

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0827**

In the Matter of Trade Secret Designations of 2019 Cogeneration and
Small Power Production Reports.

**Filed April 5, 2021
Appeal dismissed
Larkin, Judge**

Minnesota Public Utilities Commission
File No. E-999/PR-19-9

Jeffrey Hammons (pro hac vice), Environmental Law and Policy Center, Washington, D.C.; and

Scott R. Strand, Environmental Law and Policy Center, Minneapolis, Minnesota (for relators Environmental Law and Policy Center and Institute for Local Self Reliance)

Keith Ellison, Attorney General, Jeffrey K. Boman, Assistant Attorney General, St. Paul, Minnesota; and

Ryan P. Barlow, St. Paul, Minnesota (for respondent Minnesota Public Utilities Commission)

James R. Denniston, Xcel Energy, Minneapolis, