

STATE OF MINNESOTA

IN SUPREME COURT

A17-1300

Court of Appeals

Thissen, J.
Took no part, Anderson, J.

In the Matter of the Application of Otter Tail
Power Company for Authority to Increase
Rates for Electric Service in Minnesota.

Filed: April 22, 2020
Office of Appellate Courts

Keith Ellison, Attorney General, Jeffrey K. Boman, Assistant Attorneys General, Saint Paul, Minnesota, for appellant Minnesota Public Utilities Commission.

Bruce Gerhardson, Otter Tail Power Company, Fergus Falls, Minnesota; and

Richard J. Johnson, Patrick T. Zomer, Moss & Barnett, P.A., Minneapolis, Minnesota, for respondent Otter Tail Power Company.

S Y L L A B U S

The Minnesota Public Utilities Commission does not have the authority in this general rate case to require Otter Tail Power Company to file an amended transmission cost-recovery rider under Minn. Stat. § 216B.16, subd. 7b(b) (2018), which includes the costs and revenues associated with the Big Stone Access Transmission Lines.

Affirmed.

OPINION

THISSEN, Justice.

In this appeal, we must determine whether appellant Minnesota Public Utilities Commission (MPUC) can require respondent Otter Tail Power Company (Otter Tail) to amend an existing transmission cost-recovery rider approved under Minn. Stat. § 216B.16, subd. 7b(b) (2018), to include the costs and revenues associated with the two high-voltage interstate transmission lines known as the Big Stone Access Transmission Lines (Big Stone Lines). We conclude that the MPUC lacks such authority in this case. Further, because the MPUC considered but explicitly declined to include the costs and revenues of the Big Stone Lines in setting base rates in this general rate case, we need not consider, and we express no opinion on, whether federal law and a Federal Energy Regulatory Commission (FERC) tariff preempt the MPUC from considering the costs and revenues associated with the Big Stone Lines.

FACTS

Otter Tail is an electric utility company headquartered in Fergus Falls, Minnesota. It provides retail electric services to approximately 161,000 customers across Minnesota, North Dakota, and South Dakota. About 61,000 of those customers reside in Minnesota.

The Big Stone Lines are two large high-voltage transmission lines located in North Dakota and South Dakota. The Big Stone-Brookings segment runs south through South Dakota from the Big Stone South Substation to the Brookings County Substation. The Big Stone-Ellendale segment runs west and north from the Big Stone South Substation to the Ellendale Substation in Dickey County, North Dakota. The Big Stone Lines provide direct

access from the resource-rich areas of North Dakota and South Dakota—particularly significant wind power—to the rest of the electric grid covering the middle of the North American continent and beyond. Although the two Big Stone Lines do not run through Otter Tail’s Minnesota region, they connect into the regional grid and therefore benefit Otter Tail’s Minnesota retail customers (and all retail customers in the region).

Otter Tail owns an approximate 50-percent interest in each of the Big Stone Lines. Otter Tail invested approximately \$134.5 million in the Big Stone-Brookings line and approximately \$182.5 million in the Big Stone-Ellendale line, for a total investment of approximately \$317 million.

Operational control of the Big Stone Lines was turned over to the Midcontinent Independent System Operator (MISO).¹ Accordingly, the Big Stone Lines are subject to MISO’s FERC-approved Open Access Transmission Tariff, which governs how Otter Tail and its co-owners are paid for construction and operation of the Big Stone Lines. At the time of these proceedings, MISO’s tariff included a 10.32-percent base return on equity for owners of interstate transmission projects. *See Ass’n of Bus. Advocating Tariff Equity*

¹ FERC authorized the formation of regional transmission organizations, which are “voluntary associations of utilities that own electrical transmission lines interconnected to form a regional grid and that agree to delegate operational control of the grid to the association.” *Ill. Commerce Comm’n v. FERC*, 721 F.3d 764, 769 (7th Cir. 2013). FERC has encouraged the members of the regional transmission organizations to permit their regional power grids to be operated by “Independent System Operators,” which are “not-for-profit entities that operate transmission facilities in a nondiscriminatory manner.” *Id.* at 770 (citation omitted) (internal quotation marks omitted). MISO is one such regional transmission organization. MISO manages high-voltage electric transmission grids in 15 states, including Minnesota, and the Canadian province of Manitoba. Otter Tail is a member of MISO.

