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State of Minnesota

In Court of Appeals

In the Matter of the Application of
Northern States Power Company d/b/a Xcel Energy
for Approval of a Mercury Emissions Reduction Plan for the
Sherburne County Generating Facility's Unit 3

Southern Minnesota Municipal Power Agency,
Relator-Appellant,

vs.

Minnesota Public Utilities Commission,
Respondent-Appellee,

Northern States Power Company d/b/a Xcel Energy,
Utility-Respondent.

BRIEF OF RESPONDENT NORTHERN STATES POWER COMPANY D/B/A XCEL ENERGY

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STATEMENT OF ISSUES

1. Whether the Mercury Emissions Reduction Act applies to the Sherco 3 power plant, which is jointly owned 59% by a public utility and 41% by a municipal utility.

The Minnesota Public Utilities Commission held that it had authority to approve the mercury emissions plan for Sherco 3 because the Act gives the Commission authority to regulate the mercury emissions of the plant even if it has no independent regulatory authority over one of its owners.

Apposite Authorities

Minn. Stat. § 216B.685 (2008).

Minn. Stat. § 216B.682 (2008).

Minnegasco v. Minn. Pub. Utils. Comm'n, 549 N.W.2d 904, 907 (Minn. 1996).

Hans Hagen Homes, Inc. v. City of Minnetrista, 728 N.W.2d 536, 539 (Minn. 2007).

2. Whether the Mercury Emissions Reduction Act authorizes the Minnesota Public Utilities Commission to approve a mercury emissions reduction plan before making a final determination of the allocation of costs between the owners and the actual rates to be charged to customers.

The Minnesota Public Utilities Commission approved the mercury emissions reduction plan for the Sherco 3 power plant, but reserved for future determination the actual cost recovery methods and allocations.

Apposite Authorities

Minn. Stat. § 216B.685 (2008).

In re Detailing Criteria & Standards for Measuring an Elec. Util.'s Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. § 216B.1691, 700 N.W.2d 533, 539 (Minn. App. 2005).

In re Petition of N. States Power Gas Util., 519 N.W.2d 921, 923-24 (Minn. App. 1994).

STATEMENT OF THE CASE

This appeal involves the application of the unambiguous statutory language of the Mercury Emissions Reduction Act of 2006, Minn. Stat. §§ 216B.68-216B.688 (2008) ("Act"). This Act authorizes Respondent Minnesota Public Utilities Commission ("MPUC") to review and approve mercury emissions reduction plans that are mandated for "dry scrubbed units" at a qualifying power plant. Minn. Stat. §§ 216B.682 and .685. On December 21, 2007, Respondent Northern States Power d/b/a Xcel Energy ("NSP"), submitted the requisite mercury emissions reduction plan (the "Plan") for the Sherburne County Generating Facility Unit 3 ("Sherco 3") to the Minnesota Pollution Control Agency ("MPCA") and the MPUC, for review and approval. (A. 1-57).[1] NSP is the owner of a 59 percent interest in and is the operator of Sherco 3. *Id.* at 8, 103.

Relator Southern Minnesota Municipal Power Agency ("SMMPA") is the owner of the other 41 percent interest in Sherco 3. *Id.* at 103. SMMPA filed comments with the MPUC opposing the Plan. *Id.* at 101-115. Among other things, SMMPA argued that,

[1] Citations to "A" refer to the Appendix submitted by SMMPA.

because it is a municipal utility and not a "public utility," it is not subject to regulation under the Act. *Id.* at 104.

