

Nos. A07-1975 and A07-2070

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State of Minnesota  
**In Supreme Court**

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Greg Siewert, *et al.*,

*Respondents,*

v.

Northern States Power Company d/b/a Xcel Energy,

*Appellant.*

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**REPLY BRIEF AND SUPPLEMENTAL ADDENDUM OF  
APPELLANT NORTHERN STATES POWER COMPANY**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## INTRODUCTION

If the services requested in the litigation are not part of the original tariff obligations, the courts cannot, consistent with the filed rate doctrine, require performance of those services.

*Hoffman v. Northern States Power Co.*, 764 N.W.2d 34, 45 (Minn. 2009).

The Siewerts' all-consuming damages discussion proceeds on a false premise: this case can never see the light of a damages phase because the filed rate doctrine precludes the assessment of liability against a regulated utility for failing to provide facilities and services that are not part of tariff obligations.<sup>1</sup> As a matter of law, a plaintiffs' verdict would require Northern States Power ("NSP") to construct a Siewert-approved distribution system and to deliver Siewert-acceptable services. These extra-tariff obligations would be spawned from litigation rather than promulgated in formal rate making – exactly the regulatory meddling that *Hoffman* rejected. The Siewerts nonetheless want recourse against tariff-compliant facilities and services without regard to the threat posed to the regulatory process. Tellingly, the Siewerts do not deign to acknowledge, much less confront, these impediments to recovery.

The Siewerts conjure up a similarly-misguided condemnation of Minnesota Public Utilities Commission ("MPUC") primary jurisdiction. The Siewerts argue about their supposed need to be awarded damages rather than address the obvious regulatory hornets' nest that would be stirred up by a jury surmising how electricity might be better

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<sup>1</sup> For that reason, NSP will not burden the Court with a rebuttal to the Siewerts' distortion of the facts. This appeal involves certified questions of law which must be answered by precedent, not by impassioned closing arguments.

distributed. “The legislature entrusted the [MPUC] with setting the rates based on the scope of the services NSP was to perform”<sup>2</sup>; yet by this litigation the Siewerts would redefine the services required of NSP without regard to MPUC oversight of retail electric commerce. The need for MPUC expertise is at least as compelling as in *Hoffman*. The Court should therefore again defer to agency primary jurisdiction.

Finally, the Siewerts mount a “kitchen sink” attack upon the statute of repose by peppering their brief with every conceivable Minn. Stat. § 541.051 exception. Despite these maneuvers the Siewerts cannot avoid the effect of complaint allegations tying the damages sought directly to supposed defects in a substantially-completed and fully-functional distribution system. Authority from this Court teaches that injuries that arise out of an improvement to real property, like an electrical distribution system, are subject to § 541.051’s time limitations, and those limitation periods expired long before this litigation was conceived. To the extent the Siewerts could be allowed to complain about maintenance, operations, or inspections, such a lawsuit must be so limited so that claims about the fundamental nature, construction, and design of the distribution system are precluded.

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<sup>2</sup> *Hoffman*, 764 N.W.2d at 51.

## DISCUSSION

### I. *HOFFMAN* SHOWS THE WAY

#### A. *Hoffman* did not recognize a “threshold” to litigation preclusion.

The Siewerts spill much ink to concoct a filed rate doctrine “threshold.” Siewert br. at 17-20. They seek to cabin the doctrine by portraying *Hoffman* as requiring an initial assessment of whether a lawsuit is “rate related,” and only upon an affirmative determination proceeding to analyze whether the “nature” of the claim calls for filed rate preclusion. Siewert br. at 17. *Hoffman* is far more pragmatic.

*Hoffman* stemmed from *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), and a long line of subsequent precedents holding that when “an award of damages would have caused the court to interfere with the Commission’s rate-making function” the claim is filed rate barred. 764 N.W.2d at 42 (citing *Keogh*, 260 U.S. at 162). The perceived “threshold” that the Siewerts import into *Hoffman* merely involved the application of that straight forward rule of law to the circumstances of the case. *Id.* at 43 (“We turn next to an examination of whether the filed rate doctrine bars either or both of these claims.”).

The result in *Hoffman* was determined based upon whether the plaintiffs asserted “[c]laims that seek to expand services beyond what is provided for in the tariff.” *Id.* at 44. Because such causes of action “indirectly challenge the reasonableness of the filed rates, . . . the filed rate doctrine bars the judiciary from considering such claims.” *Id.* (citations omitted). When litigation is sufficiently intrusive upon the rate-making

process, the doctrine prevails. *See id.* *Hoffman*'s treatment of filed rates is straightforward – as opposed to the Siewerts' "if, then" contrivance.

The scramble to obviate *Hoffman*'s impact with an artificial "threshold" to applicability should come as no surprise: the Siewerts fully appreciate the fate that awaits their case when *Hoffman* is given effect. *See* Siewert br. at 17 ("NSP argues that *Hoffman* requires that all claims for relief are barred because NSP might be required to provide 'services' beyond that[sic] required by the tariff. ... This argument does not apply to either claim if NSP loses on the threshold question.") (emphasis added).

