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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 Respondent Minnesota Public Utilities Commission

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LEGAL ISSUES

I. Did the Minnesota Public Utilities Commission properly determine that Minn. Stat. § 216B.045 grants the Minnesota Public Utilities Commission jurisdiction over the City of Hutchinson's intrastate natural gas pipeline and that the limitation regarding municipal utility regulation does not apply when the City of Hutchinson operates an intrastate natural gas pipeline serving customers miles beyond the City's municipal boundaries?

Decision of Minnesota Public Utilities Commission: The Minnesota Public Utilities Commission properly determined that Minn. Stat. § 216B.045 granted the Commission jurisdiction over the intrastate natural gas pipeline owned and operated by the City of Hutchinson. The Minnesota Public Utilities Commission also properly determined that the limitation regarding municipal utility regulation provided by Minn. Stat. § 216B.01 does not apply when the City operates an intrastate natural gas pipeline serving customers miles beyond the City of Hutchinson's municipal boundaries.

Most apposite cases, statutes, or rules:

Geo. A. Hormel & Co. v. Asper, 428 N.W.2d 47 (Minn. 1988)

Maytag Co. v. Comm'r of Taxation, 218 Minn. 460, 17 N.W.2d 37 (1944)

Occhino v. Grover, 640 N.W.2d 357 (Minn. Ct. App. 2002)

Beck v. City of St. Paul, 50 N.W.2d 81 (Minn. 1951)

Minn. Stat. § 216B.045

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Minn. Stat. § 645.16

Minn. Stat. § 645.19

STATEMENT OF THE CASE

On December 13, 2002, the Respondent Minnesota Public Utilities Commission ("Commission") granted the Hutchinson Utilities Commission ("HUC") a Certificate of Need to build an 89-mile intrastate natural gas pipeline ("Pipeline") between Trimont, Minnesota and Hutchinson, Minnesota. Relators' Joint App. at 2.[1] Construction of the Pipeline is complete and the Pipeline is currently in operation, serving the City of Hutchinson ("City") and the City of New Ulm ("New Ulm"). *Id.* The issue of whether the Pipeline is an intrastate natural gas pipeline as defined by Minn. Stat. § 216B.045, the Intrastate Natural Gas Pipeline Act ("the Act"), came before the Commission at its August 19, 2004 meeting and is the subject of the instant appeal. *Id.* at 1.

The Commission determined that the statutory language is clear. *Id.* at 6. The Commission found that the Pipeline is an intrastate pipeline as defined by the Act because: (1) it begins and ends within the State; (2) it transports natural gas only between points within the State; and (3) all natural gas transported by the Pipeline will be consumed within the State. Jt. App. at 6. The Commission found the statutory language governing the provision of intrastate pipeline services is inclusive and unequivocal, applying to every owner and operator of an intrastate pipeline, and to every contract and any customer. *Id.* at 7. The Commission held that the only statutory exception from the requirements of the Act for a pipeline meeting the definition under Minn. Stat.

[1] Relators' Joint Appendix will hereafter be referenced as "Jt. App."

§ 216B.045, subd. 1 is for a pipeline owned and operated by a public utility. *Id.* at 7.[2] Municipalities are expressly excluded from the definition of public utility by Minn. Stat. § 216B.02, subd. 4 and, therefore, the Pipeline did not qualify for the sole exemption in the Act. *Id.* Other than intrastate pipelines owned by a public utility, the plain language of the Act granted the Commission jurisdiction over every owner and operator of an intrastate pipeline, including the Pipeline owned by the City. *Id.*

The Commission rejected the argument that the City-owned Pipeline was not subject to the Act due to the Legislative Findings of Minn. Stat. § 216B.01. *Id.* at 7. While Minn. Stat. § 216B.01 provides some limit to state regulation of municipal utilities under Minn. Stat. ch. 216B, the Commission found that municipal utilities are plainly included under Minn. Stat. § 216B.045 when the Act provides that, "*all* intrastate pipelines, except those owned by a public utility, are subject to Commission jurisdiction." Jt. App. at 7 (emphasis added).

The Commission also found that Minn. Stat. § 216B.01 (2004) limits regulation of municipal utilities under Minn. Stat. ch. 216B because "municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them." Jt. App. at 7. The purpose of the limitation provided by Minn. Stat. § 216B.01 is adequate local regulation. That purpose is not met with respect to the City's Pipeline operations. *Id.* At nearly 90 miles long, the Pipeline extends miles beyond the borders of the City. *Id.* at 1. Nonresident customers and potential nonresident customers of the

[2] Public utilities are otherwise subject to extensive state regulation under Minn. Stat. Ch. 216B.

Pipeline have no effective means of regulating the Pipeline operations. *Id.* at 7. Applying the limitation of Minn. Stat. § 216B.01 would effectively deny non-Hutchinson customers any opportunity to ensure open and nondiscriminatory access to intrastate pipeline services at reasonable rates, and would render nonresidents subject to the decisions of the City on rates, access, emergency services and all other matters, without redress. *Id.*

The Commission issued its Order Asserting Jurisdiction and Requiring Filings on September 15, 2004 ("September 15 Order") and its Order Denying Reconsideration on November 18, 2004 ("Order Denying Reconsideration"). Jt. App. at 1 and 10. The Commission's September 15 Order and Order Denying Reconsideration (together, "Orders") reviewed the clear and unambiguous language of the Act to find that the Pipeline was subject to the Commission's jurisdiction. The Commission's decision directly follows the language adopted by the Legislature and, therefore, the Commission's Orders should be affirmed.

STATEMENT OF FACTS

At the time the City applied for Commission approval of a certificate of need to construct the Pipeline, the Minnesota Department of Commerce ("Department") informed the City that the proposed Pipeline, if built, would likely be subject to state regulation under the Act. Admin. R. No. Tr. 1 at 37-38. The Commission specifically declined to determine at that early stage whether the Pipeline, once built and operational, would be subject to Commission jurisdiction. Jt. App. at 36, *In re City of Hutchinson,* 2003 WL 22234703 (Minn. Ct. App. 2003). Northern Natural Gas Company ("NNG") petitioned

this Court for review of that decision. *Id.* This Court affirmed the Commission's determination in that case, including the Commission's decision that the Commission did not have to decide at the certificate of need stage whether the Pipeline was an intrastate natural gas pipeline subject to Minn. Stat. § 216B.045. *Id*

NNG submitted a letter dated January 28, 2004 to the Commission alleging that the Pipeline was operational and, therefore, the issue of whether the Pipeline was subject to the Act was ripe for review. Jt. App. at 22. The Commission issued a Notice of Commission meeting informing the relevant parties that the issue of whether to initiate an investigation of the Act's applicability to the Pipeline would be considered at the March 23, 2004 meeting. Admin. R. No. 1.

At the March 23, 2004 Commission meeting, the City confirmed that gas was flowing through the Pipeline but said the Pipeline was serving only the City. Admin. R. No. Tr. 1 at 7-8. The City insisted it had no Pipeline contracts with other entities but that its negotiations to serve the City of New Ulm were continuing. *Id.* The Commission decided that it would solicit comments on the Commission's jurisdiction over the Pipeline. Admin R. No. Tr. 1 at 65-66. The Commission issued its Request for Comments on March 30, 2004. Admin. R. No. 3. The matter came back before the Commission at the August 19, 2004 meeting. Jt. App. at 1.

