

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of an Investigation into the
Commission's Jurisdiction Over the City of
Hutchinson's Intrastate Natural Gas Pipeline
Pursuant to Minn. Stat. § 216B.045

ISSUE DATE: September 15, 2004

DOCKET NO. G-252/CI-04-452

ORDER ASSERTING JURISDICTION AND
REQUIRING FILINGS

PROCEDURAL HISTORY

On February 12, 2004, Northern Natural Gas Company (Northern) submitted a letter requesting that the Commission investigate whether Hutchinson Utilities Commission was in compliance with Minnesota statutes regarding the operation of an intrastate pipeline.

On March 30, 2004, the Commission, by notice, requested comments on whether the Commission has jurisdiction over the City of Hutchinson's intrastate natural gas pipeline pursuant to Minn. Stat. § 216B.045.

On April 30, 2004, joint comments were filed by the City of Hutchinson (Hutchinson) and the Minnesota Municipal Utilities Association (MMUA) recommending that the Commission close this docket and decline Northern's request for an investigation.

On April 30, 2004, joint comments were filed by Centerpoint Energy Minnegasco, Interstate Power and Light Company and Aquila, Inc. (collectively, the Companies); and comments were filed by the Department of Commerce (DOC). The Companies and the DOC recommended that the Commission assert jurisdiction and exercise its authority to regulate Hutchinson's intrastate pipeline.

On May 7, 2004, Northern filed comments.

On May 17, 2004, MMUA, the DOC, Northern, and the Companies each filed reply comments.

The matter came before the Commission on August 19, 2004.

FINDINGS AND CONCLUSIONS

I. Background

On December 13, 2003, the Commission granted Hutchinson Utilities Commission¹ a Certificate of Need² to build an 89 mile long pipeline between Trimont, Minnesota and Hutchinson, Minnesota. The pipeline was to connect with the Northern Border Pipeline Company in Martin County Minnesota and was to be used to transport natural gas to the City of New Ulm, New Ulm's electric generating facilities, the City of Hutchinson and Hutchinson Utilities Commission's electric generating facilities.

Subsequently, Hutchinson and New Ulm entered into a Natural Gas Firm Transportation Capacity Agreement effective April 1, 2004. Under the Agreement, Hutchinson committed to the New Ulm Public Utilities Commission long term firm transportation capacity (one-third of the pipeline capacity per day for 365 days per year) until the last day of March 2026, unless extended.

The issue in this docket is whether the completed pipeline is subject to Commission regulation under Minn. Stat. § 216B.045 (the intrastate pipeline statute).

II. Relevant Statutes

A. Minn. Stat § 216B.01 - LEGISLATIVE FINDINGS, in part states:

It is hereby declared to be in the public interest that public utilities be regulated as hereinafter provided in order to provide the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates, Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them, ... it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein.

B. Minn. Stat. § 216B.02 - Definitions.

Subd. 4. Public Utility. "Public Utility"

means persons, corporation or other legal entities. . . operating, maintaining or controlling in this state equipment or facilities for furnishing at retail

¹ Hutchinson Utilities Commission is a municipal public utilities commission providing natural gas service to meet the needs of the City of Hutchinson and the Hutchinson Utilities Commission.

² *In the Matter of the Application of City of Hutchinson (Hutchinson Utilities Commission) for a Certificate of Need to Construct a Large Natural Gas Pipeline*, Docket No. G-252/CN-01-1826, ORDER GRANTING CERTIFICATE OF NEED AND VARYING FEE PAYMENT RULE (December 13, 2003), ORDER DENYING RECONSIDERATION (February 12, 2003).

natural, manufactured or mixed gas or electric service to or for the public or engaged in the production and retail sale thereof but does not include (1) a municipality. . . producing or furnishing natural, manufactured or mixed gas or electric service. . . .

C. Minn. Stat. § 216B.045 - Regulation of Intrastate Natural Gas Pipeline.

Pertinent parts of this statute are set forth below.

Subdivision 1. **Definition of intrastate pipeline.** For the purposes of this section "intrastate pipeline" means a pipeline wholly within the state of Minnesota which transports or delivers natural gas received from another person at a point inside or at the border of the state, which is delivered at a point within the state to another, provided that all the natural gas is consumed within the state. An intrastate pipeline does not include a pipeline owned or operated by a public utility, unless a public utility files a petition requesting that a pipeline or a portion of a pipeline be classified as an intrastate pipeline and the commission approves the petition.

Subd. 2. **Reasonable rate.** Every rate and contract relating to the sale or transportation of natural gas through an intrastate pipeline shall be just and reasonable. No owner or operator of an intrastate pipeline shall provide intrastate pipeline services in a manner which unreasonably discriminates among customers receiving like or contemporaneous services.

Subd. 3. **Transportation rate; discrimination.** Every owner or operator of an intrastate pipeline shall offer intrastate pipeline transportation services by contract on an open access, nondiscriminatory basis. . . .

Subd. 4. **Contract; commission approval.** No contract establishing the rates, terms, and conditions of service and facilities to be provided by intrastate pipelines is effective until it is filed with and approved by the commission. The commission has the authority to approve the contracts and to regulate the types and quality of services to be provided through intrastate pipelines. . . .

Subd. 5. **Complaint.** Any customer of an intrastate pipeline, any person seeking to become a customer of an intrastate pipeline, the department, or the commission on its own motion, may bring a complaint regarding the rates, contracts, terms, conditions, and types of service provided or proposed to be provided through an intrastate pipeline, including a complaint that a service which can reasonably be demanded is not offered by the owner or operator of the intrastate pipeline. . . .

Subd. 7. **Natural gas emergency.** The commission may declare a natural gas supply emergency if it finds that a severe natural gas shortage endangering the health or safety of the citizens of the state exists or is imminent in the state. . . .

III. The Parties' Positions

A. Northern

Northern argued that the plain language of Minn. Stat. § 216B.045 gives the Commission jurisdiction over Hutchinson's intrastate pipeline. Northern argued that there is no dispute that the pipeline is an intrastate pipeline and that the express terms of the statute extends Commission jurisdiction over every owner or operator of such a pipeline, including Hutchinson.

Northern argued that Hutchinson is not exempt from the provisions of Minn. Stat. § 216B.045. It argued that the only entity to which the provisions of the statute do not extend are public utilities because public utilities are already regulated by other provisions of Chapter 216B. Further, Northern argued, since municipalities are not public utilities³ municipalities do not fall within the only exemption in § 216B.045.

Northern argued that Hutchinson's reliance on Minn. Stat. § 216B.01, which indicates, in part, that it is unnecessary to subject municipal utilities to regulation unless specifically provided in the statute because they are effectively regulated by the residents of the municipalities that own them, fails for several reasons.

First, Northern argued that Minn. Stat. § 216B.045 in subd. 2 and 3 makes it clear that the statute applies to all owners and operators of intrastate pipelines, except public utilities. Northern argued that because the statute excludes only public utilities, all other owners or operators are included.

Second, Northern argued that the public policy stated in § 216B.01 that supported exemption of municipal utilities does not support exemption of municipal utilities from § 216B.045. In §216B.01, the stated reason for exempting municipal utilities is that they were effectively regulated by the residents of the municipalities that owned them. However, Hutchinson's intrastate pipeline extends well beyond the bounds of the municipal boundaries of Hutchinson. Northern argued that the legislature did not intend that the residents of Hutchinson would determine the rates and terms of service to those outside its boundaries, nor did the legislature intend that an entity discriminated against by the owner or operator of an intrastate pipeline would take its complaint to the Hutchinson Utility Commission. Rather, Northern argued, the Legislature, by clear and unambiguous language granted jurisdiction to the Commission.

Finally, Northern argued that although there may not be a complaint related to Hutchinson's pipeline, § 216B.045, subd. 4 gives the Commission the authority to approve contracts and regulate the types and quality of service provided through an intrastate pipeline. Pursuant to this authority, Northern requested that the Commission investigate the terms and conditions of the agreement between Hutchinson and the City of New Ulm.

B. City of Hutchinson and Minnesota Municipal Utilities Association

Hutchinson and MMUA argued that the letter written by Northern was not a complaint, but only a request for an investigation. Hutchinson stated that no one has requested service from the Hutchinson Pipeline and that all of the firm capacity of the Pipeline is committed by contract to the

³ Minn. Stat. § 216B.02.

cities of New Ulm and Hutchinson. Hutchinson and MMUA argued that because there has not been a complaint filed, a decision on the issue of regulation is premature. For this reason, Hutchinson and MMUA requested that the Commission close this docket.

