

STATE OF MINNESOTA
IN SUPREME COURT

City of Cohasset,

Appellant,

vs.

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

Respondent.

**BRIEF OF *AMICI CURIAE*
LEAGUE OF MINNESOTA CITIES
COALITION OF UTILITY CITIES**

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LEGAL ISSUES

I.

Minnesota law authorizes cities to require a public utility to obtain a franchise if it is furnishing utility services or occupying streets, highways, or other public property within a city. Can a city exercise its franchise authority over a utility operating a natural-gas pipeline that crosses underneath three public roads within the city and fires a generating plant that allows the utility to provide electric utility services to customers within the city?

The district court and the court of appeals held that Minnesota Power was exempt from the City's franchise authority because it does not use its natural-gas pipeline to provide natural-gas utility services to the public.

II.

Minnesota law provides that the state's pipeline-routing authority preempts all "zoning, building, or land use rules, regulations, or ordinances" of local governments. Does the state's pipeline-routing authority preempt a city's franchise ordinance?

The district court did not reach this issue. The court of appeals held that the state's pipeline-routing authority preempts the city's franchise ordinance.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The League of Minnesota Cities (League) has a voluntary membership of 830 out of 854 Minnesota cities including the city of Cohasset. The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management, and advocacy services. The League's mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities.

The Coalition of Utility Cities (CUC) is a group of seven cities (Red Wing, Becker, Monticello, Oak Park Heights, Granite Falls, Hoyt Lakes, and Cohasset) that host large power plants within their jurisdictions. The CUC formed in 1997 to protect the utility property-tax base in host communities and stem its ongoing erosion. The group has since expanded its mission to address other issues involving utilities that may affect the group.

The League and the CUC have a public interest in this case as representatives of cities throughout the state with an interest in protecting from erosion the municipal power to franchise and otherwise regulate utilities operating natural-gas pipelines within city borders.¹

¹ The League and the CUC certify pursuant to Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE AND FACTS

The League and the CUC agree with Appellant's statement of the case and facts.

INTRODUCTION

For more than a century, cities in Minnesota and across the United States have regulated utilities operating within their borders through franchise agreements and municipal police powers. Municipal franchise power has survived multiple changes in utility regulation because the Minnesota Legislature has recognized that cities are providing benefits to utility companies. The Legislature has also determined that it is good public policy to authorize cities to impose franchise fees so they can recoup some of the costs associated with the presence of a utility and receive compensation for a utility's use of public resources for private gain.

In this case, Minnesota Power is seeking to avoid obtaining a franchise from the city of Cohasset (City). Minnesota Power claims it is not a public utility subject to the City's franchise power because it will not use its natural-gas pipeline to provide natural-gas utility services to the public. It also claims that the state's exercise of its pipeline-routing authority has preempted the City's franchise power. If Minnesota Power is allowed to evade the City's regulatory authority in this manner, it will significantly erode the franchise power of all Minnesota cities.

As Minnesota and the nation move forward with addressing climate change, there will be significant changes in how electricity is generated and distributed. In this case, the purpose of the pipeline is to provide natural gas to ignite the coal used to create electrical power, replacing the fuel-oil ignition currently used. Other Minnesota cities

may likewise face the construction of natural-gas pipelines within their borders for similar purposes. It is crucial that Minnesota cities retain their franchise authority over operators of natural-gas pipelines within their borders — especially in these times of economic hardship and cuts to local government credits and aids. It is consistent with Minnesota law, and it is good public policy to require companies that operate natural-gas pipelines to obtain a franchise and pay a franchise fee to compensate cities for the burden these pipelines impose on the public and the private gain these companies receive from the use of public resources.

Minnesota Power also seeks to avoid obtaining a franchise by claiming that the state's exercise of its pipeline-routing authority has preempted the City's franchise authority. But this claim conflicts with the pipeline-routing statute's express preemption language and its legislative intent. The Minnesota Legislature enacted the pipeline-routing statute in response to a pipeline accident. The statute was intended to protect public safety and bring uniformity to the routing of large, high-pressure natural-gas pipelines. The statute expressly limits its preemptive effect to cities' "zoning, building, or land use" regulations — regulations that could interfere with the routing of these pipelines. Thus the pipeline-routing statute complements, but does not replace cities' franchise ordinances which regulate the *operation* and not the *routing* of pipelines. It would be inconsistent with Minnesota law and bad public policy to allow utility companies to evade municipal franchise authority simply because the state has approved the routing of a particular pipeline.

