smithbakke
porsborgschweigert&armstrong
attorneys at law

122 E. Broadway Avenue
Bismarck, ND 58501

P.O. Box 460
Bismarck, ND 58502-0460
Phone (701) 258-0630
Fax (701) 258-6498

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November 21, 2012

Illona A. Jeffcoat-Sacco
Attorney at Law
Public Service Commission
State Capitol
Bismarck, ND 58505-0480

In re: City of Oxbow, et. al. v. North Dakota Public Service Commission and Northern States Power Company, a Minnesota Corporation
Civil Number: 09-2012-CV-03147

Dear Ms. Jeffcoat-Sacco:

Enclosed is a copy of the Reply Brief in Support of Northern States Power Company's Motion to Dismiss with regard to the above-captioned matter.

Very truly yours,

MITCHELL D. ARMSTRONG

tmh
enclosure

Jeffcoat-Sacco.5

Sheldon A. Smith*
Randall J. Bakke*■*•
Scott K. Porsborg*■•
Suzanne M. Schweigert*
Mitchell D. Armstrong*■
Shawn A. Grinolds*■
Stacy M. Moldenhauer*■
David J. Smith*■
Bradley N. Wiederholt*■
Jack E. Zuger*

* Licensed in North Dakota
■ Licensed in Minnesota
• Licensed in South Dakota
* Board Certified Civil Trial Specialist by National Board of Trial Advocacy

138 PU-07-759 Filed: 11/26/2012 Pages: 9
APPEAL - copy of Reply Brief in Support of NSP's Motion to Dismiss
Public Service Commission
Mitch Armstrong, SAAG

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STATE OF NORTH DAKOTA

COUNTY OF CASS

IN THE DISTRICT COURT

EAST CENTRAL JUDICIAL DISTRICT

CIVIL NO. 09-2012-CV-03147

IN THE MATTER OF:

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.

REPLY BRIEF IN SUPPORT OF NORTHERN STATES POWER COMPANY'S MOTION TO DISMISS

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Cass County, ND

INTRODUCTION

The burden to demonstrate standing to maintain this appeal lies entirely with Appellants. And, Appellants agree that to have standing, Appellants must show that they will be injured by the PSC's decision. Despite multiple opportunities to articulate, with facts, some harm, Appellants have failed to do so. Generalized claims of improper easement acquisitions are irrelevant because they lack evidentiary support and because even if there were a valid claim, the remedy is a separate action, not review by this Court in this administrative appeal. Similarly, a single out-of-context quote from the World Health Organization and vague references to harm to an unidentified landscape simply fail to show any harm to these Appellants. With the exception of Reinke's tree removal, this is the only support offered for the Appellants' harm and all other Appellants must be dismissed because they have not and cannot demonstrate a particularized injury.

The only Appellant that identified an injury and could have standing is Reinke—he will be directly affected by the decision because his property will be crossed by the Fargo Project. But Reinke was not an official party to the PSC proceeding and, as a result, he does not have standing to appeal the Order. The one case Appellants cite to argue that party status is not required is unpersuasive as it was decided prior to the adoption of Section 28-32-01.8, N.D.C.C. which expressly defines a "party" for purposes of an administrative appeal.

Because Appellants lack standing, this administrative appeal should be dismissed.

ARGUMENT

A. Legal Standards

Appellants are seeking relief from this Court; therefore, it is their burden to show that they have standing to do so. *Dakota Res. Council v. Stark Cnty. Bd. of Cnty. Comm'rs*, 2012 ND 32, ¶ 5, 817 N.W.2d 373, 375 ("[P]arties seeking relief from a court must demonstrate they have

standing by alleging such a personal stake in the outcome of a controversy to justify the court's exercise of remedial powers on their behalf."). To have standing, Appellants must demonstrate that they were aggrieved by the PSC decision and were a "party" to the proceeding. *Shark v. U.S. West Commc'ns, Inc.*, 545 N.W.2d 194, 196 (N.D. 1996); *Pederson v. N.D. Workers Comp. Bureau*, 534 N.W.2d 809, 810 (N.D. 1995); N.D.C.C. § 28-32-42.1. For purposes of this appeal, "party" is a defined term; specifically, "party" is defined under the Act as "each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." N.D.C.C. § 28-32-01.8. Each Appellant was required to show that it was a "party" under the Act to pursue this appeal.

B. City of Oxbow and 81 of 82 Individual Appellants Cannot Show Harm and Must Be Dismissed

As detailed in NSP's brief in support of its motion to dismiss, 79[BM1] of the individual Appellants live at least a half mile away from the Approved Route, the City of Oxbow is also distant from the Approved Route, and while three Appellants own property on the Approved Route, two of them (the Cossettes) signed options with NSP that give NSP the right obtain easements on their property for the Fargo Project. Appellants do not challenge any of the facts set forth in NSP's brief, nor do Appellants attempt to explain how an individual that far away from the route could potentially be injured. Instead, they argue, without factual evidence, about easements, unspecified health effects, and vague landscape changes. For Reinke, Appellants do cite a specific injury, tree removal. (Brief in Response to Northern States Power Company's Motion to Dismiss dated November 14, 2012 ("App. Brief"), at pp. 4–7.) With the exception of Reinke,[1] none of these responses demonstrates an injury in fact to any of the remaining 81[BM2] individual landowners or the City of Oxbow.

[1] Appellants argue about Reinke's injury being irreparable. (App. Brief, at p. 3.) The Appellants have the burden to demonstrate irreparable injury to obtain a stay, but this issue is not relevant to this Motion to Dismiss. Appellants have not identified any legal authority in support of their argument that the loss of trees is irreparable, i.e. cannot be remedied through the payment of damages. Moreover, there is a specific North Dakota statute that defeats this

Turning first to easement acquisition. The acquisition of easements is outside the scope of review for this appeal. Neither the Certificate of Corridor Compatibility or Route Permit proceedings regulate the acquisition of easements. Yet, Appellants assert standing on an obscure claim that easements have been wrongly obtained and reference an unidentified elderly woman who apparently is not one of the Appellants. (App. Brief, at p. 4.) No affidavit or factual record support is provided. Moreover, there is no prohibition about when a utility obtains an easement for a transmission, but there are statutory requirements for how easements are obtained. N.D.C.C. § 49-22-16.1. A utility may not use "harassment, threat, intimidation, misrepresentation, deception, fraud, or other unfair tactics" to obtain an easement. N.D.C.C. § 49-22-16.1(1). If at least five landowners make such a claim against a utility, then a court action can be brought to declare the easements void. N.D.C.C. § 49-22-16.1(2) and (3). Consequently, to the extent an unidentified person has concerns about NSP's easement acquisition practices, such concern cannot support a finding of injury sufficient for standing to appeal the PSC's decision.

Appellants further argue that because of their easement acquisition concern, this Court should open up the record for additional evidence. (App. Brief, at p. 5.) This argument is misplaced. If Appellants wish additional information to be considered, Appellants must apply for leave to do so and show that the information is "relevant and material and that there were reasonable grounds for the failure to offer the evidence in the hearing or proceeding." N.D.C.C. § 28-32-45. If, and only if, this burden is satisfied, then this Court would merely remand to the PSC for the PSC to consider the evidence. *See Lewis v. N.D. Workers Comp. Bureau*, 2000 ND 77, ¶ 9, 609 N.W.2d 445, 448 (recognizing that although an Appellant may "apply to the court in

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argument because it prescribes a monetary value for damages to trees. N.D.C.C. § 32-03-30 ("the measure of damages is three times such a sum as would compensate for the actual detriment, except when the trespass was casual and involuntary or committed under the belief that the land belonged to the trespasser, or when the wood was taken by the authority of highway officers for the purposes of a highway. In such a case the damages are a sum equal to the actual detriment.").

which an administrative appeal is pending for leave to adduce additional evidence, if leave is granted the court does not consider the additional evidence, but may only remand to the agency for the agency to consider the evidence"). Appellants have not made the required application. Nor have Appellants provided that the easement-acquisition evidence would be material to the PSC's decision. Therefore, the alleged harm from easement acquisitions is irrelevant and does not meet the level required for standing, an injury in fact.

Next, Appellants also allege that they are injured in fact because the transmission line at issue could "possibly adversely affect[] health." (App. Brief, at p. 6 (quoting *Extremely Low Frequency Fields*, World Health Organization, Environmental Health Criteria Vol. No. 238 (2007).) A reference to a report about a "possible" health effect does not demonstrate the requisite injury in fact to any of the named Appellants in this case necessary for standing to bring this appeal.[2] Moreover, the same World Health Organization report notes that "virtually all of the laboratory evidence and the mechanistic evidence fail to support a relationship between low-level ELF magnetic fields and changes in biological function or disease status." *Id.* at 12.

Lastly, Appellants reference a change in the landscape. Again, there is nothing tied to an injury suffered by any of the Appellants and there are no facts or arguments supporting the assertion. Statements made without support should be disregarded. *See, e.g., State v. Obrigewitch*, 356 N.W.2d 105, 109 (N.D. 1983) ("Where a party fails to provide supporting argument for an issue listed in his brief, he is deemed to have waived that issue").

The Appellants, with the exception of Reinke, have merely suggested a remote potential for injury, but they have not demonstrated an injury in fact. The possibility of an injury is simply insufficient to confer standing. *Vickery v. N.D. Workers Comp. Bureau*, 545 N.W.2d 781, 783 (N.D. 1996) ("The potential to be aggrieved is not the equivalent of being aggrieved in fact.");

[2] Notably, potential health effects were discussed and considered by the PSC. (*See, e.g.*, Letter from North Dakota Department of Health, Docket No. 34; Transcript of Hearing, at pp. 211-212, 235; PSC Order, Conclusions of Law ¶¶ 3, 5, 7 & 8, at pp. 8–9.)

Washburn Pub. Sch. Dist. No. 4 v. State Bd. of Pub. Educ., 338 N.W.2d 664, 667 (N.D. 1983) (observing that the North Dakota Supreme Court "has distinguished between the potential to be aggrieved and to be aggrieved in fact," and that only those aggrieved in fact have standing); *see also King v. Stark Cnty.*, 10 N.W.2d 877, 878 (N.D. 1943) ("The right invaded must be immediate, not merely some possible, remote consequence."). These Appellants must, therefore be dismissed.

C. Reinke Cannot Demonstrate Standing Because He Did Not Seek and was not Admitted as a Formal Party in the PSC Proceeding

The Act provides that a party has the right to appeal and the Act provides a specific definition for party. A "party" is defined as "each person [1] named or admitted as a party or [2] properly seeking and entitled as of right to be admitted as a party." N.D.C.C. § 28-32-01.8. Reinke meets neither of these definitions, and therefore lacks standing.

Appellants disregard the definition in the statute and instead cite *In re Bank of Rhame*, 231 N.W.2d 801, 808 (N.D. 1975) for support of their response that official party status is not required. (App. Brief, at p. 4.) *Rhame* is unpersuasive. At the time of the *Rhame* decision, the Act did not define "party." *See Shark v. U.S. West Commc'ns*, 545 N.W.2d 194, 196–97 (N.D. 1996) (observing that at the time *Rhame* was decided, party was not defined in the Act, and reinforcing the requirement that an appellant must be a party and be aggrieved--in defining party, the legislature did not intend "to expand the right to judicial review to merely nominal parties who are not aggrieved").

Because Reinke was neither a formal party nor a person who sought and had a right to be admitted as a party, he does not have standing to appeal the PSC Order.

CONCLUSION

NSP respectfully requests that this appeal be dismissed in its entirety.

Dated: November 21, 2012

BRIGGS AND MORGAN, P.A.

By: */s/Lisa M. Agrimonti*

Lisa M. Agrimonti (# 06547)
Zeviel Simpser (# 06794)
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402-2157
Tel: (612) 977-8400
Fax: (612) 977-8650
Email: lagrimonti@briggs.com

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City of Oxbow, et al. vs. North Dakota Public Service Commission
Civil No. 09-2012-CV-03147

AFFIDAVIT OF SERVICE BY E-MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Diane Bailey-Andersen, being first duly sworn, deposes and states she is over the age of 18 and not a party to the above-enttitled matter. That on the 21st day of November, 2012, she served a copy of the attached **REPLY BRIEF IN SUPPORT OF NORTHERN STATES POWER COMPANY'S MOTION TO DISMISS** through the Odyssey File and Serve system and e-mailed to the following:

Mitchell D. Armstrong
Special Assistant Attorney General
122 E. Broadway Ave.
Bismarck, ND 58501
Email: marmstrong@smithbakke.com

Jennifer A. Braun
Ronald K. Hettich
P.O. Box 1817
415 11th Street South
Fargo, ND 58107-1817
Email: jennifer@aalandlaw.com
Email: ron@aalandlaw.com

Diane Bailey-Andersen

Subscribed and sworn to before me
this 21st day of November 2012.

Notary Public

JILL N. YEAMAN
Notary Public
Minnesota
My Commission Expires January 31, 2016

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