The Siewerts' concerns are well founded. This litigation cannot withstand *Hoffman* because the imposition of utility liability would effectively require the provision of a non-standard distribution system and the delivery of special services – neither of which are part of the original tariff obligation. *See, e.g.,* NSP principal br. at 22-27. This is exactly the sort of litigation that *Hoffman* forecloses. *Id.* at 45.

In short, *Hoffman* erects no threshold to filed rate applicability. Instead, consistent with the filed rate doctrine, the courts apply the rule of law whenever litigation would require performance of services not compelled by the tariff. *Id.* This litigation unquestionably implicates filed rates, and when brought to bear the doctrine makes the demise of the Siewerts' claims a foregone conclusion.

**B. *Hoffman* precludes common law claims that have rate ramifications.**

The Siewerts insist that the filed rate doctrine has no bearing on common law claims. *See, e.g.,* Siewert br. at 16 ("*Hoffman* and *AT&T* preclude only rate-related suits,

and do not preclude common law tort actions.”); *id.* at 21 (“The filed rate doctrine does not abrogate common law claims or other statutory claims.”). The doctrine obviously does not, in and of itself, cashier all common law claims, nor do filed rates squelch any other broad category of legal actions. For the same reasons, however, the doctrine does not provide wholesale exemptions based on claim type, as the Siewerts ordain. The dispositive inquiry is whether a cause of action would interfere with the regulated rate structure, not the label describing the request for redress. *Hoffman*, 764 N.W.2d at 47.

The filed rate doctrine stems from justiciability and separation of powers concerns. *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307, 314 (Minn. 2006). The doctrine does not countenance claims that directly or indirectly challenge or require judicial reconsideration of utility responsibilities as prescribed by the tariffs filed with, approved by, and overseen by executive branch agencies. *Hoffman*, 764 N.W.2d at 44-45.

This Court has never condoned separation of powers transgressions or justiciability vacuums simply because those deficiencies manifest themselves as common law tort claims. To the contrary, whenever such concerns are piqued, the doctrine applies.

The Court need look no further than *Schermer*, which first brought Minnesota’s version of the filed rate doctrine to bear on common law claims. 721 N.W.2d at 311 (“[B]ecause we conclude that the filed rate doctrine bars the Class’s claims, we need not reach the issue of whether the Class otherwise had valid statutory or common law claims.”) (emphasis added); *id.* at 316 (“[E]ven if we were to conclude that the Class had

a valid common law cause of action ... [.]” (emphasis added). If common law claims were immune to filed rate disposition, the result in *Schermer* would have been different. *See also Keogh*, 260 U.S. at 163 (filed rate doctrine means that “[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier”) (emphasis added). Subjecting this litigation to the doctrine realizes, rather than expands, the now established rule of law. *Cf. Siewert br.* at 22 (“NSP seeks unprecedented expansion of the filed rate doctrine to preclude common law claims for damages.”).

Accordingly, the Siewerts’ claim characterization dichotomy is illusory: “precluded claims” and “common law actions” are not mutually exclusive. No matter how a complaint is packaged, the doctrine has a terminal effect whenever the claim intrudes upon agency prerogative. Holding NSP accountable for utility service obligations not delineated in a filed tariff would have exactly that effect. *Hoffman*, 764 N.W.2d at 44-45. Contrary to the Siewerts’ pronouncement, common law claims that run afoul of the filed rate doctrine suffer the same fate as any other type of claim with regulatory effect.

**C. This litigation brims with justiciability and separation of powers concerns.**

The Siewerts would have this Court overlook the regulatory implications of this litigation and turn a blind eye to the genesis, role, and operation of the utility commission.

The MPUC’s *raison d’etre* is the regulation of how NSP and other public utilities distribute and charge for energy and communication services. The MPUC is legislatively

empowered to “adopt standards for safety, reliability, and service quality for distribution utilities.” Minn. Stat. § 216B.029, subd. 1(a); *Hoffman*, 764 N.W.2d at 43 (“In Chapter 216 the Minnesota Legislature vested extensive power in the MPUC to set and prospectively regulate rates for Minnesota’s public utility companies.”). Pursuant to that charge the MPUC approved NSP’s tariff, deputing to the utility discretion over standard facility design and siting. NSP Tariff, General Rules and Regulations (“Tariff”), ¶ 5.1(A) (A.123-25), ¶ 5.3(A)(6) (A.129). See *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 225, 228 (1998) (litigation cannot impose specific obligations when the governing agency leaves such matters to the regulated entity’s discretion).

If the Siewerts have their way, a jury would supplant MPUC oversight and decide the “reasonableness” of electric distribution systems and operations already approved by the agency. The Siewerts’ litigation would effectively strip the MPUC of the regulatory authority over “standards for safety, reliability, and service quality for distribution utilities” granted by the legislature. Minn. Stat. § 216B.029, subd. 1(a).