Appellant's Brief demonstrates that the plain language of three separate statutory sections gives the City express authority to require Minnesota Power to obtain a franchise. See Minn. Stat. § 216B.02; Minn. Stat. § 216G.02, subd. 4; Appellant's Brief at 13-25. Appellant's Brief also demonstrates that the court of appeals overstepped its authority by (in the words of the dissent) "adding language to the unambiguous language in Minn. Stat. § 216B.02." And finally, Appellant's Brief demonstrates that the court of appeals misconstrued the preemption language in Minn. Stat. § 216G.02, subd. 4. The League and the CUC join in Appellant's legal arguments and will not repeat them here. Instead, this *amici curiae* brief focuses on the statewide significance of this case and the important public policies at stake.

ARGUMENT

I. Municipal Franchise Power is an Important Means of Municipal Regulation and Provides a Way to Compensate the Public when Private Parties Impose Burdens on the Public and Use Public Resources for Private Gain.

More than a century ago, the United States Supreme Court recognized the power of municipalities to regulate utilities through franchise agreements and municipal police powers. *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing Manuf'g Co.*, 115 U.S. 650, 659 (1885). Minnesota courts have upheld these municipal powers for more than 100 years. *Northern States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 539 (Minn. Ct. App. 1999) (surveying case law regarding municipal powers with respect to utilities).

The Minnesota Legislature has codified these long-standing municipal powers. The statutory chapter on utilities explicitly recognizes a city's right to issue a "license, permit, right or franchise" to a public utility and to impose a fee "to raise revenue or defray increased municipal costs accruing as a result of utility operations, or both." Minn. Stat. § 216B.36. *Cf. City of Oakdale*, 588 N.W.2d at 539. The Legislature has also recognized a city's power to issue a franchise in the Public Services Corporation chapter. This chapter allows the formation of corporations to supply power, but requires that they obtain a franchise before constructing any pipeline in or on a "street, alley, or other public ground of a city." Minn. Stat § 301B.01; *see also* Minn. Stat. § 301B.02.

Municipal franchise power is important because utilities benefit from public resources while imposing burdens on city governments. This is true even when utility lines or pipelines do not cross city streets. The burdens cities face from the presence of utilities can range from minor concerns such as coal dust to serious accidents involving pipeline explosions that can threaten lives.

When accidents threaten the integrity of a pipeline or when accidents are caused by a pipeline itself, it will be a city's emergency responders who will be called on to respond. Cities need the capacity to plan for and respond to these incidents. Therefore it is vital that cities retain the ability to regulate utilities through franchise agreements and to impose franchise fees to support this capacity.

Utility franchise fees are an especially important means of financing emergency-response costs in the current economic situation. In June of 2009, the governor unallotted about \$192 million of city aids and credits. *See 2009/2010 LGA and MVHC Unallotment*

FAQ, League of Minnesota Cities (updated Dec. 22, 2009) http://www.lmc.org/media/document/1/unallotment_faq.pdf. And on April 1, 2010, the governor signed the first supplemental budget bill containing an additional \$52.5 million of cuts to city aids and credits. *See* Minn. Laws 2010, Ch. 215. In addition, it is likely that there will be additional cuts to city aids and credits in the future.²

Despite these cuts, cities still need to provide city services including emergency-response services. As a result, cities' authority to impose franchise fees has become even more important for city budgets. It would be bad public policy to narrow this important, well-established authority without clear direction from the Legislature.

The changing nature of energy generation and distribution will also make it increasingly important that cities retain their franchise authority. As the country and Minnesota move forward with climate-control goals, natural-gas operations will likely increase as a source of power. *See, e.g.*, James E. Kloeppel, *Substituting Natural Gas For Coal Offers Long-Term Climate Benefits*, News Bureau, University of Illinois at Urbana-Champaign (July 3, 2002). In addition, there will likely be other changes involving new energy technology because Minnesota has adopted one of the strongest renewable-energy standards in the country. *See* Minn. Laws 2007, Ch. 3 (adopting Minnesota's renewable-energy standard). Therefore, many cities will likely see new energy infrastructure, including underground infrastructure, built within their borders. With all of these changes on the horizon, it is essential for cities to continue exercising

² There will likely be some type of legislative action to address the uncertainty regarding the executive branch's June 2009 unallotments as a result of this Court's recent decision in *Brayton v. Pawlenty*, ___ N.W.2d ___, 2010 WL 1780074 (Minn. May 5, 2010).

their franchise power in order to protect the public and receive compensation for the use of public resources for private gain.