The MPCA completed its review on June 18, 2008 and recommended that the MPUC approve the Plan. *Id.* at 58-73. On November 6, 2008, the MPUC approved the Plan pursuant to Minn. Stat. § 216B.685, Subd. 1. Add. 1-7.[2] The MPUC agreed that SMMPA is not a "public utility," but determined that the Act applied to Sherco 3 so long as it is partly owned and is operated by a "public utility." *Id.* at 4. The MPUC further determined that it need not decide the allocation of cost responsibility between NSP and SMMPA because the Act discourages delays, the circumstance is not extraordinary, and the allocations can be addressed while compliance with the Act proceeds. *Id.*

STATEMENT OF THE FACTS

A. Sherco 3

Sherco 3 is a 900-megawatt ("MW") "dry scrubbed" coal-fired electric generating plant located in Becker, Minnesota. A. 8, 14, 102. Sherco 3 is owned 59 percent by a public utility, NSP, and 41 percent by a municipal utility, SMMPA. A. 8, 102-103. NSP acts as the operator of Sherco 3 on behalf of itself and SMMPA. A. 103.

B. The Act Applies to Sherco 3

The definitions of the Act focus on the nature of the power plant, not on the characteristics of the owners. Minn. Stat. § 216B.68. Thus, the Act begins with a definition of a "Qualifying facility" as "an electric generating power plant in Minnesota that, as of January 1, 2006, had a total net dependable capacity in excess of 500

[2] Citations to "Add." Refer to the Addendum to the brief of SMMPA.

megawatts from all coal-fired electric generating units at the power plant." *Id.* at Subd. 6. Then the Act identifies a "Targeted unit" as "a coal-fired electric generation unit greater than 100 megawatts at a qualifying facility." *Id.* at Subd. 8. Finally, the Act defines a "Dry scrubbed unit" as "a targeted unit at which pollution control technology that uses a spray dryer and fabric filter system to remove pollutants from air emissions is installed or will be installed by December 31, 2007." *Id.* at Subd. 3.

Sherco 3 is a dry scrubbed unit with over 100 megawatts of capacity and thus is a "targeted unit" at a "qualified facility."

C. The Legislative History Behind the Act.

Prior to the passage of the Act by the Minnesota Legislature, a summary of the bill was issued by House Research of the Minnesota House of Representatives. A. 209-213. (House Research Bill Summary dated May 1, 2006). That summary stated that the Act "establishes regulations to govern the reduction in emissions for mercury from six coal-fired electric generating units that collectively account for more than 75 percent of the mercury emissions of all such plants in Minnesota." *Id.* at 209. The six coal fired power plants were identified by House Research as follows: Allen S. King Plant, Sherco 1, Sherco 2, Sherco 3, Clay Boswell 3 and Clay Boswell 4. *Id.* at 210. The Summary states that the Act aims to reduce the mercury emissions from each of these six units by 90 percent with the establishment of specific requirements for "dry scrubbed units" and "wet scrubbed units." *Id.* at 210; *see also* Minn. Stat. § 216B.682. The summary identifies two dry scrubbed units in Minnesota – the Sherco 3 and A. S. King plants. A. 210.

D. The Requirements of a Plan

The Act requires that a mercury emissions reduction plan for each "dry scrubbed unit" be developed and submitted to both the MPCA and the MPUC by December 31, 2007. Minn. Stat. § 216B.682, Subd. 1(a). The legislature placed the duty of "develop[ing] and submit[ting]" the requisite plan on the "public utility that owns a dry scrubbed unit" (*i.e.*, NSP). *Id.* The mercury emissions reduction plan must "propose to employ the available technology for mercury removal that is most likely to result in the removal of at least 90 percent of the mercury emitted from the unit." *Id.* (emphasis added). Furthermore, the submitting utility must "present information assessing that plan's ability to optimize human health benefits and achieve cost efficiencies [and] . . . [e]ach plan must provide the cost, technical feasibility, and mercury emissions reduction expected for the utility's preferred technology option and each alternative considered." *Id.* at Subd. 3(a).