“[T]he regulation of rates is an ‘intricate ongoing process’ and interference by a court ‘may set in motion an ever-widening set of consequences and adjustments’ which courts are powerless to address.” *Schermer*, 721 N.Wd. at 315 (quoting *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm’n*, 369 N.W.2d 530, 535 (Minn. 1985)). The assessment of damages against a system and services that fully comply with the tariff would usurp the MPUC’s “intricate ongoing process” and economically compel NSP to change the way electricity is distributed throughout the state. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (“[State] regulation can be as effectively exerted through

an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 659 (Minn. 1989) (tort-based damages are tantamount to a “state-imposed regulatory scheme superimposed on the [existing] scheme”) (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). MPUC judgments about the propriety of distribution system design, construction and operation would be rendered advisory (at best).

By not rebutting, the Siewerts admit that a jury verdict would leave NSP no choice about changing facilities and operations, inevitably resulting in rate structure recalculation. The MPUC sets electricity prices based upon the cost of service. Minn. Stat. § 216B.01. Thus, any liability finding in the Siewerts’ favor would necessarily reorder fundamental NSP service obligations and thereby change rate base “inputs.”

The means of distributing electricity cannot vary from customer to customer. The overarching principles of utility regulation are uniformity and non-discrimination. If NSP were to distribute electricity as the Siewerts demand, then those services must be available to all ratepayers. If such litigation effects are not the “ever-widening set of consequences and adjustments which courts are powerless to address,” then what would be? *Schermer*, 721 N.W.2d at 315 (quotation omitted).

The filed rate doctrine insulates the MPUC rate-making power and responsibility from the judicial branch for good reason: the distribution of electricity across the state can neither be effective nor efficient if core utility operations are subject to patchwork

regulation effected by lawsuits. The judiciary lacks expertise and authority to comprehend the entire field of electricity distribution in the context of a particular ratepayer's discrete complaints; yet if allowed to proceed this lawsuit would have regulatory effects that would be felt in every corner of the state. The justiciability and separation of powers implications are undeniable.

**D. NSP does not seek an all-encompassing liability limitation.**

The Siewerts infuse this litigation with "Chicken Little" warnings about the supposedly dire consequences of filed rate enforcement. But solicitude for the justiciability and separation of powers principles recognized in *Schermer* and *Hoffman* would not abolish all claims against regulated utilities, and NSP seeks no such exculpation. Rather, the decades-old filed rate doctrine calls for a case-by-case assessment of whether a claim, as pled, would saddle regulated utilities with service obligations formulated outside of the statutorily-prescribed regulatory process. *Hoffman*, 764 N.W.2d at 44-45.<sup>3</sup>

NSP seeks to break no new ground. Giving effect to the filed rate doctrine would not create a liability sanctuary for conduct that does not implicate the regulatory scheme. NSP merely invokes recognized filed rate protection against having service obligations dictated by juries rather than formulated by the administrative agency with requisite expertise. As *Schermer* and *Hoffman* explained, the responsible agency is the only

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<sup>3</sup> NSP does not contend that the tariff abrogates all common law claims against utilities; accordingly, the Siewerts' discussion on pages 22 and 23 goes for naught.

tribunal that can appreciate and foresee the wide-ranging ramifications of electric distribution changes and reach informed judgments about the services that utilities can reasonably be required to render.

**E. Tariff compliance matters.**

The Siewerts conflate filed rate jurisprudence with case law regarding the liability effect of compliance with generally applicable statutes or regulations. Siewert br. at 23. For example, statutory compliance in *Wendinger v. Forst Farms, Inc.* was not dispositive because the defendant (not a regulated entity) could be held to a standard of care that did not exclusively emanate from the statutes at issue. 662 N.W.2d 546, 554 (Minn. Ct. App. 2003) (Siewert br. at 23).

In the context of regulated retail electric commerce, however, this Court has determined that the tariff defines and circumscribes the scope of NSP's duties. *Hoffman*, 764 N.W.2d at 39 ("The services that NSP is obligated to perform for Minnesota customers are set forth under the tariff."). Thus unlike the statute in *Wendinger*, the tariff does delineate what the public can expect of NSP, as well as what NSP can be paid for those services.

It bears repeating that as a regulated monopoly, NSP has no choice about the services it must provide, how much it can charge and with whom it must deal. With those restrictions comes the roster of duties to which NSP can be held, as itemized in the tariff. The Siewerts have not identified a single tariff obligation that NSP has failed to fulfill and, in fact, deny making any claims based upon a breach of tariff obligations. Siewert br. at 19. Those circumstances compel the conclusion that NSP has fully

complied with the tariff, and regulatory compliance obviates any claim about a duty being breached because the tariff is the exclusive source of utility duties.

**F. The regulatory process provides the remedy.**

To stay in court the Siewerts revive arguments rejected in *Schermer* - namely, that the Minnesota Constitution and public policy would be loathe to accept a doctrine that would prevent the award of damages. *See, e.g.,* Siewert br. at 25 (“MPUC cannot provide a ‘reasonable substitute’ for tort damages[.]”). That denouncement is no more palatable in this case than it was in *Schermer*.

The Constitution only safeguards “remedies for which the legislature has not provided a reasonable substitute.” *Schermer*, 721 N.W.2d at 316 (quoting *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 14 (Minn. 1986)). A “reasonable substitute” is afforded by legislation that regulates an entity’s participation in commerce by means of tariff filing requirements, administrative review, investigative oversight, and tariff enforcement authority. *Id.* at 316-17. Importantly, that protection is administered with the interests of all ratepayers, as well as the state’s energy supply, in mind.

