

CASE NOS. A04-2342 and A04-2414

State of Minnesota  
In Court of Appeals

HUTCHINSON UTILITIES COMMISSION, An Enterprise fund of the  
City of Hutchinson, A Minnesota Municipal Corporation,  
*Relator,*

vs.

MINNESOTA PUBLIC UTILITIES COMMISSION,  
*Respondent,*

and

MINNESOTA MUNICIPAL UTILITIES ASSOCIATION,  
A Minnesota Non-Profit Corporation,  
*Relator,*

vs.

MINNESOTA PUBLIC UTILITIES COMMISSION,  
*Respondent.*

BRIEF OF THE CITY OF NEW ULM PUBLIC UTILITIES COMMISSION AS  
*AMICUS CURIAE* IN SUPPORT OF THE APPELLANTS MINNESOTA MUNICIPAL  
UTILITIES ASSOCIATION & CITY OF HUTCHINSON PUBLIC UTILITIES

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## STATEMENT OF IDENTITY OF AMICUS CURIAE<sup>1</sup>

The Public Utilities Commission of the City of New Ulm (“NUPUC”) is a department of the City of New Ulm, Minnesota, a Minnesota municipal corporation (“New Ulm”) organized pursuant to its Home Rule Charter. The NUPUC is established pursuant to the provisions of Sections 208 through 240 of New Ulm’s Home Rule Charter (Appendix A), and consists of five members appointed by the Mayor and confirmed by City Council. (Appendix A, §209)

The NUPUC is charged with the responsibility, “To operate each and all of said utilities and to do any and all things necessary for the economical management, control and operation thereof.” (Appendix A, §214 (1)) While vested with this authority, NUPUC may not issue bonded indebtedness without the approval of the New Ulm City Council (Appendix A, §214 (2)), and may not dispose of any particular utility enterprise without approval by the City Council and the voters of New Ulm. (Appendix A, §215)

The NUPUC operates one of the widest varieties of public utility enterprises for customers of any municipal utility including:

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<sup>1</sup> Leave for the City of New Ulm Public Utilities Commission to file this Amicus Brief was granted by Order dated January 3, 2005. Pursuant to Rule 129.03 of the Rules of Civil Appellate Procedure, City Of New Ulm Public Utilities Commission certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

1. The generation, purchase for resale and distribution of electrical power;
2. The cogeneration of steam for distribution and sale to commercial and industrial customers;
3. The purchase of natural gas for use in electrical generation and for distribution and sale to residential, commercial and industrial customers;
4. The pumping, treatment, distribution and sale of potable water; and
5. Sanitary wastewater collection and treatment and permitted disposal of the byproducts of the treatment process.

The NUPUC celebrated its one hundredth anniversary of providing utility services to city and abutting rural customers in 2004. Those one hundred years have been marked by a consistent quest to provide consistent and high quality utility services, to seek out and implement new technologies and efficiencies, to provide for long term solutions to utility challenges, to maintain reasonably priced utility services, and to operate in an environmentally responsible manner. (See attached Appendix B) The NUPUC also provides an economic benefit to the inhabitants of New Ulm by making a five percent (5%) of gross revenues “in lieu of taxes” payment to the City of New Ulm annually for use in defraying the routine cost of municipal government operations. (App. A, §235)

## **BACKGROUND**

In December 2001, the Hutchinson Utilities Commission ("HUC") submitted to the Minnesota Public Utilities Commission ("MPUC") an application for a certificate of need pursuant to Minn. Stat. Chap. 216B. HUC proposed to build an 89-mile natural-gas pipeline from the Northern Border Pipeline Company pipeline near Trimont, Minnesota to the HUC's facilities in Hutchinson. About 34 miles of the pipeline from Trimont to West of New Ulm would be a 16 inch pipe, and the balance of the pipeline from New Ulm to Hutchinson would be 12 inches.

In January 2002, the Commission issued an order accepting the HUC filing as substantially complete after the submission of further documents and then referred the application to the Office of Administrative Hearings for a contested-case proceeding.

The administrative law judge recommended that the HUC be granted the certificate of need to construct the pipeline, but specifically declined to determine whether the proposed pipeline was an intrastate pipeline pursuant to Minn. Stat. §216B.045. The MPUC adopted the administrative law judge's findings of fact, conclusions of law, and recommendation, and the MPUC issued an order granting the HUC a certificate of need. After reconsideration of the matter was denied, certiorari appeal from the order denying the petition for reconsideration followed.