A. A Utility Should Not Be Allowed to Evade a City's Franchise Power By Disclaiming Part of Its Operations.

Minnesota Power attempts to evade the City's franchise power by arguing that even though it is a public utility that provides electric utility services to customers within the City, it is not a public utility when it operates its natural-gas pipeline because it does not provide natural-gas utility services to utility customers. But it is undisputed that the purpose of the natural-gas pipeline is to fire Minnesota Power's generating plant. *See* Appellant's Brief at 4-12. This generating plant, in turn, makes it possible for Minnesota Power to provide electric utility services to its customers.

Minnesota Power provides electric utility services to over 100,000 retail customers in Northeastern Minnesota. *See* Appellant's Brief at 4. In its routing application to the Public Utilities Commission, Minnesota Power detailed the public-utility purposes related to the pipeline. *See* Harper Aff. Ex. A at p. v. This type of activity puts Minnesota Power squarely within the definition of a public utility set forth in Minn. Stat § 216B.02.

The corporate entity that is providing electric utility services is the same corporate entity operating this pipeline. This pipeline is an integral part of Minnesota Power's provision of electrical utility services to its customers. A public utility should not be allowed to avoid its legal obligations to a city for integral parts of its operations — particularly when those parts could pose a danger to the public. Allowing a utility

company to disclaim part of its operations in order to pick and choose its status as a public utility in this manner is at odds with Minnesota law, and it is bad public policy.

The statute authorizing the formation of public service corporations to supply energy recognizes that these corporations will need to construct “all requisite...pipes” to deliver power. Minn. Stat. § 301B.01. It also states that no such corporation “may construct, maintain, or operate...a pipeline” without obtaining a franchise. *Id.* The statute’s plain language does not exempt pipelines supplying the fuel necessary to generate energy. Similarly, Minn. Stat. § 216B.36 does not make such an exception either.

As natural-gas use increases, other utilities may follow Minnesota Power’s lead and build underground pipelines or other power-related infrastructure through cities without connecting into a franchised operation or obtaining a separate franchise or permit. These pipelines and infrastructure will still create burdens for cities and will still use public resources for private gain. Thus this Court should reject any attempt by a utility to pick and choose its status as a public utility in order to evade a city’s franchise authority.

B. Large Industrial Consumers of Natural Gas Are Subject To Cities’ Licensing Authority Under Municipal Police Powers.

Minnesota Power is not only subject to the City’s franchise authority under Minn. Stat. § 216B.36 and Minn. Stat. § 301B.01. Its operation of a high-pressure natural-gas pipeline is also subject to regulation under the City’s municipal police powers that

authorize broad licensing authority to protect the public welfare. *See* Minn. Stat. § 412.211; Minn. Stat. § 412.221; Appellant’s Brief at 26-29.

This Court has expressed its displeasure with natural-gas customers seeking to avoid city franchises in *Village of Blaine v. Indep. Sch. Dist. No. 12, Anoka County (Blaine I)*, 121 N.W. 2d 183, 265 Minn. 9 (Minn. 1963) and *Village of Blaine v. Indep. Sch. Dist. No. 12, Anoka County, (Blaine II)* 138 N.W.2d 32, 272 Minn. 343 (Minn. 1965). In these cases, a school district located within Blaine sought to avoid the city’s franchise power by building its own pipeline and purchasing natural gas from a utility company in a neighboring city. 138 N.W. 2d at 35-36. This Court rejected this attempt to bypass Blaine’s franchise power. *Id.* at 45.