MPUC regulation is even more pervasive than the insurance regime that this Court deemed to provide a “reasonable substitute” remedy. *Schermer*, 721 N.W.2d at 318 (“[T]he insurance regulatory scheme is less stringent than, for example, the scheme for electrical, gas, and telephone utilities.”). The MPUC adopts “standards for safety, reliability, and service quality for distribution utilities,” Minn. Stat. § 216B.029, subd. 1(a), including requiring compliance with regulatory and industry standards for “safety,

design, construction, and operation of electric distribution facilities,” Minn. Stat. § 216B.029, subd. 1(d).

In public and protracted proceedings the MPUC vets NSP’s tariff, which must include “all rules that, in the judgment of the [MPUC], in any manner affect the service or product.” Minn. Stat. § 216B.05, subd. 2. At the culmination of that process “[t]he services that NSP is obligated to perform for Minnesota customers are set forth under the tariff.” *Hoffman*, 764 N.W.2d at 39. The comprehensiveness regulatory scheme protects ratepayers from a global (safety, efficiency, economic) perspective; by virtue of these procedures the Siewerts are provided a “reasonable substitute” remedy. *Schermer*, 721 N.W.2d at 316-17. Any complaint the Siewerts have about tariff performance can be taken to the MPUC.

In that regard, the Siewerts have made a telephone call to the agency and bemoan the agency’s failure to take action on its own. *See* October 21, 2004, email from A. Bierbaum of the MPUC (RA 109). But the Siewerts have failed to invoke the administrative process in any formal way, and the MPUC is not persuaded that the Siewerts have a problem based upon what has so far been presented. *Id.*

The regulatory process may not be the Siewerts’ remedy of choice, but the Constitution does not guarantee redress of a party’s choosing. The legislature’s decision to administer the relationship between utilities and their customers through the rate regulation must be respected as the “reasonable substitute” envisioned by *Schermer*.

**G. Injunctive relief was correctly rejected.**

Not satisfied with improperly being allowed to pursue damages against tariff-compliant conduct, the Siewerts take the court of appeals to task for focusing on the prayer for injunctive relief that plainly asks the judiciary to mandate the exact means and facilities that NSP must employ to distribute electricity. Siewert br. at 27. The Siewerts implore the Court to regard injunctive relief as simply the abatement of an alleged nuisance and not as backdoor utility regulation. *Id.* This is a distinction without a difference.

Either way, the court would be ordering NSP to provide different or additional facilities or services without regard to the requirements and limitations of the MPUC-approved tariff. An injunction compelling NSP to distribute electricity would run afoul of *Hoffman's* admonition that “[i]f the services requested in the litigation are not part of the original tariff obligations, the court cannot consistent with the filed rate doctrine, require performance of those services.” 764 N.W.2d at 45. The denial of injunctive relief could not have been more correct.

**H. *Schmidt v. Northern States Power Company*: a different tariff; an inexplicable result.**

The contrarian decision in *Schmidt v. N. States Power Co.*, 742 N.W.2d 294 (Wis. 2007) does not change the Minnesota filed rate analysis announced in *Hoffman*. *Schmidt* is internally inconsistent: the Wisconsin court initially acknowledged that NSP “cannot

provide services other than those in accordance with the tariff,”<sup>4</sup> but then held NSP accountable for a “common-law responsibility” requiring performance that cannot be found in the tariff. *Id.* at 312. Allowing a jury to hold NSP to non-tariff-specified duties would subject utilities to liability for failing to perform beyond the tariff. *Id.* at 312 n.34 (a “common-law duty of ordinary care may or may not be consistent with the terms of a tariff”) (emphasis added). Such extra-tariff accountability cannot be squared with Minnesota jurisprudence and flatly controverts *Hoffman*. 764 N.W.2d at 45.

Besides that, *Schmidt* only considered a discrete tariff that included a peculiar “stray voltage” provision not found in Minnesota regulations. When electrical exposure conditions in a barn exceeded specified levels, the Wisconsin tariff requires utilities to investigate. *Id.* at 31. That level was never reached in Schmidt’s barn, so NSP took no action. The Wisconsin high court held that a tariff provision triggering a utility’s obligation to investigate did not encompass the totality of NSP’s stray voltage duties. The claims were thus deemed to be copacetic with the tariff rather than seeking extra-tariff services or privileges. *Id.* at 313-14.

Unlike in *Schmidt* and *Hoffman*, the Siewerts’ claims do not involve a discrete, tariff provision; instead, they and their experts condemn the fundamental design and operation of NSP’s distribution system. The Siewerts are seeking privileges: they want the delivery of electricity to their farm to deviate from tariff specifications; and they demand that their farm be placed at the end of the line – requiring a system re-

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<sup>4</sup> *Id.* at 310.

configuration. These complaints and remedies absolutely seek privileges that are not part of the original tariff obligations, and if the Siewerts prevail NSP would be required to perform services that are not consistent with the filed rate doctrine. *Hoffman* 764 N.W.2d at 45.

## II. STRAY VOLTAGE – A PRIMARY MPUC RESPONSIBILITY

### A. Primary jurisdiction should be invoked regardless of dispute characterization.

Like with filed rates, the Siewerts discount primary jurisdiction by touting form over substance. Siewert br. at 33-36. The dispositive inquiry is simple: does “the case require[] the exercise of administrative discretion”? *Hoffman*, 764 N.W.2d at 49-50 (quotations omitted). See *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299-300 (1973) (primary jurisdiction deferral proper when the subject matter is “at least arguably protected or regulated by ... [a] regulatory statute”).

The doctrine looks past claim designations because a case should receive the benefit of a primary jurisdiction referral whenever an agency may be better equipped to address an issue due to the regulators’ “specialization, [] insight gained through experience, and [] more flexible procedure.” *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). See *id.* at 574 (primary jurisdiction referral appropriate even if the administrative answers will ultimately “serve as a premise for legal consequences to be judicially defined”); *Hoffman*, 764 N.W.2d at 48 (primary jurisdiction deferral warranted when “an issue before the court requires the particular competence and expertise of the agency”) (emphasis added). The MPUC is uniquely equipped to determine the best, safest, and most efficient method of distributing electricity in rural Minnesota.

The Siewerts complain that compensatory damages are not the stuff of administrative proceedings. Siewert br. at 35. But the MPUC’s inability to take a

common law claim from cradle to grave does not diminish the agency's primary jurisdiction over the initial assessment of complaints about a public utility's distribution of electricity. In the first instance the MPUC should decide whether Siewerts have received deficient electrical service and whether they are entitled to a distribution system and maintenance that are non-standard.<sup>5</sup>

And what tribunal would be better able to determine the duties that the MPUC intended the tariff to encompass? *Hoffman*, 764 N.W.2d at 39 ("The services that NSP is obligated to perform for Minnesota customers are set forth under the tariff."). If the tariff does not obligate NSP to distribute electricity in a way that is different than the method that has supposedly harmed the Siewerts' cows, then NSP cannot be found to have breached any duty. Therefore, common law claim or not, the absolute predicate assessment to any calculation of damages is within the sound experience, expertise and discretion of the MPUC.

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<sup>5</sup> The Siewerts' citation of *In the Matter of a Complaint against Lake Region Coop. Elec. Ass'n* (RA 316) misses the point. Although the MPUC declined to rule on civil and criminal trespass claims, the agency nevertheless decided the substantive question of whether the complaints warranted action:

[S]cience has provided no basis for regulators to establish a standard, for example that X amount of ground current is acceptable but that any greater amount will be prohibited. ... [Since] the testing requested by Complainants would not provide information that the Commission could then use to take enforcement action against any identified sources of ground currents on the Complainants' premises, it would service no legitimate regulatory purposes.

RA 317.

**B. Stray voltage is well within the MPUC's ken.**

The Siewerts' only other primary jurisdiction avoidance argument merely pronounces issues to be "inherently judicial." Siewert br. at 35-39. While "just compensation" may be suitable for judicial resolution (Siewert br. at 35), damages do not become a consideration until the underlying stray voltage complaint has been substantively evaluated by an entity with the requisite knowledge and authority.

A tariff ambiguity caused the *Hoffman* court to seek clarity that was only available from the MPUC. 764 N.W.2d at 51 (MPUC expertise would "provide much-needed perspective for the construction of the NSP tariff"). The Siewerts have not even identified the tariff obligations that NSP failed to perform. In such circumstances the judiciary should be reluctant, without administrative guidance, to be the source of new duties to which a tariff-compliant public utility would be held. The need for regulatory-expert insight into the tariff ramifications of this dispute is manifest. *See Hoffman*, 764 N.W.2d at 51 (invoking case in which administrative referral was "needed to interpret precisely which ... services were owed" under an agency order) (citing *MCI Communications Corp. v. AT&T*, 496 F.2d 214, 221 (3d Cir. 1974)). A judge and jury would be even less able to decide how electricity should be distributed in rural Minnesota than they would be to determine how points of connection should be maintained. Like in *Hoffman*, the agency help is needed.

Unlike the Siewerts, the MPUC does not regard stray voltage disputes to be "inherently judicial." On the contrary, "handling complaints related to stray voltage and currents in the earth" is one of the agency's "primary duties." *See*

<http://www.puc.state.mn.us/PUC/aboutus/general-information/utility-regulation/index.html>. The MPUC has repeatedly probed and resolved stray voltage complaints. *In re Formal Complaint by Donald and Jeanine Wolbeck Regarding Stray Voltage Against Sauk Center Water, Light and Power Comm'n*, No. E-308/C-92-1146 and *In re Inquiry into Distrib. Sys. Issues Potentially Affecting Service Quality*, No. E-308/C1-96-1483 (Minn. P.U.C. Dec. 18, 1996) (A.146-55); *In re Complaint Against Lake Region Coop. Elec. Ass'n*, No. E-119/C-92-318, 1992 WL 678528, at \*1 (Minn. P.U.C. June 4, 1992) (A.138-39); *In re Complaint Against Lake Region Coop. Elec. Ass'n*, No. E-119/C-92-318, 1992 WL 474705 at \*2 (Minn. P.U.C. Nov. 17, 1992) (A.141). If such matters were “inherently judicial,” the MPUC would not have so often exercised jurisdiction over these complaints.

Further, in recognition of the MPUC’s stray voltage expertise the legislature (the ultimate arbiter of jurisdiction) called upon the agency to oversee an investigation into the effects of electrical conditions on dairy cows. 1994 Minn. Laws, Ch. 573 (A.156-60). Clearly, the Siewerts stand alone in ordaining stray voltage determinations to be beyond MPUC purview.

The MPUC is singularly able to survey the entire field of retail electrical regulation and commerce and judge the “reasonableness” of the facilities and maintenance provided by NSP. A jury of anyone other than MPUC commissioners would be unfit to sort out this dispute – the resolution of which would perforce affect the delivery and price of electricity throughout Minnesota and beyond. As in *Hoffman*, this Court should refer these inherently administrative matters to the agency charged by the

legislature with responsibility for ensuring that all Minnesotans are safely, efficiently, and economically supplied electric energy.

### III. STATUTE OF REPOSE

#### A. The common sense “improvement to real property” test is not vitiated by the provision of service.

The Siewerts launch their scattershot assault on the statute of repose by insisting that when claims “implicate a service and not an individual defective electrical component” the principles announced in *Aquila*, *Lietz* and *Pacific Indemnity* can be disregarded. Siewert br. at 41. This sophistry glosses over the recognition in *Lietz* and *Aquila* that § 541.051 applies to any damages “arising out of” an improvement to real property, so as to foreclose artful pleading evasion. See *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 871-73 (Minn. 2006); *State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 885 (Minn. 2006). The dispositive question is whether an allegedly defective improvement is causally related to the alleged harm. *Lietz*, 718 N.W.2d at 871-73; *Aquila*, 718 N.W.2d at 885.

The Siewerts attempt to avoid *Lietz* and *Aquila* by resurrecting the out-dated and discredited rationale of *Johnson v. Steele-Waseca Coop. Electric*, 469 N.W.2d 517 (Minn. Ct. App. 1991) – despite this Court’s skepticism about the reasoning and result in that case. *Aquila*, 718 N.W.2d at 885 n.1. The Siewerts speciously contend that this “Court agreed with the Court of Appeals’ dissent that the improvement at issue in *Johnson* (electrical distribution system) was not an improvement to real property ... because it was part of a larger distribution system.” Siewert br. at 41 (citing *Aquila*, 718 N.W.2d at 885, n.1.) In fact, the Court declined to distinguish facilities that improve real property based on the improvement’s relationship to a larger system. *Id.* at 884. The

Siewerts' attempt to disavow "improvement" status based upon NSP's continued ownership and control of the larger system also flies in the face of *Aquila*. *Id.* The Siewerts are forced to resort to decades-old Georgia and Oklahoma authority, underscoring their argument's dependence upon opinions and theories that find no support in controlling Minnesota law.

*Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, recently reaffirmed by this Court, makes the common sense "real property improvement" definition applicable to all facilities. 260 N.W.2d 548, 554 (Minn. 1977). Under that rubric, the statute of repose prevails because the system supplying electricity to the Siewerts (i) improves the Siewert property; (ii) was installed at a significant expense; (iii) is a "permanent addition or betterment of real property," and (iv) "enhance[s] the capital value" of their farm. *Aquila*, 718 N.W.2d at 884. The Siewerts can neither dispel nor deny that common sense reality.

**B. No negligent maintenance, operation or inspection exception.**

The Siewerts complain about negligent maintenance, operation or inspection, but cannot carry the substantial burden that is a prerequisite to applicability of that exception. "[O]nly in exceptional circumstances" can the exception swallow the statute of repose rule. *Aquila*, 718 N.W.2d at 886 (quotation and citation omitted); *see also id.* ("[T]he burden of proving the exception lies with the parties who seek to claim the benefit of the exception.").

To qualify for the exception the Siewerts' claims would have to arise out of the breach of some maintenance or inspection duty. *See, e.g., Aquila*, 718 N.W.2d at 887 (rejecting claims when the record “contains no evidence that a duty of reasonable care existed and how Aquila breached such a duty.”); *Geary v. Miller*, No. 27-CV-07-13762, 2009 WL 1515505 (Minn. Ct. App. June 2, 2009) (Supplemental Appendix “SA” at 1) (“Because the statute specifically limits the exception to negligence in the maintenance, operation or inspection, the exception requires, at a minimum, an allegation of negligence.”) (citing *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999)).

The Siewerts plainly take NSP to task for problems that are said to be inherent in the distribution system, not the maintenance or operation of that system. *See, e.g.* Siewerts br. at 11 (“The open delta-open wye configuration creates current imbalance and, even with balanced loading, high currents are forced into the primary neutral.”); 2006 Zipse Report at 50-52 (A.88-90); 2007 Zipse Report at 5 (A.100). *See also* NSP principal br. at 12-13. The only stray voltage solutions acceptable to the Siewerts' so-called expert would be a reconfiguration to place the Siewerts' farm at the end of the line or a wholesale replacement of the multigrounded system. 2007 Zipse Report at 5 (A.100). No amount of maintenance could cure those allegedly fundamental defects.