1. Minnesota Pollution Control Agency Evaluation

Under the Act, the MPCA first evaluates the plan and has 180 days before it must submit its evaluation to the MPUC. Minn. Stat. § 216B.684. Pursuant to Minn. Stat. § 216B.684, the MPCA is required to "(1) assess whether the utility's plan meets the requirements of section 216B.682 . . . (2) evaluate the environmental and public health benefits of each option proposed or considered by the utility, including benefits associated with reductions in pollutants other than mercury, (3) assess the technical feasibility and cost-effectiveness of technologies proposed or considered by the utility for

achieving mercury emissions reduction, and (4) advise the [MPUC] of the appropriateness of the utility's plan."

2. **Minnesota Public Utilities Commission Review and Approval**

Upon receipt of the MPCA's evaluation, the MPUC is obligated to "consider the environmental and public health benefits, the [MPCA's] assessment of technical feasibility, competitiveness of customer rates, and cost-effectiveness of the utility's proposed mercury-control initiatives in light of the [MPCA's] report under section 216B.684." Minn. Stat. § 216B.685, Subd. 1. The MPUC is required, within 180 days of receipt of the MPCA's report, to order implementation of a mercury emissions reduction plan. *Id.* at Subd. 2(a). The MPUC may extend the deadline only "if the utility demonstrates the unavailability of necessary equipment or other extraordinary circumstances." *Id.* at Subd. 4(b).

E. Sherco 3's Mercury Emissions Reduction Plan

NSP, as the "public utility" required to do so, developed and submitted to the MPCA and MPUC the requisite mercury emissions reduction plan for Sherco 3. *See* A. 1-39. The Plan addresses various topics, including the available emission control technologies, details of the proposed plan, benefits of the proposed plan, cost and financial considerations, proposed implementation schedule, and alternatives considered. *See id.* The Plan explains that Sherco 3 is co-owned by NSP and SMMPA and that an agreement had not yet been reached between the parties regarding the cost sharing of the proposed emissions reduction project. *Id.* at 33. Therefore, the Plan's rate analysis provides an estimate of rate impacts "[b]efore consideration of any cost sharing." *Id.*

NSP estimated that the annual revenue requirement impact of the plan would peak in 2010 at $4.7 million and the total revenue requirement over the five-year forecast period of 2008-2012 would be $14.3 million. *Id* at 33. NSP estimated that the cumulative revenue requirement for the 13-year period through 2020 would be $87 million. *Id.* NSP calculated that the average rate impact for an NSP Minnesota residential customer in the peak year of 2010 would be $0.10 per month. *Id.*

F. Minnesota Pollution Control Agency Recommended Approval

On June 18, 2008, the MPCA completed its review of the Plan. A. 58. The MPCA (1) determined that the plan met the requirements of section 216B.682, (2) evaluated the environmental and public health benefits, (3) assessed the technical feasibility and cost-effectiveness of technologies proposed in the plan for achieving mercury emissions reduction, and (4) advised the MPUC of the appropriateness of the utility's plan. *See id.* at 58-73. Notably, the MPCA found that "[NSP] has selected the least-cost alternative that has the greatest potential of achieving the statutory goal of 90 percent reduction of mercury emissions at Sherco Unit 3." *Id.* at 65. The MPCA determined that the Plan was "appropriate for reducing mercury at Sherco 3" and "[t]he mercury reduction is substantial and will help achieve the mercury reductions needed to address contamination of fish in Minnesota lakes." *Id.* at 73. The MPCA's evaluation concluded "[t]he project represents a low-cost means of achieving that reduction and will likely meet, and potentially exceed, the Mercury Emissions Reduction Act's goal of 90 percent reduction of mercury from Sherco 3." *Id.*

G. The Minnesota Public Utilities Commission Approved the Plan

Upon receipt of the MPCA's favorable evaluation, the MPUC issued a Notice Seeking Comments on the Plan. *Id.* at 74. MPUC received comments from the Minnesota Office of Energy Security and the Izaak Walton League of America in support of the Plan. A. 75-86. SMMPA filed comments in opposition to the Plan and requested that the MPUC withhold its decision until SMMPA and NSP resolve their cost sharing issues. *Id.* at 102-103. In the alternative, SMMPA requested that NSP bear 100 percent of the costs for the Plan's implementation. *Id.* SMMPA claimed that the Act only extends to 59 percent of the unit and SMMPA's 41 percent interest was outside the Act's reach. *Id.* at 104-105.

