

STATE OF NORTH DAKOTA  
COUNTY OF CASS

**RECEIVED**

IN DISTRICT COURT

NOV 21 2012

EAST CENTRAL JUDICIAL DISTRICT

CIVIL NO. 09-2012-CV-03147

**PUBLIC SERVICE COMMISSION**

City of Oxbow, et al. )  
 )  
 Appellants, )  
 )  
 vs. )  
 )  
 North Dakota Public Service Commission )  
 and Northern States Power Company, a )  
 Minnesota Corporation, )  
 )  
 Appellee. )

**NORTH DAKOTA PUBLIC SERVICE  
COMMISSION'S BRIEF IN RESPONSE  
TO APPELLANTS' BRIEF RE:  
MOTION TO DISMISS**

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**I. INTRODUCTION**

NSP filed a motion to dismiss based on the appellants' lack of standing. In the alternative, NSP requests all appellants except Paul Reinke be dismissed. The appellants have responded, asserting Reinke has standing and easements were wrongly obtained. Appellants further request NSP's motion be denied and the matter be remanded to the Public Service Commission for a rehearing and further proceedings.

**II. APPLICABLE LAW AND ARGUMENT**

It is not disputed that the only appellant who appeared and presented any information at the administrative hearing, and is also within the approved corridor, is Paul Reinke. Appellants Jim Huesman, Kristi Houska, and Michael Bice provided comment and information at the PSC hearing, but reside over 1/2 mile from the route and are located outside the approved corridor. The remaining appellants did not comment or submit any information for the PSC's consideration in the

underlying administrative process. The underlying PSC hearing in this case was noticed and held as required by law. See 49-22-13; *Affidavit of Publication with Tear Sheets* (PSC Docket No. 59 in the Certified Record on Appeal).

The North Dakota Supreme Court has recognized, “[d]ecisions by this court since Bank of Rhame have continued to employ its three-part analysis for who has standing to obtain judicial review of an agency decision: One who is factually aggrieved, directly interested, and participates.” Shark v. U.S. WEST, 545 N.W.2d 194, 198 (N.D. 1996). A court may decide the merits of a dispute only if the party seeking relief demonstrates it has standing to litigate the issues before the court. Kjolsrud v. MKB Management Corp., 2003 ND 144, ¶ 13, 669 N.W.2d 82; Rebel v. Nodak Mut. Ins. Co., 1998 ND 194, ¶ 8, 658 N.W.2d 811.

Based on the appellants’ response, it appears they wish to litigate whether the “options for easements were wrongly obtained by NSP from landowners and Appellants.” *Brief in Response to Northern States Power Company’s Motion to Dismiss* at 4. An administrative appeal of the PSC’s order is not the appropriate forum/procedure to raise such an issue. Section 49-22-16.1, N.D.C.C., provides a specific remedy for situations where a public utility allegedly uses unfair tactics in acquiring land or easements for a facility. Such an action is a separate procedure and not part of this administrative appeal.

The appellants assert evidence of the alleged wrongful obtainment of easements “should be considered by the Court in the Motion to Dismiss based on the availability to file an application for leave to offer additional testimony, statements, and documents as provided for in the Administrative Agencies Practice Act, Section 28-32.” *Appellants’ Brief* at 5. The appellants then cite N.D.C.C § 28-32-45. As an initial matter, if the appellants are seeking to supplement the record, an appropriate motion for leave should be brought and the relevant factors specifically

addressed. There are several considerations upon a request to supplement the record and none have been addressed by the appellants. Those considerations include whether the evidence is material and whether there were reasonable grounds for failure to adduce evidence at the administrative hearing. Larsen v. Commission on Medical Competency, 1998 ND 193, ¶ 40, 585 N.W.2d 801(holding the district court did not err by denying a request to offer additional evidence when a party had an opportunity to attend the administrative hearing and present evidence). There is no indication in this case that any of the appellants did not have an opportunity to attend the hearing and present information. An administrative appeal is not a process to present evidence a person wishes had been presented at the hearing. “Failure to raise a particular issue in the agency proceeding generally prevents judicial review of the issue on appeal.” Shark, 545 N.W.2d at 199. Appellants have provided no reasonable grounds for not presenting evidence during the administrative hearing in this case.

Further, the appellants have not set forth what additional evidence they would have offered. Regardless, there is no evidence indicating the appellants were somehow prevented from presenting anything. There was no evidence excluded during the proceedings below and no person was prevented from commenting during the hearing. See Larsen, 2008 ND 193, ¶ 43, 585 N.W.2d 801 (“The record indicates Larsen and his counsel chose not to attend the administrative hearing. Having elected not to attend the hearing, Larsen cannot maintain the district court erred in denying his motion for leave” to supplement the record).

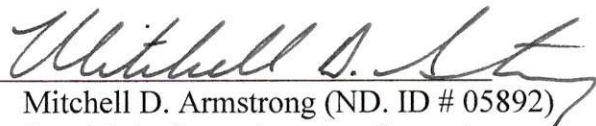
There are numerous cases addressing supplementation of an agency record on appeal. However, because the appellants have not appropriately sought leave, specified what additional evidence is sought, explained why it would be material, or provided any reasonable grounds for not presenting the evidence below, the PSC does not intend to delve into a detailed analysis of the

requirements for supplementing the record. Generally, the case law indicates supplementation of the record is not intended to allow a party to present evidence it wishes would have been presented below. A great majority of the appellants in this case did not appear or participate below, and there has been no attempt to explain why. When a person has not participated in the administrative agency decision, the law does not allow him/her to later appeal and supplement the record before the agency.

### III. CONCLUSION

For the foregoing reasons, the PSC asserts the appellants' argument regarding supplementation of the record is not properly before the Court and should be denied. Further, the appellants' argument regarding whether easements were wrongly obtained is not at issue in this appeal.

Dated this 20<sup>th</sup> day of November, 2012.

By   
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STATE OF NORTH DAKOTA

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COUNTY OF CASS

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 Nettetstad, Jayme )  
 Nettetstad, 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, )  
 Paul Reinke, Kathleen Lingen, Chris )  
 Lange, Kay Mahar, Paige Plecity, Michael )  
 Sorby, Royce Grandlund, 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, )

vs. )

North Dakota Public Service Commission, )

Appellee. )

**AFFIDAVIT OF SERVICE**