In an attempt to shoehorn their claims into the maintenance exception, the Siewerts curiously look to *Hoffman* to find a supposedly breached maintenance duty. Siewert br. at 43. But the claims in *Hoffman* arose from a specific maintenance duty; the Siewerts identify no tariff provision – unambiguous or otherwise – that calls for the inspections and maintenance they demand. Since NSP is not accused of tariff non-

performance, the filed rate doctrine precludes negligent maintenance, operation or inspection claims premised on duties that are not derived from the tariff. *Hoffman*, 764 N.W.2d at 44-45 (tariff-related complaints are for judicial resolution only when the duty in question is clearly established by the regulation).

In any event, NSP is not required to conduct prophylactic stray voltage maintenance and inspection without notice of a problem. *See Aquila*, 718 N.W.2d at 886-88 (“A utility’s duty to inspect does not require a system of inspection at all times, but only a duty to make reasonable inspections.”) (quotation omitted). Before such a duty could arise, the utility must be presented with ““facts that would suggest to a person of ordinary care and prudence that some part of the gas [or in this case, electrical] system is leaking or is otherwise unsafe for the transportation or use of gas [or electricity].”” *Id.* (quoting *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 751 (Minn. 1980)). Thousands of miles of distribution lines and related gear traverse rural Minnesota; yet the MPUC has not charged the regulated utilities with searching their systems for unreported stray voltage problems. Hence, the Siewerts’ “maintenance and inspection” exception depends upon the imposition of duties that cannot be foreseen and that are not encompassed by MPUC regulations.

NSP did not become aware of any stray voltage issue until just before the Siewerts sued. Before that, testing by the Siewerts’ veterinarian proves that NSP could not have known about elevated levels of electricity: his stray voltage monitoring found no reason for concern. Deposition of Dr. Norb Nigon at 94-97 (A.120-21). The Siewerts can fare no better than the *Aquila* plaintiffs, whose plea for refuge in the maintenance exception

went unheeded because of “sparse factual allegations” and “very little additional factual support.” 718 N.W.2d at 887.

Even if the Siewerts could carry the burden, their claims would still be substantially imperiled. The exception would only save claims if, and to the extent that, the damages sought were exclusively caused by a failure to maintain or inspect. Inherent deficiencies in the distribution system still would be subject to statute of repose disposition. In the unlikely event that the exception could cover some part of this lawsuit, what remains must be limited to those damages that are proven to have been caused by maintenance or inspection shortcomings.

**C. The equipment exception is not before this Court.**

Minnesota law is clear: “A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 581 (Minn. 1988) (citations omitted). The Siewerts did not raise the Minn. Stat. § 541.051, subd. 1(e) below. Hence, the manufacturers or suppliers of equipment or machinery exception has been waived.

Regardless, NSP is not the “manufacturer or supplier” of the equipment incorporated into the distribution system that improves the Siewerts’ property, and the equipment exception “was intended to exclude from the statute [of repose] certain products liability actions.” *Integrity Floorcovering, Inc. v. Broan-Nu Tone, LLC*, 503 F. Supp. 2d 1136, 1141 (D. Minn. 2007) (quotation omitted). Plus, the Siewerts have unequivocally disavowed the assertion of any product liability claims. *See* Siewerts’ Response to Summary Judgment at 24.

**D. The system's long ago substantial completion cannot be gainsaid.**

The Siewerts quibble about whether the electrical distribution system has been substantially completed. The 10-year statute-of-repose period begins when “construction [is] sufficiently completed [to enable] use [of] the improvement for the intended purpose.” Minn. Stat. § 541.051, subd. 1. The ZUF 21 distribution line from Zumbro Falls to Mazeppa, about which the Siewerts complain, was delivering electricity to the farmstead for decades before the Siewerts say the herd was first harmed in 1989. *Siewert v. N. States Power Co.*, 757 N.W.2d 909, 913 (Minn. Ct. App. 2008) (“The Siewerts’ Wabasha County farm was connected to the electrical grid in 1960 or shortly thereafter.”).

The Siewerts urge that minor system modifications in 1996 and 1999 and the addition of new customers over the years belie “substantial completion.” *Siewert* br. at 48-49. But none of that tweaking changed the nature, purpose, or function of the system. If anything, complaints about adding customers reveal that indulging the Siewerts’ demands would have denied electric energy to customers who located along ZUF 21 after the Siewerts started milking cows.

The legislature did not require that an improvement remain untouched in order to retain repose status. By not specifying “absolute completion” the statute ensures that minor modifications do not undo statute-of-repose protection that has been attained. This case illustrates exactly why the legislature called for the repose time periods to begin

upon “substantial” completion. The Siewerts’ version of substantial completion would require NSP to give up repose protection or deny new customers electrical service.