They argued that the legislature made specific findings in Minn. Stat. § 216B.01 against regulating municipal utilities. The legislature stated that “. . . Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them. . . it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein.”

Hutchinson and MMUA argued that Minn. Stat. § 216B.045 does not specifically provide for regulation of municipal utilities and if the legislature had intended to regulate municipal utilities operating intrastate pipelines, it would have specifically provided for it in section 216B.045.

In response to the DOC’s argument that section 216B.045 regulates “pipelines” in the same way that the certificate of need statute regulates “facilities,” Hutchinson and MMUA argued that the certificate of need statute uses the term “person” in a context that includes municipalities, which is not the case in section 216B.045. They argued that the word “person” in Minn. Stat. § 216B.045 refers to the source of the gas (Northern Border Pipeline Company) and cannot mean the City of Hutchinson. Because the certificate of need statute required a certificate of need for any “person proposing to construct a large energy facility. . . ,”⁴ the City of Hutchinson sought a certificate of need.

Finally, Hutchinson and MMUA argued that public policy does not support regulation by the Commission. They argued that municipal utility rates are decided by councils and commissions composed of city residents, who weigh the risks and benefits of utility projects using their local knowledge and perspective. This is equivalent to state regulation and is appropriate for city-owned and operated utilities.

C. The DOC

The DOC argued that the Commission has jurisdiction over the Hutchinson intrastate pipeline. It argued that the plain language of Minn. Stat. § 216B.045 governs every intrastate pipeline and its owner or operator except that of a public utility, which is fully regulated already. The DOC argued that the City of Hutchinson, as owner and operator, is clearly covered.

The DOC argued that the statutory definition of an intrastate pipeline focused on the physical characteristics of the pipeline and the use of the pipeline. It is the pipeline facility that is defined as the intrastate pipeline.

It argued that the Hutchinson pipeline is an intrastate pipeline in that it is located wholly within Minnesota, that all natural gas will be consumed within the state, that the gas transported by the pipeline is received from Northern Border and is delivered to the City of New Ulm as well as Hutchinson. Once a pipeline meets the statutory definition of an intrastate pipeline, the statutory language that governs the provision of intrastate pipeline services is inclusive and unequivocal.

⁴ Minn. Stat. § 216B.243, subd. 4.

The DOC argued that the similarity in the construction of the intrastate pipeline statute and the certificate of need statute⁵ further demonstrates that the regulatory provisions of the intrastate pipeline statute apply to municipally owned intrastate pipelines. It argued that the definitions in both statutes focus on the physical characteristics of the facility, and the regulatory terms in both statutes are all-inclusive and unequivocal.

Finally, the DOC argued that the stated purpose of limiting regulation of municipal pipelines under Minn. Stat. § 216B.01 is not met to the extent that Hutchinson provides services to entities other than itself. The statutory limitation relies on Hutchinson residents to regulate Hutchinson pipeline service provisions. However, the DOC argued that when most of the pipeline extends miles beyond the city boundaries, non-Hutchinson citizens have no opportunity to exert regulatory oversight over the Hutchinson pipeline. For this reason, when Hutchinson offers pipeline services to other entities, the stated rationale for limiting regulation of municipalities is not satisfied.

D. The Companies

The Companies stated that they were in agreement with the DOC's analysis and conclusion with respect to the Commission's jurisdiction over the Hutchinson natural gas pipeline. The Companies asked that the Commission assert jurisdiction to ensure that Hutchinson, like any other pipeline owner or operator, provides customers with open nondiscriminatory access and files any contracts regarding the pipeline for Commission approval.

The Companies argued that the plain language of Minn. Stat. § 216B.045 applies broadly to all intrastate pipelines. The Companies did not dispute that municipalities are excluded from the definition of public utility and are generally not subject to regulations that apply to public utilities. But, the Companies argue, this statute applies to pipelines, not public utilities. Hutchinson cannot rely on its exclusion from the term public utility to exempt it from regulation of its pipeline operations, in the absence of an express exemption. The Companies argued that the terms of this statute leave no doubt that all pipelines would be subject to Commission jurisdiction and that the terms of this statute are clear on their face and apply to all intrastate pipelines without exception.

