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PUBLIC SERVICE COMMISSION

DALE W. MOENCH – *Of Counsel*

November 9, 2012


ND Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

RE: In re: City of Oxbow vs. North Dakota Public Service Commission and Northern States Power Company, a Minnesota Corporation
Court File No: 09-2012-CV-03147

Greetings:

Enclosed and hereby served upon you, please find the Response to Brief in Opposition of Stay of Public Service Commission Order by NSP. If you have any questions, please feel free to contact me at the office.

Sincerely,



Ronald K. Hettich

RKH/sav
Enc.

132 PU-07-759 Filed: 11/13/2012 Pages: 11
APPEAL - Appellant's Response in Support of
Motion for Stay

Aaland Law Office, Ltd.

Ronald Hettich

STATE OF NORTH DAKOTA
COUNTY OF CASS

IN THE DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
CIVIL NO. 09-2012-CV-03147

City of Oxbow, Lonni Hayden, Warren Hayden,)
Kent Buhr, Danise Buhr, Jon Hager, Marcy)
Hager, Matt Quibell, Craig Jungberg, Colette)
Jungberg, Todd Miller, Nancy Miller, Vernon)
Skarie, June Skarie, Callie Schlieman, Brian)
Nettestad, Jayme Nettestad, Gregg)
Christensen, Cindy Christensen, Teri Lingen,)
Curt Lingen, Donna Peterson, Stanley Todd)
Miller, Jacqueline Miller, Nicole Bice, Dave)
Zens, Brenda Zens, James Haugrud, Bree)
Reinke, Loretta Carson, Dennis Biewer, John)
Frusciante, Shyla Frusciante, Don Cossette,)
Marjorie Cossette, Angela R. Cossette, Jana)
Reinke, Paul Reinke, Kathleen Lingen, Chris)
Lange, Kay Mahar, Paige Plecity, Michael)
Sorby, Royce Granlund, Darren Fitch, Matt)
Peterson, Jim Huesman, Stacey Biewer,)
Marcus Larson, Colleen Isralson, Tanya)
Harmon, E. John Carlson, David Harmon,)
Linda Covell, Don Covell, Daniel Zink, Arden)
Breimeier, Kristi Houska, Richard Houska, Ray)
Holzhey, Maria Baker, Ted Johnson, Pat)
Baker, Karla Slusher, Neal Roesler, Patricia)
Redlin, Gary Redlin, Jody Slusher, Patrick)
Reinke, James A. Schlieman, Mary Jane)
Nipstad, Doug Lingen, Brenda Carlson,)
Michael Bice, Roger Kotchian, Ryan Binek,)
Elroy Bakke, Ina Bakke, Raymond Grimen,)
Debra L. Larson, Noreen Granlund, Curt)
Bjertness, Gary Cossette)

Appellants)

v.)

North Dakota Public Service Commission and)
Northern States Power Company, a)
Minnesota Corporation)

Appellees.)

**RESPONSE TO BRIEF
IN OPPOSITION OF
STAY OF PUBLIC
SERVICE COMMISSION
ORDER BY NSP**

INTRODUCTION

Appellants previously filed a Notice of Appeal of the decision of the North Dakota Public Service Commission ("PSC"). Appellants have also filed a Motion for Stay, as well as a Motion to Amend Caption to Include Northern States Power Company, a Minnesota Corporation ("NSP"). An Order Amending the Caption to Include NSP was entered by this Court on November 6, 2012.

LAW AND ARGUMENT

I. THE MOTION FOR STAY SHOULD BE GRANTED BECAUSE APPELLANTS MEET THE BURDENS REQUIRED TO SHOW A STAY IS NECESSARY.

Appellants have presented an adequate amount of evidence proving that a stay is necessary. Generally, to be entitled to injunctive relief, a party must show no adequate remedy at law exists and irreparable injury will result if relief is not granted. Huber v. Oliver County, 1999 ND 220, ¶ 20, 602 N.W.2d 710. The briefs submitted on behalf of NSP and the PSC both reference factors to be used for guidance in determining an order for a stay. The four factors used for determining whether a court should issue a preliminary injunction are: (1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest. Magrinat v. Trinity Hosp., 540 N.W.2d 625, 629 (N.D. 1995). "The granting or denying of injunctive relief rests within the sound discretion of the district court, and the court's ruling will not be reversed on appeal unless there has been an abuse of discretion." Huber, at ¶ 20.