Coal. v. Midcontinent Indep. Sys. Operator, Inc., 156 FERC P 61,234, at ¶ 275, 2016 WL 5799957, at *75 (Sept. 28, 2016) (adopting 10.32 percent as an authorized rate of return on equity). In addition, Otter Tail is entitled to an additional 0.5-percent “addor” because of its membership in MISO. *See Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC P 61,004, at ¶ 39, 2015 WL 77424, at *10 (Jan. 5, 2015) (“We grant the MISO Transmission Owners’ request for a 50-basis point addor to their base [return on equity] for their participation in MISO”); *see generally* 16 U.S.C. § 824s(c) (2018) (encouraging the Commission to “provide for incentives to each transmitting or electric utility that joins a Transmission Organization”). Consequently, the FERC-authorized rate of return on equity for the Big Stone Lines was at the time of these proceedings 10.82 percent.² Based on that rate of return on equity, Otter Tail expected to recover \$67.8 million for the two Big Stone Lines between 2016 and 2020. The Big Stone-Brookings segment was completed in 2017 and the Big Stone-Ellendale segment was energized in 2019.

In 2012, Otter Tail filed a request with the MPUC for a transmission-cost recovery rider (TCRR) pursuant to Minn. Stat. § 216B.16, subd. 7b(b). A TCRR is a statutory mechanism through which a utility may petition the MPUC for recovery of transmission

² The actual rate of return on equity under the MISO tariff is subject to revision by FERC. In October 2018, FERC adopted a revised methodology for calculating return on equity. *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC P 61,030, 2018 WL 5075142 (Oct. 16, 2018) (proposing new methodologies for calculating return on equity for the New England Transmission Owners). On November 21, 2019, FERC issued an Order on Briefs, Rehearing and Initial Decision in *Association of Businesses Advocating Tariff Equity v. Midcontinent Independent System Operator, Inc.*, 169 FERC P 61,129, at PP 20–21, 2019 WL 6243026, at *8 (Nov. 21, 2019), which reduced the base return on equity for MISO transmission projects to 9.88 percent.

construction costs as they are incurred through a customer bill rider. Minn. Stat. § 216B.16, subd. 7b (2018). The costs and revenues of a new transmission line project typically are not included in a utility's general rate base until the transmission line has been put into service. *See* Minn. Stat. § 216B.16, subd. 6 (2018). A TCRR allows a utility to recover transmission construction costs before filing a new general retail rate case following the completion of construction and placement of the transmission line into service. *Id.* Otter Tail's 2012 petition for a TCRR listed 12 transmission projects, including the Big Stone Lines. Otter Tail subsequently amended the petition and removed nine of the transmission projects from consideration, including the Big Stone Lines. In 2013, the MPUC approved Otter Tail's request for a TCRR for the three remaining transmission projects.

In 2016, Otter Tail filed this general rate case with the MPUC, seeking an annual-rate increase on its retail electricity rates of 9.8 percent per year to help offset company-wide investment costs. Otter Tail asserted that the costs and revenues associated with the Big Stone Lines should not be considered when setting the retail rates.

During the course of the administrative proceedings, the MPUC took a position that differed from Otter Tail's position with regard to the Big Stone Lines. Because the lines had not yet become used and useful during the test year of the current rate case (2016), the MPUC declined to incorporate the costs and revenues of the Big Stone Lines into Otter Tail's retail base rates. *See generally* Minn. Stat. § 216B.16, subd. 6 (providing that "the commission shall give due consideration to evidence of the cost of the property when first devoted to public use" and that until a new transmission line is put into service, it is not considered "utility property used and useful in rendering service to the public" and so

cannot be put into the retail base rate to earn a “fair and reasonable return on investment”). The MPUC, however, claimed that it could require Otter Tail to amend the TCRR approved in 2013 to include the costs and revenues of the Big Stone Lines.

The MPUC referred the rate case to the Office of Administrative Hearings. On January 5, 2017, an administrative law judge concluded that Minnesota’s TCRR statute does not authorize the MPUC to direct Otter Tail to include the Big Stone Lines in the existing TCRR.³ The administrative law judge determined that “the statutory text [of the TCRR statute] makes clear that development of [transmission] cost adjustments is a voluntary process, initiated by formal request from the utility. The statute cannot be fairly read to authorize TCRR coverage of projects over a utility’s objection.”