The Commission determined that the Pipeline is an intrastate pipeline under the Act and that the Act expressly grants the Commission jurisdiction over every owner and operator of an intrastate pipeline except those owned by a public utility. *Id.* at 6. The Commission found that the Pipeline satisfied the definition of intrastate pipeline because

it begins and ends within the state, it transports gas only between points within the state and all gas transported by the Pipeline is consumed in the state. *Id.* The Commission found that the statutory language of the Act is inclusive and unequivocal and applied to every owner and every operator that was not a public utility. *Id.* at 7. The Commission issued its written order asserting jurisdiction on September 15, 2004. Jt. App. at 1.

Relators City and Minnesota Municipal Utilities Association ("MMUA") (together, "Relators") and the City of New Ulm ("New Ulm") petitioned the Commission for reconsideration of its *September 15 Order.* Administrative Record Item Nos. 19, 20 and 21.[3] The Commission issued its *Order Denying Reconsideration* on November 18, 2004 (*"Order Denying Reconsideration"*). Jt. App. at 10. Relators thereafter each filed with this Court a petition for a writ of certiorari to review the Commission's decision to assert jurisdiction under the Act. Jt. App. at 70 and 72.

On December 9, 2004, the HUC filed a motion for a stay pending this Court's review. Admin. R. No. 27. The Commission granted the motion in part in its *Order Granting Partial Stay* issued March 3, 2005. Jt. App. at 14. The partial stay relieved the City of certain obligations during the course of appeal, including: filing its Pipeline contracts with the Commission, keeping records, allowing inspection, and paying assessments. *Id.* at 16. Jt. App. at 17. The Commission also stayed its request for comments on how the Commission should regulate the Pipeline. *Id.* The Commission denied the stay request as it pertained to the requirements of subdivisions 7, 2, 3 and 5 of

[3] The Administrative Record will hereafter be referenced as "Admin. R. No. __."

the Act that provides that the Pipeline is subject to Commission orders during natural gas emergencies, that the City is obligated to charge reasonable rates, that the City must provide open and nondiscriminatory access to the Pipeline, and that any customer or potential customer may bring a complaint against the City to the Commission. Jt. App. at 18.

The Commission's *September 15 Order* finding that the Pipeline is subject to the requirements of the Act, affirmed in the Commission's *Order Denying Reconsideration,* is the subject of the instant appeal.

ARGUMENT

I. STANDARD OF REVIEW

Minn. Stat. § 216B.52, subd. 1 (2004) provides that an appeal from a decision and order of the Commission may be commenced in accordance with Minn. Stat. Ch. 14. Minn. Stat. § 14.69 (2004) outlines the scope of judicial review of an agency decision and states:

> [i]n a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (a) in violation of constitutional provisions; or
>
> (b) in excess of the statutory authority or jurisdiction of the agency; or
>
> (c) made upon unlawful procedure; or
>
> (d) affected by other error of law; or
>
> (e) unsupported by substantial evidence in view of the entire record as submitted; or

(f) arbitrary or capricious.

This Court is not bound by an agency's interpretation of the law. *Geo. A. Hormel & Co. v. Asper,* 428 N.W.2d 47, 50 (Minn. 1988). This Court retains the authority to review de novo errors of law which arise when an agency decision is based on the meaning of words in a statute. *See Hare v. State of Minnesota Dep't of Human Serv.*, 666 N.W.2d 427, 431 (Minn. Ct. App. 2003) (citing *In re Eller Media,* 664 N.W. 2d 1, 7 (Minn. 2003)). However, "an agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature." *Hormel,* 428 N.W.2d at 50 (citations omitted).

On appeal from an agency decision, the party seeking review bears the burden of proving that the agency's conclusions violate one or more provisions of Minn. Stat. § 14.69. *Markwardt v. State, Water Resources Bd.,* 254 N.W.2d 371, 374 (Minn. 1977). Relators have not met that burden. The Commission is expressly charged with enforcing the requirements of the Act. Minn. Stat. § 216B.045, subd. 5 (2005). Because the Commission is the agency charged with the Act's administration, the Court may defer to the Commission's interpretation. *Hormel,* 428 N.W.2d at 50. The Commission's determination that the requirements of the Act apply to the Pipeline is consistent with the plain language of the Act and the intent of the Legislature. The Commission's decision, therefore, is not affected by any error of law and is not in excess of the Commission's statutory authority. Further, the Commission's decision to solicit comments regarding its regulation of the Pipeline does not impose any requirement on the City that is not

imposed on a similarly-situated party. Thus, the Commission's decision is constitutional. Finally, the Commission's *Orders* reflect the Commission's reasoned decision making and, therefore, the Commission cannot be found to be arbitrary and capricious.

II. THE COMMISSION PROPERLY DETERMINED THAT THE PLAIN LANGUAGE OF THE ACT PROVIDES THAT THE PIPELINE IS SUBJECT TO THE REQUIREMENTS OF MINN. STAT. § 216B.045.

A. Standard Of Law

"To determine the meaning of a statute, we look first and foremost to the language of the statute itself." *Occhino v. Grover*, 640 N.W.2d 357, 359 (Minn. Ct. App. 2002) (citing Minn. Stat. § 645.16). If a statute's meaning is plain on its face and as applied, judicial construction is neither necessary nor proper. *Id.* (citing *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)).

B. The Plain Language Of Minn. Stat. § 216B.045 Demands Commission Jurisdiction Over The Intrastate Natural Gas Pipeline Owned And Operated By The City.

1. The Pipeline meets the definition of intrastate pipeline under the Act.

The language of the Act is clear. The definition of intrastate pipeline under Minn. Stat. § 216B.045 is plain and clearly includes the 89-mile Pipeline owned and operated by the City. Minnesota Statutes § 216B.045, subd. 1 (2004) defines intrastate pipeline as a pipeline which: (1) is wholly within the State of Minnesota; (2) transports or delivers natural gas only between points within the State; and (3) all of the natural gas is consumed within the state.

The Pipeline is located wholly within the State of Minnesota, originating in Trimont, Minnesota and terminating at the City. Jt. App. at 2. The Pipeline receives natural gas from the interstate pipeline Northern Border Pipeline Company at Trimont, Minnesota and transports and delivers natural gas to the City and to New Ulm. Jt. App. at 19 (Webster Aff. ¶ 4). All of the natural gas is consumed within the state. Jt. App. at 6. Finally, the only exception from the Act is for a pipeline owned and operated by a public utility. Minn. Stat. § 216B.045, subd. 1 (2004). The City is not a public utility. "Public utility" is expressly defined to exclude municipal utilities. Minn. Stat. § 216B.02, subd. 4 (2004). Therefore, the Pipeline meets the definition of intrastate natural gas pipeline under the Act.

2. The Commission read the Act according to the rules of grammar.

Minn. Stat. § 645.08 (1) (2004) requires that, "words and phrases are construed according to rules of grammar and according to their common and approved usage[.]" Applying this principle to the review of the Act commands the Act's application to the City's Pipeline. The language of the Act uses terms that are commonly used and understood and that include municipal utilities.

a. The broad terms "owner" and "operator" include the city.

