to regulate [gas company]'s business or its rates in ways common to a franchise.").

Appeals succinctly concluded, Minnesota Power's "gas pipeline, standing alone, is not subject to a franchise under Minn. Stat. § 216B.36 because it is not a natural gas public utility." *Cohasset*, 776 N.W.2d at 782-83.

The Kansas Supreme Court's decision in *State, ex rel., v. City of Coffeyville*, 28 P.2d 1032 (Kan. 1934) is equally applicable to this case of first impression in Minnesota. In *City of Coffeyville*, the city owned an electric light plant (similar to Minnesota Power's Boswell Energy Center) and used natural gas for fuel to operate the electric plant. *Id.* at 1033. The City of Coffeyville entered into a contract with the Trinity Company, an entity the Kansas Public Utilities Commission previously determined was not a public utility. *Ibid.* The Trinity Company was a producer of natural gas having one customer only, the City of Coffeyville, and was "not engaged in general commercial distribution of natural gas..." *Ibid.* The Kansas Supreme Court addressed whether the City of Coffeyville need to comply with Kansas statutes related to franchises and held those statutes inapplicable for the following reasons:

It is perfectly plain that the first part of this section relates to grants of privilege to use streets and alleys 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. **Privilege to serve the public is the subject of the grant**, and use of streets and alleys for construction and maintenance of appliances necessary to furnish the service is merely an incident to that subject. In granting such privileges the city acts through its mayor and commissioners in its public, governmental capacity. In this instance, the city acted through its mayor and commissioners in its private, corporate capacity to make contracts necessary to execution of its administrative powers. (R. S. 12-101.) **What the city did was to buy gas, just as it might buy coal, and as an incident to delivery of the fuel it authorized the piping of the gas to the meters at the city light plant and city buildings.** The distinction between

exercise of public, governmental power, and private, administrative power, has been drawn so often, it is not necessary to do so again.

Id. at 1034 (emphasis added).

Therefore, the Kansas Supreme Court determined that the city's purchasing of natural gas for an electric plant was not subject to a statutory franchise requirement. Furthermore, the Kansas Supreme Court reasoned that the implications of holding otherwise were important:

A franchise charge would simply be added to price in the formation of the contract. **Purchase by the city of fuel for its own use does not affect the inhabitants in the way a franchise to furnish gas to the inhabitants affects them.** Purchase of fuel is purely administrative business, use of the streets merely facilitated delivery, and to avoid absurdity it is necessary to hold that subdivision seventh operates in the same field as the remainder of the section, the field of public, governmental activity.

Ibid. (emphasis added). *City of Coffeyville* is equally applicable to Minnesota Power's purchase of gas for its own industrial use at Boswell Energy Center, which does not affect the residents of Cohasset in the way a franchise to furnish gas to these same residents would affect them. To the extent there are affects, those were addressed by the MPUC in issuing a pipeline route permit under Minn. Stat. § 216G.02. In particular, Minn. Rules 7852.0700 sets forth the criteria for the MPUC to consider in granting a route permit for the Boswell Gas Pipeline.¹³

¹³ Minn. Rules 7852.0700, subp. 3(J) requires the MPUC to consider local land use ordinances "relating to the location, design, construction, or operation of the proposed pipeline and associated facilities."

The City's basic argument is that just because Minnesota Power provides electric service to the residents of Cohasset any gas pipeline owned by Minnesota Power is subject to a gas franchise.¹⁴ If this argument were taken to its logical conclusion any Minnesota Power owned or operated asset within the municipal boundaries of the City of Cohasset would be subject to any franchise fee as established by Cohasset. This expansive application could include private roads and parking lots within Boswell Energy Center, any water discharge pipes, or even Boswell Energy Center itself if there is any nexus to the City of Cohasset's operations or existing services. *Cohasset*, 776 N.W.2d at 781. Another example of an absurd outcome from the City's argument: if a natural gas utility was operating in the City of Cohasset and providing retail service to the residents of Cohasset and needed to build its own electric transmission line to serve a gas pumping station, then Cohasset would assert that the natural gas utility should be subject to any electric franchise ordinance and associated franchise fee simply because it was providing gas service to the public. These examples demonstrate why the Court of Appeals properly ruled in favor of Minnesota Power.¹⁵

¹⁴ On pages 31-36 of its Brief, the City provides at length its arguments concerning franchise fee structure. While Minnesota Power disagrees with the legal analysis and many of the City's unsupported factual characterizations, these issues have not been litigated and are outside the scope of this Court's review of the District Court's and Court of Appeals' decisions dismissing the City's complaint. *See Lee v. Delmont*, 36 N.W.2d 530, 537 (Minn. 1949) ("Issues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable. Neither the ripe nor the ripening seeds of controversy are present.").

