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December 27, 2012

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RECEIVED

DEC 28 2012

PUBLIC SERVICE COMMISSION

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 are copies of the following documents with regard to the above-captioned matter:

1. Notice of Filing; and
2. Order Granting in Part and Denying in Part Northern States Power Company's Motion to Dismiss.

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*

Very truly yours,


MITCHELL D. ARMSTRONG

tmh
enclosures

Jeffcoat-Sacco.10

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■ Licensed in Minnesota

● Licensed in South Dakota

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of Trial Advocacy

DEC 26 2012

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA.

City of Oxbow, et al.,

Appellants,

vs.

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

Appellees.

File No. 09-2012-CV-03147

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NOTICE OF FILING

You are hereby notified that on the 21st day of December, 2012, Judge Lisa K. Fair McEvers signed an Order in the above-entitled action. Said document is attached.

Dated this 21st day of December, 2012.



Jody Fischer
Electronic Court Recorder
East Central Judicial District

DEC 26 2012

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

City of Oxbow, et al.,

Appellants,

v.

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

Appellees.

**ORDER GRANTING IN PART AND
DENYING IN PART NORTHERN
STATES POWER COMPANY'S
MOTION TO DISMISS**

Case No. 09-2012-CV-03147

Appellee, Northern States Power Company ("NSP"), moved to dismiss Appellants' appeal, arguing Appellants were not parties to the proceedings before the PSC, and therefore lacked standing. In the alternative, NSP argues that all Appellants, with the exception of Paul Reinke, should be dismissed because either they had not participated in the proceeding before the NSP, or if they did participate, they will not suffer injury and therefore cannot be a person aggrieved by the PSC's decision.

Appellants resisted the motion, arguing formal intervention as a party is not required to gain standing. Appellants also argue that easements were wrongfully obtained from Appellants and they should be allowed to offer additional testimony, because reasonable grounds exist for not offering evidence. Appellants also argue that they will suffer irreparable injury due to health concerns linked to high voltage transmission lines to be used in the NSP project.

Appellees, North Dakota Public Service Commission ("PSC") and NSP, responded to Appellants' brief in opposition, arguing that the easement issue is outside the scope of review on the appeal, and the request to supplement the record should have been brought as a separate motion. A

hearing was held on November 26, 2012. The Court ruled from the bench that Appellants who did not testify at the hearings below were dismissed from this action for lack of standing because they failed to participate at the proceedings below, but granted the remaining four Appellants, Paul Reinke, Jim Huesman, Kristi Houska, and Michael Bice 10 days to brief the Court regarding facts contained within the record showing how they are factually aggrieved by the PSC's decision.

LAW AND ANALYSIS

The law setting out who may for appeal from an agency order is set forth in N.D.C.C. § 28-32-42(1) and (5) which state in relevant part:

1. Any **party** to any proceeding heard by an administrative agency . . . may appeal from the order within thirty days after notice of the order has been provided as required by section 28-32-39.
5. The notice of appeal must specify the parties taking appeal as appellants. . . . The agency and all parties of record have the right to participate in the appeal.

(Emphasis added). Statutes are to be construed liberally, with a view to effecting its objects and promoting justice. N.D.C.C. § 1-02-01. It is noted that persons who may take an appeal from an agency order is more expansive if the appeal is from the rulemaking process, allowing any "interested person" (rather than a party) who has participated in the rulemaking process the right to appeal, and expanding the time frame to appeal from thirty to ninety days. N.D.C.C. § 28-32-42(2). The term "party" is defined under N.D.C.C. § 28-32-01(8), as relevant here as: "each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." This portion of the statute has remained virtually unchanged since at least 1977. 1977 N.D. Laws ch. 284 § 1. However, as noted in Shark v. U.S. West Communications, Inc., 545 N.W.2d 194, 197 (N.D. 1996), the definition of "party" added nothing to the distinct concept of standing for judicial review of an agency

decision, and the legislative history does not imply an intent to overrule or replace the standing doctrine, nor expand the right of judicial review.