On review, the MPUC disagreed with the administrative law judge’s recommendation and concluded that it had statutory authority to compel Otter Tail to account for the costs and revenues of the Big Stone Lines under Minn. Stat. § 216B.16, subd. 7b(b)(2)–(3). The MPUC reasoned that, by filing a general rate case, Otter Tail “invite[d]” the MPUC to evaluate all the utility’s costs and revenues and that it could use

³ The administrative law judge also concluded that the Federal Power Act preempted the MPUC from including costs and revenues of the Big Stone Lines in the base rate and recommended that the MPUC exclude those costs and revenues from Otter Tail’s retail ratemaking case. But the MPUC disagreed with the administrative law judge’s recommendation, asserting that it retains the express and exclusive authority to set retail rates for the intrastate sale of electricity. On certiorari review, the court of appeals reversed the MPUC’s order and held that section 219 of the Federal Power Act preempts the MPUC from considering the Big Stone Lines’ costs and revenues in the retail ratemaking proceeding. See *In re Otter Tail Power Co.*, No. A17-1300, 2018 WL 2770388, at *5 (Minn. App. June 11, 2018). We do not express an opinion on preemption for the reasons stated in this opinion.

all rate setting mechanisms—retail base rate authority and riders including the TCRR—to accomplish that purpose. Accordingly, the MPUC directed Otter Tail “to amend its petition in the currently pending TCRR docket to incorporate into its filing the costs and revenues related to the [Big Stone] Lines.”

The court of appeals reversed the MPUC and held that Minnesota’s TCRR statute limits the MPUC’s authority to regulating “Minnesota jurisdictional costs net of associated revenues,” a category to which the Big Stone Lines do not belong. *See In re Otter Tail Power Co.*, No. A17-1300, 2018 WL 2770388, at *6 (Minn. App. June 11, 2018) (citation omitted) (internal quotation marks omitted). We granted the MPUC’s petition for review.

ANALYSIS

A.

The question before us is whether the MPUC has authority to order Otter Tail to include the costs and revenues of the Big Stone Lines in its existing TCRR in this proceeding. “Whether an administrative agency has acted within its statutory authority is a question of law that we review de novo.” *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010).

“The MPUC, as a creature of statute, only has the authority given it by the legislature. ‘The legislature states what the agency is to do and how it is to do it.’ ” *Minnegasco v. Minn. Pub. Utils. Comm’n*, 549 N.W.2d 904, 907 (Minn. 1996) (quoting *Peoples Nat. Gas Co. v. Minn. Pub. Utils. Comm’n*, 369 N.W.2d 530, 534 (Minn. 1985)). An agency’s authority may be stated either expressly in statute or implied from the express powers given to the MPUC by the Legislature. *See Hubbard*, 778 N.W.2d at 318. Express

authority exists only where a statute unambiguously grants the MPUC such authority. *See id.* at 320. “ ‘While express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature.’ ” *Minnegasco*, 549 N.W.2d at 906–07 (quoting *Peoples Nat. Gas Co.*, 369 N.W.2d at 534).

The MPUC claims authority under Minn. Stat. § 216B.16, subd. 7b(b), to force Otter Tail to amend its 2013 TCRR to include the Big Stone Lines. But the plain language of section 216B.16, subdivision 7b(b), does not expressly grant such power. Instead, the statute provides that, “[u]pon filing by a public utility or utilities providing transmission service, the commission may approve, reject, or modify . . . a tariff.” Minn. Stat. § 216B.16, subd. 7b(b) (emphasis added). Further, Minn. Stat. § 216B.16, subd. 7b(c), states that “[a] public utility *may* file annual rate adjustments to be applied to customer bills paid under the tariff approved in [section 216B.16, subdivision 7b(b)].” *See also* Minn. Stat. § 645.44, subd. 15 (2018) (“ ‘May’ is permissive.”). Based on the plain language of the statute, we conclude that the Minnesota Legislature created the TCRR as an optional financial tool available to a utility upon request. Certainly, nothing in Minn. Stat. § 216B.16, subd. 7b, expressly authorizes the MPUC to compel or require a utility to use or modify a TCRR.

The MPUC also claims broad authority under Minn. Stat. § 216A.05, subd. 5 (2018), to require Otter Tail as part of the current general rate case to amend its existing TCRR to include the Big Stone Lines. Section 216A.05, subd. 5, provides:

With respect to those matters within its jurisdiction the commission shall receive, hear, and determine all petitions filed with it in accordance with the rules of practice and procedure promulgated by the commission, and may

investigate, hold hearings, and make determinations upon its own motion to the same extent, and in every instance, in which it may do so upon petition.

