

NO. A06-2275

State of Minnesota
In Supreme Court

Irene Hoffman, et al.,

Appellants,

v.

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

Respondent.

**BRIEF AND APPENDIX OF
RESPONDENT NORTHERN STATES POWER COMPANY**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
STATEMENT OF LEGAL ISSUES	3
STATEMENT OF THE CASE.....	5
STATEMENT OF FACTS.....	7
I. THE REGULATION OF UTILITY SERVICES AND CHARGES.....	7
II. THIS LITIGATION.....	11
DISCUSSION	14
I. THE FILED RATE MUST PREVAIL	14
A. Extra-Tariff And Rate Refund Demands Are Precluded	15
1. <i>Chicago & Alton R.R. Co. v. Kirby</i>	16
2. <i>Keogh v. Chicago & Nw. Ry. Co</i>	17
3. <i>Arkansas Louisiana Gas Co. v. Hall</i>	18
4. <i>AT&T v. Central Office Tel., Inc.</i>	20
B. <i>Schermer</i> Brings Filed-Rate Law To Minnesota	21
1. Background	21
2. The doctrine trumps civil litigation	22
3. No exceptions.....	24
C. <i>Schermer</i> And Its Foundational Precedents Are Dispositive.....	26
1. Services that are not tariff-specified cannot be compelled.....	27
2. Exclusive MPUC tariff dispute resolution authority	29
3. Regardless of the label, appellants seek a rate refund	33
II. THE DISPOSITION OF THE DAKOTA-BASED CLAIMS ON COMITY GROUNDS ARE NOT BEFORE THIS COURT; EVEN IF ADDRESSED THE DISMISSAL SHOULD BE AFFIRMED	42
A. Comity Never Appealed.....	42
B. Regardless, Comity Prevails	43

TABLE OF CONTENTS

(continued)

	Page
III. THE PRIMARY JURISDICTION OF SPECIALIZED AGENCIES IS ENTITLED TO DEFERENCE.....	45
A. The Primary Jurisdiction Doctrine Institutionalizes Agency Deference	45
B. Agency Primary Jurisdiction Must Be Respected	46
1. Separation of powers requires deference	46
2. Tariff ambiguities and issues of first impression are for agency resolution	50
C. Tariff Claim Resolution Is Not “Inherently Judicial”	53
CONCLUSION	56

TABLE OF AUTHORITIES

CASES

<i>AEP Texas North Co. v. Texas Industrial Energy Consumers</i> , 473 F.3d 581 (5th Cir. 2006)	41-42
<i>Am. Bankers Ins. Co. v. Alexander</i> , 818 So.2d 1073 (Miss. 2001).....	35
<i>Arkansas Louisiana Gas Co. v. Hall</i> , 453 U.S. 571 (1981).....	8, 27-28
<i>AT&T v. Central Office Telephone, Inc.</i> , 524 U.S. 214 (1998).....	<i>passim</i>
<i>Atlantis Express, Inc. v. Standard Transp. Servs., Inc.</i> , 955 F.2d 529 (8th Cir. 1992)	60
<i>Balder v. Haley</i> , 399 N.W.2d 77 (Minn. 1987)	11, 55
<i>Brown v. MCI WorldCom Network Servs., Inc.</i> , 277 F.3d 1166 (9th Cir. 2002)	38
<i>Brown v. Ticor Title Ins. Co.</i> , 982 F.2d 386 (9th Cir. 1992)	35-36
<i>Capital City Ins. Co. v. G.B. "Boots" Smith Corp.</i> , 889 So.2d 505 (Miss. 2004).....	35
<i>Chicago & Alton Railroad Co. v. Kirby</i> 225 U.S. 155 (1912).....	24-25, 40
<i>City of Rochester v. People's Co-op. Power Ass'n, Inc.</i> , 483 N.W.2d 477 (Minn. 1992)	69
<i>City of Willmar Mun. Utils. Comm'n v. Kandiyohi Coop. Elec. Power Ass'n</i> , 452 N.W.2d 699 (Minn. Ct. App. 1990).....	69
<i>Computer Tool & Eng'g, Inc. v. N. States Power Co.</i> , 453 N.W.2d 569 (Minn. Ct. App. 1990).....	16
<i>Davis v. Cornwell</i> , 264 U.S. 560 (1924).....	25

<i>Everett v. O’Leary</i> , 90 Minn. 154, 95 N.W. 901 (1903)	50
<i>Granville v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1</i> , 732 N.W.2d 201 (Minn. 2007)	56
<i>H.J., Inc. v. Nw. Bell Tel.</i> , 954 F.2d 485 (8th Cir. 1992)	47-48
<i>Hague v. Allstate Ins. Co.</i> , 289 N.W.2d 43 (Minn. 1979)	57
<i>Hilling v. N. States Power Co.</i> , No. 3-90 CIV 418, 1990 WL 597044 (D. Minn. Dec. 12, 1990)	15, 67
<i>Hoffman v. N. States Power Co.</i> , 743 N.W.2d 751 (Minn. Ct. App. 2008).....	<i>passim</i>
<i>Hoffman v. N. States Power Co.</i> , No. 27-CV-06-5365, slip op. (Minn. Dist. Ct. Nov. 1, 2006)	10
<i>Hoffman v. N. States Power Co.</i> , No. 27-CV-06-5365, slip op. (Minn. Dist. Ct. Nov. 28, 2006)	10
<i>Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.</i> , 736 N.W.2d 313 (Minn. 2007)	8, 11, 55
<i>In re City of Rochester</i> , 478 N.W.2d 329 (Minn. Ct. App. 1992).....	16
<i>In re Empire Blue Cross & Blue Shield Customer Litig.</i> , 164 Misc.2d 350 (N.Y. Sup. Ct. 1994).....	50
<i>In re Minn. Joint Underwriting Ass’n</i> , 408 N.W.2d 599 (Minn. Ct. App. 1987).....	68
<i>Info Tel Commc’ns, LLC v. Minn. Pub. Utils. Comm’n</i> , 592 N.W.2d 880 (Minn. Ct. App. 1999).....	9, 63-64, 71
<i>Keogh v. Chicago & Nw. Ry. Co.</i> , 260 U.S. 156 (1922).....	8, 25-26, 53
<i>Knipmeyer v. Bell Atl. Corp.</i> , No. 0308, 2001 WL 1179415 (Pa. Com. Pl. May 22, 2001).....	50

<i>Lipton v. MCI WorldCom, Inc.</i> , 135 F. Supp. 2d 182 (D.D.C. 2001).....	38
<i>Minihane v. Weissman</i> , 640 N.Y.S.2d 102 (N.Y.A.D. 1996).....	50
<i>Minneapolis St. Ry. Co. v. City of Minneapolis</i> , 251 Minn. 43, 86 N.W.2d 657 (1957).....	67, 72
<i>Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n</i> , 294 N.W.2d 297 (Minn. 1980).....	60, 65
<i>Mitchell v. Chicago Title Ins. Co.</i> , No. CT 02-17299, 2004 WL 2137815 (Minn. Dist. Ct. Aug. 13, 2004).....	65
<i>Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.</i> , 341 U.S. 246 (1951).....	52, 59
<i>N. States Power Co. v. City of Oakdale</i> , 588 N.W.2d 534 (Minn. Ct. App. 1999).....	15-16
<i>N. States Power Co. v. City of St. Paul</i> , 256 Minn. 489, 99 N.W.2d 207 (1959).....	51
<i>Nw. Bell Tel. Co. v. State</i> , 299 Minn. 1, 216 N.W.2d 841 (1974).....	33-34
<i>Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n</i> , 369 N.W.2d 530 (Minn. 1985).....	34
<i>Public Utility District No. 1 v. IDACORP Inc.</i> , 379 F.3d 641 (9th Cir. 2004).....	49-50
<i>Rios v. State Farm Fire & Casualty Co.</i> , 469 F. Supp. 2d 727 (S.D. Iowa 2007).....	42-44
<i>Roedler v. United States Dep't of Energy</i> , No. CIV 98-1843, 1999 WL 1627346 (D. Minn. Dec. 23, 1999).....	<i>passim</i>
<i>Saunders v. Farmers Ins. Exch.</i> , 440 F.3d 940 (8th Cir. 2006).....	35
<i>Schermer v. State Farm Fire & Casualty Co.</i> , 721 N.W.2d 307 (Minn. 2006).....	<i>passim</i>

<i>Square D Co. v. Niagara Frontier Tariff Bureau, Inc.</i> , 476 U.S. 409 (1986).....	48
<i>St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n</i> , 312 Minn. 250, 251 N.W.2d 350 (1977)	14, 61-62
<i>State ex rel. Foster v. Naftalin</i> , 246 Minn. 181, 74 N.W.2d 249 (1956)	44
<i>Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.</i> , 204 U.S. 426 (1907).....	26, 68
<i>United States v. W. Pac. R.R.</i> , 352 U.S. 59 (1956).....	60

STATUTES

Minn. Const., art. I, § 8	34
Minn. Stat. ch. 216B.....	13
Minn. Stat. § 60A.031	36
Minn. Stat. § 70A.04	31
Minn. Stat. § 70A.06	31
Minn. Stat. § 72A.20	31-32
Minn. Stat. § 216.17	70
Minn. Stat. § 216A.05	70
Minn. Stat. § 216B.02	14, 18
Minn. Stat. § 216B.03	70
Minn. Stat. § 216B.05	13
Minn. Stat. § 216B.06	15
Minn. Stat. § 216B.09	67, 70
Minn. Stat. § 216B.14	16
Minn. Stat. § 216B.16	14, 17

Minn. Stat. § 216B.17	17, 41-42
Minn. Stat. § 216B.23	17, 42
Minn. Stat. § 216B.37	13, 46
N.D.C.C. § 28-32-42	56
N.D.C.C. § 49-02-02	70
N.D.C.C. § 49-02-03	70
N.D.C.C. § 49-02-04	70
S.D.C.L. § 1-26-30	57
S.D.C.L. § 49-34A-6	70

INTRODUCTION

Appellants Irene Hoffman, *et al.* invite the Court down a rabbit hole; in appellants' world neither their case nor the governing law are what they appear to be. *See* Alice in Wonderland (Walt Disney Pictures 1951) ("If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't."). Rejecting the imaginary in favor of reality, the court of appeals enforced the filed-rate doctrine articulated in *Schermer v. State Farm Fire & Casualty Co.*, 721 N.W.2d 307 (Minn. 2006). This Court should remain similarly grounded.

When viewed right-side up, appellants' lawsuit violates the well-established preclusion against the imposition of extra service obligations on a regulated utility and the refund of approved rates. Wishing away century-old regulatory principles, appellants turn the matter upside down and declare their litigation to be something other than what it plainly is: simply upon appellants' say-so, services not mentioned in the tariff would become required, and the return of amounts paid for electric services would no longer be refunds.

