

NO. A09-364

State of Minnesota
In Court of Appeals

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

Southern Minnesota Municipal Power Agency,
Relator-Appellant,

v.

Minnesota Public Utilities Commission,
Respondent-Appellee.

**BRIEF AND ADDENDUM OF RELATOR-APPELLANT
SOUTHERN MINNESOTA MUNICIPAL POWER AGENCY**

William E. Flynn (#0030600)
Todd J. Guerrero (#0238478)
LINDQUIST & VENNUM PLLP
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

*Attorneys for Relator-Appellant
Southern Minnesota Municipal Power Agency*

Jeanne M. Cochran (#0246116)
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
1100 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2131
(651) 296-2106

Lori Swanson, Attorney General
OFFICE OF THE ATTORNEY GENERAL
Suite 102, State Capitol
75 Rev. Martin Luther King, Jr. Blvd.
St. Paul, MN 55101-2147

*Attorneys for Respondent-Appellee
Minnesota Public Utilities Commission*

(Additional Counsel listed on following page)

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

Michael C. Krikava (#182679)
Michael W. Kaphing (#0389349)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

*Attorneys for Respondent Northern States
Power Company d/b/a Xcel Energy*

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STATEMENT OF THE ISSUES

- I. The Mercury Emissions Reduction Act of 2006, Minn. Stat. §§ 216B.68-688, applies only to “public utilities.” It does not provide for regulation of municipal utilities. The MPUC erroneously approved a mercury emission reduction plan submitted by Xcel Energy, a public utility, which purports to extend to SMMPA and SMMPA’s interests in the Sherco 3 power plant. Should this Court reverse the MPUC’s legal error in asserting authority over SMMPA and its interests in Sherco 3?

The Commission ruled that it had the authority under the Act to approve the Xcel plan.

List of Most Apposite Authority

Minn. Stat. § 216B.01

Minn. Stat. §§ 216B.68–216B.688 – Mercury Emissions Reduction Act of 2006

In the Matter of an Investigation Into the Commission’s Jurisdiction Over the City of Hutchinson’s Interstate Natural Gas Pipeline, 707 N.W.2d 223 (Minn. App. Ct. 2005)

- II. The MPUC approved Xcel’s plan without any critical evaluation of the statutorily mandated factors and before making a final determination as to the actual rate impact upon the customers who will pay the costs of implementing the plan, as is required by the Act. Should this Court reverse the MPUC’s insufficiently substantiated and arbitrary and capricious approval of the mercury emissions reduction plan for Sherco 3?

The Commission approved the Xcel plan over the objection of SMMPA and others.

List of Most Apposite Authority

Trout Unlimited, Inc. v. Minn. Dep’t. of Agric., 528 N.W.2d 903 (Minn. App. Ct. 1995), review denied (Minn. Apr. 27, 1995)

Minn. Stat. § 14.69

STATEMENT OF THE CASE

This matter presents the Court with an opportunity to interpret the 2006 Minnesota Mercury Emissions Reduction Act (the “Act”). The purpose of the Act is to reduce mercury emissions of selected coal-fired power plants owned by public utilities located in the state by providing public utilities with financial incentives to pursue such reductions. By its express terms, the Act applies only to “public utilities” as defined by Minn. Stat. § 216B.02, subd. 4. As a municipal power agency, relator Southern Minnesota Municipal Power Agency (“SMMPA”) is not a public utility under Minn. Stat. Chapter 216B and therefore the Act does not apply to SMMPA or its interests.

On December 21, 2007, Northern States Power Company d/b/a Xcel Energy (“Xcel”), as a public utility, filed with the Minnesota Public Utilities Commission (“MPUC” or the “Commission”) a mercury reduction plan for the Sherburne County Generating Facility Unit 3 (“Sherco 3”). Sherco 3 is jointly owned by Xcel (59%) and SMMPA (41%) as tenants in common. Xcel filed the plan on its own behalf and not on behalf of SMMPA. Xcel did not limit its plan to Xcel’s interest in and emissions from Sherco 3. Instead, Xcel submitted a plan which includes SMMPA’s interests in and emissions from Sherco 3. Xcel estimates that implementing its plan at Sherco 3 will cost approximately \$87 million over the next 12 years. The MPUC approved and ordered implementation of the plan on November 6, 2008. *See* Appellant’s Addendum, pp.1-7; hereinafter ADD 1-7. By written order dated January 28, 2009, the MPUC denied SMMPA’s petition for reconsideration pursuant to Minn. Stat. § 216B.27. ADD 8-11.

This appeal followed.

STATEMENT OF THE FACTS

Southern Minnesota Municipal Power Agency

SMMPA, headquartered in Rochester, Minnesota, is a municipal corporation and political subdivision of the State of Minnesota organized under Minn. Stat. Chapter 453, to, among other things, provide its member municipal utilities a means to secure, by joint action among themselves, “an adequate, economical, and reliable supply of energy.”

Minn. Stat. § 453.51. SMMPA performs an essential governmental function and exercises a part of the sovereign powers of the state. Minn. Stat. § 453.54, subd. 1. The exercise of these powers by SMMPA and other municipal entities formed under Chapter 453 has been determined by the Minnesota Legislature to “benefit the people of the state and serve a valid public purpose in improving and otherwise promoting their health, welfare, and prosperity.” Minn. Stat. § 453.51. SMMPA provides electricity at wholesale to its membership, which includes eighteen municipal utilities, located predominantly in south-central and southeastern Minnesota, serving approximately 92,000 retail industrial, commercial, and residential customers.

Because the legislature has declared that municipal utilities are effectively regulated by the municipalities which own and operate them, neither SMMPA’s nor its members’ rates and standards of service are regulated by the MPUC. Minn. Stat. § 216B.01.

The Minnesota Public Utilities Commission

The MPUC is a state agency that, among other duties, regulates the retail rates, tariffs, charges, and services of electric and natural gas public utilities under Minn. Stat. Chapter 216B.

Northern States Power Company d/b/a Xcel Energy (“Xcel”)

Xcel is a for-profit, “public utility”¹ whose retail rates and service are subject to strict regulation by the MPUC pursuant to Minn. Stat. Chapter 216B. Xcel is the state’s largest public utility, with regulated operations in eight Western and Midwestern states.

Sherburne County Generating Facility Unit 3

Sherco 3, located in Becker, Minnesota, is an 884 megawatt coal-fired electric generating plant that uses a state-of-the-art dry scrubbing system to remove sulfur dioxide and particulates from the plant’s flue gases. Since its construction, SMMPA has held a 41 percent interest in Sherco 3 as a tenant in common. Xcel has a 59 percent interest in the plant as a tenant in common, and acts as the plant’s operator on behalf of both Xcel and SMMPA. Sherco 3 is SMMPA’s most important generation resource, providing approximately 90 percent of SMMPA’s generation output.

The Minnesota Mercury Emissions Reduction Act of 2006

Minnesota has long had an interest in reducing emissions of mercury from Minnesota point sources; a goal which SMMPA supports. Mercury is found in some of

¹ A “public utility” means “persons, corporations or other legal entities . . . operating, maintaining or controlling in this state equipment or facilities for furnishing at retail natural, manufactured or mixed gas or electric service to or for the public . . . but does not include . . . a municipality or cooperative electric association . . .” Minn. Stat. § 216B.02, subd. 4.

Minnesota's lakes and rivers and can accumulate in fish and other wildlife. The Minnesota Pollution Control Agency ("MPCA") estimates that of the non-naturally occurring mercury found in Minnesota, approximately 90 percent originates from sources outside of Minnesota, with the remaining 10 percent coming from Minnesota sources; and approximately five percent of the total originates from electric power plants located in the state, largely through the combustion of coal which includes trace amounts of mercury. *See*, "Reducing Mercury Emissions from Power Plants in Minnesota," MPCA, Sept. 2006 (<http://www.pca.state.mn.us/publications/p-p2s4-08.pdf> - 38.8KB - MPCA Web Site; last visited April 8, 2009). Approximately 25 percent of the coal generation located in the state is specifically not subject to the Act. Appellant's Appendix, p. 209; hereinafter A 209.

In 2006, Governor Pawlenty directed that the MPCA bring together stakeholders to develop mercury reduction legislation. Those stakeholders included Xcel Energy and Minnesota Power, the state's two largest electrical utilities, the MPCA, the Minnesota Department of Commerce (through its Office of Energy Security), and certain environmental groups. SMMPA was not invited to and did not participate in the meetings. The stakeholders carefully crafted a compromise that became the Mercury Emissions Reduction Act of 2006, Minn. Stat. §§ 216B.68 – 216B.688 (the "Act") (*see*, ADD 12-19). *Id.*

Principally, the Act requires a "public utility" that "owns" a dry scrubbed unit at a qualifying facility to prepare and submit to the MPCA and the MPUC, no later than December 31, 2007, a plan that proposes to employ technology for mercury removal.