The North Dakota Supreme Court discussed an injunction in Nodak Mutual Ins. Co. v. Ward County Farm Bureau, 2004 ND 60, ¶ 28, 676 N.W.2d 752, where Ward County Farm Bureau appealed from a judgment refusing to postpone the election of

directors. The Court stated, "postponing the election would have required that new proxies be sent to more than 26,000 policyholders at substantial cost and expense to Nodak. The court found no irreparable harm would result to Ward County Farm Bureau because the election could be challenged if it was wrongfully conducted." Id. The Court concluded that the district court did not abuse its discretion in refusing to postpone the special corporate election.

One of the concerns of Appellants is the preparation work that will be required to continue the construction of the transmission line. Part of the PSC's order includes a three-hundred foot easement under the wires. Trees will be removed to make way for the towers to support the transmission line as well as in the easement. Appellant's case is distinguished from Nodak because once the trees are cut down, they are forever cut down and the home to many wild life are gone forever. NSP argues that a monetary value can be placed on the trees and that new ones can be planted; however, real property is a unique and custom resource that a person can own. Once the trees and shelterbelts are clear-cut, they are gone for decades to come. In the end, neither money nor replanting of the removed trees can return the landscape to its original condition within the lifetimes of the Appellants. Many of the Appellants live out in the rural areas to enjoy nature. That will be lost if all of these trees are clear cut.

A. THERE IS A STRONG SHOWING APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THE APPEAL.

The first factor this Court must consider in the four-part test is whether there is a strong likelihood that the appeal will be successful on the merits. Magrinat, at 629. In this case, there is a strong indication that the appeal will be successful. Appellants are not asking that NSP's entire Fargo Project be shut down and that NSP be prevented

from putting in a transmission line. Appellants are simply asking that the construction of the transmission lines be delayed until the PSC has had a chance to review and consider all of the evidence that was presented to it. Based on the PSC's Order and Findings of Fact, it is clear that the PSC based its decision solely on the information presented in the application made by NSP. Moreover, as outlined below, Appellants argue that not everyone who has an interest in this process was given an opportunity to be heard.

Evidence was presented at the January 20, 2012, PSC Hearing from several witnesses who opposed the proposed route location through Pleasant Township. (Order p. 7, Findings of Fact ¶ 37). The PSC found that "this process included several public input meetings." Id. Appellants contend that the alleged public input meetings were not held, nor were the landowners and residents given any notice that such meetings were going to be held.

Initially, "NSP preferred a route approximately four miles north of the proposed route." Id. A route four miles north of the current, Preferred Route, would have not impacted any of the Appellants, which is why Appellants favored NSP's initial route. The original proposed route would have placed the transmission line in the middle of Fargo's speculated flood diversion project. NSP made an accommodation for the City of Fargo even though there was no approved flood diversion project at the time of the public meeting in this case. It is noteworthy that there still is no approved flood diversion for the City of Fargo. This is important because the current placement of the transmission line does affect real people and their property, not just speculated interests such as Fargo's flood diversion.

Additionally, NSP made accommodations to the initial route for Dean Kraft, who operates two private airstrips on his property in Mapleton Township. Id. at ¶ 35. The reason for the accommodation was because planes would need to turn immediately after taking off in order to avoid flying underneath the transmission lines. Id. This special accommodation was made by NSP to Mr. Kraft, however NSP did not make any accommodations to the citizens in Pleasant Township and City of Oxbow who would have their homes, properties, and livelihoods near the transmission lines.

B. UNLESS A STAY IS GRANTED, THERE WILL BE IRREPARABLE INJURY.

The second factor this Court must consider in the four-part test is whether there will be irreparable injury. Magrinat, at 629. Mr. Reinke will suffer irreparable injury if the trees on his property are cut down in anticipation of the transmission line being constructed on his land. Despite NSP's argument that the loss of Mr. Reinke's trees should not be considered an irreparable damage because he could be compensated for the loss, this argument falls flat. The trees on Mr. Reinke's property range from saplings to one-hundred year old trees. Even if NSP planted trees on Mr. Reinke's property to replace the ones that would get cut down, Mr. Reinke would not live long enough to be able to enjoy the newly planted trees as he does now. As mentioned above, these trees also provide a habitat for various wildlife animals. Newly planted trees simply cannot provide the cover required to protect certain species.

Appellants contend that they will suffer irreparable injury due to their homes losing value because of the proximity of the transmission lines to their homes. NSP argues that Mr. Reinke is the sole person that would suffer any actual harm, however, it

does not discuss the loss in values to homes in the area due to the transmission lines. There has been no evidence presented which proves that there will not be a decrease in home and property values due to the placement of the transmission line so close to Appellants' homes.