In Shark, appellants Shark and Simons were dismissed for lack of standing from an administrative appeal to district court. Id. at 194. Shark was allowed to intervene at the proceeding below, but was dismissed for lack of standing because he was not an aggrieved party, because the PSC's order had not caused him injury in fact. Id. at 195-96. Simon did not move to intervene in the proceeding below, but wrote a letter to one PSC Commissioner praising the Commissioner's position on the issue. Id. at 196. Simon was dismissed due to lack of standing for failure to participate. Id. Based on the Shark case, this Court is not convinced that intervening as a party to the administrative proceeding is required to acquire standing; rather, it appears that actual participation in the proceedings below and being aggrieved by the decision are the vital elements. See also In re Juran & Moody, Inc., 2000 ND 136, ¶ 16, 613 N.W.2d 503 (allowing Commissioner to appeal from an ALJ decision and stating that the definition of party under N.D.C.C. § 28-32-01(8) is for the purpose of identifying a party to the agency proceeding, not the distinct concept of standing for judicial review).

The test for standing in the administrative appeal context was developed in In re Application of Rhame, 231 N.W.2d 801, 806-808 (N.D. 1975), as standing is necessary for judicial review of an administrative order. While the Rhame case has been overruled on other issues, the concepts of determining standing set forth in that case appear to remain the law to be relied upon in North Dakota. See Shark 545 N.W.2d at 197-200 (applying three-part analysis of Rhame case); In re Juran & Moody, Inc., 2000 ND 135, ¶ 17 (reiterating that Rhame case establishes requirements for standing to appeal from an agency decision). The requirement for standing to an appeal from agency decision is that a person must: 1) participate in the proceedings before an administrative agency; 2) be directly

interested in the proceedings, and 3) be factually aggrieved by the agency decision. In re Juran & Moody, 2000 ND 135, ¶ 17 (citations omitted).

To be “aggrieved in fact,” an appellant must make a plausible argument that they will suffer economic injury or some type of loss or gain. Shark, 545 N.W.2d at 200. A generalized interest where the potential effect is remote and speculative does not provide a reasonable basis for judicial review. Id. A party lacks standing if he has only nominal interest in the action. Washburn Pub. Sch. Dist. No. 4 v. State Bd. of Pub. Sch. Educ. 338 N.W.2d 664, 667 (N.D. 1983). A party is factually aggrieved only where a decision has enlarged or diminished a party’s interest. Id. There is a difference between the potential to be aggrieved and to be aggrieved in fact. Id. A generalized interest shared with others, the effects of which are remote and speculative, does not provide a reasonable basis for review of claims. Shark, 545 N.W.2d at 200 (discussing Shark’s generalized interest shared with telephone customers anywhere).

The Appellants concede that only four Appellants participated at the proceedings before the PSC by testifying at the hearings. However, Appellants argue they have standing because options for easements were wrongfully obtained by NSP, and because the easements were wrongfully obtained, the motion to dismiss should be denied and the Appellants should be allowed to offer additional testimony as provided in N.D.C.C. § 28-32-45. Appellants rely on Dakota Resource Council v. Stark Co. Bd. of Cty. Comm’rs, 2012 ND 114, ¶ 8, 817 N.W.2d 373, to show they have standing to appeal, because they can demonstrate a legal interest that may be enlarged or diminished by the PSC’s decision. The Appellants’ reliance on the Dakota Resource Council case is misplaced, as the case involved an appeal under N.D.C.C. ch. 28-34, which has different standards for standing than appeals brought under N.D.C.C. ch. 28-32. In addition, if the Appellants believe that NSP committed

wrongful acts in obtaining easements, an appeal of the PSC's order is not the appropriate remedy. Likewise, if Appellants wanted the Court to consider additional or excluded evidence, they should have utilized the appropriate procedures by moving to supplement the record under N.D.C.C. § 28-32-45. No such motion has been filed with the Court, nor was any petition for reconsideration filed with the PSC prior to appeal, as provided in N.D.C.C. § 28-32-40.