The MPCA is required to review the plan for its technical feasibility, cost effectiveness of the different technologies available, and environmental benefits (Minn. Stat. § 216B.684). The MPUC is required to review the plan to ensure that costs to ratepayers are not excessive and that customer rates remain “competitive.” Minn. Stat. § 216B.685 and Minn. Stat. § 216B.1692.

In conjunction with Minn. Stat. § 216B.1692, the emissions reduction rider statute, the Act provides significant financial incentives to public utilities to pursue the reductions. *See* ADD 20-23. The emissions reduction rider statute provides an “automatic” rate recovery regulatory framework under which *only public utilities* may seek to recover the costs they have invested in certain qualifying environmental initiatives, and to do so outside of a general rate case. “Costs” in this context by definition includes a return or profit on public utilities’ equity capital.

Public utilities such as Xcel must ordinarily establish in a general rate case before the MPUC that all costs incurred to provide service are prudent and result in “just and reasonable” rates. The emissions reduction rider framework provides that the public utility is able to recover its emissions reduction investment immediately and thereby avoid “regulatory lag” and rate-case uncertainty, and its ratepayers and Minnesota residents generally are thought to enjoy the benefits of certain environmental improvements. In the case of mercury emission reductions under §§ 216B.68 to 216B.688, the Act incorporates the emissions reduction rider statute by reference and thereby allows public utilities the opportunity to recover the costs of mercury reduction investments immediately.

Specifically, in conjunction with § 216B.1692, § 216B.683, subd. 1, allows Xcel the opportunity to recover from its ratepayers all of the costs it incurs in furtherance of its mercury reduction efforts, including recovery of the costs for studies undertaken to support its mercury reduction plan, the purchase and installation of necessary equipment and chemicals (*e.g.*, sorbent or other emission-control reagents), ongoing operation, and maintenance costs. It also allows Xcel to immediately recover costs for construction work in progress as soon as funds are expended, which is usually not allowed to be included in a public utility's rate base because it is not costs associated with a property that is "used and useful" and therefore eligible for earning a rate of return. Even further, the Act provides Xcel an opportunity to earn a "performance-based incentive," resulting in an even higher profit on its equity than is allowed for its other expenditures. Minn. Stat. § 216B.683, subd. 2.

As a non-profit municipal corporation, the Act's financial incentives to public utilities are inapplicable to SMMPA. That is, the Act provides no similar *quid pro quo* to municipal power agencies or municipal utilities such as SMMPA. Indeed, nowhere does the Act, or the emissions-reduction-rider statute, even mention municipal power agencies or municipal utilities.

The Xcel Plan

On December 21, 2007, Xcel submitted a mercury emissions reduction plan for Sherco 3 to both the MPCA and the MPUC. A 1-57. The plan largely addresses the technical aspects of reducing mercury emissions at Sherco 3. Xcel's plan proposes to

remove 81 to 90 percent of the mercury emissions from all of Sherco 3, and not just from Xcel's 59% interest in Sherco 3.

In its filing, Xcel made clear that it was filing the plan unilaterally and without input from SMMPA into the plan's technical elements or agreement by SMMPA as to its cost allocation. As stated by Xcel:

Sherco 3 is partly owned by Southern Minnesota Municipal Power Agency (SMMPA). Xcel Energy is 59 percent co-owner of Sherco 3 and is filing this Plan on its own behalf and consistent with the statute. We are currently discussing cost sharing options for the project with SMMPA. Between now and the time we file our Emissions Reduction Rider in March of 2008, we will develop a proposal for cost sharing.

A 33; emphasis added.

The plan's cost is significant. Xcel estimates that the plan will cost a minimum of \$87 million between now and 2020. A 33. Xcel has yet to file its emissions reduction rider. Xcel has, however, indicated that it expects SMMPA to be responsible for 41 percent of the cost of Xcel's plan. A 159.

With respect to the rate impacts Xcel's plan may have on its customers, Xcel's 37-page filing makes only the following short, unverified statement:

Before consideration of any cost sharing, the estimated state of Minnesota revenue requirement impact would peak in 2010 at \$4.7 million, and the total revenue requirement over the five-year forecast period of 2008 - 2012 is \$14.3 million. The average rate impact for an Xcel Minnesota residential customer in 2010 would be \$0.10 per month.

A 33.