On November 6, 2008, after review of the submitted comments, oral arguments, and Commission deliberations, the MPUC approved the Plan. Add. 1-11. The MPUC recognized that the Act "is clearly designed to achieve rapid reductions in mercury emissions" and simply does not "permit the delay SMMPA seeks while co-owners resolve cost allocation issues." *Id.* at 4. Instead, the MPUC held that it would only be able to delay its decision if the utility demonstrated the unavailability of necessary equipment or other extraordinary circumstances, and that such extraordinary circumstances were not present in this case. *Id.* at 4-5 (citing Minn. Stat. § 216B.685, subd. 4(b)).

The MPUC recognized that SMMPA was not a "public utility" under the Act. Add. 4. But, the MPUC concluded that the Act regulates Sherco 3, reasoning that the obligations of the Act are "not eliminated by the partial ownership interest of a joint-

power agency." *Id.* Based on the finding that "the proposed plan filed by [NSP] meets the requirements of the statute, promises significant environmental and health benefits, is technically feasible, is cost-effective, and will not impose excessive costs on [NSP's] customers," the MPUC approved the Plan and ordered implementation. *Id.* at 5.

On November 25, 2008, SMMPA filed an application for Rehearing, Reconsideration, and Modification of the MPUC's November 6, 2008 order. A. 191-202. The MPUC denied reconsideration on January 28, 2009 because SMMPA's application did not raise any new issues, did not present new evidence, did not expose errors or ambiguities in the original order, and did not otherwise persuade the MPUC that it should rethink its decision. Add. 9.

ARGUMENT

SUMMARY OF ARGUMENT

SMMPA emphasizes the well-established principle that the MPUC's authority only extends as far as its legislative grant of authority. Br. 12-14.[3] As SMMPA correctly recognizes, the MPUC's jurisdiction and authority is conferred by the legislature. Br. 12; *Minnegasco v. Minn. Pub. Utils. Comm'n,* 549 N.W.2d 904, 907 (Minn. 1996) (the MPUC is a "creature of statute" with that "authority given it by the legislature").

NSP agrees with this principle. The dispute concerns the scope of the legislative grant of authority. The question is whether the legislature intended the Act to apply to the Sherco 3 plant or only to a plant owner that is a public utility. Although the Act requires a "public utility" to "develop" and "submit" the plan, the legislature granted the

[3] Citations to "Br." refer to SMMPA's appellate brief.

MPUC the authority to review and approve a mercury emissions plan for each targeted "dry scrubbed unit." Minn. Stat. §§ 216B.682, Subd. 1(a), 216B.685. This authority extends to Sherco 3 because it is a "targeted unit" and the Plan was submitted by NSP, a public utility that is a part owner and the operator of Sherco 3.

Further, because the MPUC conducted a thorough review of all of the statutorily required factors, its approval of the Plan was not arbitrary or capricious. The Act does not require that the allocation of costs, the design of actual rates, or the precise determination of customer rate impacts be completed before approval of the Plan. Instead, the Act contemplates that the MPUC can order implementation of a plan based on aggregated information and can reserve for later decision the actual cost allocations and recovery mechanisms.

I. THE MPUC WAS AUTHORIZED TO REVIEW AND APPROVE SHERCO 3'S MERCURY EMISSIONS REDUCTION PLAN PURSUANT TO MINN. STAT § 216B.685

A. Standard of Review

Whether the MPUC had authority to approve the Plan for Sherco 3 is a question of law and the proper standard of review is de novo. *See St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989) (interpretation of state statutes are questions of law that this Court reviews de novo). Where a "statute's language is plain and unambiguous, [appellate courts] engage in no further construction." *In re Stadsvold*, 754 N.W.2d 323, 328 (Minn. 2008) (citations omitted). Indeed, "[w]here the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and [appellate courts] apply the statute's plain

meaning." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007).