The four remaining Appellants who participated below have submitted a supplemental brief for the purpose of showing they are aggrieved and interested parties. Because these Appellants have different interests and varying potential harms, each will be addressed separately.

1. Paul Reinke

NSP concedes that if being a party is not a requirement for appeal, Paul Reinke should not be dismissed for lack of standing, because he participated in the hearing, and owns property within the 150-foot approved route or the 300-foot approved corridor; therefore, he has a colorable argument that he is an aggrieved party. Mr. Reinke has trees on his property and would suffer the loss of trees on his property. Mr. Reinke is a factually aggrieved and interested party.

2. Michael Bice

Michael Bice resides in Hickson and owns the Knickerbocker Liquor Locker, a bar and liquor store in Hickson. His home is approximately one-half mile south of the proposed power line. Mr. Bice testified generally that he was concerned about property values decreasing like they had due to the possibility of the flood diversion. Mr. Bice testified vaguely that if the power line were not so close, the community had potential for growth, but with the power line, building within 1,000 feet to the north would be a concern, referring a future interest. Otherwise, Mr. Bice testified that he was generally concerned for the effects of the power line on growth of the area, including surrounding

cities, the township and Cass County. While Mr. Bice is an interested party, he is not a factually aggrieved person. His concerns about the future loss of growth and diminished property values are speculative. He provided no testimony or evidence on how the values of the property that he owns will likely be affected. The potential effect of the agency's order is remote and speculative and does not provide a reasonable basis for judicial review.

3. Kristi Houska

Ms. Houska lives in the Bakke Addition, and her home is approximately one-half mile from the proposed power line. She testified that she is concerned about health impacts, particularly to children who use a road for recreational purposes near the proposed power lines, and loss of use to the recreational path while the project is in construction. In discussing an exhibit called "Health and Human Safety" filed by NSP, which indicated that there would be no significant impacts associated with health and safety considerations, Ms. Houska stated "I don't care if it says no significant impacts, if there's any health impacts whatsoever and my children are associated with that, I don't want that." It is clear to the Court that Ms. Houska is concerned for the safety of her child and the children in the community. However, Ms. Houska is unable to show how she or anyone else will be actually harmed. Her mere speculation from her "reading up" that power lines can be harmful is insufficient. Ms. Houska has failed to show any actual harm, and therefore is not an aggrieved person. Ms. Houska is also concerned of the possible loss of use of public road used for recreational purposes. However, she has failed to show she has any right or interest different from the generalized interest of all residents whose children may use the road for recreational purposes. Ms. Houska is not a factually aggrieved person.

4. **Jim Huesman**

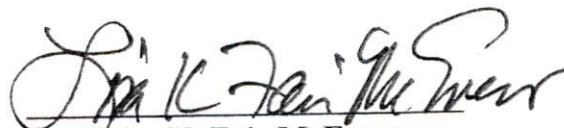
Mr. Husesman resides in the Bakke Addition on Main Avenue in Hickson. He testified at the hearing "it seems senseless to devise a plan or even make changes to a plan that puts it closer to a group of 200 homes over something that is not reality. 'Cause the reality is those homes exist and they're there right now and the diversion does not, its an idea." Mr. Huesman's testimony is vague in regard to how he is an aggrieved person; therefore, Mr. Huesman has also failed to show he is factually aggrieved by the PSC's order.

CONCLUSION

The only Appellant who can show he both participated, and is an aggrieved person, is Paul Reinke. In regard to NSP's motion to dismiss in regard to Paul Reinke, the motion is **DENIED**. In respect to all other Appellants, this Court has determined that they lack standing for failing to participate in the proceedings below, or, with the exception of Mr. Reinke, the remaining Appellants have failed to show they are factually aggrieved by the PSC's order, and therefore NSP's Motion to Dismiss all other Appellants is hereby **GRANTED**.

Dated this 21st day of December, 2012.

BY THE COURT:



**Hon. Lisa K. Fair McEvers
District Court Judge
East Central Judicial District**