UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Case Nos.: 14-2156 and 14-2251

State of North Dakota, Industrial Commission of North Dakota, Lignite Energy Council, Basin Electric Power Cooperative, The North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, Minnkota Power Cooperative, Inc.,

Appellees/Cross-Appellants,

v.

Beverly Heydinger, Commissioner and Chair, Minnesota Public Utilities Commission, David C. Boyd, Commissioner, Minnesota Public Utilities Commission, Nancy Lange, Commissioner and Vice Chair, Minnesota Public Utilities Commission, Dan M. Lipschultz, Commissioner, Minnesota Public Utilities Commission, Betsy Wergin, Commissioner, Minnesota Public Utilities Commission, and Mike Rothman, Commissioner, Minnesota Department of Commerce, each in his or her official capacity,

Appellants/Cross-Appellees.

APPELLEES' MOTION FOR ATTORNEYS' FEES PURSUANT TO 8TH CIR. R. 47C

Appellees/Cross-Appellants State of North Dakota, Industrial Commission of North Dakota, Lignite Energy Council, Basin Electric Power Cooperative, The North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, and Minnkota Power Cooperative, Inc. (collectively, "Appellees") respectfully submit this Motion for Attorneys' Fees pursuant to 8th Cir. R. 47C. Appellees further request that, pursuant to Rule 47C(b), this motion be remanded to the District Court for appropriate hearing and determination. The District Court has already held that Appellees are entitled to their attorneys' fees incurred in the District Court, but it has not yet determined the appropriate amount for the fee award. Accordingly, Appellees respectfully submit that interests of judicial efficiency and economy would be best served by remanding the present motion to the District Court to decide the present motion in the first instance.

BACKGROUND

The Minnesota Legislature passed the Next Generation Energy Act ("NGEA") in 2007. Appellees challenged part of the NGEA as unconstitutional. Specifically, Appellees challenged the provisions of the statute that state "***no person shall":***

> (2) ***import or commit to import from outside the state power*** from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions; or

> (3) ***enter into a new long-term power purchase agreement*** that would increase statewide power sector carbon dioxide emissions. For purposes of this section, a long-term power purchase agreement means an agreement to purchase 50 megawatts of capacity or more for a term exceeding five years.

Minn. Stat. § 216H.03, subd. 3 (emphasis added).

Despite Appellees' attempts to dissuade the legislature from enacting these provisions, including extensive lobbying, the legislature nevertheless did so. Appellees, a broad cross-section of the entities regulated and restricted by the NGEA, challenged the provisions on various grounds, including under the Dormant Commerce Clause and the Supremacy Clause. Appellees asserted these various challenges for the single purpose of invalidating the challenged section of the statute and obtaining a permanent injunction prohibiting Appellants, various state commissioners (collectively, the "State"), and their successors in office from enforcing these subdivisions. After exhaustive discovery, Appellees and Appellants filed cross-motions for summary judgment. The District Court determined that Appellees had standing and that their claims were ripe. The District Court further determined that the challenged sections of the NGEA violated Appellees' rights under the Commerce Clause and granted summary judgment to enforce Appellees' Commerce Clause rights under Section 1983. Because this ruling was dispositive and provided all the relief Appellees sought under all of their alternative grounds in challenging the NGEA, the District Court

did not rule on Appellees' claims that the statute was preempted by the Federal Power Act and the Clean Air Act and therefore violated the Supremacy Clause. The District Court initially determined that Appellees were not entitled to attorneys' fees based on the summary judgment briefing.

The State appealed the ruling to the Eighth Circuit in May 2014, and thereafter Appellees cross-appealed the attorneys' fees determination. Contemporaneously, Appellees formally moved the District Court for an award of their attorneys' fees and costs, and the District Court held that Appellees were entitled to fees under Section 1988. The District Court held that Appellees were the prevailing parties under Section 1983 and, as such, Appellees were entitled to an award of fees unless some type of special circumstances would render a fee award unjust. The District Court found there were no special circumstances that would render an award unjust. Accordingly, the District Court granted Appellees' request for attorneys' fees in December 2014 and ordered further briefing to determine the amount and reasonableness of the fees. The parties submitted briefs according to the District Court's schedule, but the District Court has not yet rendered a final determination as to the amount of fees.