B. The Plain Language of the Act Authorizes the MPUC's Review and Approval of the Sherco 3 Plan

SMMPA argues that the MPUC lacks jurisdiction over its ownership portion of Sherco 3 because SMMPA is not a public utility. Br. 15, 18. The MPUC's jurisdiction is controlled by statute. Br. 16 (citing *In re Investigation Into Commission's Jurisdiction Over City of Hutchinson's Intrastate Natural Gas Pipeline*, 707 N.W.2d 223 (Minn. App. 2005)). The scope of the MPUC's authority over SMMPA is irrelevant because the Act is clear that it regulates each "dry scrubbed unit at a qualifying facility." Minn. Stat. § 216B.682, Subd. 1 (a); *see* A. 209-210. Issues regarding which entities own or partially own a "targeted unit" are outside the scope of the MPUC's analysis. Instead the legislature simply mandated that the MPUC review and approve a mercury emissions reduction plan for the targeted "dry scrubbed unit." Indeed, it is difficult to conceive how the MPUC could exceed its authority where it performs the very limited function that the legislature required it to perform. *See Peoples Natural Gas Co. v. Minnesota Public Util. Comm'n,* 369 N.W.2d, 530, 534 (Minn. 1985) (the MPUC's "express statutory authority need not be given a cramped reading").

The MPUC's authority may be "either express or implied." *In re Investigation Into Commission's Jurisdiction Over City of Hutchinson's Intrastate Natural Gas Pipeline*, 707 N.W.2d at 226. A brief analysis of the three simple elements of the Act defining the MPUC's scope of authority demonstrates that the Act unambiguously and expressly

authorizes the MPUC to approve the Sherco 3 Plan. First, as a 900 MW "dry scrubbed unit," Sherco 3 is within the Act's regulatory scope as a "Qualifying facility," with capacity greater than 500 MW; as a "Targeted unit," with capacity greater than 100 Megawatts; and as a "dry scrubbed unit." Minn. Stat. § 216B.68, Subds. 3, 6, and 8. Second, as a targeted unit, Sherco 3's public utility owner, NSP, is required to develop and submit a mercury emissions reduction plan that employs the "available technology for mercury removal that is most likely to result in the removal of at least 90 percent of the mercury emitted from the unit." Minn. Stat. § 216B.682, Subd. 1(a). Third, the MPUC is required to review and evaluate each utility's mercury emissions-reduction plan and within 180 days of reviewing the MPCA's report on a utility's plan, the MPUC is required to order the implementation of the plan. Minn. Stat. § 216B.685, Subds. 1, 2(a).

Notably missing from this statutory language is any ownership limitation or qualification on the scope of the mercury emissions reduction plan or the MPUC's approval authority. If the legislature desired to limit its regulation to certain portions of Sherco 3 or of any other "unit," it was capable of writing such terms into the statute. *See Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006) (noting that the court "will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently."). Instead, the Act regulates the emissions from each targeted "dry scrubbed unit." Minn. Stat. § 216B.682, Subd. 1(a). Indeed, a "unit" is defined as "a single quantity regarded as a whole in calculation." *Merriam-Webster's Collegiate Dictionary* 1292 (10th ed. 1993); *see also* Minn. Stat. § 645.08(1) (2008) (providing that words in a statute are construed according to their common usage).

C. The Legislative History Confirms the Legislative Intent to Regulate Sherco 3

Although this court need not look to the legislative history because the language of the Act expressly regulates dry scrubbed units at Qualifying facilities, any conceivable ambiguity was clarified in the House Research Bill Summary. That Summary specifically identified Sherco 3 as a one of the units that was targeted by the Act. *See* A. 209; *See also Haage v. Steies*, 555 N.W.2d 7, 9 (Minn. App. 1996) (explaining that "the legislative history prepared by the House Research Department . . . provide[s] evidence of legislative intent").