In the real world of regulated commerce appellants' claims are indisputably foreclosed. The complaint seeks to subject Northern States Power Company d/b/a Xcel Energy, Inc. ("NSP") to an inspection obligation that is neither contemplated nor mentioned by the governing tariff. And even if the tariff called for such an undertaking, the damages sought necessarily constitute a partial rate refund of the amounts supposedly paid for services not received. This quintessential assault on the regulatory scheme

cannot be squared with the result in *Schermer*. The court of appeals could not have been more right.

Even if appellants' filed-rate transgressions did not preclude appellants' claims, judicial intrusion into this tariff dispute would infringe upon the Minnesota Public Utilities Commission's ("MPUC") primary jurisdiction. The MPUC is vested with exclusive rate-making prerogative. No entity is better equipped to determine utility service obligations because the MPUC understands that rates must be based upon the costs a utility incurs to provide tariff-specified services. Hence if appellants are right about NSP's tariff duties, then the MPUC would be singularly empowered to appraise the regulated value of the undelivered services – the only measure of damage that the regulatory regime could allow. Stated another way, only the MPUC could determine what costs were allocated to the supposedly-unperformed service when the agency set the utility's rate. Primary jurisdiction provides further reason to affirm the result below.

STATEMENT OF LEGAL ISSUES

[AS CERTIFIED BY THE DISTRICT COURT AND
CONSIDERED BY THE COURT OF APPEALS]¹

1) Does the filed rate doctrine bar plaintiffs' claims?

- The court of appeals concluded that the filed-rate doctrine precludes this litigation because appellants' service obligation complaints and rate refund demands would interfere with the regulatory process and contravene the separation of powers and justiciability mandates of *Schermer v. State Farm Fire & Casualty Co.*, 721 N.W.2d 307 (Minn. 2006).

Most Apposite Authority

- *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307 (Minn. 2006);
- *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); and
- *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156 (1922).

2) Does the primary jurisdiction doctrine call for the court to defer resolution of the services required by the applicable tariff to the administrative agency legislatively charged with approving and overseeing that tariff?

- Because the filed-rate doctrine forecloses this litigation the court of appeals did not reach primary jurisdiction, which nonetheless compels judicial deference in favor of the regulatory agencies.

¹ Appellants proffer a third issue regarding dismissal of North and South Dakota claims on comity grounds. Appellants did not petition to review that ruling; the comity holding is, therefore, not before this Court. See *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 317 n.1 (Minn. 2007).

Most Apposite Authority

- *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307 (Minn. 2006);
- *Info Tel Commc'ns, LLC v. Minn. Pub. Utils. Comm'n*, 592 N.W.2d 880 (Minn. Ct. App. 1999), *rev. denied* (Minn. July 28, 1999); and
- *Roedler v. United States Dep't of Energy*, No. CIV 98-1843, 1999 WL 1627346 (D. Minn. Dec. 23, 1999), *aff'd*, 255 F.3d 1347 (Fed. Cir. 2001).

STATEMENT OF THE CASE

Four electric utility customers from Minnesota, North Dakota, and South Dakota sued NSP for failing to perform services supposedly required by the applicable tariffs. The complaint seeks damages that could be nothing other than a partial refund of rates paid, as well as injunctive relief compelling NSP to deliver services that are specified neither in the tariff nor appellants' complaint.

NSP sought dismissal because the filed-rate and primary jurisdiction doctrines circumscribe judicial authority over rate refund and tariff services claims. *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307, 314-15 (Minn. 2006); *Roedler v. United States Dep't of Energy*, No. CIV 98-1843, 1999 WL 1627346, at *16 (D. Minn. Dec. 23, 1999),² *aff'd*, 255 F.3d 1347 (Fed. Cir. 2001). The district court declined to dismiss but nonetheless certified the questions for interlocutory appeal. *Hoffman v. N. States Power Co.*, No. 27-CV-06-5365, slip op. (Minn. Dist. Ct. Nov. 1, 2006) (“*Dismissal Order*”) (Appellants' Appendix (“App.”) at 55-66); *Hoffman v. N. States Power Co.*, No. 27-CV-06-5365, slip op. (Minn. Dist. Ct. Nov. 28, 2006) (“*Certification Order*”) (App.84-86).³

² Attached to Respondents' Appendix (“RA.”) at 11.

³ The district court certified the questions for an immediate appeal, which were appropriately accepted by the court of appeals. Appellants do not now challenge the propriety of that certification. See generally App. br. Therefore, the question of appellate review is not before this Court. See *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 317 n.1 (Minn. 2007) (“Those two issues were not raised in appellants' petition for review and are therefore beyond the scope of this appeal and will not be considered in this opinion.”); *Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987) (issues not briefed are waived).

The court of appeals corrected the district court's filed-rate doctrine error.

Applying this Court's teachings the intermediate court explained:

here, as in *Schermer*, [appellants] underestimate the extent to which a judicial decision in their favor would interfere with rate-making. Whether properly characterized as a request for additional services or enforcement of the tariff "as it stands," [appellants'] claims will inevitably impact the rate-making process between NSP and the MPUC. Public-utility rate setting is a complex process, involving the agency's review and careful balancing of multiple factors affecting the regulated entity's appropriate rate of return. A judgment from the court in this matter-whether or not it merely construes the tariff-will interfere with the rate-making process.

Hoffman v. N. States Power Co., 743 N.W.2d 751, 756 (Minn. Ct. App. 2008) (citations omitted).

This case is legally indistinguishable from *Schermer*. The appellate court therefore concluded that "[t]he holding in *Schermer* applies with equal force here." *Id.* at 755. The Minnesota claims having succumbed to the force of the filed-rate doctrine, the court declined to take up the out-of-state claims for reasons of comity. The filed-rate doctrine was dispositive, so the appellate court did not consider primary jurisdiction.

Appellants petitioned for further review of the filed-rate and primary jurisdiction implications of this litigation. This Court was not asked to review the comity dismissal. The petition, encompassing only filed rates and primary jurisdiction, was granted.

STATEMENT OF FACTS

I. THE REGULATION OF UTILITY SERVICES AND CHARGES

To put the facts and claims in the proper context, a brief overview of utility regulation is appropriate. This litigation arises out of the statutorily-prescribed relationship among state administrative agencies, a public utility, and its retail customers. Electric utilities are regulated monopolies within their designated service areas. Minn. Stat. § 216B.37 (2006). Restricting the provision of electric services to a single utility is deemed by the legislature “to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public.” *Id.*

These statutory purposes are realized through a comprehensive regulatory scheme. Minn. Stat. ch. 216B. The Minnesota Public Utilities Commission (“MPUC”) is vested with plenary authority over the utilities that supply natural gas and electric services to Minnesota consumers. *Id.*

The requisite oversight is implemented with tariffs that are filed with, approved by (subject to review and modification) and administered by the MPUC. Minn. Stat. § 216B.05, subd. 1 (2006). The tariffs delineate the allowable “rates,” which include the charges assessed and the services provided. Minn. Stat. § 216B.02, subd. 5 (2006) (defining “rate” as “every compensation, charge, fare, toll, tariff, rental, and classification, or any of them, demanded, observed, charged, or collected by any public utility for any service and any rules, practices, or contracts affecting” prices or services).

Tariff proceedings review the utility's filing and assess supporting and opposing evidence and arguments. This public process encourages participation by all interested parties, including appellants' amici.

To set rates the MPUC determines

the public need for adequate, efficient, and reasonable service and ... the need of the public utility for revenue sufficient to enable it to meet the cost of furnishing the service, including adequate provision for depreciation of its utility property used and useful in rendering service to the public, and to earn a fair and reasonable return upon the investment in such property.

Minn. Stat. § 216B.16, subd. 6 (2006).

The MPUC evaluates an electric utility's proposed costs of providing the requisite services, as well as how those costs should be borne by ratepayers. *See, e.g., St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 312 Minn. 250, 251-57, 251 N.W.2d 350, 352-54 (1977) (describing the rate approval process). To set rates the MPUC considers "both facts within its expertise and facts of common knowledge in arriving at its decision in the ratemaking area." *Id.* at 255, 251 N.W.2d at 354.

Pursuant to the statutorily-specified administrative procedure, the MPUC determines the reasonableness of a utility's charges and specifies the services that must be provided in exchange for those charges – *i.e.*, the "rates." *N. States Power Co. v. City of Oakdale*, 588 N.W.2d 534, 537 (Minn. Ct. App. 1999). No entity can sell electricity at retail except pursuant to the approved rates. Minn. Stat. § 216B.06.

Tariffs are not just guidelines. On the contrary, "[u]nder Minnesota law, the MPUC has been delegated authority to regulate public utilities and to determine the reasonableness of the rates they charge. MPUC's rate-making function is a quasi-

legislative function, and decisions of the Commission ‘command the same regard ... as enactments of the legislature.’” *Hilling v. N. States Power Co.*, No. 3-90 CIV 418, 1990 WL 597044, at *3 (D. Minn. Dec. 12, 1990) (citations omitted) (RA.23-25). Accordingly, tariffs are not mere contracts between private parties, but rather agency judgments about the required services and rate recovery. Rates must be based on costs. Therefore, the service obligations must necessarily be itemized and assessed in the rate approval process because the scope of services dictates the cost that the utility will incur and must be permitted to recover. Simply put, services and rates are inextricably intertwined.

Once filed, the tariff has the full force and effect of law until changed or amended by the agency. *City of Oakdale*, 588 N.W.2d at 537. No claim of right or obligation can supersede the filed rates. This regulatory order protects and advantages the public and the utilities alike. *See, e.g., In re City of Rochester*, 478 N.W.2d 329, 331 (Minn. Ct. App. 1992) (“Controlled entry and operation only by permission of some agency of government” avoids “socially wasteful” and “unduly disruptive” operations) (quotation omitted), *rev. denied* (Minn. Jan. 30, 1992); *Computer Tool & Eng’g, Inc. v. N. States Power Co.*, 453 N.W.2d 569, 573 (Minn. Ct. App. 1990) (“[a]pproving a liability limitation falls within the ambit of the commission’s broad regulatory power” because the diminished litigation exposure reduces the cost of electricity), *rev. denied* (Minn. May 23, 1990).

The MPUC safeguards consumers by administering and enforcing the filed rates. The MPUC is empowered to “investigate and examine the condition and operation of any

public utility or any part thereof.” Minn. Stat. § 216B.14 (2006). The tariff enforcement process does not exclusively depend upon agency vigilance: consumers are enabled to complain about “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 ... electricity.” Minn. Stat. § 216B.17, subd. 1 (2006).

If a utility’s “practices, acts, or service” are adjudged to be “unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise unreasonable or unlawful, or [the MPUC] shall find that any service which can be reasonably demanded cannot be obtained,” the MPUC will “fix reasonable measurements, regulations, acts, practices, or service to be furnished, imposed, observed and followed in the future.” Minn. Stat. § 216B.23, subd. 2 (2006). All tariff changes are subject to administrative review. Minn. Stat. § 216B.16 (2006).

II. THIS LITIGATION

Appellants sued their electric utility, NSP. (App.13-14 at ¶¶ 6-10). NSP is a regulated monopoly that sells electricity to residential customers in assigned service areas. (App.17 at ¶ 20). NSP conducts business pursuant to a tariff reviewed, revised, and approved by responsible authorities. (*Id.* at ¶ 21.)

The tariff establishes both the price of power and the parties' respective obligations. (*Id.* at ¶ 22.) *See also* Minn. Stat. § 216B.02, subd. 5. The tariff also allocates responsibility for the safe handling of electricity. (App.17-18 at ¶ 23.) Each monthly, residential customer bill includes a "Basic Service Charge" that is assessed to cover the cost of the distribution system. This charge is distinct from the variable amounts paid for the energy a ratepayer actually consumes during the billing month. (*Id.*)

Appellants charge that NSP failed to provide tariff-required services. (App.12-13 at ¶¶ 1-4.) Specifically, the lawsuit maintains that NSP should have inspected "points of connection." (App.13 at ¶ 4.) NSP is also condemned for failing to have an inspection program in place. (App.20 at ¶ 29.)

The point of connection is the junction between NSP's distribution lines and a customer's equipment – in other words, where the wires from the two systems meet. (App.18 at ¶ 24.) This place is often within the meter box. (*Id.*) NSP makes the initial hook-up to a customer's facility by affixing company-owned wires (referred to in the tariffs as "service conductors") to lugs inside the meter box. (*Id.*) After the connection is completed and the meter installed, the meter box is sealed or locked as provided for by

the tariff. *Id.* From the contact point within the box, electricity flows through the meter onto the customer's wires for consumption within the structure. (*Id.*)

Appellants divine that NSP should inspect the points of connection based upon two tariff sections that happen to reference points of connection. The first provision states:

SERVICE CONNECTIONS

The customer, without expense to the Company, will grant the Company right-of-way on his premises for the installation and maintenance of the necessary distribution lines, service conductors, and appurtenances, and will provide and maintain on the premises, at a location satisfactory to the Company, proper space for the Company's transformers, metering equipment, and appurtenances.

The service conductors as installed by the Company from the distribution line to the point of connection with the customer's service entrance conductors will be the Company's property and will be maintained by the Company at its own expense.

The customer will provide for the safekeeping of the Company's meters and other facilities and reimburse the Company for the cost of any alterations to the Company's lines, meters, or other facilities necessitated by customer and for any loss or damage to the Company's property located on the premises. The exception is when such loss or damage is occasioned by the Company's negligence or causes beyond the control of the customer.

(App.19-20 at ¶ 27 (citing General Rules and Regulations, ¶ 5.5 Minnesota (available at RA.10)).

The second supposedly-relevant tariff section provides:

CUSTOMER'S WIRING, EQUIPMENT, AND PROPERTY

All wiring and equipment on customer's side of the point of connection, except metering equipment, will be furnished, installed, and maintained at the customer's expense in a manner approved by the public authorities having jurisdiction over the same.

(App.20 at ¶ 28 (citing General Rules and Regulations, ¶ 4.2 Minnesota (available at RA.9)). Significantly, neither tariff provision calls for point of connection maintenance, and inspections are not even alluded to.

Despite the plain language limiting NSP's maintenance obligations to the "service conductors," appellants complain that their points of connection have not been inspected and that they are therefore entitled to compensation. (App.21-22 at ¶¶ 32-33.) Appellants also ask the court to compel the point of connection services, although the complaint does not designate the maintenance and inspections that NSP should perform. (*Id.* at ¶¶ 32-35.) Apparently, a judge or jury would be called upon to design that technical task.

Importantly, appellants do not pretend to have sustained any property damage or personal injury as a result of NSP's supposed non-performance. The only conceivable damage would be having paid for a service that appellants did not receive – the resolution of which inevitably depends both on whether the tariff requires the service and whether the MPUC included the cost of that service in the approved tariff.

DISCUSSION

I. THE FILED RATE MUST PREVAIL

Appellants portray the application of *Schermer* to their lawsuit as akin to crossing the Rubicon. If the result below is affirmed, appellants and their amici contend that consumer protection as we know it would be irreparably compromised. But the intermediate court did not – and this Court need not – extend or even approach the boundaries of the filed-rate doctrine. Rather, the Court only need confirm that the rule of law adopted in *Schermer* precludes this action, which seeks to compel services not specified in the tariff and to recover damages that would effect a partial rate refund.⁴

Appellants' logic implodes upon itself. To disguise the request for an extra-tariff service, appellants ordain that the never-mentioned point-of-connection inspections have nonetheless been factored into NSP's cost of service. App. br. at 21 (“[T]he past and current rates already compensate NSP for the inspection and maintenance obligation.”). If that premise were correct, the damages sought would perforce equate to the portion of the rate that would have been allocated to the cost of point-of-connection inspection and maintenance. Such an award would constitute a prohibited partial rate refund.

Appellants attempt to elude that inescapable conclusion by labeling the recourse they seek as the “fair market value” of the undelivered tariff services. But if the services were called for by the tariff, there would be no “market.” By law NSP is the monopoly provider of all tariff-required services; hence, the “value” of what was not received could

⁴ Appellants and their amici's forebodings about the insurance policy ramifications of the appellate court's decision are not even a consideration.

only be measured in terms of the rate-base costs associated with the point-of-connection services. A return of such amounts could be nothing other than a rate refund.

Alternatively, permitting appellants to recover the “fair market” value of some other entity’s performance of tariff-required services would violate NSP’s legislated monopoly. Neither the law nor the tariff contemplate anyone other than NSP providing electric services in NSP’s designated service area. The recognition of a competitive market for the provision of tariff-specified services would strike at the very foundation of public utility regulation. Every which way, the lawsuit leads to an unlawful result.

On the facts and circumstances before the Court and even on appellants’ own theory of the case, the filed-rate doctrine is a show stopper.

A. Extra-Tariff And Rate Refund Demands Are Precluded.

The jurisprudential context out of which *Schermer* arose shows the way, and *Schermer* can be applied to this case without breaking new filed-rate ground. The result in *Schermer* was the inevitable outgrowth of well-developed filed-rate law. The history and rationale of that authority is therefore instructive.

Tellingly, neither *Schermer* nor its foundational precedents are among the “Most Apposite Authorities” cited in appellants or their amici’s statement of the issues; instead they rely upon scattered pronouncements from the likes of the Southern District of Iowa, New Jersey, and the concurring pen of former Chief Justice William Rehnquist. Appellants’ peculiar sources of support are no accident: the clear line of filed-rate case law that appellants avoid and that this Court embraced compel the judicial forbearance endorsed by the court of appeals.

1. *Chicago & Alton R.R. Co. v. Kirby.*

One of the earliest judicial ratifications of what would become known as the “filed-rate doctrine” was *Chicago & Alton Railroad Co. v. Kirby*,⁵ involving a railroad-shipper dispute over the transportation of race horses. 225 U.S. 155, 162-63 (1912). The tariff-based services were too slow to meet the shipper’s needs, so the railroad agreed to expedited delivery. *Id.* at 162-63. The horses did not arrive as promised, and a lawsuit followed. *Id.*

Despite the indisputable breach of contract, the claim was rejected because the regulatory scheme did not allow the railroad to be held accountable for service obligations exceeding the published rates. *Id.* at 164-66. The agreed-upon quicker delivery amounted to a prohibited “preference or advantage”:

An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs; and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act.

Id. at 165. See *Davis v. Cornwell*, 264 U.S. 560, 561 (1924) (refusing to enforce agreement to provide freight cars on a date certain – a term not specified in the tariff).

⁵ Given the prevalence of railroad litigants in filed-rate jurisprudence, such cases will be referenced by the non-railroad party (*e.g.*, *Kirby*).

2. *Keogh v. Chicago & Nw. Ry. Co.*

With *Kirby* in place, would-be plaintiffs attempted to cast their regulated commerce claims in non-tariff terms in order to evade the filed-rate bar. Within a decade any loophole that might have existed was closed. *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156 (1922).

Keogh was an anti-trust action based upon indisputable anti-competitive behavior: competitor railroads agreed to fix transportation rates and thereby restrain trade. *Id.* at 159-60. Additionally, there was no doubt about shipper damages: “[t]he uniform rates so established were arbitrary and unreasonable; they were higher than those theretofore charged; and they were higher than the rates that would have been, if competition had not been thus eliminated.” *Id.* at 160. Nonetheless, the filed-rate doctrine precluded judicial redress because the anti-competitive rates had been filed with the Interstate Commerce Commission. *Id.*

“A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act.” *Id.* at 162. Rather, anti-trust laws only afford a “right of action to one who has been injured in his business or property”; “injury implies violation of a legal right.” *Id.* at 163 (quotation omitted). Therein lay *Keogh*’s undoing:

The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. (citations omitted) (emphasis added). In other words, an anti-trust injury could not be inflicted upon a shipper who has no legal right to any rate except the filed rate, regardless of whether that rate is the product of a competitor conspiracy or a competitive marketplace.

Allowing anti-trust claims to proceed in the face of regulatory approval would favor the suing shipper over other ratepayers. *Id.* The availability of similar claims to similarly-damaged shippers makes no difference: “[i]t is no answer to say that each of these might bring a similar action under [the Anti-trust Act]. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.” *Id.* (citing *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907)).

3. *Arkansas Louisiana Gas Co. v. Hall.*

The terminal effect of the filed-rate doctrine on tariff-based civil litigation was reconfirmed in *Arkansas Louisiana Gas Co. v. Hall*, which extended the rule beyond the realm of railroad regulation. 453 U.S. 571 (1981). Arkansas Louisiana Gas Co. (“Arkla”) contracted to purchase natural gas from Frank Hall, *et al.*, for a fixed-price subject to a “favored nations clause.” *Id.* at 573. Pursuant to that clause, if Arkla paid more for gas produced from the same field, then Hall would be paid the higher price. *Id.* After the deal with Arkla was inked, Hall filed – and the Federal Power Commission approved – the gas procurement contract. *Id.* at 574.

Believing that subsequent transactions triggered the price adjustment, Hall sued for the difference between what Arkla had been paying and the amount that the favored

nations clause should have yielded. *Id.* The district court found that the favored nations clause applied; the filed-rate doctrine nevertheless precluded damages for completed sales. *Id.* at 574-75.