Otter Tail responds that the specific and later-adopted TCRR provision in Minn. Stat. § 216B.16, subd. 7b, which expressly leaves modification of the TCRR to the discretion of the utility, controls over the general language of section 216A.05, subdivision 5. See *Connexus Energy v. Comm’r of Revenue*, 868 N.W.2d 234, 242–43 (Minn. 2015) (applying the canon that, when a conflict exists between two statutory provisions, the specific provisions in a statute control the general provisions to hold that the statutory limitations period specific to erroneous refunds applied rather than the more general statutory limitations period).

We agree with Otter Tail. Once again, the TCRR statute, first enacted in 2005, is a voluntary mechanism designed by the Legislature to allow a utility to request the recovery of construction costs before a transmission asset is placed into service. The express language of the statute gives the utility the discretion to seek early recovery of the costs for a particular transmission line. Section 216A.05, subdivision 5, was enacted in 1967, long before the TCRR statute was enacted, and on its face does not address TCRRs. We conclude that the MPUC’s generic powers in section 216A.05, subdivision 5, do not control over the specific legislative directive in the TCRR statute. *Connexus Energy*, 868 N.W.2d at 242–43; see also Minn. Stat. § 645.26, subd. 4 (2018) (“When the provisions of two or

more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail.”).⁴

We find further support in our precedent on implied statutory authority, where we state that we are “reluctant to find implied statutory authority.” *In re N. States Power Co.*, 414 N.W.2d 383, 387 (Minn. 1987). As we explained in *In re Qwest’s Wholesale Service Quality Standards*, “if nothing more than a broad grant of authority were needed to show that implied authority could be fairly drawn from the statutory scheme, the implied authority would be present in all cases in which the agency had a broad grant of authority,” and we declined to adopt such a “sweeping rule.” 702 N.W.2d 246, 261 (Minn. 2005). We also stated that “any doubt about the existence of an agency’s authority [is resolved] against the exercise of such authority.” *Id.* at 259. For the reasons stated above, broad general authority under Minn. Stat. § 216A.05, subd. 5, to “make determinations upon its own motion” does not grant the MPUC implied authority to compel the use of a TCRR over a utility’s objection.

Accordingly, the MPUC’s order requiring Otter Tail to include its costs and revenues from the Big Stone Lines in the existing TCRR must be reversed.

B.

Otter Tail also argues that the MPUC is preempted by federal statute and FERC tariffs from considering the costs and revenues of the Big Stone Lines when setting Otter

⁴ It seems an odd result procedurally to use in the proceeding before us the TCRR statute to achieve through the backdoor the capture of the costs and revenues of the Big Stone Lines for retail rate calculations when the agency itself disavowed any such power under its general ratemaking authority in this very proceeding

Tail's Minnesota retail rates. We have just held that the MPUC does not have authority in this proceeding to compel Otter Tail to include the Big Stone Lines in the TCRR. Further, the MPUC expressly declined to incorporate the Big Stone Lines' costs and revenues in setting base rates in this proceeding, noting that the Big Stone Lines had not yet become used and useful during the test year of the current rate case. Accordingly, the MPUC lacks statutory authority to include the costs and revenues of the Big Stone Lines in the current general retail rate case. We need not consider whether federal law preempts state authority that does not exist under the circumstances presented in this case. Accordingly, we express no opinion on whether the MPUC is preempted by federal statute and FERC tariffs from considering the costs and revenues of the Big Stone Lines when setting Otter Tail's Minnesota retail rates.⁵

⁵ Otter Tail moved to strike portions of the MPUC's reply brief under Minn. R. Civ. App. P. 127 and 128.02, subd. 4. Specifically, Otter Tail takes issue with the MPUC's reference and argument regarding a jurisdictional cost of service study (JCOSS); it argues that because neither Otter Tail nor the MPUC relied on the JCOSS in its opening briefs, and because the MPUC had not referenced the JCOSS before, it should be stricken from its reply brief. The MPUC, in response, contends that the arguments in its reply brief are in its opening brief (albeit indirectly) and that the JCOSS is record evidence rebutting Otter Tail's claims.

We have held that when a party fails to raise an argument in its opening brief, and the responding party does not do so in its own brief, the initial party is precluded under Minn. R. Civ. App. P. 128.02, subd. 4, from raising that issue in its reply brief. *See State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009). Here, the JCOSS is referenced by testimony in the record, and the MPUC cites to that testimony indirectly and in a footnote in its opening brief (although it does not identify it as JCOSS testimony). Moreover, none of our conclusions relies on the materials that Otter Tail seeks to strike. Therefore, we deny Otter Tail's motion to strike.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

ANDERSON, J., took no part in the consideration or decision of this case.