Throughout 2014 and 2015, the parties focused their efforts on briefing the State's appeal to the Eighth Circuit. The Court heard arguments in October 2015 and published its opinion on June 15, 2016. *See North Dakota v. Heydinger*, ___

F.3d ___, Nos. 2156, 2251, 2016 WL 3343639 (8th Cir. June 15, 2016). The Court affirmed the District Court's judgment in its entirety and did not amend or modify the judgment entered by the District Court in any way. In short, the Court affirmed the judgment in which Appellees were granted all of the relief they sought in this action.

Judge Loken, writing for the Court, affirmed the District Court based on the District Court's stated rationale, holding that the NGEA provisions violated Appellees' rights under the Commerce Clause. Judge Loken also dismissed Appellees' cross-appeal regarding attorneys' fees as moot because, during the pendency of the appeal, the District Court had ruled that Appellees were prevailing parties entitled to recover their reasonable attorneys' fees and costs. Judge Loken did not address the merits of Appellees' preemption claims. Judge Murphy agreed with Judge Loken's conclusion that the statute was unconstitutional, but did so on the grounds that the NGEA was preempted by the Federal Power Act. Judge Colloton did not address the Commerce Clause argument but instead relied on preemption grounds in light of the Federal Power Act as well as the Clean Air Act for affirmance.

Now that Appellees have prevailed in both the District Court and the Eighth Circuit in securing all the relief they sought in this action, they move for an award of the attorneys' fees and costs they have incurred in connection with the appeal

under Eighth Circuit Rule 47C. Appellees respectfully request the Court remand the motion for fees to the District Court pursuant to Eighth Circuit Rule 47C(b) for appropriate hearing and determination by the District Court.

ARGUMENT

Under Section 1988(b), a court, in its discretion, may award the "prevailing party" in a section 1983 claim that party's attorneys' fees. 42 U.S.C. § 1988(b). Congress passed Section 1988 "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). As a result, courts routinely award fees to the prevailing party in Section 1983 actions "unless special circumstances would render such an award unjust." *Id.* (internal quotations omitted). Appellees prevailed in the District Court, they obtained a judgment for all of the relief they sought, and the Eighth Circuit Panel has unanimously affirmed the District Court's judgment. No special circumstances are present that would render an attorneys' fee award unjust in this case. Appellees' request for fees is appropriate and reasonable. Accordingly, Appellees should be granted an award of their attorneys' fees based on the Court's affirmance of the judgment granting all the relief Appellees have sought.

I. APPELLEES OBTAINED ALL THE RELIEF SOUGHT AND PREVAILED ON ALL THEORIES PRESENTED.

For purposes of attorneys' fees under Section 1988, plaintiffs are prevailing parties if they obtain judicially sanctioned and "enforceable judgments on the merits [or] court-ordered consent decrees that create the 'material alteration of the legal relationship of the parties.'" *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)); *see also Advantage Media, L.L.C. v. City of Hopkins, Minn.*, 511 F.3d 833, 836 (8th Cir. 2008) ("[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." (internal quotations omitted)).

The Eighth Circuit has identified three principles to determine whether a party "prevailed" so as to be eligible to recover attorneys' fees: (1) whether there was a court-ordered change in the legal relationship; (2) whether the judgment was rendered in the party's favor; and (3) whether a party obtained actual judicial relief rather than just a judicial announcement. *Rogers Group, Inc. v. City of Fayetteville, Ark.*, 683 F.3d 903, 910 (8th Cir. 2012) (citing *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 946 (D.C. Cir. 2005)). All three of these requirements are easily met in this case. The District Court granted Appellees'

request for all relief they sought, and the Eighth Circuit unanimously affirmed that judgment without any amendments or modification.

First, the Court ordered an injunction, changing the legal relationship between the parties and preventing the State from enforcing the NGEA against Appellees. *See Rogers*, 683 F.3d at 910 (finding the relationship changed because "[t]he district court's preliminary injunction blocked the City from enforcing the ordinance"). Second, the judgment was in Appellees' favor because Appellees obtained the complete relief they sought, and they are now protected from possible enforcement. *See id.* at 911. Third, the award was not simply technical or a "judicial pronouncement"; Appellees are now free to contract in the ways they sought in the first instance and can do so without fear of enforcement. *See id.* ("When the District Court granted the injunction, it granted Rogers Group the precise relief that it had requested." (internal quotation omitted)).