"Owner" and "operator" are broad terms that include the City. Subdivision 3 of the Act requires, *"[e]very owner* or *operator* of an intrastate pipeline shall offer intrastate pipeline transportation services by contract on an open access, nondiscriminatory basis." Minn. Stat. § 216B.045, subd. 3 (2004) (emphasis added). The City admits that it owns

the Pipeline. Admin. R. No. Tr. 1 at 5. The phrase "every owner" must by definition include the City.

The "plain meaning presupposes the ordinary usage of words that are not technically used or statutorily defined, relies on accepted punctuation and syntax, and draws from the full-act context of the statutory provision." *Occhino v. Grover,* 640 N.W.2d at 359 (citing *Am. Tower*, 636 N.W.2d at 312). The Act does not define either "owner" or "operator." "Owner," however, may be defined as,

> [o]ne who has the right to possess, use, and convey something; a person in whom one or more interests are vested. An owner may have complete property in the thing or may have parted with some interests in it (as by granting an easement or making a lease).

Black's Law Dictionary (8th ed. 2004); *see also Beck v. City of St. Paul*, 50 N.W.2d 81, 83 (Minn. 1951) ("Owner" is "the person in whom is vested the ownership, dominion, or title of property.") "Operator" is defined as "[o]ne who operates a machine or device," or "[t]he owner or manager of a business or an industrial enterprise." *The American Heritage Dictionary of the English Language* (4th ed. 2000).

Further, other than the exclusion provided for public utilities, the definition of intrastate pipeline does not speak to ownership of an intrastate pipeline and what effect, if any, that variations in the type of ownership may have on the Commission's regulatory authority over an intrastate pipeline. Under the Act, every intrastate pipeline and every "owner or operator" of an intrastate natural gas pipeline that is not a public utility, is subject to the Act.

Relators argue that the Legislature could have used a term defined by statute to include municipal utilities. City Br. at 17; MMUA Br. at 20. The Legislature, however, chose to use all-inclusive words such as "every" and "all." Thus, the terms "every owner" or "operator" must be construed according to their common and approved usage to include every owner without exception, including a municipal utility owner of an intrastate natural gas pipeline. Minn. Stat. § 645.08 (1) (2004). The Commission explicitly noted, "[t]he statutory language that governs the provision of intrastate pipeline services is inclusive and unequivocal, applying to all owners and operators of intrastate pipelines, every contract and any customer. Such terms are clear and unambiguous." Jt. App. at 7. The City is the owner of the Pipeline and the Act applies.

b. The use of the word "person" includes municipal utilities.

MMUA argues that the phrase "another person" refers to the Northern Border Gas Pipeline and that cannot mean the City. MMUA Br. at 17. To what party the phrase "another person" may refer in this specific fact scenario is not in dispute. The use of the phrase "another person" is significant, however, because it indicates the first entity would also be a "person."[4] The use of the term "person" in the definition of intrastate pipeline in subdivision 1 of the Act also indicates a legislative intent to cover all entities, including municipal utilities. Since "person" includes municipal utilities under Minn.

[4] Minn. Stat. § 216B.02, subd. 3 defines person as "a natural person, a partnership, or two or more persons having a joint or common interest, and a corporation . . . ." Corporation is defined to include a municipality, among other entities. Minn. Stat. § 216B.02, subd. 2 (2004).

Stat. § 216B.02, subds. 2 and 3 (2004), the City is included under this provision of the Act.

It is also instructive to compare the use of the term "person" in the Act with the use of the term "person" in the certificate of need statute, Minn. Stat. § 216B.243 (2004). Relators agree that the City was required to file with the Commission a petition for a certificate of need to construct the Pipeline. City Br. at 3; MMUA Br. at 17. The certificate of need statute did not specifically name "municipal utilities," but nonetheless included municipal utilities by the use of the term "person." Minn. Stat. § 216B.243, subd. 4 (2004).[5] Nowhere else in Minn. Stat. § 216B.243, however, is the term "person" used. For example, Minn. Stat. § 216B.243, subd. 3 (2004) states, that, "[n]o proposed large energy facility shall be certified for construction unless the *applicant* can show demand . . . and unless the *applicant* has otherwise justified its need." (emphasis added). Further, Minn. Stat. § 216B.243, subd. 3a (2004) states that the Commission may not issue a certificate of need unless the "applicant" has explored the possibility of using renewable resources.

Similarly, the Act uses the term "person" in one provision and thereafter uses the broad and inclusive terms "owner and operator." Just as it would be inconsistent with Minn. Stat. § 216B.243 to allow a municipal utility to construct a large energy facility without a certificate of need, it would be inconsistent with Minn. Stat. § 216B.045 to allow a municipal utility to operate an intrastate pipeline without complying with the Act.

[5] Minn. Stat. § 216B.243, subd. 4 (2004) requires that any "person" proposing to construct a large energy facility must apply for a certificate of need.

C. The City's Pipeline Is Subject To The Requirements Of The Act Because The Pipeline Is Not Owned Or Operated By A Public Utility.

The Commission's interpretation of the Act is in accord with the well-established rule that the expression of one thing means the exclusion of others ("expressio unius est exclusio alterius"). Minn. Stat. § 645.19 (2004). "Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others." *Maytag Co. v Comm'r of Taxation*, 218 Minn. 460, 463, 17 N.W.2d 37, 40 (1944). Provisos must be construed, "to limit rather than to extend the operation of the clauses to which they refer." Minn. Stat. § 645.19 (2004).

The only exclusion from the requirements of § 216B.045 is for public utilities. Subdivision 1 of the Act specifies,

> an intrastate pipeline does not include a pipeline owned or operated by a public utility, unless a public utility files a petition requesting that a pipeline or a portion of a pipeline be classified as an intrastate pipeline and the Commission approves the petition.

(2004). The City is not a public utility as defined by Minn. Stat. § 216B.02, subd. 4 (2004). Under Minn. Stat. § 216B.02, subd. 4, "public utility" specifically "does not include . . . a municipality or a cooperative electric association." Since the City is not a public utility, the City is not excepted from the definition of intrastate pipeline and the requirements of the Act.

In interpreting statutes, a court "cannot supply that which the legislature purposely omits or inadvertently overlooks." Wallace v. Comm'r of Taxation, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971). Thus, when a statutory question involves failure of expression rather than ambiguity of expression, courts are not free to substitute

amendment for construction and thereby supply the legislative omissions. See State v. Moseng, 254 Minn. 263, 269, 95 N.W.2d 6, 11-12 (Minn. 1959). The language of the Act includes municipal utilities in the use of the term "person," and the use of the broad terms every "owner" and every "operator." The Act provides an exclusion from these terms for public utilities but does not provide an exclusion for municipal utilities. All other "persons," "owners" and "operators" are subject to the requirements of the Act. Minn. Stat. § 216B.045, subds. 1 and 3 (2004). The statutory language adopted by the Legislature, combined with the fact that the Legislature specifically excluded another form of ownership, confirms that the Act applies to municipal utilities.

A review of Minn. Stat. ch. 216B reveals why the Legislature provided an exception from the Act for public utilities. The statutory sections of Minn. Stat. ch. 216B already subject public utilities to regulatory requirements equivalent to those outlined in the Act. First, all of the provisions incorporated by Minn. Stat. § 216B.045, subd. 6 (2004) already apply to public utilities. Moreover, Minn. Stat. § 216B.03 (2004) requires that, "[e]very rate made, demanded, or received by any public utility . . . shall be just and reasonable. Rates shall not be unreasonably preferential, unreasonably prejudicial or discriminatory, but shall be sufficient, equitable and consistent in the application to a class of customers." Further, Minn. Stat. § 216B.05, subd. 1 (2004) requires that "[e]very public utility shall file with the commission schedules showing all rates, tolls, tariffs and charges which it has established and which are in force at the time for any service performed by it within the state[.]" (emphasis added).

Additionally, Minn. Stat. § 216B.09, subd. 1 (2004) provides that the Commission, "may ascertain and fix just and reasonable standards, classifications, rules, or practices to be observed and followed by any or all public utilities with respect to the service to be furnished." Minn. Stat. § 216B.16 (2004) authorizes the Commission to set rates for public utilities. Minn. Stat. § 216B.17, subd. 1 (2004) provides that the Commission, on its own motion or upon complaint,

> that any of the rates, tolls, tariffs, charges, or schedules or any joint rate or any regulation, measurement, practice, act or omission affecting or relating to the production, *transmission*, *delivery* or furnishing of *natural gas* or electricity or *any service in connection therewith* is in any respect unreasonable, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with notice, to make such investigation as it may deem necessary.

(emphasis added). Further, Minn. Stat. § 216B.23, subd. 2 (2004) provides that whenever the Commission finds,

> any regulations, measurements, practices acts or service to be unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise unreasonable or unlawful, the commission shall determine and by order fix reasonable measurements, regulations, acts, practices or service to be furnished, imposed, observed and followed in the future in lieu of those found to be unreasonable, inadequate or otherwise unlawful, and shall make any order respecting the measurement, regulation, act, practice or service as shall be just and reasonable.

The above provisions clearly illustrate that the Legislature provided the exception to public utilities because public utilities were already subject to the Commission's jurisdiction. Thus, the Legislature required the Commission to regulate all other owners and operators of intrastate pipelines that would not otherwise be subject to state regulation.

D. The Commission's Decision Is Consistent With The Rules Of Construction Of An Ambiguous Statute.

First, the Act is not ambiguous. Therefore, construction and interpretation of the Act is neither necessary nor proper. *Molloy v. Meier,* 679 N.W.2d 711, 723 (Minn. 2004) (citation omitted). A statute is only ambiguous if it is susceptible to more than one reasonable interpretation. *Id.* However, even if this Court were to apply the principles of statutory construction, the Court would find that the Commission's decision is consistent with the language of the Act and the intent of the Legislature.

1. The legislative history supports a finding that the Pipeline is subject to Commission jurisdiction.

An evaluation of the contemporaneous legislative history demonstrates that the Legislature evinced no intent to exclude municipal utilities from the Act's requirements. Relators claim that the Legislature initially considered and rejected "including municipalities within its intrastate pipeline regulatory scheme" when the following provision was introduced:

> The commission is hereby vested with the powers, rights, functions, and jurisdiction to regulate in accordance with the provisions of Laws 1974, chapter 429 every public utility as defined herein and to regulate contracts establishing the rates, service, and facilities of persons other than public utilities furnishing or transporting to a person natural, manufactured, or mixed gas through a pipeline located wholly within Minnesota to the extent that regulation is permitted by the Natural Gas Act, United States Code, title 15, section 717(c). The exercise of such powers, rights, functions, and jurisdiction is prescribed as a duty of the commission. The commission is authorized to make rules in furtherance of the purposes of Laws 1974, chapter 429.

City Br. at 18; MMUA Br. at 19 (citing S.F. 258 (revisor 87-0774) (Jan. 16, 1987) (emphasis added to denote proposed changes to existing statute)).

This provision of the original bill, however, would have merely revised Minn. Stat. § 216B.08 outlining the duties of the Commission. What was finally enacted was an entirely new section of Chapter 216B pertaining to the regulation of intrastate pipelines. These changes cannot be read to imply an exclusion that was not made. As noted by the Department,

> [t]he City provides no support for its explanation for the word change described other than an unfounded assumption of legislative intent, and fails to address other changes such as the fundamental format change resulting in Minn. Stat. § 216B.045 as finally enacted. . . . At best, one can see that the Legislature chose for some unidentified reason to create a *separate stand-alone section dealing comprehensively with intrastate pipelines.* In so doing, lawmakers changed the focus from the regulator to the facility itself. That is, Minn. Stat. § 216B.045 begins by describing the pipeline project that is defined as an 'intrastate pipeline.' It then proceeds to apply regulatory terms to 'every owner and operator' of an intrastate pipeline and to every instrastate pipeline rate and every intrastate pipeline contract.

Admin. R. No. 13 at 9-10 (emphasis added). Further, the Department, "found no historical explanation of the legislative drafters' word choice." *Id.* at 10.

CenterPoint Energy Minnegasco, Interstate Power and Light Company, and Aquila, Inc. (together, "Companies") also noted that the legislative history did not evince an intent to exclude municipal utilities. Admin. R. No. 12 at 3. The Companies explained, "the Legislature simply replaced an awkward reference to 'persons other than public utilities' with the term 'intrastate pipeline' in section 216B.045. The Legislature then defined 'intrastate pipeline' to 'exclude a pipeline owned or operated by a public utility.'" *Id.* Thus, "[t]he term 'intrastate pipeline' simply reflects better drafting as a

term that can be used repeatedly throughout section 216B.045 with respect to each of its specific provisions." *Id.*

Although courts may refer to legislative changes in a bill in order to interpret the final statute, such a general guide is not helpful in every case. *See County of Washington v. Am. Fed'n of State, County and Mun. Employees, Council 91*, 262 N.W. 2d 163, 168 (Minn. 1978) (citing 2A Sands, Sutherland Statutory Construction (4th ed.) § 48.18). Further,

> An amendment may have been adopted, however, only because it expressed better a provision already embodied in the original bill or because the provision in the original bill was deemed unnecessary because unwritten law would produce the same result without it. Thus caution must be exercised in using the action of the legislature on proposed amendments as an interpretive aid.

Id.

The statute originally proposed to be amended, Minn. Stat. § 216B.08, outlines the Commission's authority over public utilities. It was logical for the Legislature to decide not to amend a statute outlining the Commission's authority over public utilities with a clause outlining the Commission's authority over entities that are not public utilities. The Legislature not only removed the proffered clause but adopted an entirely new statute. There was no indication of an intent to exclude municipal utilities. Rather, the Legislature opted for broad and inclusive language that would apply to every owner or operator that was not a public utility.

2. The Legislature's intent to provide for state regulation of intrastate pipelines would not be met under Relators' interpretation.

Minn. Stat. § 645.16 (2004) provides that the consequences of a particular interpretation may be considered in interpreting an ambiguous statute. In the instant matter, several public interest considerations outlined by the Legislature will not be met if the Commission fails to perform its duty to enforce the requirements of the Act.

First, the Legislature has indicated that every rate and contract relating to the sale or transportation of natural gas through an intrastate pipeline is to be just and reasonable. Minn. Stat. § 216B.045, subd. 2 (2004). Without Commission oversight, the determination of just and reasonable rates and contracts will be left solely to the entity offering those rates and contracts. Second, the Legislature indicated that every owner or operator of an intrastate pipeline must offer intrastate pipeline transportation services on an open access, nondiscriminatory basis. Minn. Stat. § 216B.045, subd. 3 (2004). Again, without the Commission's regulatory authority, there is no assurance that the intent of the Legislature will be met. Third, the Act provides the opportunity for potential and existing customers to bring a complaint to the Commission about the rates or service of the intrastate pipeline and to question whether an intrastate pipeline has available capacity. Minn. Stat. § 216B.045, subd. 5 (2004). None of these protections exist without Commission regulatory authority.

Further, natural gas emergencies present a serious danger to residents of a cold-weather state such as Minnesota. The Legislature recognized this danger and authorized the Commission to declare a natural gas emergency if the Commission finds that a severe

natural gas shortage endangering the health or safety of Minnesotans exists. Minn. Stat. § 216B.045, subd. 7 (2004). If the Commission finds that a natural gas emergency exists, the Commission may order the suspension of contracts for the sale and transportation of natural gas and require that the intrastate pipeline be operated to provide transportation services as required by the public interest. *Id.* This protection for Minnesota residents adopted by the Legislature will not exist in absence of Commission jurisdiction.

Finally, the Legislature provided one exception from the requirements of the Act and that exception is for public utilities. Public utilities are otherwise broadly regulated at the state level. The Legislature provided that other entities, not otherwise extensively regulated at the state level, would be subject to Commission regulation. The City is one of those other entities not otherwise extensively regulated. The intent of the Legislature, evinced by the clear language of the Act, must be given effect.

E. The Complaint Provision Under Minn. Stat. § 216B.17 Does Not Provide A Remedy To Potential Pipeline Customers.

MMUA cites to the complaint provision in Minn. Stat. § 216B.17, subd. 6 as providing the appropriate redress for any aggrieved Pipeline customer. MMUA Br. at 25. Minn. Stat. § 216B.17, subd. 6 (2005) provides that, "[t]he commission shall have the power to hear, determine and adjust complaints made against any municipally owned gas or electric utility with respect to rates and services upon petition of ten percent of the nonresident consumers of the municipally owned utility or 25 such nonresident consumers whichever is less."

The above statutory provision applies only to nonresident consumers of a municipal utility. It does not apply to those that would seek to become a nonresident consumer of a utility. If, for instance, a City along the pipeline route sought to receive service and the City refused, the *potential* consumer would not be able to bring a complaint pursuant to the provision cited by Relators. Under the Act, however,

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

Minn. Stat. § 216B.045, subd. 5 (2005) (emphasis added).

Additionally, MMUA noted that cities remain subject to judicial review and they cannot engage in unreasonable, arbitrary, or capricious conduct. MMUA Br. at 25 (citing *Billy Graham Evangelical Ass'n v. City of Minneapolis,* 667 N.W.2d 117, 123 (Minn. 2003)). However, if the City owning and operating an intrastate pipeline refuses service, it is unclear what claim a potential customer may bring if the pipeline is not required to provide access to available capacity under the Act. The goals of the Legislature for the operation of an intrastate natural gas pipeline would not be met and harmed parties would be unable to present a claim.

Moreover, MMUA claims, "[e]ven if the Commission were entitled to re-evaluate local regulation, the citizens of Hutchinson and New Ulm may petition the city council, the municipal utility, vote their mind, and make any grievances known." MMUA Br. at 25. The Commission has not re-evaluated local regulation in this proceeding. The

Commission has only exercised its duty as directed by the Legislature. Moreover, the claim made by MMUA ignores the fact that any Pipeline customer that is not a resident of the City has no input over the Pipeline's operations.

Without Commission jurisdiction, the only means by which a nonresident customer or a potential nonresident customer could complain is to go directly to the City - the entity engaged in the activity complained of. If the potential customer is seeking nondiscriminatory access to the Pipeline at reasonable rates, as required by the Act, this approach is unlikely to provide that customer any redress. The ability of existing and potential customers to have their concerns adequately addressed solely by the entity that is causing the concerns is questionable. The Act demonstrates that the Legislature believes that Commission regulation over intrastate pipelines is necessary.

F. The Exclusion Of The Assessment Provision Under Minn. Stat. § 216B.62, Subd. 5 Does Not Support A Finding That The Commission Does Not Have Jurisdiction Over The Pipeline.

Subdivision 6 of the Act specifies that Minn. Stat. §§ 216B.10, subds. 1 and 4, 216B.12, 216B.13, and 216B.62, subds. 2, 4 and 7 "shall apply to owners and operators of intrastate pipelines." First, Minn. Stat. § 216B.10, subd. 1 states,

> The commission shall establish a system of accounts to be kept by public utilities subject to its jurisdiction. A public utility which maintains its accounts in accordance with the system of accounts prescribed by a federal agency or authority shall be deemed to be in compliance with the system of accounts prescribed by the commission. Where optional accounting is prescribed by a federal agency or authority, the commission may prescribe which option is to be followed.

(2004). By including this provision in the Act, the Commission is authorized to require owners and operators of intrastate natural gas pipelines to comply with either state or

federal accounting procedures. The Act also includes Minn. Stat. § 216B.10, subd. 4, which states,

> The commission may require any public utility to file annual reports in the form and content, having regard for the provisions of this section, as the commission may require, and special reports concerning any matter about which the commission is authorized to inquire or to keep itself informed. The commission may require the reports to be verified. The basic financial statements in the annual report of a public utility may, at the direction of the public utilities commission, be examined by an independent certified public accountant and the accountant's opinion thereof included in the annual report filed with the commission.

(2004). Therefore, owners and operators will also be required to file an annual report at the direction of the Commission.

The owner or operator of an intrastate pipeline is also subject to Minn. Stat. § 216B.12, which grants the Commission and duly authorized officers of the Department the right of entrance and inspection for the purposes of making examinations and to inspect the accounts, books, papers, and documents of the owner or operator. Additionally, Minn. Stat. § 216B.13 (2004) applies and authorizes the Commission to order the owner or operator to produce its books, accounts, papers or records relating to its business in the state. If these statutes were not specifically included by the Act, they would not apply because the sections by their terms apply only to public utilities, the only entities specifically excluded by the Act. By including these provisions in the Act, the Legislature has made all owners and operators of intrastate natural gas pipelines subject to these requirements.

Further, the Act provides that § 216B.62, subd. 2, 4 and 6 shall apply. Minn. Stat. § 216B.62, subd. 2 (2004) provides that, in a proceeding upon its own motion, on

complaint, or upon an application to the Commission, in which the Commission deems it necessary to investigate a public utility, the Commission may assess the costs of the investigation to the public utility being investigated. Minn. Stat. § 216B.62, subd. 4 (2004) outlines the procedure by which a public utility may contest the assessment. Finally, Minn. Stat. § 216B.62, subd. 6 indicates that the Commission may assess the costs of contested cases conducted by the office of administrative hearings against the public utility. Again, because these provisions are explicitly included under the Act, these provisions apply to all "owners and operators" of intrastate natural gas pipelines and are not limited to public utilities.

MMUA argues that the Act's provision specifying the subdivisions of § 216B.62 that apply indicates the Legislature's intent to exclude municipal utilities. MMUA Br. at 18. MMUA makes this argument because the only provision of § 216B.62 that applies to municipal utilities is subdivision 5 and that provision is not included under the Act.