In affirming, the Supreme Court noted that the doctrine “has been extended across the spectrum of regulated utilities. The considerations underlying the doctrine ... are preservation of the agency’s primary jurisdiction over reasonableness of rates and the need to ensure that regulated companies charge only those rates of which the agency has been made cognizant.” *Id.* at 577-78 (quotations omitted). The purpose and principle of filed rates, therefore, required that the doctrine be extended to all manner of regulated commerce. *Id.*

Damages could not be allowed because “[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively.” *Id.* at 578. “It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach of contract action what the Commission itself may not do.” *Id.* at 580.

The seemingly-unfair effect of the filed-rate bar was emphasized in Justice Powell’s dissent: “Despite the fact that Arkla breached its contract, and despite the fact that no federal policy is threatened by allowing the Louisiana courts to redress that breach, the Court today denies respondents the benefit of their lawful bargain.” *Id.* at 586 (Powell, J., dissenting). The majority did not take issue with Justice Powell’s observation; the preservation of regulatory order was the paramount concern. Thus regardless of harsh results, the filed-rate doctrine prevailed.

4. ***AT&T v. Central Office Tel., Inc.***

AT&T v. Central Office Telephone, Inc., 524 U.S. 214 (1998) addressed the “services” component of the filed-rate doctrine. *AT&T* arose out of a dispute between the provider (AT&T) and a reseller (Central Office) of telecommunications services. *Id.* at 216-20. Central Office complained that AT&T did not meet agreed-upon service specifications. *Id.* at 220. The tariff, however, committed those service-related responsibilities to AT&T’s discretion:

whereas [Central Office] asks to enforce a guarantee that orders would be provisioned within 30 to 90 days, the tariff leaves it up to [AT&T] to “establis[h] and confir[m]” a due date for provisioning, requires that petitioner merely make “every reasonable effort” to meet that due date, and if it fails gives the customer no recourse except to “cancel the order without penalty or payment of nonrecurring charges.”

Id. at 225.

Despite the tariff, the district court allowed Central Office’s lawsuit to proceed. *Id.* at 221. Enforcing what was deemed to be a contractual commitment, the jury assessed substantial damages against AT&T. *Id.*

The Ninth Circuit upheld the judgment without regard to published tariff, concluding that “this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing.” 108 F.3d 981, 990 (9th Cir. 1997). The appellate court went so far as to remand for an assessment of punitive damages. *Id.*

The Supreme Court rejected the appellate court’s rates-versus-services dichotomy: “Rates ... do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for

inadequate services and vice versa.” 524 U.S. at 223. Invoking the earliest precedents, the Court reaffirmed that challenges to tariff-required services offend the filed-rate doctrine just as much attacks on tariff-approved pricing:

In [*Kirby*], we rejected a shipper’s breach-of-contract claim against a railroad for failure to ship a carload of race horses by a particularly fast train. We held that the contract was invalid as a matter of law because the carrier’s tariffs “did not provide for an expedited service, nor for transportation by any particular train,” and therefore the shipper received “an undue advantage ... that is not one open to others in the same situation.” [225 U.S.] at 163. Similarly, in [*Davis*], we invalidated the carrier’s agreement to provide the shipper with a number of railroad cars on a specified day; such a special advantage, we said, “is illegal, when not provided for in the tariff.” [264 U.S.] at 562.

524 U.S. at 224 (other citations omitted).

AT&T demonstrates that ratepayers cannot elude the filed-rate bar by complaining about regulated “services” as opposed to approved prices: objections to rates and claims against services are two sides of the same filed-rate coin. In both situations, the courts must stand down.

B. Schermer Brings Filed-Rate Law To Minnesota.

By the time *Schermer* was handed down the table had already been set. This Court followed United States Supreme Court filed-rate rationale without qualification, and the court of appeals dutifully brought those precedents to bear in dismissing appellants’ tariff-based claims.

1. Background.

Schermer challenged insurance rates and services, which, like electricity, are subject to tariff regulation. Minn. Stat. § 70A.06, subd. 1 (2006). The Minnesota

Department of Commerce (“MDOC”) is responsible for determining whether an insurer’s proposed rates are “excessive, inadequate or unfairly discriminatory.” Minn. Stat. § 70A.04, subd. 1 (2006). Insurance rates cannot discriminate based upon the age of the structure to be insured. Minn. Stat. § 72A.20, subd. 13(b) (2006).

The MDOC approved an insurer’s rate plan that afforded discounts and imposed surcharges based upon electric wiring age. 721 N.W.2d at 310. Years after the rate was approved, an insured’s premiums were hiked because the house’s electrical system was old. *Id.* The policyholder complained, and MDOC required the insurer to produce actuarial data. *Id.* The insurer eventually conceded that “electrical system cause-of-loss data to support” the surcharge was lacking. *Id.* The complained-about rate was therefore based upon the age of the structure, in violation of § 72A.20, subd. 13(b). In a subsequent consent decree, the insurer denied wrongdoing but ceased and desisted from imposing surcharges. *Id.*

2. The doctrine trumps civil litigation.

Shortly thereafter a class action complaint was filed (and later certified). *Id.* at 311. The class alleged that surcharging older residences was racially discriminatory. *Id.* at 309. The district court and the court of appeals turned back those allegations on filed-rate grounds. *Id.* The class nonetheless resisted doctrine applicability “because their challenge is not to the reasonableness of the [tariff that had been filed with the responsible agency], but to its legality, which is a matter within the peculiar expertise of courts.” *Id.* at 314. Also, damages were said to be “judicially ascertainable.” *Id.*

This Court dismissed those arguments by recounting the United States Supreme Court's twin filed-rate rationales. *Id.* at 311-12. The doctrine sounds in "separation of powers" when the legislative delegation of exclusive authority to determine rate reasonableness is considered. *Id.* at 312. At the same time, justiciability concerns are piqued because "a court is not well suited to determine, if the rate approved by the commission were found to be unlawful, what other rate the commission would find to be reasonable and non-discriminatory to take its place." *Id.* at 312 (citing *Keogh*, 260 U.S. at 164-65). Pursuant to that allocation of responsibility,

regulatory agencies have special expertise, investigative capacities, and experience and familiarity with the regulated industry that enabled them to "consider the whole picture regarding the reasonableness of a proposed rate," whereas the courts are ill-suited to second guess the decisions of regulatory agencies.

Id. (quotation omitted).

The Court sanctioned both rationales: "the filed-rate doctrine should reflect separation of powers and comity considerations [which] the Class's argument overlooks." *Id.* at 314. Separation of powers principles are implicated because "rate making is a legislative function." *Id.* (citing *Nw. Bell Tel. Co. v. State*, 299 Minn. 1, 28, 216 N.W.2d 841, 857 (1974) (other citation omitted)).

[I]f a court were to entertain a private claim that a regulated rate was unreasonable or unlawful, it would necessarily have to second guess the decisions of the agency to whom the legislature has delegated the responsibility to approve rates, and a court generally would not have the technical expertise to do so nor the capacity to consider the entire rate structure or to balance all competing interests.

Id. at 314.

As to justiciability, “courts are ill-equipped to retroactively reallocate rates among ratepayers, by modifying the rates for some ratepayers but not for others.” *Id.* at 315 (citing *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm’n*, 369 N.W.2d 530, 535 (Minn. 1985)). “[T]he regulation of rates is an ‘intricate ongoing process’ and interference by a court ‘may set in motion an ever-widening set of consequences and adjustments’ which courts are powerless to address.” *Id.* (quoting *Peoples Natural Gas*, 369 N.W.2d at 535). Consistent with venerable filed-rate jurisprudence formulated by the highest court in the land, the Court endorsed the protection of regulatory uniformity and centrality against judicial interference.

3. No exceptions.

The Court spurned entreaties to craft doctrinal exceptions. The class insisted that the filed-rate bar contravened the constitutional guarantee of “a certain remedy in the laws for all injuries or wrongs.” *Id.* at 316 (citing Minn. Const., art. I, § 8). *Schermer* explained that the Constitution only preserves “remedies for which the legislature has not provided a reasonable substitute.” The pervasive administrative oversight constitutes such a substitute because

[t]he statutes that regulate insurance companies in general and rates in particular – including the rate filing requirements, the DOC review requirements, the DOC investigative responsibilities, and the DOC and district court enforcement capabilities – provide remedies that ensure protection of the interests of ratepayers. In fact, the collective requirements of those statutes relieve individual ratepayers of the burden of reviewing, monitoring, or challenging rates and, instead, charge the DOC with the responsibility to assure ratepayers that rates will not be excessive. This regulatory scheme is a reasonable substitute for the common law claim that the Class will be prevented from asserting.

Id. at 316-17.

The Court also rejected limitations on filed-rate litigation preclusion that had been accepted in other jurisdictions. *Id.* at 317-18 (discussing *Saunders v. Farmers Ins. Exch.*, 440 F.3d 940, 944-45 (8th Cir. 2006) (no bar when rate as filed violates a federal anti-discrimination statute); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393-94 (9th Cir. 1992) (action not precluded when regulatory review is minimal); *Am. Bankers Ins. Co. v. Alexander*, 818 So.2d 1073, 1085 (Miss. 2001), *overruled on other grounds by Capital City Ins. Co. v. G.B. "Boots" Smith Corp.*, 889 So.2d 505 (Miss. 2004) (doctrine inapplicable against breach of fiduciary duty claims)).

Championing an argument that had been successful in *Brown*, the *Schermer* class insisted that there should be a filed-rate exception because insurance tariff review is "passive." *Id.* at 317. This Court disagreed, finding that commerce in insurance was subject to "meaningful review" because the MDOC is charged with enforcing the laws, insurers must file all rates with the agency, and the rates cannot be "excessive, inadequate, or unfairly discriminatory." *Id.* at 318 (quotations and citations omitted). On top of that, MDOC is charged with "examin[ing] the affairs and conditions of every insurer licensed in the state not less frequently than once every five years." *Id.* at 318 (quoting Minn. Stat. § 60A.031, subd. 1). Notably, "the insurance regulatory scheme is less stringent than, for example, the scheme for electrical, gas, and telephone utilities," but "this difference in degree of regulation is one that the legislature has chosen and it

does not materially impact the rationale for the filed-rate doctrine.” *Id.* (emphasis added).⁶

The litigation could not go forward because “the regulation of rates is an ‘intricate ongoing process’ and interference by a court ‘may set in motion an ever-widening set of consequences and adjustments’ which courts are powerless to address.” *Id.* at 315 (quoting *Peoples Natural Gas*, 369 N.W.2d at 535). No judicial remedy was available for the *Schermer* class: “In order to uphold the regulatory scheme enacted by the Legislature, we conclude that the Insurance Commissioner serves as the plaintiff’s sole source of relief.” *Id.* at 319 (quotations and citation omitted) (emphasis added).