SMMPA argues that the Act, *only* establishes regulations to govern the reduction in emissions of mercury from 59 percent of Sherco 3. Br. at 15. Such an interpretation is simply not consistent with the legislature's goal of reducing mercury emissions at the six power plants that create 75 percent of the states mercury emissions from all such plants in Minnesota. A. 209. The goals of the Act would be defeated if a portion of a "targeted unit" was somehow exempted from the requirements of the reduction of mercury emissions solely because a municipal utility was a partial owner.

SMMPA argues that the legislature must not have intended the statute to apply to SMMPA's interest in Sherco 3 because the sole cost recovery mechanism detailed in the Act is an emissions reduction rider that is only available to a public utility. *See* Br. 6-7 (citing Minn. Stat. § 216B.1692). It is true that such a mechanism is helpful to a public utility, which otherwise could not recover these costs except through a complex rate case. See Minn. Stat. § 216B.16, Subd. 1 (2008). But a municipal utility such as SMMPA is not thus restricted and therefore does not require such a cost recovery rider. Instead,

pursuant to Minn. Stat. § 453.57, SMMPA is authorized to establish its rates "as it may deem necessary, proper, desirable, and reasonable." And, under Minn. Stat. § 453.57, a municipal utility "may establish, levy, and collect . . . rents, rates, and other charges . . . in connection with any project or properties . . . with respect to which it may have any interest or any right to capacity thereof."

Similarly, a municipal utility "may purchase, sell, exchange, or transmit electric energy within and outside the state in such amounts as it shall determine to be necessary and appropriate to make the most effective use of its powers and to meet its responsibilities, and may enter into agreements with any person with respect to that purchase, sale, exchange, or transmission, on such terms and for such period of time as its board of directors determines." Minn. Stat. § 453.54, Subd. 16. Accordingly, including the rider mechanism to benefit a public utility owner does not evidence any legislative intent that the Act would not apply to targeted units that are partly owned by a municipal utility because the municipal utility does not need the rider mechanism.

As noted by the MPUC, "the obligations arising from [] ownership and operation are not eliminated by the partial ownership interest of a [non-public utility.]" Add. 4; *see also In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007) (explaining that this Court should defer to an agency's interpretation of a statute that it administers).

II. THE MPUC PROPERLY CONSIDERED ALL FACTORS MANDATED BY MINN. STAT. § 216B.685

A. Standard of Review

As correctly stated by SMMPA, this Court may review the MPUC's approval of the Plan for Sherco 3 to determine whether the decision was arbitrary or capricious. Minn. Stat. § 14.69 (2008). An order may be arbitrary and capricious if the MPUC: (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the MPUC's expertise. *Citizens Advocating Responsible Devel. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006). "An agency decision is not arbitrary and capricious if the agency, presented with opposing points of view, reaches a reasoned decision that rejects one point of view." *In re Detailing Criteria & Standards for Measuring an Elec. Util.'s Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. § 216B.1691*, 700 N.W.2d 533, 539 (Minn. App. 2005).

Importantly, "[d]ecisions of administrative agencies are presumed to be correct" and are given deference by a reviewing court where an agency exercises "expertise and special knowledge in the field of its technical training, education and experience." *In re Petition of N. States Power Gas Util.*, 519 N.W.2d 921, 923-24 (Minn. App. 1994). Any party who asserts that an agency's decision is arbitrary and capricious bears the burden of proving it. *See Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

B. The Act Identifies the Factors to Consider for Plan Review

Before approving a plan, "the [MPUC] shall consider [1] the environmental and public health benefits, [2] the agency's assessment of technical feasibility, [3] competitiveness of customer rates, and [4] cost-effectiveness of the utilities proposed mercury-control initiatives in light of the [MPCA's] report under section 216B.684." Section 216B.685, Subd. 1 (numbers and brackets added).