¹⁵ Cohasset's recitation of case law related to Minn. Stat. § 645.17(1) and legislative intent is misplaced. The Court of Appeals did not hold that the plain meaning of Minn.

In addition to its arguments related to Minn. Stat. § 216B.36, Cohasset asserts that under Minn. Stat. § 301B.01 a “public service corporation” would still be required to obtain a franchise. Appellant’s Br. at 18-19. However, Cohasset’s reliance on Minn. Stat. § 301B.01 is misplaced. Cohasset fails to explain how Minnesota Power meets the definition of a “public service corporation” for gas service. Minn. Stat. § 301B.01 provides that:

A corporation may be organized to construct, acquire, maintain, or operate internal improvements, including railways, street railways, telegraph and telephone lines, canals, slackwater, or other navigation, dams to create or improve a water supply or to furnish power **for public use**, and any work for **supplying the public**, by whatever means, with water, light, heat, or power, including all requisite subways, pipes, and other conduits, and tunnels for transportation of pedestrians. No corporation formed for these purposes may construct, maintain, or operate a railway of any kind, or a subway, pipe line, or other conduit, or a tunnel for transportation of pedestrians in or upon a street, alley, or other public ground of a city, without first obtaining from the city a franchise conferring this right and compensating the city for it.

(emphasis added). Similar to Minn. Stat. § 216B.36, Minn. Stat. § 301B.01 is “limited to providing utility services for public use”. *Cohasset*, 776 N.W.2d at 783. The right of an industrial user of gas to bypass a local franchise for its own use is also well established under federal law.¹⁶ Minnesota Power is not providing a utility service for public use,

Stat. § 216B.36 was absurd, just that Cohasset’s application of a gas franchise to any infrastructure of an electric utility was an absurd application of Minn. Stat. § 216B.36. *See Cohasset*, 776 N.W.2d at 781.

¹⁶ The Tenth Circuit Court of Appeals in *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992), found that state regulation was limited to local retail sales, thereby excluding delivery to industrial customers where the customers have taken delivery directly from interstate pipelines. *Id.* at 1421 (“While delivery by Northwest and delivery

since its pipeline will be used to serve Minnesota Power's own private industrial purposes.

As the Court of Appeals appropriately held and the City does not dispute, Minnesota Power "is not using the pipeline to furnish gas to the public; it is not collecting charges or doing the things necessary to conduct a utility business as a natural gas public utility." *Cohasset*, 776 N.W.2d at 783.

D. A Municipality's Police Powers Do Not Constitute Imposition of a Franchise

At oral argument before the District Court, the City brought forth a new argument that it was a statutory city with broad police powers that allowed the imposition of a franchise on Minnesota Power's gas pipeline. *See* Respondent's App. at 25-26 (District Court Trial Transcript at 16-17); *compare* Appellant's App. 48-49 (Complaint ¶ 25). The District Court's decision dismissed the Appellant's police power claims as either not applicable or limited to raising revenue that is not acceptable (citing *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn. 1987)). Appellant's Add. at 22-23. The Court of Appeals also rejected Cohasset's police power arguments as outside the scope of Minn. Stat. §§ 216B.36 and 301B.01. *See Cohasset*, 776 N.W.2d at 783-84.

by Cascade are similar in that both result in the final local delivery for consumptive use, a local retail sale is conspicuously missing."). *See also, Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117, 121-22 (D.C. Cir. 1989) (upholding FERC's exercise of jurisdiction to approve bypass arrangements to large, high-pressure pipelines); *Bd. of Water, Light and Sinking Fund Commrs. v. FERC*, 294 F.3d 1317, 1325-26 (11th Cir. 2002).

As authority for its police powers argument, Cohasset invokes *Northern States Power v. City of Oakdale*, 588 N.W.2d 534 (Minn. Ct. App. 1999) regarding a city's power to require a franchised public utility to bury underground electric power lines as applicable to this case. Appellant's Br. at 26. The question in that case was not whether Northern States Power's electric distribution to serve a new customer was subject to a franchise under Minn. Stat. § 216B.36, but whether the City of Oakdale was conferred the authority under Minn. Stat. § 216B.36 to require undergrounding. *City of Oakdale*, 588 N.W.2d at 539. The Court of Appeals determined that "by the plain language of the statute, the legislature reserved the authority of municipalities to require distribution line undergrounding." *Id.*, 588 N.W.2d at 541. Minnesota Power's pipeline is readily distinguishable since the pipeline is for a private, industrial purpose, while Northern States Power's distribution electric line was for a public utility purpose, to serve a retail customer. *See also, Cohasset*, 776 N.W.2d at 784 (distinguishing the City's arguments on *City of Oakdale*).