C. Schermer And Its Foundational Precedents Are Dispositive.

Appellants cannot avoid the filed-rate ramifications of *Schermer*. Like the *Schermer* plaintiffs, appellants pursue damages that would necessarily result in a rate refund. Worse than in *Schermer*, appellants’ claims are based on the non-receipt of services that are not specified in the tariff. Thus as the court of appeals’ concluded, the filed-rate doctrine forecloses this litigation.

Affirmance of the result below does not mean that every possible case against utilities and other regulated entities, supposedly manifested in hundreds or thousands of

⁶ In the face of this regulatory assessment the Attorney General surmises that the extent of the filed-rate doctrine’s applicability to regulated utilities “remains an important, open question.” Amicus br. at 4. Such a pronouncement ignores the *Schermer* Court’s understanding of the issue under consideration: “[W]e now consider whether we should adopt a filed rate doctrine for regulated rates filed with Minnesota regulatory agencies....” *Id.* at 314. Nothing about this characterization of what was being decided suggests that *Schermer* should be limited to insurance regulation. Rather all “Minnesota regulatory agencies” are encompassed by *Schermer*’s adoption of the filed-rate doctrine.

consumer lawsuits, would be displaced as appellants and their amici dread. Appellants and amici's desire to map the outer limits of the filed-rate doctrine can wait for another day. In the meantime, this appeal regarding electric-tariff-required services can be decided for what it is, not for what appellants and amici surmise it might become. And one thing is certain – this case is not about insurance policies (which have no points of connection) as appellants and amici ruminates.

1. Services that are not tariff-specified cannot be compelled.

Appellants argue a case that is not theirs. Touting the lone concurrence in *AT&T* (and a few cases that followed that rationale⁷) they promote consumer litigation as the appropriate means for vindicating tariff enforcement. That theory, however, is neither the approach adopted in *Schermer* nor the view prevailing in the United States Supreme Court (Chief Justice Rehnquist's concurrence in *AT&T* was joined by no one other than himself). More fundamentally, the argument fails before it begins: the tariff appellants want to “enforce” says nothing about point-of-connection inspections.

⁷ *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166 (9th Cir. 2002); *Lipton v. MCI WorldCom, Inc.*, 135 F. Supp. 2d 182 (D.D.C. 2001). Notably, neither decision addresses the separation-of-powers concerns that *Schermer* regarded as sacrosanct. Also, the defendant in both cases – MCI WorldCom – was in the throes of one of the largest accounting scandals in history; under the circumstances of that massive fraud the defendant was not about to be afforded anything but the narrowest construction of filed rate protection.

Regarding the points of connection, the first of the two tariff provisions upon which appellants hang their case states as follows:

SERVICE CONNECTIONS

* * * * *

The service conductors as installed by the Company from the distribution line to the point of connection with the customer's service entrance conductors will be the Company's property and will be maintained by the Company at its own expense.

* * * * *

(RA.10.) In contrast to service conductors, point-of-connection maintenance is not specified, and inspections are not even mentioned.

The second supposedly applicable provision deals with customer electrical systems as follows:

CUSTOMER'S WIRING, EQUIPMENT, AND PROPERTY

All wiring and equipment on customer's side of the point of connection, except metering equipment, will be furnished, installed, and maintained at the customer's expense in a manner approved by the public authorities having jurisdiction over the same.

(RA.9.) Again, nothing is said about point-of-connection maintenance (only customer-side maintenance), and regarding inspections the tariff is silent.

In fact, both provisions only reference the point of connection to demark the physical dimensions of the service conductor and to identify the apparatus after which customer responsibility for equipment maintenance begins. Since the tariff does not

speak to maintaining or inspecting points of connection, *ipso facto*, appellants seek extra-tariff services.⁸

Appellants' effort to impose service obligations beyond those provided in the tariff constitutes a filed-rate infringement of the first order. *Kirby* long ago recognized the unenforceability of service obligations not itemized in the tariff. 225 U.S. at 162-66. Nothing has changed: nearly 90 years later *AT&T* reaffirmed that a regulated entity could not be held to service obligations not spelled out in the tariff. 524 U.S. at 224-25.

Appellants' imagined point-of-connection inspection obligations are no different than the service terms debunked in *Kirby* and the performance demands rejected in *AT&T*. Simply put: if the tariff does not specify the duty, then the regulated entity cannot be accountable for not providing the service.⁹ Consequently, NSP is not liable for not inspecting points-of-connection because no tariff provision makes NSP responsible for that task.

2. Exclusive MPUC tariff dispute resolution authority.

Even if the tariff were ambiguous as to service obligations, judicial resolution would still be improper. Separation-of-powers implications pervade the filed-rate doctrine. *Schermer*, 721 N.W.2d at 314 (“[T]he filed-rate doctrine should reflect

⁸ The failure of the tariff to assign point-of-connection maintenance and inspection responsibility could be an engineering oversight. The correction of that deficiency, however, is a task for MPUC ratemaking, not judicial innovation.

⁹ Significantly in both *Kirby* and *AT&T* the regulated entity had indisputably agreed to provide the undelivered service. Nonetheless, the filed-rate doctrine foreclosed non-performance damages. In contrast, NSP's tariff does not come close to requiring NSP to maintain and inspect the points of connection.

separation of powers and comity considerations[.]”¹⁰ Out of respect for those constitutionally-based considerations the judiciary must defer to MPUC tariff administration. Such deference does not leave ratepayers without recourse: the MPUC is charged with providing protection to customers by investigating electric service complaints and fashioning any necessary “fix.” Minn. Stat. §§ 216B.17, subd. 1, 216B.23, subd. 2. Showing solicitude for that administrative authority, the appeals court accepted that: “MPUC is in the best position to determine whether the point of connection must be maintained and, if so, by whom.” *Hoffman*, 743 N.W.2d at 756. As the lower court recognized, the issue is MPUC prerogative, not contract interpretation.

AEP Texas North Co. v. Texas Industrial Energy Consumers is instructive. 473 F.3d 581 (5th Cir. 2006). That litigation took on an electric tariff filed with the Federal Energy Regulatory Commission (“FERC”). *Id.* at 582. The state regulatory agency sought redress against tariff noncompliance, but jurisdiction to regulate the wholesale power market rested exclusively with FERC. *Id.* at 584-86. Because the “filed rate doctrine, which governs this case, derives from that jurisdictional grant,” the court concluded: “it is within FERC’s jurisdiction, not the states,’ to make a final determination as to whether the tariff has been violated. If a state disputes a utility’s interpretation of a tariff, FERC is the proper forum for resolving the disagreement.” *Id.* at 586.

¹⁰ At best, appellants pay short shrift to the Court’s serious separation-of-powers concerns. Certainly, circular logic (“Because the filed rate doctrine does not apply ... there are not powers to separate”) (App. br. at 21) cannot obviate the fundamental constitutional principles upon which our form of government is founded.

MPUC authority over appellants' tariff-based service complaints is no less pervasive. The MPUC oversees the "practices, acts, or services" required by the tariff. Minn. Stat. § 216B.23, subd. 2. In particular, the legislature empowered the MPUC to investigate and remedy service complaints, like those that appellants hope to litigate. Minn. Stat. § 216B.17. The courthouse does not provide a shortcut around the statutorily-prescribed process for vetting tariff adherence challenges. Minn. Stat. § 216B.17, subd. 1.

Appellants portray *Rios v. State Farm Fire & Cas. Co.* as condoning tariff enforcement litigation. 469 F. Supp. 2d 727 (S.D. Iowa 2007). *Rios* addressed filed rates in the context of a class action seeking contract-based damages arising out of regulated insurance rates. *Id.* at 733, 736-39. Exactly like appellants, the *Rios* class tried to avoid filed-rate consequences by arguing that "they are merely seeking to enforce the terms of the services State Farm filed with the Commissioner." *Id.* at 737. The *Rios* court was not misled because "the underlying conduct ... does not control whether the filed rate doctrine applies. Rather, the applicability of the filed rate doctrine is controlled by whether the court's decision will have an impact on agency procedures and rate determinations." *Id.* at 738 (quotation omitted) (emphasis added). In other words, when a claim has the potential to disturb the aggregate rates, that result – and not the pleading – controls.

Rios concluded that "[f]or all practical purposes, the damages sought can only be measured by comparing the difference between the premium rates the Commissioner originally approved with the premium rates the Commissioner should have approved absent [the challenged contractual provision]." *Id.* at 739. (citation omitted). That

calculus, however, was for the administrative process because “the Court would have to ‘second guess’ what rate the Commissioner would have charged for each relevant Class Period for the homeowners’ policies less the [complained-of] provision. This type of rate making and damages concept falls squarely within the filed rate doctrine.” *Id.* (quotations omitted).

Despite finding that the ratepayers could not prevail, *Rios* offered in dicta that the mere assertion of a damages claim was not obviated. *Id.* (“The filed rate doctrine does not preclude plaintiffs ... from suing for damages by having been deprived of benefits which were promised, and were consistent with the filed rate, but were not delivered.”) (quotation omitted) (emphasis added).¹¹ While such claims could be plead, the doctrine nevertheless eliminates the prospect of recovery. *Id.* (“[A]lthough the filed rate doctrine does not bar [the] fraudulent inducement/rescission claim, the damages sought (return of all premiums paid [relating to subject clause]), would necessarily and plainly challenge the rates previously approved by the Commissioner.”) (quotation omitted).

The *Rios* court was apparently reminding the litigants that “the application of the filed rate doctrine ‘may seem harsh in some circumstances’ and leave plaintiffs’ alleged state law violations unredressed.” *Id.* (quoting *AT&T*, 524 U.S. at 223). Regardless of

¹¹ The *Rios* court made this observation regarding “Class II members”; State Farm had not sought dismissal of the Class II claims or damages on filed-rate grounds. *Id.* at 737. As a result, the issue was not before the court, and the court’s speculation about the filed-rate effect on those claims was merely dicta. See *State ex rel. Foster v. Naftalin*, 246 Minn. 181, 208, 74 N.W.2d 249, 266 (1956) (“Dicta ... generally is considered to be expressions in a court’s opinion which go beyond the facts before the court and are therefore the individual views of the author of the opinion and not binding in subsequent cases.”).

that acknowledged deprivation, *Rios* cannot be read to countenance the recovery of tariff-based damages. Appellants are just plain wrong in suggesting otherwise.

Thus even if point-of-connection responsibility were in doubt, resolution of that dispute would be for the MPUC. The agency is the only tribunal with the history, expertise and authority to discern regulatory intent, as well as the necessity, appropriateness and cost of such services. Simply put, who better to determine the purpose and effect of a regulation than the agency that reviewed and approved that regulation in the first place?

3. Regardless of the label, appellants seek a rate refund.

Appellants' case would be precluded even if NSP should have provided point-of-connection services. The requested relief places this litigation at odds with *Schermer* because, according to appellants' logic, the complaint necessarily demands a rate refund. Affording such a remedy would interfere with the regulatory scheme and MPUC ratemaking authority.

a. Rate refunds proscribed.