The Minnesota Court of Appeals affirmed the conclusion of the MPUC that it did not need to determine whether the proposed pipeline was an intrastate pipeline pursuant to Minn. Stat. §216.045 in order to issue the certificate of need. Ultimately, the Court of Appeals affirmed the MPUC's order granting the HUC a certificate of need.

After the certificate of need was granted, HUC financed and built the pipeline. This construction was supported by the Natural Gas Firm Transportation Capacity agreement signed on April 27, 2004, and effective on April 1, 2004. This agreement between HUC and the NUPUC commits long-term firm transportation capacity of one-third of the pipeline's capacity to NUPUC until, at least, March 2026. This agreement between Hutchinson and New Ulm, together with the pipeline's firm capacity serving HUC's current and anticipated needs, constitutes the entire capacity of the pipeline.

### **SUMMARY OF ARGUMENT**

The Petition for Writ of Certiorari presents an important question involving the authority and jurisdiction of the MPUC to regulate an intrastate gas pipeline built, owned operated by, and whose capacity is fully subscribed to, municipally owned utilities. While Minn. Stat. §216B.01 provides an exemption from MPUC regulation under Minn. Stat. Ch. 216B for municipal utilities unless otherwise

specifically provided in that chapter, MPUC has determined that the provisions of Minn. Stat. 216B.045 make the HUC pipeline subject to the jurisdiction of the MPUC.

In essence, the MPUC has decided that because the definition of an intrastate pipeline set forth in Minn. Stat. 216B.045, Subd. 1 describes the same type of pipeline built by HUC, the exemption language set forth in Minn. Stat. §216B.01 for municipal utilities is specifically overridden. It attempts to justify this conclusion by suggesting that once a pipeline leaves a municipal utility's operating jurisdiction it is no longer "effectively regulated by the residents of the municipalities which own and operate them..." Minn. Stat. §216B.01.

NUPUC believes that the language of Minn. Stat. §216B.01 exempting municipal utilities from MPUC pipeline regulation recognizes an important distinction between municipal utilities and privately owned utilities. As applied to the HUC pipeline, the exemption is well founded because the total capacity of the pipeline is committed to municipal utilities, both of which are fully subject to regulation by their electorate.

## ARGUMENT

### I. MPUC assertion of jurisdiction is based upon unfounded policy concern.

The Relators HUC and Minnesota Municipal Utilities Association (MMUA) have thoroughly discussed in their briefs the legislative history of the relevant portions of Minn. Stat. Ch. 218B and how MPUC improperly interpreted Minn. Stat. §216B.045 to assert jurisdiction. It appears that in large part the assertion of jurisdiction by the MPUC was based not upon clear statutory language that the HUC pipeline is subject to MPUC jurisdiction; but, rather, upon a policy determination by the commission that the pipeline **should be** subject to MPUC jurisdiction. The essence of the MPUC rationale for asserting jurisdiction over the HUC pipeline is summarized in the totally conclusory determination by the MPUC that:

In the present case, when the pipeline extends miles beyond the City of Hutchinson's boundaries, the stated purpose for limiting the regulation of a municipal pipeline under this statute [Minn. Stat. §216B.01] is not met. Any nonresident of the City of Hutchinson would have no means of regulating the utility but would be subject to decisions made by Hutchinson on rates, access, emergency services and all matters related to customers. Such a limitation would effectively deny non-Hutchinson citizens any opportunity to insure open and nondiscriminatory access to intrastate pipeline services at reasonable rates and an opportunity to require that a

service that can reasonably be demanded be offered by the owner or operator of the intrastate pipeline. (Relators' Joint Appendix, pg.7.)

The totality of the capacity of the HUC pipeline is either committed to the internal needs of HUC or to the transportation capacity needs of NUPUC. (Relators' Joint Appendix, pg.19.) The MPUC argument that "Any nonresident of the City of Hutchinson would have no means of regulating the utility" assumes that either (1) NUPUC is the "nonresident" of concern to it, or (2) that the MPUC can ultimately invalidate the firm capacity contract between HUC and NUPUC and require allocation of the pipeline capacity (of either party) to third parties.

If the concern is the former, the fact is that the HUC pipeline was jointly planned to meet the specific needs of New Ulm and Hutchinson. The decrease in the pipeline diameter just West of New Ulm is because of the capacity committed solely to NUPUC at an interconnecting pipeline at that point leading only to New Ulm. The HUC/NUPUC firm capacity agreement was negotiated at arms-length between the two municipal utilities. Its terms were approved by the utility commissioners of both municipal utilities as well as their city councils. Who better to determine the fairness of an agreement to meet the needs of two municipal corporations and their constituents? NUPUC neither seeks nor requires the protection of MPUC from HUC.