MPCA Review

On June 18, 2008, the MPCA submitted its review of Xcel's mercury reduction plan to the MPUC, finding the plan, on balance, is "appropriate" and recommending approval. A 58-73. Under Minn. Stat. § 216B.684, the MPCA is charged with evaluating the environmental and technical aspects of the plan.

MPUC Review

Following written comments from interested parties, the MPUC held a hearing on the matter on October 23, 2008. At the hearing, SMMPA presented evidence that if SMMPA is required to pay for 41 percent of the cost of Xcel's plan, SMMPA may be required to pay more than \$40 million by 2020. A 186. Indeed, under Xcel's proposal, the rate impact to a SMMPA customer is likely to be as much as 20 times more than the cost impact to a comparable Xcel customer. A 147-48, 194. Under Xcel's plan as proposed, SMMPA would likely need to increase its rates by approximately one and one-half percent for customers across its entire system. A 148, 168, 186.

The MPUC approved Xcel's plan and ordered its implementation by written order dated November 6, 2008. ADD 1-7. In its Order, the MPUC found that SMMPA "is not subject to the Mercury Emissions Reduction Act of 2006." ADD 4. It nonetheless found that because Sherco 3 is "owned in major part by a public utility," and because it is "operated by" a public utility, Sherco 3 "is subject to the Act." *Id.* (Emphasis in original.) The Order further stated that the decision "neither includes nor implies any determination on cost recovery methods or allocations, which need not be decided today." ADD 5.

SUMMARY OF ARGUMENT

The MPUC exceeded its statutorily granted jurisdiction by approving Xcel's Sherco 3 mercury-reduction plan and exercising jurisdiction over SMMPA, a municipal agency comprised of municipal utilities. The several sections of the Act that govern the MPUC's authority unambiguously demonstrate that the MPUC had no jurisdiction to approve the Sherco 3 plan and thereby regulate SMMPA.

Minnesota Statutes § 216B.01 expressly exempts municipal utilities from the regulatory scheme that the MPUC administers except where the Legislature specifically provides that the MPUC's regulation is to apply to municipal utilities. This Court confirmed this clear-statement rule in *In re Investigation Into Commission's Jurisdiction Over City of Hutchinson's Intrastate Natural Gas Pipeline*, 707 N.W.2d 223, 225 (Minn. Ct. App. 2005). The Act does not include a clear statement extending the MPUC's jurisdiction to utilities such as SMMPA. To the contrary, the plain language of the Act's relevant statutory provisions make clear that they only give the MPUC jurisdiction over "public utilities," which by definition does not include SMMPA.

Not only did the MPUC exceed its jurisdiction by approving the Xcel plan, the MPUC's decision was also arbitrary and capricious. Here, despite the mandate of Minn. Stat. § 216B.685 that the MPUC consider the cost and customer rate consequences before approving a plan, the MPUC failed to provide any real evaluation of the financial consequences to customers or rate competitiveness. There was insufficient evidence from which the MPUC could make that determination. The MPUC simply ignored this issue, concluding that it was not required to address how the costs of Xcel's plan might

be recovered or allocated prior to approving the plan. Because the statute requires the MPUC to consider the financial consequences to customers and rate competitiveness before approving a plan, the MPUC exceeded its authority in approving Xcel's plan without this determination and its approval of the plan without that analysis was arbitrary and capricious.

STANDARD OF REVIEW

This Court's review of the MPUC's decision is controlled by the Minnesota Administrative Procedure Act, Minn. Stat. § 14.69. In relevant part, § 14.69 states that the Court may reverse or modify the MPUC's decision if it concludes that SMMPA's substantial rights have been prejudiced because the decision is either "in excess of the statutory authority or jurisdiction of the agency" or "arbitrary or capricious."

"Whether an agency has jurisdiction over a matter is a legal question, and thus a reviewing court need not defer to agency expertise on the issue." *Hutchinson*, 707 N.W.2d at 225 (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)). "Statutory construction is a question of law, which this court reviews de novo." *Hutchinson*, 707 N.W.2d at 227 (citing *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998)).

An agency's decision will be deemed arbitrary or capricious if "its determination represents its will and not its judgment." *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). An agency decision represents its will rather than its judgment if the agency "entirely failed to consider an important aspect of the issue."

Trout Unlimited, Inc. v. Minn. Dep't. of Agric., 528 N.W.2d 903, 907 (Minn. Ct. App. 1995), *review denied* (Minn. Apr. 27, 1995).