Local governments and residents in the area north of the proposed route requested that it not be located in those areas due to future development, "particularly considering the diversion project as proposed would effectively set a limit on expansion in the area." (Order p. 7, Findings of Fact ¶ 38). As a result of those expansion concerns and the proposed diversion, "NSP determined it was more prudent to select a route further south." Id. NSP selected and advocated to the PSC the route further south that comes close homes and the established communities of the Appellants versus a route north of it where there might be expansion or growth in the future.

C. NO SUBSTANTIAL HARM WILL COME TO OTHER INTERESTED PARTIES.

The third factor that this Court must consider in the four-part test is whether or not there will be substantial harm to other interested parties. Magrinat, at 629. NSP has not presented any evidence that they will suffer substantial harm if a stay was ordered. NSP alleges that a stay would preclude them from "doing any work in North Dakota, and it could result in significant cost increases depending on the duration of the stay and the ability to proceed with work in Minnesota." (Brief of NSP in Opposition to Stay, at p. 6). However, NSP provides no actual figures of actual monetary loss that it would suffer if a stay were ordered.

NSP states that it has obtained options for easements from 78 of 90 affected landowners along the Approved Route, and Mr. Reinke has not granted NSP an option for any easement on his property. (Chezik Aff., ¶ 5; Lahr Aff., ¶ 8). Mr. Reinke's property is the first property that the Approved Route lies on the North Dakota side of the Red River. It will be necessary for NSP to commence condemnation proceedings to obtain the remaining easements to place the transmission line on the affected properties where it does not have an easement. NSP admits in its Brief in Opposition that a "condemnation action could take a year or more to complete and construction during the pendency of condemnation will result in significant construction inefficiency in working around parcels included in the condemnation." (Chezik Aff. ¶ 6; Brief of NSP in Opp. To Stay). Therefore, the stay will not have any adverse financial impact on NSP because it could be facing a year-long delay in this project to obtain all of the necessary easements anyway.

NSP has given no concrete authority that the condemnation proceedings are likely to be successful. Appellants are in agreement that it would be inefficient to build around the condemnation parcels, and that no construction should begin until the condemnation proceedings are complete.

Appellants are not asking for a long stay, they are only asking for a stay until the appeal has concluded. The appeal should reasonably be concluded in much less than a year, unlike the condemnation proceedings which could still be pending a year from now.

NSP also argues that if the Court granted a stay of the construction, the local building permits NSP has obtained could be in jeopardy. This argument is not

persuasive. NSP began obtaining local permits in the fall of 2011, and it states that if the permits were going to expire, that it would need to seek extensions. (Chezik Aff., ¶ 5). NSP presented no evidence regarding how many permits may expire, when the permits may expire, or what would need to be done to obtain an extension of the permit. For all we know, it may be as simple as filling out a one-page request for an extension and sending the document to the local governing body who issued the original permit.

NSP has chosen to proceed in this manner at its own peril. It does not make sense why NSP chose to obtain permits several months before the public meeting was even held before the PSC. Permits were not required until the PSC's Order dated September 12, 2012 was issued and which required that NSP comply with all local zoning laws and obtain necessary permits from local government units. (Order at p. 9, Order at ¶ 5). The fact that NSP obtained the permits so far in advance and might be running into issues with extending the permits is not a valid argument against granting the stay as requested.

D. THE STAY WILL DO NO HARM TO THE CURRENT PUBLIC INTEREST.

The fourth factor that this Court must consider in the four-part test is the effect on public interest. Magrinat, at 629. There is no evidence that an order staying the PSC's decision will harm the public interest. NSP discusses that the Fargo Project is designed to meet customer demands in the Red River Valley, and this is not in dispute. (Brief of NSP in Opp. To Stay). However, in the PSC's Findings of Fact, it states that the Fargo Project was implemented to construct transmission infrastructure needed to "implement long-term and cost-effective solutions for customers to meet the growth in energy demand expected between 2009 and 2020." (Order at p. 3, Findings of Fact ¶

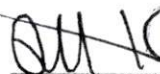
3). There is no way to show that a stay of the construction on a temporary basis will negatively impact future users of the transmission line. Likewise, there has been no credible evidence presented to show that Fargo's current transmission lines would not be able to meet the needs on a temporary basis. The project was expected to be completed in 2015. The stay requested by the Appellants is nowhere near that long. As previously mentioned, this appeal would be expected to be completed within the next few months rather than the three years.

CONCLUSION

Based on the foregoing reasons, Appellants ask that this Court enter an order staying the decision of the PSC as requested.

Dated this 9th day of November, 2012.

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