Separately, the Act provides that the MPUC shall "order the implementation of [the Plan] . . . unless the [MPUC] determines that the plan as proposed fails to provide for increased environmental and health benefits or would impose excessive costs on the utility's customers." Minn. Stat. § 216B.685, Subd. 2.

C. The MPUC Conducted a Thorough Review of Each Required Consideration

The MPUC found that the Sherco 3 Plan "meets the requirements of the statute, promises significant environmental and health benefits, is technically feasible, is cost-effective, and will not impose excessive costs on [NSP's] customers." Add. 5. The first three of these – environmental and health benefits, technical feasibility, and cost effectiveness – were mandatory considerations. Section 216B.685, Subd. 1. The transcript of the MPUC proceedings reveals a thorough review of these required elements. *See* A. 141-190.

SMMPA contends that the MPUC was arbitrary and capricious by failing to address cost recovery methods or the allocation between SMMPA and NSP before approving the Plan. Br. 20. But, the Act does not require the MPUC to address the cost allocation between SMMPA and NSP. This is not necessary until the plan has been

implemented and the MPUC can determine actual costs and consider specific cost recovery mechanisms.

The MPUC is obligated to consider competitiveness of customer rates and the cost effectiveness of the plan when first reviewing the emissions reduction plan. Minn. Stat. § 216B.685, Subd. 1. The MPUC satisfied that obligation in this case. The MPUC noted that the aggregate revenue requirement from the plan, through 2020, was estimated to be $87 million. A. 33. NSP's plan estimated that the rate impact of the plan for an average NSP-Minnesota residential customer, at its peak in 2010, would be only $0.10 per month, even if 100 percent of the costs were allocated to NSP. *Id.* The MPUC Staff Briefing Papers issued prior to the MPUC's first order pointed out that if the costs of the Plan were allocated proportionally to percent of ownership, the NSP ratepayer impact would be reduced to approximately $0.06 per month. A. 139. The MPUC Staff Briefing Papers issued prior to the MPUC's decision on reconsideration pointed out that the MPUC's recognition of the aggregate revenue requirement of $87 million applied to all rate payers and satisfied any generalized rate payer impact analysis. The Briefing Papers also noted that the Act does not require the petitioning utility to file a specific rider for cost recovery at the time of plan approval. A. 208; *see also* Minn. Stat. § 216B.683, Subd. 1 (a) (explaining that utility "may" submit a rider). Based on the MPUC's analysis and expertise in rate impact analysis, it determined that the Plan "is cost-effective, and will not impose excessive costs on [NSP's] customers." Add. 5.

The MPUC did not need to address the NSP/SMMPA cost allocation to determine that each utilities rates would still be competitive and that the plan was cost effective.

Given this Court's deference to "[d]ecisions of administrative agencies" where the agency exercises "expertise and special knowledge in the field of its technical training, education and experience," this Court should affirm the MPUC's Order. *See In re Petition of N. States Power Gas Util.*, 519 N.W.2d at 923-24.

CONCLUSION

The Legislature identified Sherco 3 as a unit that was targeted by the Act. Similarly, the legislature mandated that the MPUC review and approve mercury emissions reduction plans for targeted units. The unambiguous words of the Act mandated that (1) NSP develop and submit a mercury emissions plan for the Sherco 3 dry scrubbed unit; (2) the MPCA review the Plan and submit its evaluation to the MPUC within 180 days; and (3) the MPUC review and approve the plan within 180 days of the MPCA's evaluation. These three steps were taken as required by the Act and therefore the MPUC's approval of the Plan should be affirmed.

Dated: May 11, 2009

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent Northern States Power d/b/a Xcel Energy 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 Word 2003 and contains 4,657 words, excluding the Table of Contents, Table of Authorities, and Appendix.

DATED: May 11, 2009

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