Minnesota Power is making a similar attempt to avoid the City’s franchise and licensing powers. The City’s natural-gas system was constructed, in part, because Minnesota Power had expressed an interest in purchasing gas from the City’s utility. *See* Appellant’s Brief at 7-8. Minnesota Power even advised the City to build a large-capacity pipe to serve the company’s natural-gas needs. *Id.* Yet when Minnesota Power finally decided to purchase natural gas, it chose to bypass the City’s natural-gas system and build its own pipeline. *Id.*

The fact that natural gas is consumed for a utility company’s own use or that it has “industrial” purposes does not invalidate a city’s franchise and licensing power. In *City of Saint Paul v. Northern States Power Co.*, 462 N.W.2d 379, 385 (Minn. 1990), this Court pointed out that the city of St. Paul could have imposed a fee for natural gas transported by Northern States Power (NSP) within the city even though NSP was not a

party to the sale transaction. Like Minnesota Power, NSP was a public utility for purposes of state statute. This Court held that the franchise fee could apply even when NSP was not acting in that capacity. *Id.*

If Minnesota Power is allowed to evade the City's franchise and licensing authority, it could have serious ramifications for Minnesota cities. If Minnesota Power prevails, other utilities or industrial natural-gas consumers may decide to evade municipal franchise power by building pipelines for their own use following a route that does not parallel or cross city streets and connect to a natural-gas source not subject to the city's franchise power. This Court should reject Minnesota Power's attempt to evade the City's franchise and licensing power and confirm that cities are authorized to regulate utilities under both their franchise power and their police powers.

C. The Pipeline-Routing Statute Does Not Authorize Utility Companies to Evade Municipal Franchise Power

When the Minnesota Legislature enacted the pipeline-routing statute, it was reacting to a serious tragedy — the explosion of a pipeline and the death of two Minnesota citizens. *See* Appellant's Brief at 41-42. In adopting the pipeline-routing statute, the Legislature sought to enact safety measures to prevent further tragic accidents and did not express any intention of eliminating municipal franchise and licensing power. *Id.*

The preemption clause in the pipeline-routing statute clarifies that the Legislature did not intend to eliminate municipal franchise and licensing powers. The statute reads: "The pipeline routing permit supersedes and preempts all *zoning, building, or land use*

rules, regulations, or ordinances promulgated by regional, county, local, and special purpose governments.” Minn. Stat. § 216G.02, Subd. 4 (emphasis added). By specifically limiting the statute’s preemptive effect to municipal “zoning, building, and land use” powers, the Legislature expressed its intent to leave other municipal powers, such as franchise and licensing powers, in place. In fact, the permit the state issued in this case specifically requires Minnesota Power to “comply with all terms and conditions of permits or licenses issued by...local units of government” *See* Appellant’s Appendix at 75. (Paragraph VIII F of permit).

Despite these facts, Minnesota Power asserts that the City’s franchise ordinance has been preempted. If this Court were to agree and hold that that the state’s issuance of a pipeline-routing permit preempts a city’s franchise and licensing powers, it will allow utilities and other industrial natural-gas consumers to use the permit process to evade municipal franchise and licensing powers. This will have significant consequences for the City, members of the CUC and other Minnesota cities. Other utilities and industrial natural-gas consumers could decide to build pipelines that are large enough to fall within the state’s permitting powers. If a franchise or license has not yet been issued to such a pipeline, these companies could simply do as Minnesota Power has done and file for a permit, and then claim municipal regulatory authority is preempted. And even if a franchise has already been issued to such a pipeline, these companies could still argue that the existing franchise is preempted by state law.

The Legislature did not intend such results. The fact that it required local governments to develop pipeline-response plans demonstrates that the Legislature

understood that cities would have continuing involvement with pipelines that are constructed within their city limits. *See* Minn. Stat. § 299J.10. It only makes sense that the Legislature intended that franchise and licensing fees would remain in place in order to help fund emergency-response costs. In short, the state pipeline-routing process complements but does not replace municipal franchise power.

CONCLUSION

This Court’s decision will have a significant, statewide impact on cities. The League and the CUC urge this Court to protect municipal franchise power from erosion because this long-standing power provides a way of compensating cities when utilities impose burdens on the public and use public resources for private gain. It would be bad public policy to allow a public utility to evade municipal franchise power by picking and choosing its status as a public utility and disavowing integral parts of its operations — especially when those parts could harm the public. Cities are authorized to require a franchise or license under both their franchise power and their police powers. And finally, the pipeline-routing statute was adopted to protect public safety and bring uniformity to the routing of large, high-pressure pipelines. By specifically limiting the statute’s preemptive effect to “zoning, building, and land use” regulations, the Legislature expressed its intent to leave other municipal regulations — such as franchise and licensing ordinances — in place. The state pipeline-routing statute complements, but does not replace municipal franchise power.

For all of these reasons, the League and the CUC respectfully request that this Court reverse the court of appeals' decision.

Dated: May 6, 2010

Respectfully submitted,

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