

OFFICE OF THE CITY ATTORNEY
MEMORANDUM

DATE: June 24, 2005

TO: Mayor and Common Council
RPU Board

FROM: Terry L. Adkins – Rochester City Attorney

SUBJECT: Closed Meeting to Consider Filing Lawsuit Against SMMPA

Because of action taken in 1999 by the City and Rochester Public Utilities, RPU no longer takes all of its power needs from the Southern Minnesota Municipal Power Agency. Instead, RPU is responsible for the City's power needs in excess of 216 megawatts. Thus, RPU is no longer an "all requirements" member of SMMPA.

SMMPA has recently taken formal action to purchase up to 75 megawatts of power from a proposed 600 megawatt coal-fired electric generating facility located in South Dakota that is known as Unit Two of the Big Stone Power Plant. SMMPA's participation in the Big Stone II project is projected to be \$100 million. SMMPA's current rate structure would require RPU customers to pay approximately 42% of this cost despite the fact this electric generating capacity is not required for RPU customers. Instead, SMMPA's need for this additional electric generating capacity occurs in order to satisfy the needs of the other SMMPA members who continue to look to SMMPA for all of their electric power needs.

The potential cost to the RPU ratepayers is significant. Based on SMMPA's projections, RPU ratepayers could experience an increase of between four and seven percent in their rates in order to pay for this power plant. For the typical, average RPU residential customer, this could mean a yearly increase in RPU rates of up to \$50. Yet, because in 1999 RPU capped the amount of power it takes from SMMPA, RPU ratepayers would never need the capacity of this power plant. Essentially, RPU ratepayers will be helping to pay for a resource provided for the other member cities of SMMPA.

In 1994 and 2004, the City of Rochester Common Council and Rochester Public Utility Board adopted formal resolutions concerning the rate charged by SMMPA to Rochester Public Utilities. I have attached copies of both resolutions.

In both resolutions, the City made it clear that, in light of the fact that RPU would no longer take all of its electrical power needs from SMMPA after 1999, the rate charged to RPU should not include the cost of generating resources needed for SMMPA's post-1999 growth. In both

resolutions, the Common Council clearly stated its intent to legally challenge any action by SMMPA to cause RPU and its customers to pay for any such resources.

The applicable sentence of the February 8 and 24, 1994, resolutions states as follows:

BE IT FURTHER RESOLVED that the City of Rochester intends to contest in a court of law any attempt by SMMPA to cause Rochester to pay for any generation or transmission capacity required to satisfy the generation or transmission requirements of those SMMPA members who have elected to extend their SMMPA power sales contracts beyond the year 1999.

The applicable sentence of the December, 2004 resolution states as follows:

NOW, THEREFORE, BE IT RESOLVED by the Rochester Public Utility Board and the City of Rochester Common Council that it reaffirm in its entirety the resolution dated February 8, and February 24, 1994, that is attached hereto.

We are now at the point where, pursuant to the above resolutions, the Council must consider whether to institute the threatened litigation against SMMPA. As legal counsel for the City, I have caused to be prepared a proposed complaint that would initiate the lawsuit. I intend to distribute copies of the proposed complaint to the Council and Board members at the June 27th Committee of the Whole.

As legal counsel for the City, I have a legal duty and obligation to meet with the Common Council to discuss the following litigation strategy issues:

1. The allegations made in our proposed complaint, the facts supporting those allegations and the strengths/weaknesses of those allegations.
2. The legal basis for any lawsuit brought against SMMPA.
3. Legal strategies involving the prosecution of this lawsuit.
4. SMMPA's possible legal defenses.
5. Possible settlement scenarios

I cannot have an open, candid and confidential meeting with you to discuss the above legal strategies in an open meeting format. You and I cannot ask questions, answer questions, share our thoughts about this case, determine the possible settlement scenarios and discuss our litigation strategies when all of our discussions and information is disclosed to the public as it occurs. In an open and public meeting of our litigation discussions, you would not be comfortable in asking whether a particular legal strategy should be followed or whether the contemplated lawsuit case is a strong or weak one. Similarly, I would feel constrained and would not be able to discharge my duties as City Attorney to provide straightforward and candid

legal advice as to what might happen if we selected one particular litigation strategy over another.