IV. Commission Action

The Commission finds that it has jurisdiction over Hutchinson's intrastate natural gas pipeline pursuant to Minn. Stat. § 216B.045. The plain language of the statute gives the Commission jurisdiction. The pipeline is clearly an intrastate pipeline and the express terms of the statute give the Commission jurisdiction over every owner or operator of such pipeline.

The Hutchinson pipeline meets the definition of a Minnesota intrastate pipeline under the statute. It meets the statutory criteria in that (a) the pipeline will begin and end within the state; (b) the pipeline will transport gas only between points within the state; and (c) all gas transported by the pipeline will be consumed within the state. Minn. Stat. § 216B.045, subd. 1.

⁵ Minn. Stat. § 216B.243.

The statute confers jurisdiction over all intrastate natural gas pipelines except those owned by public utilities. Municipalities are expressly excluded from the definition of a public utility.⁶ Therefore, Hutchinson’s pipeline does not qualify for the sole exemption set forth in the statute. Hutchinson cannot rely on the term “public utility” to exempt it from the statute, in the absence of an express exemption.

Further, there are no other exemptions in the statute for municipally owned pipelines. A pipeline that meets the definition of an intrastate pipeline falls within the regulatory provisions of subdivisions 2-7 of Minn. Stat. § 216B.045. The statutory language that governs the provision of intrastate pipeline services is inclusive and unequivocal, applying to all owners and operators of intrastate pipelines, every contract and any customer. Such terms are clear and unambiguous.

These regulatory provisions require, among other things, reasonable rates and open access on a non-discriminatory basis. Further, these provisions give the Commission broad oversight authority over contracts governing services provided by intrastate pipelines and provide for complaints to the Commission from any customer of an intrastate pipeline, potential customer, the Department, or the Commission on its own motion. These regulatory provisions provide no exceptions for municipally owned utilities. Rather, these provisions provide consumer protections to all intrastate pipeline customers and potential customers, regardless of who owns or operates the pipeline.

The argument by Hutchinson that § 216B.01 (municipalities are not subject to regulation unless specifically provided) is controlling in the current situation is not persuasive. The plain meaning of the statute, as discussed herein, is that all intrastate pipelines, except those owned by a public utility, are subject to Commission jurisdiction. Further, the stated purpose for limiting regulation of municipal pipelines as expressed in Minn. Stat. § 216B.01 does not support Hutchinson’s argument that the statute does not apply.

Minn. Stat § 216B.01 limits the regulation of municipal utilities but it does so “. . . [b]ecause municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them. . . .” In the present case, when the pipeline extends miles beyond the City of Hutchinson’s boundaries, the stated purpose for limiting the regulation of a municipal pipeline under this statute is not met. Any nonresident of the City of Hutchinson would have no means of regulating the utility but would be subject to decisions made by Hutchinson on rates, access, emergency services and all matters related to customers. Such a limitation would effectively deny non-Hutchinson citizens any opportunity to insure open and nondiscriminatory access to intrastate pipeline services at reasonable rates and an opportunity to require that a service that can reasonably be demanded be offered by the owner or operator of the intrastate pipeline.

For the above reasons, the Commission concludes that the Commission has jurisdiction over every owner and operator of an intrastate pipeline (except ones owned by a public utility), including Hutchinson.

⁶ Minn. Stat § 216B.02, subd. 4.

Under the provisions of the statute no contracts that establish the rates or terms and conditions of service to be provided by intrastate pipelines are effective until filed with the Commission.⁷ Therefore, the Commission will require Hutchinson to file all contracts for services provided to shippers with the Commission, including the Hutchinson/New Ulm Firm Transportation Capacity Agreement.

The Commission recognizes that the oversight directed by the statute could be accomplished in various ways. For this reason, the Commission will request comments from the parties on how the Commission should regulate this intrastate pipeline.

ORDER

1. The Commission asserts jurisdiction over the City of Hutchinson's intrastate natural gas pipeline, pursuant to Minn. Stat. § 216B.045
2. Hutchinson shall file all contracts for services provided to shippers with the Commission for approval, including the Hutchinson/New Ulm Firm Capacity Agreement.
3. The parties are requested to file comments on how the Commission should go about regulating this intrastate pipeline.
4. The Commission delegates authority to the Commission's Executive Secretary to establish and vary procedural timelines for the duration of this proceeding.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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⁷ Minn. Stat. § 216B.045, subd. 4.