Appellants acknowledge that the award of damages based upon "the rate that the plaintiff alleges should have been charged absent the defendant's wrong doing" would be filed-rate precluded. App. br. at 10. Despite that admission, the claim for "the fair market value of the inspection and maintenance services they did not receive" is said to avoid that prohibition. App. br. at 15. This false dichotomy cannot withstand critical analysis.

To start with, there can be no difference between the MPUC's rate allocation for point-of-connection services and the alternative "market value" of that service. There is no market for tariff services. By law electric services are provided at retail pursuant to a regulated monopoly. Minn. Stat. § 216B.37. The tariff requires NSP to provide power, as well as all services attendant to the delivery of that electricity. *See In re City of Rochester*, 478 N.W.2d at 331 ("We also agree with the [MPUC's] characterization of the utility function as that which is necessary for supplying electric power.") (citing Minn. Stat. §§ 216B.02, subd. 4, 216B.38, subd. 5).

A non-NSP entity could no more maintain NSP's distribution system than another power producer could supply electricity to NSP ratepayers; all services called for by the tariff can only be rendered by the utility to which the service area has been exclusively assigned. Minn. Stat. § 216B.37. Hence, if appellants were correct about NSP being obligated to provide point-of-connection services, then the relief sought could only be measured by the amount that the approved rate allocates to the costs of providing those services. Therefore, appellants' insistence that point-of-connection services are encompassed by the tariff is their undoing.

Appellants' "refund versus value" supposition is, as the court of appeals recognized, "no more than semantic." *Hoffman*, 743 N.W.2d at 756. "Fair market value" is not a talisman against a century of filed-rate enforcement. There is no hint in *Schermer* or in any of its foundational precedents that would-be plaintiffs can plead around the filed-rate doctrine by calling an attempt to get money back for services a utility failed to

deliver as anything other than a rate refund. Grounded in core separation of powers principles, the doctrine is not so manipulable.

The Eighth Circuit rejected such sophistry in *H.J., Inc. v. Nw. Bell Tel.*, 954 F.2d 485 (8th Cir. 1992). The *H.J.* plaintiffs accused the telephone company of bribing the regulators. *Id.* at 486. Such malfeasance was said to have caused consumers to pay more than what the telecommunications services rendered were worth. *Id.* To redress that wrong, plaintiffs sought RICO-based damages, which if awarded would have amounted to anything but a mere return of rates paid.

Giving effect to the filed-rate doctrine, the appellate court reasoned “that the underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court’s decision will have on agency procedures and rate determinations.” *Id.* at 489 (emphasis added). Ratepayers obviously received nothing in exchange for rates that were inflated as a result of bribes. Yet for filed-rate purposes utility culpability and claim description – e.g., fraud or breach of contract – took a back seat to the substantive effect on the aggregate rate regime that proceeding with the claim would cause.

Much like appellants, the *H.J.* class insisted that “the filed rate doctrine does not apply because [the action] does not ask the court to engage in rate-making activities.” *Id.* at 492. The court was unimpressed: “We are convinced that the H.J. Class’s RICO damages can only be measured by comparing the difference between the rates the Commission originally approved and the rates the Commission should have approved absent the conduct of which the class complains.” *Id.* at 494. Thus regardless of the

nature of the underlying breach of duties – e.g., fraud or contractual non-performance – a damage remedy would inevitably have filed-rate ramifications.

H.J. demonstrates why creative pleading cannot overcome the filed-rate bar. The dispositive test is whether a litigant’s rate will, in effect, be changed on account of the litigation. Despite appellants’ characterization of their damages as something other than a rate refund, this action necessarily requires a court to compare what appellants paid with what the rate “should have been” charged if costs associated with non-performed point of connection services had been excluded from the rate base. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 415-17 (1986) (doctrine precluded anti-trust action that would have measured damages based upon the difference between the filed rates and the rate that a competitive market would have yielded).¹²

Even if the damages appellants seek could be something other than a reflection of NSP’s rate, the filed-rate doctrine makes no distinction between contract-based and tariff-driven calculations because the regulatory effect is the same. Ninth Circuit precedent arising out of the California energy crisis shows why. *Public Utility District No. 1 v. IDACORP Inc.* concerned “contract-related claims against energy wholesalers by a public utility which contends it was forced to pay exorbitant prices for electricity.” 379 F.3d 641, 644 (9th Cir. 2004). Defendants were allegedly enabled to extract excessive charges

¹² The *Square D* plaintiffs, like appellants, sought damages based upon a “freely competitive market” rate. 476 U.S. at 413. *See* App. br. at 15 (appellants seek “the fair market value of the inspection and maintenance services they did not receive”). The *Square D* Court refused to disturb years of precedent and determined that *Keogh*’s rationale barred such claims. 476 U.S. at 417. The claims in this case can fair no better.

from a dysfunctional market for wholesale energy. *Id.* at 645. In other words, plaintiffs were not getting what they paid for because prices were a product of market manipulation rather than supply and demand. The complaint sought “restitution” “equal to the difference between [the amount charged] and the fair value for the electric power.” *Id.*

Preemption and filed rate principles compelled dismissal. Filed-rate considerations were “grounded in an agency’s exclusive rate-setting authority.” *Id.* at 650 (citation omitted). “At its most basic, the filed rate doctrine provides that state law ... may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the ... agency in question.” *Id.* (citation omitted). Thus because “[t]he relief sought by [plaintiff] would require the court to set damages by assuming a hypothetical rate, the ‘fair value,’ [the action] violat[es] the filed rate doctrine.” *Id.* (citation omitted) (emphasis added).¹³

¹³ See also *Knipmeyer v. Bell Atl. Corp.*, No. 0308, 2001 WL 1179415, at *4 (Pa. Com. Pl. May 22, 2001) (RA.26-29) (awarding damages for undelivered services would require the court “to calculate the difference in value between [what plaintiffs were promised] and [the] service that the [plaintiffs] actually received. The end result of such an award would be an impermissible refund of a portion of [the] filed rate”); *In re Empire Blue Cross & Blue Shield Customer Litig.*, 164 Misc.2d 350, 358 (N.Y. Sup. Ct. 1994) (assessing damages would require the court to “determine what would be a reasonable rate,” which “is precisely the judicial determination ... that the filed rate doctrine forbids;” indeed “ascertaining of damages and the determination of a reasonable rate are hopelessly intertwined”) (quotations omitted), *aff’d*, *Minihane v. Weissman*, 640 N.Y.S.2d 102 (N.Y.A.D. 1996); *Everett v. O’Leary*, 90 Minn. 154, 157, 95 N.W. 901, 902 (1903) (plaintiffs seeking damages for insurer’s failure to issue a fire insurance policy, even though no fire had occurred, could only recover a refund in the form of “the amount paid as the premium,” not the fair market value of procuring such coverage elsewhere).

Logically, if appellants are not seeking to impose extra-tariff obligations upon NSP, then they can only be seeking a partial refund of rates paid: if the service is tariff-required then the value of what appellants did not receive can only be measured by the portion of the rate allocated to the provision of that service; if the points-of-connection services are not specified in the tariff then NSP cannot be held accountable for not delivering even if a court believed that conducting the not-required maintenance and inspections would be a good idea.

Appellants' mischaracterizations cannot alter the real world effect of awarding damages; the end result could only reduce rates or impose new service obligations.

b. Damages would frustrate filed-rate doctrine purposes.

Regardless of whether damages are called a refund of rates or "fair market value" of undelivered services, any recovery would indisputably reduce the effective rate appellants paid for retail electricity. Because rates are subject to comprehensive regulation, a court would be required "to speculate about whether the [MPUC] would have approved this lower ... rate [*i.e.*, the rate paid minus damages awarded] as the reasonable and lawful rate." *Schermer*, 721 N.W.2d at 315 (citing *Arkansas Louisiana Gas Co.*, 453 U.S. at 578-79). Such an endeavor "would interfere with the regulatory scheme established by the legislature and with the ratemaking functions of the [agency]." *Id.* at 314. *See also N. States Power Co. v. City of St. Paul*, 256 Minn. 489, 493, 99 N.W.2d 207, 211 (1959) ("[P]rescribing or fixing rates for a public utility involves a

legislative function which may not be usurped by the courts.”). The separation of powers encroachment posed by appellants’ litigation is palpable.

Claims that grow out of filed rates must inevitably devolve into judgments about “reasonableness” and market regulation policy. *Schermer* and its foundational precedents confirm that such issues are not justiciable:

The petitioner, in contending that [courts] are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate. Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission.

Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 250-52 (1951)
(emphasis added).

Damages/refunds would also offend filed-rate non-discrimination precepts. The only claims before the lower court were those of the named respondents – Hoffmans, Ustanko, and Endyehu.¹⁴ Thus any recovery would lessen the amount that those four customers paid for electricity – unquestionably a rate reduction in favor of those litigants. The discriminatory consequence of such a remedy was recognized in *Schermer*, even though a class had been certified:

If the court were to retroactively adjust the rates of only the Class members, it would inevitably disrupt the balancing of interests achieved by the

¹⁴ In fact, jurisdiction in Minnesota is limited to the appellants Irene and David Hoffman because Ustanko and Endyehu are out-of-state complainants asserting out-of-state tariff challenges implicating out-of-state utilities commissions.

[commission] when the rates were approved because the court has no jurisdiction to reallocate rates among other customer classes to assure that in total, the rates are adequate for [the company].

721 N.W.2d at 315.¹⁵

Flouting the filed-rate doctrine, “[a]n award of ... damages to some ratepayers would completely alter the allocation among classes of customers that the [commission] had approved.” *Id.* Since the certified class in *Schermer* was denied overcharge damages, the fatal consequences of the doctrine upon this putative class action are ineluctable.

Finally, contrary to appellants’ amici’s suggestion, denying civil litigation damages would not leave ratepayers in the lurch. The legislature has put in place a regulatory process to protect appellants and all consumers. *Schermer* recognizes that such procedures provide more-than-adequate safeguards against regulated industry abuse: the filing, review, investigative, and remedial protocols “ensure protection of the interests of ratepayers” and constitute “a reasonable substitute for the common law claim that [appellants] will be prevented from asserting.” 721 N.W.2d at 316-17.

By law, the MPUC is appellants’ protector, and thus the agency – not the courts – is the place for appellants to air their grievances and seek relief. Dissatisfaction about the relief available pursuant to the MPUC consumer complaint process is for the legislature, not the judiciary, to assess and, if necessary, rectify. As it is, the legislature provided a consumer complaint protocol and purposely restricted the recourse available. Just like in

¹⁵ *Accord Keogh*, 260 U.S. at 163.

Schermer, this Court is not empowered to judicially legislate an alternative remedy. 721 N.W.2d at 319.