Indeed, by holding a public meeting on this limited issue, SMMPA representatives would most likely attend an open meeting held on this topic if for no other reason than to learn our litigation strategies and plans. Obviously, the public's best interests would be harmed by conducting this legal discussion in the open. In my mind, your access to confidential, timely and appropriate legal advice before you decide whether to file this lawsuit is in the public's best interest in this matter.

Under Minnesota law, a public body may close its meeting if closure is required by the attorney-client privilege. The Minnesota Supreme Court has ruled that a public body otherwise required to hold public meetings may hold a closed meeting pursuant to the attorney-client privilege when that privilege's need for absolute confidentiality prevails against the interests served by the Open Meeting Law.

Based upon the facts outlined in this memo, I believe the need for absolute confidentiality in this case involving the anticipated litigation to be brought against SMMPA outweighs the interest served by the Open Meeting Law. Without a closed meeting to discuss this issue, the City of Rochester elected officials and its attorney will not be able to candidly, openly and fully discuss the case's merits and strategy without fear the communications will be divulged to the opposing side.

Accordingly, I recommend to you that at the Council's June 27, 2005, Committee of the Whole meeting, the Mayor and Common Council approve a closed meeting based upon the information provided in this memorandum, the anticipated filing of a lawsuit as noted in the 1994 and 2004 Council resolutions and the need for confidential communications with the City Attorney to discuss litigation strategies. The purpose of the closed meeting is to discuss the five topics described above as they relate to the anticipated litigation to be brought against SMMPA as contemplated by the 1994 and 2004 Common Council resolutions. No pending application, other topic or other public business item, beyond the issues discussed in this memo, will be addressed in the closed meeting. And, no formal vote will occur during the closed session.

After completion of the closed session, the Council will reconvene in open session its June 20, 2005, formal meeting that was recessed to June 27th. At that formal meeting, which will be an open meeting, the Council will consider a Request for Council Action brought by the RPU General Manager seeking permission from the Council to instruct the City Attorney to file the appropriate lawsuit against SMMPA as a result of SMMPA's decision to cause RPU to pay for the cost of electric power that will not benefit RPU customers. The Council will then consider the request in an open and public meeting format.

Enclosures

651-04

JOINT RESOLUTION

WHEREAS, the City of Rochester is a member of the Southern Minnesota Municipal Power Agency (SMMPA) and has signed a Power Sales Contract with SMMPA by which the City receives power from SMMPA for its electrical requirements; and,

WHEREAS, in 1999, as permitted by the Power Sales Contract, the City of Rochester elected to freeze the amount of power it receives from SMMPA (commonly referred to as the Contract Rate of Delivery or "CROD") and thus to become a partial requirements member of SMMPA; and,

WHEREAS, other city members of SMMPA elected to continue to take their total power requirements from SMMPA; and,

WHEREAS, in the early 1990's, the City of Rochester Public Utility Board and Common Council became concerned that SMMPA might require the City of Rochester to pay the cost of capital expansion projects required to meet the total requirements of those SMMPA members who have elected to extend the total requirements provision of their SMMPA power sales contracts beyond 1999; and,

WHEREAS, on February 8, 1994, and February 24, 1994, the City of Rochester Public Utility Board and Common Council adopted a resolution setting forth its concern and publicly announcing its intent to contest in a court of law any attempt by SMMPA to cause the City of Rochester to pay for any generation or transmission capacity required to satisfy the generation or transmission requirements of those SMMPA members who have elected to extend their SMMPA power sales contracts beyond 1999. A copy of that resolution is attached and incorporated by reference; and,