Appellees obtained precisely the relief they requested in the District Court based on the Commerce Clause, and the Court of Appeals' decision did nothing to disturb or modify the relief that was granted in the District Court's judgment. Therefore, Appellees are certainly the prevailing parties in this action. *See*, *e.g.*, *Hensley*, 461 U.S. at 433.

II. APPELLEES PREVAILED IN A MANNER THAT ALLOWS THEM TO RECOVER ATTORNEYS' FEES UNDER SECTION 1988.

Appellees are entitled to a statutory award of attorneys' fees in these proceedings because they have obtained all the relief they sought and prevailed in a case asserting a substantial Section 1983 claim, succeeded on their Section 1983 claim, and succeeded on other claims that arose from the same nucleus of operative fact.

A. The District Court's Judgment, Based On The Commerce Clause Claim Under Section 1983, Was Unanimously Affirmed, Thus Authorizing The Court To Award Attorneys' Fees.

The Supreme Court, in *Dennis v. Higgins*, noted that a plaintiff may bring a claim asserting Commerce Clause theories under Section 1983. 498 U.S. 439, 445 (1991). And the Eighth Circuit has stated that attorneys' fees may be warranted under Section 1988 when a plaintiff succeeds on such a claim. *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 285 n.4 (8th Cir. 1993). In fact, the District Court found that Appellees were the prevailing party and that no special circumstances existed that would render an award unjust, and therefore awarded fees to Appellees. *See North Dakota v. Heydinger*, No. 11-cv-3232, 2014 WL 7157013, *3-5 (Dec. 15, 2014).

While the Eighth Circuit's opinion proffered additional rationales for affirmance in the present action, it in no way disturbed the District Court's judgment granting all of Appellees' requested relief under the Commerce Clause

claim. The majority did not hold that the District Court's reasoning was incorrect. Indeed, Judge Loken—writing for the Court—expressly relied on the same rationale as the District Court when affirming the judgment. *Heydinger*, 2016 WL 3343639 at *5-8. And while Judge Murphy disagreed with Judge Loken's analysis, Judge Murphy nevertheless affirmed the judgment. *Id.* at *12-13 (Murphy, J., concurring). Judge Colloton concurred and decided not to address the merits of the Commerce Clause question, but Judge Colloton also affirmed the District Court's judgment without modification. *Id.* at *13-14 (Colloton, J., concurring). In short, Appellees obtained the precise relief requested on their Section 1983 claim, the District Court granted relief on that basis, and the Eighth Circuit affirmed the District Court's judgment in all respects. Accordingly, Appellees are entitled to attorneys' fees under Section 1988.

B. Appellees' 1983 Claim Was Substantial, Appellees Succeeded On Their Preemption Claim, And The Preemption Claim Arose Out Of A Common Nucleus Of Operative Facts.

Even if Appellees were deemed to have succeeded on their preemption claim only, Appellees are still entitled to attorneys' fees under Section 1988. Congress recognized that Section 1983 actions may arise in conjunction with non-fee-generating claims and that courts are required to avoid constitutional questions if possible. Accordingly, Congress enacted the language in Section 1988 to allow an award of fees to a "prevailing party" in "any action or proceeding to enforce a

provision of section [1983]," rather than limiting such awards solely to a party who prevails *on the Section 1983 claim* at issue in the action of proceeding. 42 U.S.C. § 1988; *see* H.R. Rep. no. 94-1558, p. 4, n.7 (1976) ("In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim." (internal citations omitted)); *Maher v. Gagne*, 448 U.S. 122, 132 (1980) ("And clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided.").

Under the so-called "avoidance exception," a prevailing party who is granted relief on a non-fee-generating claim that is dispositive of the case because the Court has avoided reaching the constitutional question may recover its attorneys' fees under Section 1988 so long as the fee-generating claim (1) was "substantial" and (2) "arose out of a common nucleus of operative fact."[1] *D.C., Inc. v. Missouri*,

[1] While the majority of case law related to this issue discusses situations in which pendent state-law claims are joined with federal claims, courts have relied on this rationale in cases involving non-fee-generating federal statutory claims. *See Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 480 F.3d 734, 739 (5th Cir. 2007) ("While this doctrine arose in the context of successful pend[e]nt state law claims, it has been used to award § 1988 fees to plaintiffs prevailing on non-fee-supporting federal statutory claims as well as non-fee-supporting federal

627 F.3d 698, 700 (8th Cir. 2010) (quotation omitted); *Rogers*, 683 F.3d at 911-12; *see also* H.R. Rep. No. 94-1558, p. 4, n.7 (citing *Hagans v. Lavine*, 415 U.S. 528 (1974) & *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)).

A claim will fail the substantiality test "only if 'its unsoundness so clearly results from the previous decisions of [the Supreme C]ourt as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Hagans*, 415 U.S. at 537-38 (also referencing as "insubstantial" claims that are "essentially fictitious," "obviously frivolous," "obviously without merit," and only where prior court decisions "inescapably render the claims frivolous"). Claims arise from a "common nucleus of operative fact" when the claims are so related that a party "would ordinarily be expected to try them all in one judicial proceeding." *Gibbs*, 383 U.S. at 725.

In the present case, even if the Eighth Circuit's narrowest area of agreement in the case is deemed to be the preemption claim, Appellees are still entitled to recover their attorneys' fees. *See Marks v. United States*, 430 U.S. 188, 193 (1977). If the narrowest common ground in the Eighth Circuit opinion was that the NGEA was preempted by federal law, this occurred because the Court sought to

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constitutional claims."); *Gerling Global Reins. Corp. of Am. v. Garamendi*, 400 F.3d 803, 808-09 (9th Cir. 2005) (awarding attorney fees under § 1988 and pursuant to *Maher* where Court found statute was preempted and therefore avoided ruling on the constitutional question), *op. amended and rehearing denied*, 410 F.3d 531.

avoid ruling on the Dormant Commerce Clause question. *See Heydinger*, 2016 WL 3343639 at *13 (Colloton, J., concurring). Therefore, under that view, Appellees prevailed on the non-fee-generating claim, the claim was dispositive, and the Court effectively avoided ruling on the merits of Appellees' Commerce Clause claim. Appellees are therefore entitled to an award of their attorneys' fees because their Commerce Clause claim (1) was "substantial" and (2) the preemption claim upon which the judgment was affirmed "ar[ose] from the same 'common nucleus of operative fact'" as the Commerce Clause claim. *See Rogers*, 683 F.3d at 911-13; *see also Kimbrough v. Ark. Activities Ass'n*, 574 F.2d 423, 426-27 (8th Cir. 1978).

There can be no dispute that the Commerce Clause claim was "substantial" as the term is defined by case law. *See Hagans*, 415 U.S. at 537-38. Here, the District Court ruled in favor of Appellees based on the Commerce Clause grounds, both parties extensively briefed and argued the Commerce Clause claim, and the majority of the panel addressed the merits of the Commerce Clause challenge at length. *See Gerling Global Resins. Corp. of Am. v. Garamendi*, 400 F.3d 803, 808 (9th Cir. 2005) ("This panel has twice grappled with the fee-support issues in detail. The extent of our previous analysis demonstrates that the [Constitutional] claims brought by plaintiffs were not constitutionally insubstantial."), *op. amended*

and rehearing denied, 410 F.3d 531. This is hardly a case in which any judge or court has declared the Commerce Clause challenge "frivolous."

Moreover, it is axiomatic that the preemption challenges and the Commerce Clause challenge all arose "from a common nucleus of operative fact." They were all facial challenges to the NGEA based on the enactment and plain language of the statute itself. *See Rogers*, 683 F.3d at 913 ("Rogers Group's claim that the City lacked authority under Arkansas law to regulate the Quarry . . . arises from the same 'common nucleus as operative fact' as its federal constitutional claims. That is, all the claims concern the City's passage of an ordinance regulating rock quarries . . . ."); *Emery v. Hunt*, 272 F.3d 1042, 1046-47 (8th Cir. 2001) (finding state and federal constitutional claims sufficiently related for the purposes of attorneys' fees when both types of claims challenged legislative action that resulted in redistricting); *Gerling*, 400 F.3d at 809 (finding preemption claim and Commerce Clause claim sufficiently similar where they stemmed from the state's attempted enforcement of a state statute).

Thus, even if this Court arguably avoided affirming the judgment on Section 1983 grounds by affirming based on the preemption claim, Appellees are nonetheless entitled to recover attorneys' fees under Section 1988 because the Commerce Clause claim was substantial and arose from the same nucleus of operative fact as the preemption claim.