Finally, the City's invocation of general statutory city powers under Minn. Stat. §§ 412.211 and 412.221 does not result in applying Cohasset's gas franchise ordinance to Minnesota Power. As the District Court correctly held:

Municipalities, like the City of Cohasset, possess no inherent powers and are purely creatures of the legislature. See Minn. Const. art. XII, § 3 ("The legislature may provide by law for the creation, organization, administration, consolidation, division and dissolution of local government units and their functions * * *"). Thus, municipalities possess only those powers that are conferred by statute or implied as necessary to carry out legislatively conferred powers. See *Minnetonka Electric Co. v. Village of Golden Valley*, N.W.2d 138, 140 (Minn. 1966) (ruling

that where state legislature has preempted the field, municipal ordinance that conflicted with state law could not operate); *Village of Brooklyn Center v. Rippen*, 96 N.W.2d 585, 587 (Minn. 1959) (ruling that village did not have implied power to license boats). The City of Cohasset therefore has no inherent power to impose a franchise upon Minnesota Power's pipeline unless state law specifically grants that authority.

Appellant's Add at 21.

For the purposes of this case, neither Minn. Stat. §§ 412.211 nor 412.221 specifically grant gas franchise authority to the City of Cohasset. As the Court of Appeals correctly stated, "because sections 216B.36 and 301B.01, define the city's ability to regulate and franchise the gas pipeline, and because respondent's gas pipeline does not fall within the terms of these statutes, the city does not have the power to regulate and impose a franchise under Minn. Stat. § 412.211." *Cohasset*, 776 N.W.2d at 784. Minnesota Power recognizes a municipality would have the power to impose a property tax on this pipeline,¹⁷ but that authority does not extend to the power to impose a franchise fee. The specific grants of franchise authority are found only in Minn. Stat. §§ 216B.36 and 301B.01 and are limited in application to public utilities or public service corporations. A plain reading of Minn. Stat. §§ 216B.36 and 301B.01 and applicable case law provides Minnesota Power is not subject to Cohasset's gas franchise authority

¹⁷ The City continues to incorrectly assumes that the pipeline is not subject to personal property taxes under Minn. Stat. § 272.02, subd. 10. While the Boswell Gas Pipeline does have the environmental attribute of igniting coal powered electric generation with natural gas instead of fuel oil, Minnesota Power has not taken the position that this qualifies the pipeline for the personal property tax exemption.

since Minnesota Power does not today and does not intend to sell natural gas service to the public and has constructed and will operate this pipeline for its own private use.

E. Minnesota Power is Not Subject to Cohasset's Permit Authority

Without the legal authority to impose a gas franchise on Minnesota Power's pipeline, the only remaining authority Cohasset maintains would be a local governmental site approval. Cohasset believes that such authority could take the form of an "ordinance" under its police powers. Appellant's Br. at 38. Under Cohasset's ordinance a franchise is required of any person¹⁸ who wants to "own, construct, maintain, or operate a Designated Pipeline within the City of Cohasset." Appellant's Add. at 40. Under Minn. Stat. § 216G.02, subd. 2, Minnesota Power could not begin construction of this pipeline without prior approval of the MPUC, while construction without a franchise is explicitly prohibited by the City's gas franchise ordinance. Therefore, both state law and the City of Cohasset's ordinance require a regulatory approval prior to "construction". See Minn. Stat. § 645.08(1) ("words and phrases are construed according to rules of grammar and according to their common and approved usage").

The MPUC's issuance of a pipeline route permit to Minnesota Power on September 17, 2008 in Docket No. E015/GP-08-586 necessitates that any local governmental site approvals by Cohasset are preempted by Minn. Stat. § 216G.02, subd.

¹⁸ It should be noted Cohasset's Ordinance does not mention "public utility" or "public service corporations", but would be applicable to any "person" owning a Designated Pipeline.

4 and Minn. Rules 7852.0200. Minn. Stat. § 216G.02, subd. 4 (formerly Minn. Stat. § 116I.015) states:

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.

(emphasis added). It is unnecessary to turn to the legislative history of Minn. Stat. § 216G.02 and statutory preemption arguments when the plain meaning of the statute can be determined on its face. *See* Minn. Stat. § 645.16. (“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”). Since Cohasset cannot impose a gas franchise, then any other local action to regulate Minnesota Power’s pipeline is preempted by Minn. Stat. § 216G.02 and Minn. Rules 7852.0200 and Cohasset’s ordinance requirement must yield to the MPUC’s issuance of a state route permit.

IV. CONCLUSION

For all the foregoing reasons, Minnesota Power respectfully requests the Court affirm the Court of Appeals’ decision in all respects.

Dated: May 28, 2010

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Office Word 2003 and contains 8538 words, excluding the Table of Contents and Table of Authorities.

DATED: May 28, 2010



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