If the concern is the later, the implications for both New Ulm and Hutchinson and their needs for natural gas transportation capacity are enormous. If MPUC can assert jurisdiction bases upon the possibility that third (nonresident) parties may be discriminated against, it is implied that MPUC can eliminate and invalidate the HUC/NUPC contract. This in turn would frustrate the reasonable and cooperative efforts of two separate municipal units of government to address the present and long terms gas needs of their inhabitants.

A jurisdictional decision by the MPUC based upon policy considerations lacking a basis in fact - or law - cannot be upheld.

**II. Municipal utilities have broad authority to act without further regulation both within and without their boundaries.**

Municipal utilities have broad authority under Minnesota law to operate in the best interests of their customers. Minn. Stat. §412.321, Subd. 1:

Any statutory city may own and operate any waterworks, district heating system, or gas, light, power, or heat plant for supplying its own needs for utility service or for supplying utility service to private consumers or both. It may construct and install all facilities reasonably needed for that purpose and may lease or purchase any existing utility properties so needed...

Under Minn. Stat. §412.321, Subd. 3:

Any city may, except as otherwise restricted by this section, **extend any such public utility outside its limits**

and furnish service to consumers in such area at such rates and upon such terms as the council or utility commission, if there is one, shall determine...(emphasis added)

Minn. Stat. 455.05 provides:

The governing body of any home rule charter city of the third class may construct a municipal electric light and power plant and necessary transmission and distribution systems and operate the same for municipal purposes and sell and dispose of electricity for light, heat, and power purposes to private consumers **within and without the city.** (emphasis added)

Minn. Stat. § 412.361 grants broad discretion and authority to municipal utility commissions to build, remodel, expand, and run utility operations:

The commission shall have power to extend and to modify or rebuild any public utility and **to do anything it deems necessary for its proper and efficient operation;** and it may enter into necessary contracts for these purposes. (emphasis added)

While Minn. Stat. §471.656, Subd. 1 limits the ability of municipalities to issue municipal bonds for extraterritorial utility projects, Subd. 2. provides a specific exemption from this restriction if:

(5) the issuer is a municipality or municipalities acting under a joint powers agreement and the financing is for the acquisition or improvement of property, facilities, or rights of use or access thereto **which are necessary or**

**useful** in the operation of municipal public utilities.  
(emphasis added)

Subd. 3. of Minn. Stat. §471.656 specifically defines "municipal public utilities" as including natural gas and related services.

Likewise, the Legislature has determined that two or more municipalities may form a municipal power agency for electrical power pursuant to Minn. Stat. Ch. 453. When so constituted, a municipal power agency:

...may plan, acquire, construct, reconstruct, operate, maintain, repair, extend, or improve one or more projects **within or outside the state**; or acquire any interest in or any right to capacity of a project and may act as agent, or designate one or more of the other persons participating in a project to act as its agent, in connection with the planning, acquisition, construction, reconstruction, operation, maintenance, repair, extension, or improvement of the project. Minn. Stat. §453.54, Subd.2.  
(emphasis added)

The legislature has granted a similar authorization for municipal utilities to provide gas to their customers pursuant to Minn. Stat. Ch. 453A. Once again, such a municipal gas agency:

...may plan, acquire, construct, reconstruct, operate, maintain, repair, extend, or improve one or more projects **within or outside the state or the United States**; or acquire any interest in or any right to capacity of a project and may act as agent, or designate one or more of the other persons participating in a project to act as its agent, in connection with the planning, acquisition, construction, reconstruction, operation, maintenance,

repair, extension, or improvement of the project. Minn. Stat. §453A.04, Subd.2. (emphasis added)

Minnesota courts have long held that the plain language of the statute shall not be disregarded if the meaning is clear. Southern Minnesota Mun. Power Agency v. Boyne, 578 N.W.2d 362 (Minn. 1998); Kirkwold Constr. Co. v. Capital M.G.A. Constr., Inc., 513 N.W.2d 241 (Minn.1994); Lahr v. City of St. Cloud, 246 Minn. 489, 494 n. 10, 76 N.W.2d 119, 122 n. 9 (1956). NUPUC contends that the exemption language of Minn. Stat. §216B.01 is clear and unequivocal. But it is also evident from the long history of legislative authority granted to municipal utilities that the exemption from MPUC regulation was intentional and part of a larger policy of allowing municipal utilities vast latitude to respond to the needs of their electorate.

**III. Municipal utility involvement in extraterritorial natural gas transportation is a reasonable and necessary extension of their operations.**

There are thirty-one Minnesota cities that sell natural gas to their commercial, residential and industrial customers. (Relators' Joint Appendix, pg.44.) The New Ulm experience in gas distribution is typical of that of many communities.