III. THERE ARE NO SPECIAL CIRCUMSTANCES THAT WOULD RENDER AN AWARD OF ATTORNEYS' FEES UNJUST IN THIS CASE.

The Eighth Circuit has held that the exceptions to awarding fees "should be narrowly construed" and has not delineated any "special circumstances" that would warrant a denial of fees in this case. *Peter v. Jax*, 187 F.3d 829, 837 (8th Cir. 1999). Only "[a] strong showing of special circumstances [can] support a denial of attorney fees." *Hatfield v. Hayes*, 877 F.2d 717, 720 (8th Cir. 1989) (quotation omitted). Appellants cannot make this difficult showing here.

The Eleventh Circuit, which appears to have developed the most detailed definition of "special circumstances," has set forth a list of situations that might be deemed "special circumstances":

> (1) where the plaintiff's action asserted essentially a private tort claim for money damages, (2) where the plaintiff was not instrumental in achieving the remedy sought, (3) where plaintiffs challenged an antiquated, rarely enforced statute, and (4) where the plaintiff through a settlement or consent order agreed to compromise his right to pursue subsequent fees.

Love v. Deal, 5 F.3d 1406, 1410 (11th Cir. 1993) (quoting *Maloney v. City of Marrieta*, 822 F.2d 1023, 1027 (11th Cir. 1987)); *see also De Jesus Nazario v. Morris Rodriguez*, 554 F.3d 196, 200 (1st Cir. 2009) ("'[S]pecial circumstances' that would permit the outright denial of a fee award . . . are few and far between.").

In this case, there are no such "special circumstances" that would justify denying Appellees attorneys' fees. Appellees did not assert an essentially private

tort claim for money damages, they sought injunctive relief; Appellees were instrumental in achieving the remedy sought; the statute Appellees challenged was new and the threat of enforcement had already substantially affected Appellees; and Appellees have never agreed to waive their right to pursue fees. *See Love*, 5 F.3d at 1410.

In the District Court, Appellants suggested that the Court should deny fees due to the harm to the public and that using taxpayer funds to compensate Appellees would be unjust. *Heydinger*, 2014 WL7157013, at *4. But simply because the burden would fall on taxpayers is an insufficient reason to deny fees. *Riddell v. Nat'l Democratic Party*, 624 F.2d 539, 544 (5th Cir. 1980) (granting fees "even though . . . the burden of an award would fall on the present taxpayers" (quotation omitted)). Appellants also suggested fees should be denied because Appellees had the means to pay competent counsel; Appellants acted in good faith; Appellants never enforced the challenged provisions; and an adjudication on the merits was the only possible way to resolve the dispute. *Heydinger*, 2014 WL 7157013, at *4. These grounds do not justify the denial of fees. *See, e.g.*, *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1377 (8th Cir. 1996) (good faith is inadequate); *Jones v. Wilkinson*, 800 F.2d 989, 991-92 (10th Cir. 1986) (ability to pay not a special circumstance).

Further, although Appellants never formally enforced the NGEA against Appellees, the threat alone was sufficient to meet standing grounds and interfered with Appellees' ability to conduct business. Moreover, Appellees were able to resolve this issue only through litigation.

There are no special circumstances that exist that would render an award unjust. Accordingly, the Court should grant Appellees' reasonable fees expended litigating this appeal.

IV. THE FEES AND COSTS REQUESTED BY APPELLEES ARE REASONABLE AND APPROPRIATE

Appellees seek an award of fees and costs that are reasonable and appropriate which they have incurred in these appellate proceedings in the amount of $296,682 in attorneys' fees and $9,076.26 in costs, plus additional fees and costs that they have recently incurred and will likely incur in the completion of these appellate proceedings. These fees and costs are reasonable and appropriate, and are detailed in the Affidavit of Thomas H. Boyd in Support of Appellees' Motion for Attorneys' Fees Pursuant to 8th Cir. R. 47C ("Boyd Aff.").