Because the filed-rate doctrine precludes appellants' claims, the Court need not address the remaining arguments that appellants advance. These grounds, however, provide additional reasons why the court of appeals result should be affirmed.

II. **THE DISPOSITION OF THE DAKOTA-BASED CLAIMS ON COMITY GROUNDS ARE NOT BEFORE THIS COURT; EVEN IF ADDRESSED THE DISMISSAL SHOULD BE AFFIRMED**

A. **Comity Never Appealed.**

The dismissal of the non-Minnesota claims is not before this Court for two reasons. First, appellants never argued below that the claims of North and South Dakotans could survive if the Minnesota claims failed. (App.112-49.) Having failed to present and preserve that issue, appellants waived the argument. *Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987) (issues not briefed are waived).

Second, appellants did not raise comity in their petition for review¹⁶ and this Court did not independently grant review on that issue. (RA.8.) Since appellants failed to petition for review of the comity disposition and since review was not independently granted, the issue is not before this Court. *See Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 317 n.1 (Minn. 2007) (“Those two issues were not raised in appellants’ petition for review and are therefore beyond the scope of this appeal and will not be considered in this opinion.”).

The interests of justice do not warrant an opposite conclusion. *Granville v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1*, 732 N.W.2d 201, 204 (Minn. 2007) (“this court may take any action that justice may require.”). Before the district and appellate courts appellants had every opportunity to argue that the North and South Dakota-based claims should survive regardless of the fate of the Minnesota-based claims,

¹⁶ (RA.1-7.)

and they could have petitioned for further review of that issue. Instead appellants did nothing. On this record, the interests of justice do not justify further consideration of these issues.

B. Regardless, Comity Prevails.

Even if the Court were to address the comity disposition, appellants' argument fails. The attack on the Minnesota tariff is barred by the filed rate doctrine. *See supra* I. Since these claims cannot be judicially reviewed, there is no reason for Minnesota courts to address disputes involving tariffs approved and administered by the utilities regulatory agencies of North and South Dakota. Such an exercise would, as the court of appeals acknowledged, "invade the province of the courts of those states to interpret their laws in the first instance" and would "upset the administrative schemes designed by their legislatures to govern public utilities." *Hoffman*, 743 N.W.2d at 757.

Besides that, Minnesota courts cannot assert jurisdiction over out-of-state utility rates. The Dakota legislatures have designated how challenges to rates promulgated by the commissions in those states must be pursued. *See* N.D.C.C. §§ 28-32-42(3)(a)-(b) (appeal of commission actions "must be taken to the district court designated by law" or "to the district court of the county in which the hearing ... was held"); S.D.C.L. §§ 1-26-30.2 (appeal of agency decision "shall be allowed in the circuit court"). These statutorily-specified *fora* are entitled to respect. Thus the claims of North and South Dakota NSP customers had to be dismissed in order to allow the administrative procedures and judicial appeals to be exhausted as the legislatures of those states

intended. The Minnesota judiciary should not intrude upon North and South Dakota sovereignty.

Finally, even assuming Minnesota courts could dabble the electric rate regulation of neighboring states, appellants sued in Minnesota and are therefore bound by Minnesota law. Appellants do not contend that any other law should apply and take no issue with the court of appeals' conclusion that the filed-rate question has not been "addressed by the North Dakota or South Dakota courts." *Hoffman*, 743 N.W.2d at 757. Since those courts have not spoken on the issue, Minnesota law applies. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 46-47 (Minn. 1979) (when laws of different states do not conflict Minnesota law can be applied).¹⁷ Since the filed-rate doctrine bars Minnesota tariff-based claims, the effect must be the same for NSP customers to the west.

The Court should decline to address appellants' comity arguments, but even the interests of justice counseled otherwise, the North and South Dakota-based claims cannot survive.

¹⁷ Appellants' arguments regarding *forum non conveniens* and NSP's failure to challenge the jurisdiction of Minnesota courts are simply red herrings. NSP did not have to challenge the exercise of judicial jurisdiction over claims that were filed-rate barred. Having brought this litigation to Minnesota the Dakota appellants have to live with the consequences of being barred by Minnesota's filed-rate doctrine. And in any event, NSP did argue that if the claims were not barred, they should be deferred to the appropriate administrative agency – whether that be the MPUC or the North or South Dakota's commissions.

III. THE PRIMARY JURISDICTION OF SPECIALIZED AGENCIES IS ENTITLED TO DEFERENCE

Even if appellants' claims were not barred by the filed rate, the Court should defer to utility regulatory agency expertise. As the filed-rate doctrine analysis demonstrates, resolution of appellants' claims would require a court to sort out the complex financial calculations and policy considerations inherent in the rate-making process. The MPUC exists to perform such analyses. If that were not reason enough, resolving tariff ambiguities and answering regulatory issues of first impression are best left to the agencies legislatively charged with approving and overseeing these regulations. These are not, as appellants proclaim, inherently judicial tasks. Rather, the assessment requires resources and expertise that utilities commissions possess and courts lack.

A. The Primary Jurisdiction Doctrine Institutionalizes Agency Deference.

The primary jurisdiction doctrine ensures that tariff-based claims are decided by an administrative agency with the wherewithal and authority to evaluate and superintend the regulation of regulated monopolies. *Roedler*, 1999 WL 1627346, at *16. When a court is asked to decide an issue within the province of an administrative body, considerations of comity and avoidance of conflict call for deference to agency authority and expertise. *Montana-Dakota Utils. Co.*, 341 U.S. at 253. *See also Schermer*, 721 N.W.2d at 314-19 (ratemaking and interpreting filed rates is a "legislative function" requiring deference to the appropriate regulatory agency out of respect for the "separation of powers and comity" concerns inherent in the filed rate and primary jurisdiction doctrines).

The exercise of judicial jurisdiction should be postponed “in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion,” because “agencies created ... for regulating the subject matter should not be passed over.” *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass’n*, 294 N.W.2d 297, 302 (Minn. 1980) (quotation omitted). By deferring to agency expertise, courts preserve the orderly and sensible coordination of regulatory authority and promote informed and consistent regulation. *United States v. W. Pac. R.R.*, 352 U.S. 59, 63 (1956). A court should stand aside “whenever enforcement of the claim at issue requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Roedler*, 1999 WL 1627346, at *16 (citing *Atlantis Express, Inc. v. Standard Transp. Servs., Inc.*, 955 F.2d 529, 532 (8th Cir. 1992)). In cases with rate refunds or mandatory service ramifications, “[t]he purposes behind the doctrine of primary jurisdiction are evident.” *Id.*

B. Agency Primary Jurisdiction Must Be Respected.

1. Separation of powers requires deference.

Appellants discount administrative expertise, trumpeting the district court’s self-assessment that “this case does not require ‘special competence’ that this Court does not already possess.” App. br. at 28. The law, however, allocates tariff enforcement responsibility quite differently.

Schermer acknowledged the separation of powers and comity considerations implicated by the regulation of commerce. 721 N.W.2d at 316. This recognition is

equally applicable in the primary jurisdiction context because the issues presented by appellants' tariff-based claims "have been placed within the special competence of an administrative body." *Roedler*, 1999 WL 1627346, at *16.

Schermer explained that an "agency has 'technical expertise' and is able to balance many competing interests and ... unlike a court, the agency may draw on its 'own internal sources of knowledge and experience' and is not limited to the evidentiary record." 721 N.W.2d at 313 (discussing *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 312 Minn. 250, 255-56, 251 N.W.2d 350, 354, 358 (1977)). The agency's experience from the underlying rate approval process provides a source, not available in the courts, from which the MPUC can assess tariff requirements and service charges. Deference to agency oversight is called for because

[w]hen a court is asked to determine whether one part of the rate structure is unlawful, as applied to a subset of ratepayers, it must necessarily interfere with the function delegated by the legislature to the [agency] and it has neither the expertise nor the mechanisms to deal with the entire rate structure or the adequacy of the return to the regulated entity.

Id. at 315.

Anticipating *Schermer's* separation-of-powers pronouncement, the *Roedler* court (applying Minnesota law) concluded that the agency with primary responsibility for the regulatory regime should resolve disputes over the obligations imposed by NSP's electric tariffs. *Id.* The *Roedler* plaintiffs complained about paying for (but not receiving) a tariff-specified service – namely, off-site nuclear waste storage. Despite acknowledging the utility's failure to deliver, the issue of what NSP was obligated to provide was not for judicial resolution. *Id.*

The court deferred because plaintiffs were seeking remedies (rate refunds and injunctive relief) that necessarily implicated the regulatory scheme. *Id.* When tariff-required service ramifications are presented the “purposes behind the doctrine of primary jurisdiction are evident” because “[t]he matter implicates the utilization of a statutory and regulatory scheme.” *Roedler*, 1999 WL 1627346 at *16. Thus standing down in favor of agency primary jurisdiction was compelled. *Id.*

The court of appeals has also respected administrative agency prerogative. *Info Tel Communications, LLC v. Minnesota Public Utilities Commission* reviewed a regulatory agency’s interpretation of tariff provisions. 592 N.W.2d 880, 884 (Minn. Ct. App. 1999).¹⁸ The court readily accepted the MPUC’s findings, including determinations about underlying tariff purposes. *Id.* at 884-85. And upon concluding that the tariff was ambiguous, the court remanded for a thorough agency assessment of relevant factors, including the avoided and incurred costs, which is an “essential element in the interpretation of the tariff[.]” *Id.* at 885.

The issues in this case cannot be distinguished from those in *Schermer*, *Roedler*, or *Info Tel*. Like in *Schermer*, appellants’ claims involve the resolution of tariff duties and charges; that undertaking unquestionably requires “technical expertise.” *Schermer*, 721 N.W.2d at 313. Judicial interference would disrupt the delicate balance of powers because courts neither have “the expertise nor the mechanisms to deal with the entire rate structure or the adequacy of the return to the regulated entity.” *Id.* at 315.

¹⁸ *rev. denied* (Minn. July 28, 1999).

Like the *Roedler* plaintiffs, appellants ask a court to refund a portion of the agency-approved rates and to impose future obligations on the utility. (App.21-22 at ¶¶ 32-35.) Such relief would circumvent agency review in circumstances where the need to defer to agency expertise is obvious. *Roedler*, 1999 WL 1627346, at *16.¹⁹

The determination of whether the tariff encompasses a maintenance or inspection obligation would, at the very least, require clarification of tariff ambiguities. *Info Tel* demonstrates – as later articulated in *Schermer*'s separation-of-powers explanation – that the elucidation of regulatory purpose is for the agency with responsibility to regulate. *Info Tel*, 592 N.W.2d at 885. In contrast, appellants would have this Court usurp the role with which MPUC has been legislatively charged.