ARGUMENT

I. The MPUC Exceeded Its Statutory Mandate By Exercising Jurisdiction Over SMMPA.

A. Because None of the Act's Provisions on Which the MPUC Based Its Jurisdiction Specifically Apply to SMMPA, the MPUC Erred By Exercising Jurisdiction Over SMMPA and Its Interest in Sherco 3.

The MPUC exceeded its jurisdiction by approving the Sherco 3 plan and regulating SMMPA, in direct contravention of the controlling provisions of the Act that govern the scope of the MPUC's legislatively granted authority. This is evident first and foremost from the plain language of the Act. However, it is also confirmed by the different treatment of municipal utilities *versus* public utilities throughout Chapter 216B and the historical recognition and application of that different treatment by the courts. This history and particularly the 2005 decision in *Hutchinson* provide a helpful backdrop to the Legislature's choice of words in the 2006 Act.

Because the MPUC is a creature of statute, its jurisdiction is limited by statute. *See Great N. Ry. v. Pub. Serv. Comm'n*, 169 N.W.2d 732, 735 (Minn. 1969) (observing that the MPUC "has only those powers given to it by the legislature," and that "any reasonable doubt of the existence of any particular power in the [MPUC] should be resolved against the exercise of such power"). *See also, People's Natural Gas Co., Div. of Inter-North, Inc. v. Minn. Pub. Util. Comm'n.*, 369 N.W.2d 530 (Minn. 1985) (The MPUC "has only those powers given to it by the legislature.").

Since granting the MPUC statewide electric and natural gas ratemaking authority in 1974, the Minnesota Legislature has consistently distinguished between “public utilities” and “municipal” utilities and municipal power agencies in delineating the MPUC’s jurisdiction and authority under Chapter 216B. By definition, a “public utility . . . does not include . . . a municipality.” Minn. Stat. § 216B.02, subd. 4. This important distinction is explained and amplified in the very first provision of Minn. Stat. Chapter 216B:

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

Minn. Stat. § 216B.01 (emphasis added).

The text of § 216B.01 establishes a clear-statement rule that the Legislature follows in subjecting municipal utilities to its utility regulatory scheme; and which the MPUC and courts are expected to follow in interpreting and applying the jurisdictional reach of the MPUC’s statutory authority. The clear interpretive presumption is that the Legislature does not intend to subject municipal utilities such as SMMPA and its members to MPUC jurisdiction, unless the Legislature specifically so provides.

The Minnesota Court of Appeals confirmed this clear-statement rule in its 2005 *Hutchinson* decision. The Court observed: “the language of section 216B.01 is clear on its face It mandates that municipal utilities are excepted from regulation under Chapter 216B, ‘except as specifically provided herein.’” *Hutchinson*, 707 N.W. 2d at 227. The facts of the *Hutchinson* case illustrate the proper application of § 216B.01.

In *Hutchinson*, the Court considered whether the MPUC exceeded its authority by asserting jurisdiction over the intrastate pipeline of Hutchinson—a municipal utility. There, the statute on which the MPUC based its jurisdiction provided: “Every owner or operator of an intrastate pipeline shall offer intrastate pipeline transportation services by contract on an open access nondiscriminatory basis.” *Hutchinson*, 707 N.W.2d at 226 (citing Minn. Stat. § 216B.045, subd. 3). Despite applying to “[e]very owner or operator of an intrastate pipeline,” which on its face would cover a municipal owner or operator, this Court concluded that because the statute did not “specifically provide for regulation of municipal utilities,” the MPUC exceeded its jurisdiction in regulating a municipal utility on the basis of the statute. *Id.* Importantly, this Court declined to permit even the fairly direct statutory language of § 216B.045, subd. 3 to override the statutory clarity required under § 216B.01.

This Court’s application of § 216B.01’s clear-statement rule in *Hutchinson* confirms that the MPUC exceeded its jurisdictional mandate by approving Xcel’s plan and applying it against SMMPA’s interest in Sherco 3. Under § 216B.01 and *Hutchinson*, the MPUC has no jurisdiction over SMMPA unless the statutory provision under which it acts specifically applies to and regulates municipal utilities such as SMMPA. As set out in greater detail below, no such specific statutory provision supports the MPUC’s regulatory action here.