WHEREAS, on December 9, 2004, the SMMPA Executive Director wrote a letter to the Rochester Public Utility General Manager and stated that SMMPA had rejected the City's proposed dual rate model (that took into consideration the fact that some SMMPA members remained total requirements members while RPU elected to become a partial requirements member) and instead reaffirmed "a single rate model for all Members;" and

WHEREAS, in light of SMMPA's December 9, 2004, letter, the Rochester Public Utility Board and City of Rochester Common Council believe it important to reaffirm in its entirety the February, 1994, resolutions adopted by the Board and Council; and,

NOW, THEREFORE, BE IT RESOLVED by the Rochester Public Utility Board and the City of Rochester Common Council that it reaffirm in its entirety the resolution dated February 8, and February 24, 1994, that is attached hereto.

BE IT FURTHER RESOLVED that the City Clerk shall send a copy of this Joint Resolution to the President of the SMMPA Board of Directors.

PASSED AND ADOPTED BY THE COMMON COUNCIL OF THE CITY OF
ROCHESTER, MINNESOTA, THIS 20TH DAY OF DECEMBER, 2004.

John Hunsicker
PRESIDENT OF SAID COMMON COUNCIL

ATTEST: *Andy Kaye*
CITY CLERK

APPROVED THIS 21ST DAY OF DECEMBER, 2004.

Ardele F. Breda
MAYOR OF SAID CITY

(Seal of the City of
Rochester, Minnesota)

PASSED BY THE PUBLIC UTILITY BOARD OF THE CITY OF ROCHESTER,
MINNESOTA, THIS 16TH DAY OF DECEMBER, 2004.

R. H. Hord
President

Kathleen Wilson
Secretary

RESOLUTION

WHEREAS, the City of Rochester is a member of the Southern Minnesota Municipal Power Agency (SMMPA); and,

WHEREAS, the City of Rochester elected to not amend its Power Sales Contract with SMMPA to extend the total requirement provision of such contract beyond the year 1999; and,

WHEREAS, the Rochester Common Council and the Rochester Public Utility Board are concerned that SMMPA may require Rochester to pay the cost of capital expansion projects required to meet the total requirements of those SMMPA members who have elected to extend the total requirements provision of their SMMPA power sales contracts beyond the year 1999; and,

WHEREAS, the Rochester Common Council and the Rochester Public Utility Board contend that the City of Rochester is not legally obligated to pay for any generation or transmission capacity required to satisfy the generation or transmission requirements of those SMMPA members who have elected to extend their SMMPA power sales contracts beyond the year 1999.

NOW, THEREFORE, BE IT RESOLVED by the Common Council of the City of Rochester and the Rochester Public Utility Board that Rochester's SMMPA representative will vote against any capital expenditure proposed by SMMPA designed to expand existing SMMPA generation or transmission capacity if implementation of such proposal is likely to result in the City of Rochester paying any portion of the cost of such expansion through higher rates for power purchased from SMMPA under its existing power sales contract or otherwise.

BE IT FURTHER RESOLVED that the City of Rochester intends to contest in a court of law any attempt by SMMPA to cause Rochester to pay for any generation or transmission capacity required to satisfy the generation or transmission requirements of those SMMPA members who have elected to extend their SMMPA power sales contracts beyond the year 1999.

BE IT FURTHER RESOLVED that the City Clerk shall send a copy of this resolution to the President of the SMMPA Board of Directors.

PASSED AND ADOPTED BY THE COMMON COUNCIL OF THE CITY OF ROCHESTER, MINNESOTA, THIS 23 DAY OF February 1994.

Dorothy B. Selby

PRESIDENT OF SAID COMMON COUNCIL

ATTEST: Carol A. Durrin
CITY CLERK

APPROVED THIS 24 DAY OF February, 1994

James B. Selby
Acting MAYOR OF SAID CITY

(Seal of the City of
Rochester, Minnesota)

Passed by the Public Utility Board of the City of Rochester, Minnesota this 8th day of
February, 1994.

Jim A. Buel
President

Hardee Wilson
Secretary