A closer look at the assessment provisions of § 216B.62 reveals why subdivision 5 relating to municipal electric utilities and cooperative electric associations was not included. First, while subdivision 2 of the Minn. Stat. § 216B.62 provides the mechanism by which the Commission may assess to a utility the costs incurred in *any* type of investigation, subdivision 5 only permits the Commission to recover from utilities the utilities' proportionate share of the costs of the Commission's review and disposition of resource plans, service area disputes, the state transmission plan and service quality complaints. Minn. Stat. § 216B.62, subd. 5 (2004). Subdivision 2 is not limited in the types of costs that may be recovered. Further, subdivision 2 requires the owner and

operator to "pay the expenses" related to the investigation or other action conducted by the Commission and not just a "proportionate share." Minn. Stat. § 216B.62, subd. 2 (2004). By including subdivisions 4 and 6, the Legislature merely provided the mechanism by which an owner or operator may contest an assessment and by which the Commission may assess the costs of contested case hearings conducted by the office of administrative hearings.

Additionally, the fact that Minn. Stat. § 216B.62, subd. 2 applies to public utilities and that subdivision 5 applies to municipal electric utilities and cooperative electric associations is of little consequence when they have been specifically incorporated into § 216B.045. Subdivision 6 of the Act specifies that, "[s]ections 216B.10, subdivisions 1 and 4, 216B.12, 216B.13, and 216B.62, subdivisions 2, 4, and 6 shall apply to owners and operators of intrastate pipelines." When those statutes are specifically applied to owners and operators of intrastate pipelines, the fact that the statute, by itself, would not otherwise apply to a party is no longer relevant.

III. THE LIMIT ON STATE REGULATION OF MUNICIPAL UTILITIES FOUND IN MINN. STAT. § 216B.01 DOES NOT EXTEND TO A MUNICIPAL PIPELINE OPERATION SERVING OTHER UTILITIES.

"Legislative findings are given some weight in the interpretation of statutes." *See Production Credit Ass'n of Worthington v. Spring Water Dairy Farm*, 407 N.W.2d 88, 91 (Minn. 1987) (citing *Bricelyn Sch. Dist. No. 132 v. Bd. of County Comm'rs*, 238 Minn. 53, 55 N.W.2d 597 (1952)). The City argues that Minn. Stat. § 216B.01, "Legislative Findings," indicates that municipal utilities are excluded from the Act. The limitation

does not apply, however, when the reason for the limitation on regulation is not met. Minn. Stat. § 216B.01 states, in part,

> Because municipal utilities are effectively regulated by the residents of the municipalities which own and operate them . . . it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein.

(2004).

First, the limitation expressed in Minn. Stat. § 216B.01 is prefaced by an acknowledgement that other regulation exists. In the instant matter, the City is serving customers miles beyond the municipal boundaries. Those customers and potential customers do not "effectively regulate" the City and HUC. Thus, the purpose behind the exclusion in the legislative findings is not met where, as here, the utility is serving customers up to 89 miles beyond its municipal boundaries.

At a minimum, the Pipeline provides natural gas service to New Ulm. Jt. App. at 19 (Webster Aff. ¶ 3). The residents of New Ulm do not have a voice in the City's operation of the Pipeline. Amicus Curiae City of New Ulm Public Utilities Commission ("NUPUC") indicates that, "NUPUC neither seeks nor requires the protection of MPUC from HUC." NUPUC Br. at 7. The fact that NUPUC does not seek a forum with the Commission, however, does not alter the Legislature's intent that that forum be available. Further, New Ulm is not the only entity that may be affected by policies adopted by the City with respect to its Pipeline operations. Residents of cities or any other entities that seek or receive service from the Pipeline do not have the ability to vote for the elected officials charged with governing the Pipeline's operations. Without regulation at the

state or federal level, the Pipeline may have unfettered ability to apply discriminatory rates, services, and access to parties outside of the City.

The Companies aptly explained how,

> [a] municipality's residents can, in theory, protect their own interests at the ballot box with respect to the rates, terms and conditions of the services they purchase from their municipality's utility. But those residents are not in a position to protect the interests of nonresident consumers who purchase the city's pipeline services outside the city's boundaries. As such, the nondiscrimination, open access and reasonable rate requirements of section 216B.045 must necessarily be enforced by the Commission, at least with respect to consumers outside a city's municipal boundaries.

Admin. R. No. 5 at 6-7.

Finally, Relators point to various statutes within Minn. Stat. ch. 216B that also indicate when they apply to municipal utilities. City Br. at 15; MMUA Br. at 14. In general, the language of Minn. Stat. ch. 216B is such that the statutory provisions would only apply to public utilities and, because public utilities are defined to exclude municipal utilities under Minn. Stat. § 216B.02, subd. 4 (2004), these statutes would otherwise exclude municipal utilities. The Act, however, is not drafted to exclusively apply to utilities. Rather, the Act applies to "persons" and to "owners" and "operators" of intrastate pipelines. Minn. Stat. § 216B.045, subds. 1 and 3 (2004). The Act merely defines intrastate pipeline, excluding public utilities, and further refers to a pipeline "owner or operator," without providing any reason to distinguish one owner or operator from another.

IV. THE LEGISLATURE HAS INDICATED ITS INTENT THAT THE COMMISSION REGULATE INTRASTATE PIPELINES.

A. The Legislature Has Indicated That Pipeline Operations Are Distinct From Other Utility Operations.

By enacting Minn. Stat. § 216B.045, the Legislature has specifically treated the operation of an intrastate pipeline as something separate and distinct from other utility operations. Although Relators and NUPUC point to several provisions of Minnesota Statutes outlining what activities municipal gas utilities may engage in, neither Relators nor NUPUC indicate how any of these provisions remove the Pipeline at issue in this proceeding from Commission regulation. City Br. at 21; MMUA Br. at 23-24; NUPUC Br. at 8-11. Relators and NUPUC argue that Minn. Stat. chs. 412, 453 and 453A authorize municipalities to create natural gas and electric utilities and that such authorization extends to the operation of a natural gas pipeline. City Br. at 21; MMUA Br. at 23; NUPUC Br. at 8-11. While the statutes referred to by Relators authorize municipalities to engage in certain activities, these statutes do not bar the exercise of Commission jurisdiction under the Act.

Further, the dispute before the Court does not involve whether the City can own and operate an intrastate natural gas pipeline. The dispute is whether an intrastate natural gas pipeline owned and operated by a municipal utility is subject to the requirements of the Act. The Commission's exercise of its jurisdiction over the Pipeline does not prohibit cities from engaging in pipeline operations. If a city chooses, however, to engage in owning and operating a pipeline and that pipeline meets the definition of intrastate pipeline under the Act, that pipeline will be subject to Commission jurisdiction.

Without Commission jurisdiction, there would be an absence of regulatory protection for connecting cities or other customers. Although MMUA alleges that the Commission erred in "dismissing local regulation as inadequate," MMUA Br. at 23, the Commission does not dismiss local regulation at all. What is at issue is the regulatory design enacted by the Legislature. The Legislature has determined that state regulation is required for intrastate natural gas pipelines. It is not for the Relators or the Commission to determine whether local regulation is "adequate" when the Legislature has indicated its preference for state regulation of intrastate natural gas pipelines.

B. The Legislature Has Made The Public Policy Determination That There Should Be State Regulation Of An Intrastate Natural Gas Pipeline.