Initially, gas was produced from coal transported to the community by rail. The process was originally undertaken by small, private entrepreneurs seeking to

capitalize on the increasing popularity of the new product for home and commercial heating and cooking purposes. Beginning in 1914, gas produced from coal gasification was locally produced and distributed throughout the community. (App. B, pg. 9-10)

By 1939 a natural gas line was finally completed to New Ulm from Mankato. The "new" gas product was much more energy efficient than gas from coal gasification and New Ulm's gasification plant was soon shut down and gas customers were converted to natural gas. (App. B, pg.15)

The availability of a steady supply of natural gas from the new Northern Natural Gas pipeline caused NUPUC to recognize its benefit for the production of electricity. By 1943 NUPUC had put on line substantial electrical generation capacity fired by natural gas. This dependence on natural gas caused NUPUC to seek to seek to acquire the local gas distribution system from its then owner Northern Natural Gas. This process was completed and NUPUC got into the gas purchase and distribution business on January 2, 1946. (App. B, pg.15) For almost 60 years NUPUC has been in the business of negotiating for the purchase of, and sale and distribution of natural gas for all New Ulm customers.

With the evolving consciousness of environmental issues in the early 1970s, many utilities looked for alternatives to coal as a source of energy for electrical

generation. While many utilities chose to increase their use of low sulfur coal for electrical generation, NUPUC turned to an increased level of natural gas usage for electrical generation thereby increasing its dependence upon gas transportation capacity. (App. B, pg. 19) Additional electrical needs also resulted in the addition of more gas fired generation capacity for NUPUC. (App. B, pg.20) Just three years later nation-wide gas shortages subjected NUPUC to interruptions of its gas supply and threatened to seriously impede the ability to locally generate electricity. (App. B, pg 21)

Evolving federal regulations in the mid-1980s allowed NUPUC to purchase natural gas as a commodity separately from the cost of gas transportation. This was a substantial change for the industry and allowed NUPUC to go into the open market to contract for natural gas under long term contracts, thereby creating less uncertainty and volatility in gas cost. NUPUC leased substantial off site storage for natural gas and this produced significant savings for New Ulm customers. However, transportation needs meant that NUPUC was still dependant upon Northern Natural Gas and its willingness and capacity to move the product to New Ulm. To further protect itself from transportation uncertainties, NUPUC built the capacity to store 240,000 gallons of propane gas in New Ulm as a backup for the utility's needs as well as that of its customers. (App. B, pgs 22, 24)

Further growth in demand for electrical power within New Ulm resulted in NUPUC installing another gas combustion turbine in 2001, which only further exposed it to the volatility of natural gas cost and transportation concerns. (App B, pg 27) The HUC pipeline, and the participation of NUPUC in it, are the direct result of these evolving changes in the way electricity is generated and the way in which the natural gas commodity is purchased and transported. Ultimately, the participation of HUC and NUPUC in this pipeline is to assure the continued vitality of each community.

The Legislature's trust in the ability of municipal utilities to operate for the best interest of their customers is not misplaced. In the case of NUPUC, the utility carries an "A1" bond rating by Moody's Investor Service for its bonded indebtedness based upon the finding that,

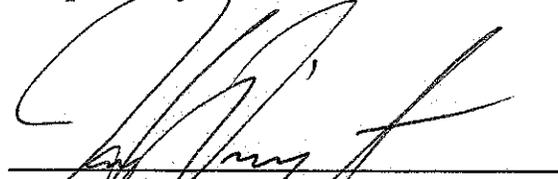
Moody's expectation is that the combined utility system will continue to maintain satisfactory financial operations, given its strong record of providing adequate debt service coverage, the capacity of the city's current system to meet service demand for the foreseeable future, and planned rate increases to incorporate future capital borrowing. (App C, pg 3)

## **CONCLUSION**

MPUC assertion of jurisdiction over the HUC pipeline is based upon an unfounded policy concern about what Minn. Stat. §216B.045 should say, rather

than the clear exemption from regulation language of Minn. Stat. §216B.01. The Legislature has given municipal utilities broad authority to act without further regulation both within and without their boundaries, and that policy is clearly set forth in the general exemption language of Minn. Stat. §216B.01. Municipal utility involvement in extraterritorial natural gas transportation is a reasonable and necessary extension of their operations and can be accomplished for the good of, and subject to the control of, the municipal utility's own local customers.

Respectfully Submitted,



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Dated: March 24, 2005

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) (with amendments effective July 1, 2007).