The MPUC approved the Xcel plan under several provisions of the Act, including Minn. Stat. §§ 216B.682 and 216B.685. These statutes require *public utilities* that own qualifying facilities to submit mercury reduction plans. Nowhere do these statutes

include a clear statement that they apply to municipal agencies such as SMMPA and its municipal members. Thus, when construed in light of § 216B.01 and *Hutchinson*, these statutes cannot be interpreted to apply to any portion of a qualifying facility that is not *owned by a public utility*, and cannot be read to give the MPUC jurisdiction to regulate SMMPA or its interest in Sherco 3. The Act was never intended to apply to SMMPA, let alone was it intended that SMMPA's customers should pay approximately 20 times what a similarly situated Xcel customer would pay, as proposed by Xcel.²

The effect of the MPUC's approval of Xcel's plan is to subject SMMPA to regulation by the MPUC. SMMPA owns 41 percent of Sherco 3. Xcel's plan as approved by the MPUC applies to Sherco 3 as a whole—not simply Xcel's interest in the plant. The Order requires the installation of a sorbent injection system for Sherco 3, as a whole. ADD 4-5. It requires continued operation of the equipment installed under the plan to be optimized to obtain maximum mercury reductions for Sherco 3, as a whole. *Id.* And it requires continued reporting on such optimization efforts for Sherco 3, as a whole. *Id.* Under these circumstances, the MPUC's decision to apply Xcel's plan to

² At the October 23 hearing, SMMPA requested that if the MPUC was going to approve Xcel's plan, then it should clarify that it is not applying the plan to SMMPA's interest in Sherco 3. A 155. Xcel admitted at the hearing that it is possible to limit the plan to Xcel's 59 percent of Sherco 3, and that Xcel actually considered doing just that, but instead decided against it. A 184. SMMPA indicated at the hearing that it appreciates that applying Xcel's plan only against Xcel's interest may result in less mercury emission reductions at Sherco 3, but this result is the only one consistent with the fact that the Act does not apply to SMMPA. A 166-68, 173-74. SMMPA indicated at that time that it is willing to agree to voluntarily reduce mercury emissions from Sherco 3 as long it is based on a cost allocation that results in a "fair and equitable distribution among the ratepayers." A 169.

Sherco 3 as a whole, including SMMPA's 41 percent interest, subjects SMMPA and its interests to MPUC regulation.

Because the Act does not specifically extend to SMMPA, the MPUC exceeded its statutory authority by applying Xcel's mercury reduction plan against SMMPA's interest in Sherco 3.

B. The Plain Language of the Statutes Governing the MPUC's Review and Evaluation of Xcel's Plan Confirms That the MPUC Has No Jurisdiction to Regulate SMMPA.

The plain language of the statutes pursuant to which the MPUC acted, even without the clear-statement rule established by § 216B.01 and *Hutchinson*, justifies only one jurisdictional conclusion: the MPUC exceeded its authority by approving the Xcel 3 plan and thereby subjecting SMMPA and its interests to MPUC regulation.

The MPUC's jurisdiction is controlled by statute, *Hutchinson*, 707 N.W.2d at 225, and "[t]he touchstone for statutory interpretation is the plain meaning of a statute's language." *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005). "When a statute's meaning is plain from its language as applied to the facts of the particular case, a judicial construction is not necessary." *Id.* Minnesota courts may only look beyond the plain meaning of a statute and consider extrinsic interpretive aids if the statutory language is ambiguous. *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006); *Minn. Ass'n of Prof'l Employees v. Anderson*, 736 N.W.2d 699, 703 (Minn. Ct. App. 2007) ("[E]vidence of legislative intent other than the plain language of the statute should be considered only if a statute's language is ambiguous."). Where the language is plain on its face, as it is here, the Court's inquiry is at an end.

The terms of Minn. Stat. § 216B.682 and § 216B.685 are plain, and cannot reasonably be interpreted to extend to SMMPA. Importantly, these statutes are not silent, general, or generic with respect to the scope of authority granted to the MPUC. Rather, the statutory authority granted to the MPUC under the Act repeatedly and exclusively applies only to public utilities.³

By explicitly extending the MPUC's authority to exclusively public utilities, the Act does not subject SMMPA or its interests to the MPUC's jurisdiction. *See Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 457 (Minn. 2006) (“abid[ing] by the canon of statutory construction ‘*expressio unius exclusio alterius*,’ meaning the expression of one thing is the exclusion of another”).