The Legislature has clearly stated its policy that entities owning and operating an intrastate pipeline and that are not otherwise subject to Commission regulation will be subject to the Act. Amicus Curiae League of Minnesota Cities ("League") begins its brief with the statement that the League, "will focus only on why it is good public policy to affirm the authority of municipal utilities to operate independently of the MPUC." League Br. at 3. NUPUC asserts that the Commission's determination to exercise its duty was based on a policy determination by the Commission that the Pipeline should be subject to state regulation. NUPUC Br. at 6. The issue before this Court, however, is not a matter of the policy choice of the Commission. Rather, the policy to charge the Commission with regulating intrastate natural gas pipelines in Minnesota has been made by the Legislature itself. It is not for the Commission, Relators or this Court to change

the policy implemented by statute solely because some may not agree with the Legislature's decision.

First, the Commission based its determination on the language of the Act. When reviewing Minn. Stat. § 216B.01, the Commission found further support for its determination. The stated purpose of Minn. Stat. § 216B.01 is not met with respect to the City's pipeline operations. Customers and potential customers of the Pipeline do not vote in the City's elections and do not have a voice in how the Pipeline is operated. That NUPUC is the only customer at this time does not change the fact that the Pipeline is subject to Commission regulation pursuant to the Act.

Second, the purposes of the Act would not be met if the Commission did not exercise its jurisdiction over the Pipeline. One purpose of the Act is to authorize the Commission to declare a natural gas emergency and order the suspension of any contract for the duration of the emergency so that the owner or operator of an intrastate natural gas pipeline may furnish gas transportation service as required by the public interest. Minn. Stat. § 216B.045, subd. 7 (2004). If the Pipeline were allowed to operate purely under the direction and control of the City in such an event, the Commission's ability to protect the public interest of all consumers in the state would be thwarted.[6]

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[6] The City notes the Commission's authority over an intrastate natural gas pipeline in a natural gas emergency and claims that, "[i]in the worst-case scenario, the pipeline that Hutchinson funded and constructed to meet its own energy shortfall could, under the regulation of the MPUC, be rerouted to another municipality and leave Hutchinson with not just an energy shortfall, but an energy crisis." City Br. at 24. This proposition is unfounded. Minn. Stat. § 216B.045, subd. 7 (2004) provides that, "[t]he commission may declare a natural gas emergency if it finds that a severe natural gas shortage
(Footnote Continued on Next Page)

Third, under the Act, a pipeline owner or operator must offer intrastate pipeline transportation services on an open access, nondiscriminatory basis. *See* Minn. Stat. § 216B.045, subd. 3 (2004). To the extent there is available capacity, the pipeline owner or operator must provide firm and interruptible service on behalf of any customer. *Id.* Relators and NUPUC argue that the firm capacity of the Pipeline is fully subscribed. MMUA Br. at 24-25; NUPUC Br. at 4. Whether or not the City has contracted for the Pipeline's capacity, however, is irrelevant to the determination of whether the Commission has jurisdiction over the Pipeline pursuant to the Act.

Further, the fact that a pipeline is fully subscribed does not mean that a pipeline has no available capacity. At the hearing before the Commission, the City indicated that to say the Pipeline is fully subscribed does not mean that the contracting parties use the full capacity every day. Admin. R. No. Tr. 1 at 42. The City further explained, "I think it's clear that in the early years, not all of the capacity here of this pipeline will be used by Hutchinson. But with the projections that were presented in the certificate of need process, shortly *after the year 2016*, with the contemplated additional electrical capacity, generating capacity Hutchinson is going to add, that capacity will all be needed by Hutchinson or New Ulm." *Id.* (emphasis added).

Additionally, while the parties argue that the firm capacity of the Pipeline is fully subscribed, the parties do not address the available interruptible capacity. MMUA

(Footnote Continued From Previous Page)
endangering the health or safety of the citizens of the state exists or is imminent in the state." The Commission would hardly remedy a crisis in one area by creating a crisis in another.

explained at the hearing that, "[i]t's conceivable, that while the firm capacity of the pipe is taken by the two cities, that there will be interruptible energy--or interruptible capacity that would not be subject to permanent use." *Id.* at 44-45. Thus, it appears that there is available capacity on the Pipeline.

The Act requires that, "[t]o the extent the intrastate pipeline has *available* capacity, the owner or operator of the intrastate pipeline must provide firm and interruptible transportation on behalf of any customer." Minn. Stat. § 216B.045, subd. 3 (2004). Clearly the Legislature understood that an intrastate pipeline could be used to serve multiple entities. The Legislature also understood that natural gas service is a service that can benefit many customers and should be provided where feasible.

Thus, the Legislature clearly indicated its intent that intrastate pipelines be operated on an open access and nondiscriminatory basis, and that the Commission have the authority to enforce the requirements of the Act. If the Commission does not exercise jurisdiction over the Pipeline, the objectives put forth by the Legislature will not be met. The Commission's jurisdiction over the Pipeline was established by the Legislature itself and cannot be put aside merely because Relators disagree with it. The remedy Relators seek can only be found with the entity that adopted the Act, not with the entity charged with its enforcement.

V. THE COMMISSION LAWFULLY ASSERTED ITS JURISDICTION UNDER THE ACT.

The Commission followed the plain language of the Act to determine that the Legislature granted the Commission jurisdiction over the Pipeline. The Commission acted within its grant of statutory authority, the Commission did not impose any

regulatory requirement on the Pipeline other than or in addition to the requirements of the Act itself, and the Commission applied its reasoned judgment to determine that the Pipeline met the definition of intrastate pipeline under the Act.

A. The Legislature Granted The Commission Authority Over Intrastate Pipelines.

First, the Commission agrees with Relators that the Commission is created by statute and has only those powers given to it by the Legislature. *See In re Minnesota Power,* 545 N.W.2d 49, 51 (Minn. Ct. App. 1996) (citing *Great N. Ry. v. Pub. Serv. Comm'n,* 284 Minn. 217, 220, 169 N.W.2d 732, 735 (1969)). The Commission's authority over the Pipeline is explicit from the plain language of the Act itself. Here, the Legislature has charged the Commission with the duty of regulating intrastate natural gas pipelines in the State of Minnesota. Minn. Stat. § 216B.045 (2004).

Second, the Commission's decision was not in excess of its statutory authority. "The extent of jurisdiction or authority bestowed upon an administrative agency is measured by the statute from which it derives its authority." *Frost Benco Elec. Ass'n v. Minnesota Pub. Util. Comm'n,* 358 N.W.2d 639, 642 (Minn. 1984) (citing *McKee v. County of Ramsey,* 310 Minn. 192, 195, 245 N.W.2d 460, 462 (1976)). The Act specifically charges the Commission with the authority to enforce the provisions of the Act by requiring all contracts be submitted to the Commission for approval and providing customers and potential customers the ability to file complaints regarding a pipeline operation with the Commission. Minn. Stat. § 216B.045, subds. 4 and 5 (2005). Further, in the event of a natural gas emergency, the Act grants the Commission the authority to

order the suspension of any contract and require the pipeline be operated as required by the public interest. Minn. Stat. § 216B.045, subd. 7 (2005). Because the Act applies to municipal utilities, the Commission has acted within its explicit grant of authority from the Legislature in asserting jurisdiction over the Pipeline.