Against the results in *Schermer*, *Roedler*, and *Info Tel* appellants tout two irrelevant cases: *Mitchell v. Chicago Title Ins. Co.*, No. CT 02-17299, 2004 WL 2137815 (Minn. Dist. Ct. Aug. 13, 2004) and *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297 (Minn. 1980). See App. br. at 28-30. *Mitchell* – a pre-*Schermer*, district court decision – did not implicate agency expertise. 2004 WL 2137815 at *1-*3. Rather, the question presented was whether the regulated entity had notice of a loan renewal that would trigger the application of one tariff provision rather than another. *Id.* at *2. Neither the meaning of the tariff nor the scope of duties imposed was in dispute.

¹⁹ Notably, appellants can do no more than dismiss *Roedler*'s compelling conclusion as “perfunctory.” App. br. at 28 n.12.

Minnesota-Iowa Television Co. is even less apposite because “the [regulatory agency] and [the] court [were] not being asked to rule on the same question.” 294 N.W.2d at 302. The dispute did not arise out of the filed tariff, so the regulatory ramifications were insignificant.

Since appellants object to amounts paid to and services rendered by NSP, the courts should defer the complaints to the agencies’ primary jurisdiction. By yielding to the courts can ensure that the tariff will be enforced according to agency intent and consistent with comprehensive regulatory policy.

2. Tariff ambiguities and issues of first impression are for agency resolution.

The tariff articulates no point-of-connection-inspection duty; thus there is no ambiguity: the “duty” does not exist. Even if the tariff were ambiguous, appellants are misguided wanting the judiciary, instead of the commissions that approved and oversee the regulation, to resolve tariff imprecision.

The perils of tariff decipherment by the uninitiated cannot be understated. Ratemaking is a complex process. A court attempting to interpret an “ambiguous” tariff provision could, despite the best of intentions, impermissibly change the regulatory scheme in ways that judges cannot foresee. *Schermer*, 721 N.W.2d at 315 (“[T]he regulations of rates is an intricate ongoing process and interference by a court may set in motion an ever-widening set of consequences and adjustments which courts are powerless to address.”) (citation omitted). Thus if the obligations imposed by a tariff are

open to question, the regulatory agencies – with their inherent expertise and authority – should provide the answer.

The resolution of any ambiguity presented in this case would require the court to engineer every service and cost component encompassed by the tariff according to the somehow-divined intent of no less than three utilities commissions. None of the tariffs define what point of connection “maintenance” entails or even mention point of connection “inspections.” Thus a court would have to venture beyond express tariff language to determine what inspections, if any, were contemplated in the rate-setting process, and what portion of the rates were allocated to the costs that make up the rate base in the various states.

It could well be that the agencies did not even consider point-of-connection duties in promulgating the tariff. That failure may have been unwise, and the regulatory lacuna may be in need of filling. Such a tariff fix, however, must be left to the agencies that can assess the need for point-of-connection services, implement amendments, and make required financial adjustments.

Construing ambiguities against NSP is no answer. Conducting the requisite analysis and considering the benefits of additional service obligations require the “special competence of an administrative body” with its “specialized knowledge.” *Roedler*, 1999 WL 1627346, at *16 (citing *Atlantis Express*, 955 F.2d at 532). *See also Hilling*, 1990 WL 597044, at *3 (“Issues of proper allocation of costs, the proper price to be paid for power from other sources, and the ultimate reasonableness of utility rates involve local

policy choices and technical matters within the peculiar expertise of the [utility agencies]. Such issues are not appropriate for judicial determination.”²⁰

As with the clarification of tariff ambiguities, agency primacy also prevails when, like in this case, a court is called upon to resolve regulatory issue of first impression or of particular complexity. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907); *Roedler*, 1999 WL 1627346, at *16. “Courts should show deference to the agency’s expertise and special knowledge in the field of its training, education, and experience ... [and] should defer to the agency’s skill and expertise even in cases of first impression.” *In re Minn. Joint Underwriting Ass’n*, 408 N.W.2d 599, 604-05 (Minn. Ct. App. 1987).²¹

If appellants’ claims are not barred by the filed-rate doctrine, then the issues necessarily require an initial agency analysis and careful balancing of the interests and costs to the states, the utility, and the various classes of consumers. The issue is one of first impression because the regulatory agencies have yet to weigh in (or even express a

²⁰ This is not a simple private contract dispute that calls for resolving ambiguity “against NSP as the drafter.” *See* App. br. at 31. The rates are the product of a regulatory review process that culminates in a final agency approval, as opposed to negotiations between two parties. Because of that genesis, the filed rates have the force and effect of law. *Minneapolis St. Ry. Co. v. City of Minneapolis*, 251 Minn. 43, 71, 86 N.W.2d 657, 676 (1957) (MPUC’s decisions “command the same regard and are subject to the same tests as enactments of the legislature”); Minn. Stat. § 216B.09, subd. 3 (2006) (filings made with the MPUC “continue in force until amended by the public utility or until changed by the commission”). Statutory ambiguities are not interpreted against a party to which the law applies. There is no reason to approach tariff interpretation any differently.

²¹ Contrary to appellants’ assertion (App. br. at 31-32), courts do defer issues of first impression to the appropriate agency.

view) regarding point-of-connection requirements. After an appropriate administrative assessment the agencies might conclude that the tariff does not address points-of-connection maintenance or inspection and that the tariff should be amended. Rewriting tariffs, however, is certainly not a job for district court judges. These are matters within the ken of administrative agencies. *City of Willmar Mun. Utils. Comm'n v. Kandiyohi Coop. Elec. Power Ass'n*, 452 N.W.2d 699, 703 (Minn. Ct. App. 1990).

C. Tariff Claim Resolution Is Not “Inherently Judicial”.

Appellants accept primary jurisdiction as the appropriate means for deciding issues within the special competence of an administrative body and also concede the doctrine’s role in maintaining the “orderly and sensible coordination of the work of agencies and courts.” App. br. at 26 (quoting *City of Rochester v. People’s Co-op. Power Ass’n, Inc.*, 483 N.W.2d 477, 480 (Minn. 1992) (citations omitted)). Nonetheless, appellants pronounce tariff interpretation, administration and enforcement to be “inherently judicial” functions. *Id.* at 26-32. This logic cannot hold.

Appellants fail to comprehend that utilities commissioners are uniquely qualified to discern and implement their own intent. The legislatures of Minnesota, North Dakota, and South Dakota vested their respective utility regulatory agencies with exclusive responsibility for prescribing the services a utility must provide and the price a utility can charge for those services, including all associated standards, rules, and practices. Minn. Stat. §§ 216B.03, 216B.09; N.D.C.C. §§ 49-02-03 through 49-02-04; S.D.C.L. § 49-34A-6. The right to object to rates is controlled by the agencies. Minn. Stat. § 216.17; N.D.C.C. §§ 49-02-02 through 49-02-03; 49-05-02; 49-34A-26.

The refunds and injunctive relief that appellants demand would inevitably amount to judicial imposition of enhanced services, which indisputably impinges upon the special competence of the utility agencies. *See, e.g.*, Minn. Stat. § 216A.05, subd. 2(2); N.D.C.C. §§ 49-02-03 & 49-02-04; S.D.C.L. § 49-34A-6. An elaborate ratemaking protocol has been established in each state, and authority over the proceedings has been placed in the hands of the regulatory agencies. The courts have no role in that process and must stand aside in order for the agency to exercise its “specialized knowledge.” *Roedler*, 1999 WL 1627346, at *16.

The agencies have the requisite institutional competence to sort out the proper mix of services and associated costs: approved rates must be attributable to some services that is delivered; the cost of these services must be uniform. *Schermer*, 721 N.W.2d at 314-16. The threshold determination in this case is whether the tariff obligates NSP to inspect points of connection. A decision regarding point-of-connection responsibility requires an interpretation of what services the tariff now requires, as well as an assessment of what services are necessary, and a calculation of the costs attributable to those services, which, by extension, requires a comprehension of the approving commission’s intent.

Certainly, the agencies that were created to oversee the conduct of electric utility business are far better equipped to understand what maintenance, if any, would be appropriate at the point of connection and what maintenance obligations the agencies intended to impose by approving the tariffs. These are exactly the determinations that the primary jurisdiction doctrine was formulated to address. Thus the determination of the

services that the tariff obligates the utility to provide – especially when the obligation is, at best, implied – is anything but inherently judicial.

Appellants proffer no authority to the contrary. The sole support for their “inherently judicial” pronouncement is a court of appeals comment: “[t]ariffs are interpreted no differently than any other contract.” App. br. at 27 (quoting *Info Tel*, 592 N.W.2d at 884). *Info Tel*, however, did not address when an agency must be given the first opportunity to interpret a tariff. Rather, the court was simply discussing the standard of review applicable to commission tariff interpretations. *Id.* at 884. If anything, *Info Tel*’s reliance upon commission findings regarding several underlying tariff issues shows that such matters are not “inherently judicial.” And as this Court has observed tariffs have the force and effect of law;²² that cannot be said about any private contract. Laws and contracts are not subject to the same rules of interpretation.

Roedler also demonstrates that claims like those of appellants are not “inherently judicial” as with a simple contract dispute. In a typical breach of contract case a court is called upon to assess the contracting parties’ intent. In this tariff dispute – like in *Roedler* – the dispositive consideration is the regulatory agency’s intent. The contracting intent of ratepayers is of no moment because the tariffs have been promulgated by three independent executive agencies, which best know their own regulatory intent.

Judicial resolution of these issues could – unbeknownst to a court – read additional obligations into the tariff that the responsible agency had no intention, or even positively

²² See *Minneapolis St. Ry. Co.*, 251 Minn. at 71, 86 N.W.2d at 676.

declined, to include. This is exactly why the courts must defer tariff dispute resolution to administrative agencies. *Id.* See also *Schermer*, 721 N.W.2d at 312 (“[i]t would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.”) (quotations omitted).

CONCLUSION

Appellants seek judicial relief in the form of extra-tariff services and rate refunds. The filed rate doctrine, as adopted by *Schermer*, divests the courts of authority to decide such claims. Even if appellants’ claims could escape the filed rate bar, the Court should respect separation-of-powers and defer the claims to the expertise of the primary jurisdiction of the agencies. Either way, the court of appeals should be affirmed: appellants’ claims are not for judicial resolution.

Dated: June 16, 2008

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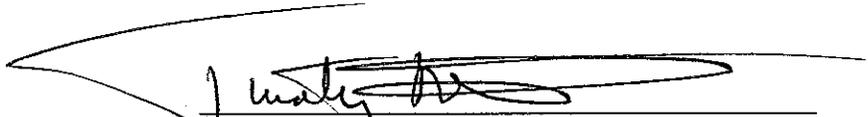
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant Northern States Power Company d/b/a Xcel Energy, Inc. certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a)(1) in that it is, printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 13,931 words, excluding the Table of Contents and Table of Authorities.

Dated: June 16, 2008



Timothy R. Thornton

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