The Legislature's use of the statutorily-defined term “public utility,” in marked contrast to the absence of any reference to “municipality,” “municipal utility” or

³ *See, e.g.*, Minn. Stat. § 216B.681 (“a *public utility* that owns or operates a qualifying facility shall install, maintain, and operate continuous mercury emission-monitoring system The *public utility* shall report to the agency as public data the quality assured data produce from the monitoring”); Minn. Stat. § 216B.682, subd. 1 (“a *public utility* that owns a dry scrubbed unit at a qualifying facility shall develop and submit to the agency and the commission a plan for mercury emissions reduction at each such unit.); Minn. Stat. § 216B.682, subd. 2 (“a *public utility* that owns a wet scrubbed unit at a qualifying facility shall develop and submit to the agency and the commission a plan for mercury emissions reduction at each such unit”); Minn. Stat. § 216B.683, subd. 1(a) (“A *public utility* required to file a mercury emissions reduction plan . . . may also file for approval of emissions-reduction rate riders pursuant to section 216B.1692.”); Minn. Stat. § 216B.6851, subd. 1 (“A *public utility* with less than 200,00 customers . . . that owns two wet scrubbed units at a qualifying facility may opt to be regulated under this section”); Minn. Stat. § 216B.6851, subd. 3 (“A *public utility* that elects to be regulated under this section”); and Minn. Stat. § 216B.1692, subd. 2 (“A *public utility* that intends to submit a proposal for an emissions-reduction rider under this section must submit to the commission, the department, the Pollution Control Agency, and interested persons its plans for emissions-reduction projects at its generating facilities.”). (Emphasis added).

“municipal power agency,” makes the exclusion of municipal utilities from the Act’s scope particularly clear. The Legislature has long demonstrated that it knows how to subject municipal entities such as SMMPA to the MPUC’s regulatory authority. Where the Legislature intended to subject a “municipality,” a “municipal utility,” or a “municipal power agency” to regulation under Chapter 216B, it has found the precise words to do so in a number of different provisions. *See, e.g.*, Minn. Stat. § 216B.025, § 216B.09, subd 2, § 216B.097, § 216B.0975, § 216B.16, § 216B.1612, § 216B.164, § 216B.1691, § 216B.241, § 216B.243, and § 216B.62.

The terms of the Act are clear. The only reasonable interpretation of the governing provisions of the Act is that they extend only to public utilities and thus afford the MPUC no jurisdiction over SMMPA. The MPUC erred by approving the overly broad Xcel plan thereby erroneously subjecting SMMPA and its interest in Sherco 3 to MPUC regulation.

Section 216B.682 specifically limits its scope to that portion of Sherco 3 that is owned by Xcel. The statute mandates that a public utility that “owns” a dry-scrubbed unit shall develop a plan for mercury emissions.” *Id.*

The MPUC decision itself demonstrates the error in applying the Act to SMMPA’s interest in Sherco 3. The MPUC rightly concluded that the Act does not apply to SMMPA. Yet notwithstanding this fact, and the fact that Xcel owns only 59% of Sherco 3, the Order concludes that the Act applied to *all* of Sherco 3 because it is owned “in major part” by a public utility. ADD 4. To interpret the Act in this manner the MPUC was forced to insert its own qualifying words into the statutory directive and thereby

change the statute's plain language. By its plain language the statute applies only to the 59% interest that is *owned* by the public utility. Absent SMMPA's consent, Xcel's plan should have been limited to Xcel's 59% ownership interest. The MPUC therefore lacked jurisdiction to regulate SMMPA's 41% interest in Sherco 3.

The Minnesota Supreme Court has held that "any reasonable doubt of the existence of any particular power in the [MPUC] should be resolved against the exercise of such power." *Great N. Ry. v. Pub. Serv. Comm'n*, 169 N.W.2d at 735. This principle reflects, and is consistent with, the care that the Legislature has taken to set forth the MPUC's jurisdiction, and the § 216B.01 presumption that municipal utilities are not subject to MPUC jurisdiction unless the Legislature specifically so provides. For all of these reasons, the MPUC exceeded its authority by approving the Xcel plan, and its decision should be reversed.

II. Because the MPUC Failed to Properly Consider Important Factors Mandated By the Legislature In Connection With Its Review of the Plan, Its Decision Was Arbitrary and Capricious.

In addition to being outside of its statutory authority, the MPUC's approval of Xcel's Sherco 3 mercury emissions reduction plan is also arbitrary and capricious. An agency's decision is arbitrary and capricious if it represents its will rather than its judgment. *Markwardt*, 254 N.W.2d 371, 374. And its decision represents its will rather than its judgment if it "entirely failed to consider an important aspect of the issue." *Trout Unlimited, Inc. v. Minn. Dep't. of Agric.*, 528 N.W.2d at 907.