B. The Commission's Decision Is Constitutional.

"The Equal Protection Clause of both the state and federal constitutions requires equal application of the laws such that all people in similar circumstances are treated similarly." *Peterson v. Minnesota Dep't of Labor and Industry,* 591 N.W.2d 76, 79 (Minn. Ct. App. 1999) (citing *Rocco Altobelli, Inc. v. State Dep't of Commerce,* 524 N.W2d 30, 37 (Minn. Ct. App. 1994)). Further, "an essential element of an equal protection claim is that 'the persons claiming disparate treatment must be similarly situated to those to whom they compare themselves.'" *Id.* (citing *St. Cloud Police Relief Ass'n v. City of St. Cloud,* 555 N.W.2d 318, 320 (Minn. Ct. App. 1996)).

The portion of the Commission's *September 15 Order* at issue is Order ¶ 3 which states, "[t]he parties are requested to file comments on how the Commission should go about regulating this intrastate pipeline." Jt. App. at 8. By issuing a request for comments, the Commission has indicated its intent for parties to submit how intrastate natural gas pipelines are to be regulated in the State of Minnesota. The mere act of making an inquiry does not amount to treating two similarly-situated parties differently. Further, the Commission's *Orders* do not evince an intent by the Commission to treat the Pipeline differently than any other intrastate pipeline. Rather, the Commission merely seeks to review its current regulatory processes.

Only if the Commission had taken action to apply different regulatory requirements against two similarly-situated parties could the City even begin to claim that there was an equal protection violation. Requesting comments in no way affects the operation of the Pipeline or how the Pipeline must comply with the Act. The claim that the Commission's request for comments somehow violates the Equal Protection Clause is without merit.

Additionally, the City argues that the Commission's order is unconstitutional because it is vague and overbroad. City Br. at 23. The City cites *Thompson v. City of Minneapolis,* 300 N.W.2d 763, 768 (Minn. 1980), for the proposition that a determination of an agency is vague and overbroad where the words of the agency are not sufficiently specific to provide fair warning of the type of conduct which is unacceptable. *Id.* The Commission has neither been vague and overbroad in its decision-making, nor has the Commission indicated that any conduct is unacceptable.

The parties are not left wondering what is required of the City. The Act outlines very rudimentary requirements for intrastate pipeline owners and operators: to charge just and reasonable rates; to provide open, nondiscriminatory access to available capacity; to file all contracts for Commission approval; and to comply with the orders of the Commission in a natural gas emergency, in the provision of a reasonable quality of service, in providing any reports and paying any costs. Minn. Stat. § 216B.045 (2004). These are explicit requirements of the Act. The Commission has not ordered anything different from or in addition to the requirements of the Act itself. The Commission has merely asserted its jurisdiction over the Pipeline pursuant to the authority granted by the

Legislature. The Commission solicited comments regarding its enforcement of the Act's requirements. Only if the Commission thereafter imposes a requirement that is vague and overbroad may the City make this allegation.

C. The Commission's Decision Is Based On The Commission's Judgment.

Relators further contend that the Commission's decision was arbitrary and capricious. *See* MMUA Br. at 30; City Br. at 23. A decision may be deemed "arbitrary and capricious" if the decision reflects the agency's will and not its judgment." *See Trout Unlimited, Inc. v. Minnesota Dep't of* Agriculture, 528 N.W.2d 903, 907 (Minn. Ct. App. 1995) (citations omitted).

An agency ruling is arbitrary and capricious if (a) the agency relied on factors not intended by the legislature; (b) it entirely failed to consider an important part of the problem; (c) it offered an explanation that is contrary to the evidence; or (d) the decision is so implausible that it cannot be explained as a difference in view or the result of the agency's expertise. *In re Space Ctr. Transp.*, 444 N.W.2d 575, 581 (Minn. App. 1989). To satisfy the arbitrary and capricious test, the agency must explain the connection between the facts found and choices made. *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency,* 469 N.W.2d 100, 103 (Minn. Ct. App. 1991) (citations omitted).

First, the Commission's reasoned analysis reflected in its *Orders* makes clear that the Commission was exercising its judgment and not its will. The transcripts of the Commission meetings and the language of the *Orders* reveal a well-prepared Commission with substantive questions and analyses. Second, the parties to this

proceeding do not dispute whether, as a matter of fact, that the Pipeline meets the definition of intrastate pipeline under the Act as being a pipeline located wholly within the State of Minnesota, transporting or delivering natural gas received from another person at a point inside or at the border of the state, which is delivered to a point within the state to another and is not owned or operated by a public utility. Minn. Stat. § 216B.045, subd. 1 (2005).

By asserting the jurisdiction granted by the Act, the Commission did not rely on factors not intended by the Legislature, the Commission did not fail to consider any important aspect of the problem, the Commission did not offer any explanation contrary to the evidence, and the Commission's decision is directly in line with the language of the Act. The Commission found that the Pipeline met the definition of intrastate pipeline under the Act and that the Pipeline did not qualify for the only exception because the Pipeline was not owned or operated by a public utility. Jt. App. at 6-7. The Commission's *Orders* clearly articulate the Commission's reasoned decision-making that cannot be characterized as arbitrary and capricious.

VI. STATE REGULATION OF THE PIPELINE IS NOT PREEMPTED.

Relator MMUA asserts that the federal Natural Gas Act provides for municipal regulation of a pipeline because "state commission" is defined to include "the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers *within* the State or municipality." MMUA Br. at 29 (citing 15 U.S.C. § 717a(8)) (emphasis added). First, a definition with no further explanation does not provide a basis by which to exempt this Pipeline from state

regulation. Second, the City does not appear to meet the above definition when the City is providing natural gas transportation service to consumers that are not "within" the municipality.

Relator MMUA appears to argue some form of preemption merely by citing to the definition of "state commission" that does not appear to include the City providing transportation service to consumers outside of the municipality. MMUA further asserts that, "[t]he Pipeline is regulated, according to the Natural Gas Act, by the municipality acting as the appropriate 'state commission.'" MMUA Br. at 29. MMUA cites no authority for this blanket pronouncement of law, but rather goes on to claim that, "[r]eversing the Commission's orders in this matter will reconcile section 216B.01, upholding local regulation, with federal statutes upholding local regulation." MMUA Br. at 29 (citing *Martin ex rel. Hoff v. City of Rochester,* 642 N.W.2d 1, 17 (Minn. 2002) (courts construe statutes to avoid conflict with federal law), *cert. denied,* 123 S. Ct. 2668 (2003)).

Again, MMUA does not explain how the Natural Gas Act provides for or exempts the City from state regulation over the Pipeline at issue in this case. Moreover, although MMUA cites *Martin ex rel. Hoff v. City of Rochester,* 642 N.W.2d at 17, for the proposition that courts construe statutes to avoid conflict with federal law, MMUA fails to demonstrate how the Act here does, in fact, conflict with federal law. MMUA Br. at 29. The state's authority over an intrastate pipeline is not preempted and the Commission's *Orders* should be affirmed.

CONCLUSION

Based on the foregoing, the Commission respectfully requests the Court affirm the Commission's September 15 Order and Order Denying Reconsideration.

Dated: April 25, 2005

Respectfully submitted,

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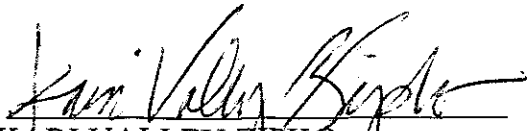

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 10, 679 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2002, the word processing system used to prepare this Brief.

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