Finally, even if 1996 and 1999 were the statute-of-repose commencement dates, this lawsuit would still be tardy. The statute of limitations for claims based upon real property improvements is two years; that period begins to run upon injury discovery. Minn. Stat. § 541.051, subd. 1(a). Knowing the cause of the harm is of no import. *Id.* Milk production was supposedly lower than expected in 1990 and further damages were said to have been incurred in 1999. Siewert br. at 7. Section 541.051’s limitations period ran on such claims in 1992 and 2001, respectively. Accordingly, even under the Siewerts’ theory, this lawsuit is time barred.

**E. The never-raised and inapplicable fraudulent concealment rationalization fails.**

As with the “equipment” exception first raised before the court of appeals, the Siewerts’ “fraudulent concealment” incantations were waived by silence before the district court. *Thiele*, 425 N.W.2d at 582.

Besides that, fraudulent concealment requires a plaintiff to “prove there was an affirmative act or statement which concealed a potential cause of action.” *Haberle v. Buchwald*, 480 N.W.2d 351, 357 (Minn. Ct. App. 1992) (citations omitted). The Siewerts identify no “affirmative act or statement” employed by NSP to conceal a potential cause of action. At best, the Siewerts accuse NSP of failing to take action or to speak up. Siewert br. at 50. But silence and inaction are not enough. *Hemmerlin-Stewart v. Allina Hospitals & Clinics*, No. A05-100, 2005 WL 2143691, at \*2 (Minn. Ct.

App. Sept. 6, 2005) (SA 5) (“[S]ilence alone does not constitute fraud in the absence of a duty to speak.”). In sum, evidence of active and fraudulent concealment is utterly lacking.

**F. Continuing torts do not toll the statute of repose.**

While continuing torts can put off statute-of-limitations accrual, the doctrine does not delay statute-of-repose claim foreclosure. The continuing tort doctrine extends the time within which a claim may accrue. As *Weston v. McWilliams & Assocs., Inc.* explains: statutes of limitations “are not triggered until the cause of action has accrued”; in contrast a “statute of repose . . . may constitutionally eliminate causes of action even before they accrue.” 716 N.W.2d 634, 641 (Minn. 2006) (citations omitted). “Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct.” *Id.* (quoting 51 Am. Jur. 2d *Limitations of Actions* § 18 (2000)). Since the concept of accrual is immaterial to the statute of repose, the Siewerts lack both supporting case law and a rationale for a “continuing tort” theory forestalling § 541.051’s 10-year limit.

In the context of a continuing trespass argument, the court of appeals recently explained why § 541.051 is not subject to continuing tort forbearance:

Section 541.051 expressly states that, when the other conditions for the time bars are met, ‘no action [can be brought] by any person in contract, tort, or otherwise to recover damages.’ . . . This language does not reasonably allow an interpretation that continuing trespass is exempted from the bar. Likewise, the statute has specifically delineated exceptions to the time bars, none of which address continuing trespass. . . . It would not be reasonable to infer an exception for continuing trespass when the statute has listed exceptions that do not include it.

*Geary*, 2009 WL 1515505 at \*3 (internal citations omitted). Continuing tort contentions do not shield the Siewerts' claim from § 541.051.

## CONCLUSION

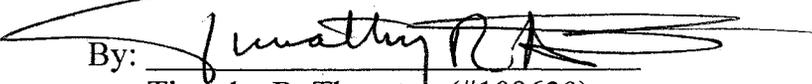
The Siewerts cannot credibly distinguish this lawsuit from *Hoffman, Schermer*, and the U.S. Supreme Court precedents upon which Minnesota filed rate and primary jurisdiction authority is founded. The Siewert case is not excepted from the filed rate doctrine simply because common law or tort claims are alleged. This litigation necessarily challenges the reasonableness of NSP's tariff-based duties and would impose higher (or at the very least, different) electricity distribution standards than those adjudged by the MPUC to be most appropriate. Indeed, the Siewerts readily admit wanting to hold NSP liable for breaching duties that cannot found in the tariff.

At the very least, the undeniable regulatory entanglements posed by the Siewerts' theories cry out for MPUC primary jurisdiction guidance. Finally, the Siewerts' complaint ties their damages to the distribution system as designed and constructed, and such a causal relation unquestionably invokes statute-of-repose limitations, which have long since run.

The Court should affirm the lower court's handling of the injunctive relief and correct allowance of damages claims.

Dated: September 8, 2009

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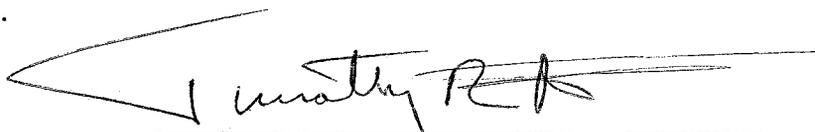
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## CERTIFICATE OF COMPLIANCE

The undersigned counsel for Northern States Power Company d/b/a Xcel Energy certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(b) in that it is, printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains less than 7,000 words, excluding the Table of Contents and Table of Authorities.

Dated: September 8, 2009

A handwritten signature in black ink, appearing to read "Timothy R. Thornton", is written over a horizontal line. The signature is stylized and includes a large, sweeping initial stroke.

Timothy R. Thornton