Here, in approving Xcel's plan, the MPUC failed to address in any meaningful manner the problems presented when the MPUC orders Xcel's plan to be imposed on the

41 percent of Sherco 3 owned by SMMPA. In fact, the MPUC concluded it did not have to address “cost recovery methods or allocations” before approving Xcel’s plan. As a result, the MPUC failed to consider and make reasoned determinations on various factors required by the Act, including particularly, the plan’s effects on ratepayers. Indeed, even though SMMPA presented the MPUC squarely with questions regarding uncertainty of the Act in light of SMMPA’s ownership of 41 percent of Sherco 3, the MPUC proceeded to approve the plan as if either SMMPA had no ownership interest in the unit, or as if the Act applied as against its interest in the unit, even though the MPUC acknowledged that the Act *did not in fact* apply against SMMPA. ADD 4.

Under the Act, the MPUC is required to consider several factors, including, importantly, the costs that the plan imposes on ratepayers. Minn. Stat. § 216B.685, subds. 1, 2 (requiring the MPUC to consider the “competitiveness of customer rates . . . cost-effectiveness of the utility’s proposed mercury-control initiatives” and whether the plan “would impose excessive costs on the utility’s customers”). In order to properly make this evaluation, the Act contemplates that the MPUC will review, *contemporaneously*, both the public utility’s emissions reduction plan *and* its emissions reduction rider. *Id.* In its November 6 Order, the MPUC approved Xcel’s plan, as filed, without requiring Xcel to file its emission-reduction rider, or provide any meaningful information as to customer rate impact.

The MPUC’s failure to require full information on rate impact from Xcel is consistent with the MPUC’s approach throughout this matter, where there was minimal review of the factors of Minn. Stat. § 216B.685, and very little reasoned explanation of

how and why the Commission reached the conclusions that it did. *See, e.g., Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238, 244-45 (Minn. 1984) (court must conduct a “searching and careful inquiry of the record to ensure that the agency action has a rational basis”). Moreover, in approving the Xcel plan, and to avoid addressing the issues presented by SMMPA’s ownership, the MPUC concluded that it would not make any decision “on cost recovery methods or allocations, which need not be decided today.” ADD 5. As a result, the MPUC unnecessarily and arbitrarily placed itself in a position where it simply was unable to consider whether the plan imposes “excessive costs on the utility’s customers,” or the “competitiveness of customer rates” that the Act requires it to consider.

In its Order, the only consideration the MPUC seems to give to possible rate impacts from the plan is acceptance of Xcel’s *unverified* statement about what the plan may cost for only its *residential* customers. ADD 3. The record in this case, like the Order, is devoid of *any* information about what impact the plan may have on Xcel’s commercial, industrial, governmental, and other customer classes, much less an evaluation of what impact the plan may have on the “competitiveness” of such rates.

Because the MPUC approved Xcel’s plan without evaluation of the plan’s cost consequences on ratepayers or even which ratepayers would bear which costs, the MPUC’s approval of the plan represented an exercise of its will rather than its reasoned judgment.

CONCLUSION

Controlling Minnesota law — Minn. Stat. § 216B.01 and this Court's precedential decision in *Hutchinson* — clearly provides that municipal utilities are not subject to MPUC jurisdiction unless the Legislature specifically provides the MPUC with the authority to regulate them. The unambiguous language of the Act, and § 216B.682 and § 216B.685 in particular, do not specifically apply to SMMPA. In fact, those statutes apply only to public utilities. Accordingly, the MPUC exceeded its jurisdiction by approving the Xcel plan and thereby subjecting SMMPA to MPUC regulation. Because the MPUC failed to address fundamental criteria required by the Act, the MPUC's decision was also arbitrary and capricious, and a failure to comply with the Act.

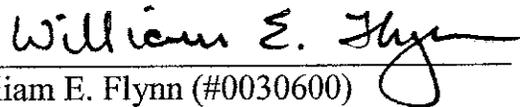
Accordingly, the MPUC's decision below should be reversed.

Dated: _____

April 9, 2009

Respectfully submitted,

LINDQUIST & VENNUM PLLP



William E. Flynn (#0030600)

Todd J. Guerrero (#0238478)

4200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

(612) 371-3211

*Attorneys for Relator-Appellant Southern
Minnesota Municipal Power Agency*