Appellees engaged Winthrop & Weinstine, P.A. to represent them in the instant litigation. (Boyd Aff. ¶ 10) Appellees agreed to compensate Winthrop & Weinstine, P.A. for the legal services provided by its attorneys and staff on an hourly basis in accordance with the standard hourly rates that the law firm typically charges for the services provided by these individuals. (*Id.*) The hourly rates that

have been charged for these legal services are consistent and commensurate with the hourly rates charged by attorneys and paraprofessionals with similar credentials and experience who provide similar services in the local community. (Boyd Aff. ¶¶ 33-36; ¶ 33 Affidavit of James S. Simonson (*See* Dist. Ct. ECF Nos. 254 & 272))

This appeal took a substantial amount of time to complete. During this time, Appellees have been regularly invoiced for the legal services in accordance with the above-described fee arrangement. (Boyd Aff. ¶ 11 & Ex. A) Appellees have paid these invoices in full. (*Id.* ¶ 12) The legal services rendered by Appellees' attorneys and their staff in representing Appellees are described in great detail in the invoices submitted to the Court. (*Id.* Ex. A) These legal services are also summarized in the supporting affidavit submitted by Appellees' counsel. (*Id.* ¶ 7)

Attorneys' fees awarded under Section 1988 are typically computed under the "Lodestar" method of multiplying reasonable hours by reasonable hourly market rates for attorneys in the community with comparable backgrounds and experience. *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005); s*ee Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The fee resulting from the Lodestar method calculation is presumed reasonable. *City of Riverside v. Rivera*, 477 U.S. 561, 568 (1986). The hours expended litigating this appeal by Appellees' counsel multiplied by their standard hourly rates totals

$296,682, and Appellees ask for additional fees that they have recently incurred and will likely incur in the future when completing appellate proceedings. (Boyd Aff. ¶ 27 and Exs. A & I) Appellees respectfully submit this is a reasonable fee for this case.[2]

This amount may be adjusted at the discretion of the Court after considering factors that are relevant to a particular case. *Hensley* 461 U.S. at 429. When determining fees under Section 1988, "[t]he most important factor . . . is the magnitude of the plaintiff's success in the case as a whole." *Jenkins v. State of Missouri*, 127 F.3d 709, 716 (8th Cir. 1997). And "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435. The Court may also take into account various other factors including:

> (1) ***the time and labor required***; (2) ***the novelty or difficulty of the questions***; (3) ***the skill requisite to perform the legal service properly;*** (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) ***the experience, reputation, and ability of the attorneys***; (10) ***the "undesirability" of the case***; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 430 n.3 (emphasis added).

[2] Appellees also seek a statutory award for recovery of their costs incurred in these appellate proceedings which currently are $9,076.26. Boyd Aff. ¶ 36 & Ex. J.

Numerous factors in the present case support Appellees' request for an award of the full amount of attorneys' fees they have incurred in litigating this appeal. Most importantly, Appellees obtained all of the relief they have sought in the case. Appellees' attorneys had to expend considerable time and labor litigating the case to obtain this relief. (*See* Boyd. Aff. ¶¶ 7-8 (discussing the necessity of opposing the State's motion to dismiss the cross-appeal; coordinating with *amici*; reviewing the complex briefs and massive appendices (including amici briefs); and extensive oral argument preparation) The case involved novel and complex issues of law and facts, and the grounds of the appeal were multiple and varied. (*See id.* ¶¶ 4, 7-8 (discussing the various legal theories at issues, the significance of the case, and the difficult technical aspects of the factual underpinnings of the case)). The case required deft legal skills, and it required work from reputable attorneys with excellent legal abilities. (*See id.* ¶¶ 15-22, 25). Overall, the various factors weigh in favor of allowing Appellees to recover their attorneys' fees and costs in their entirety.

CONCLUSION

For the above-stated reasons, Appellees respectfully request that their motion for the full amount of their attorneys' fees and costs be granted in all respects.

Dated: June 29, 2016

s/Thomas H. Boyd

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

State of North Dakota, Industrial Commission of North Dakota, Lignite Energy Council, Basin Electric Power Cooperative, The North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, Minnkota Power Cooperative, Inc. v. Beverly Heydinger, Commissioner and Chair, Minnesota Public Utilities Commission, David C. Boyd, Commissioner, Minnesota Public Utilities Commission, Nancy Lange, Commissioner and Vice Chair, Minnesota Public Utilities Commission, Dan M. Lipschultz, Commissioner, Minnesota Public Utilities Commission, Betsy Wergin, Commissioner, Minnesota Public Utilities Commission, and Mike Rothman, Commissioner, Minnesota Department of Commerce, each in his or her official capacity

Appeal Nos.: 14-2156 and 14-2251

I hereby certify that on June 29, 2016, I electronically filed the following:

1. Appellees' Motion for Attorneys' Fees Pursuant to 8th Cir. R. 47C

With the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 29, 2016

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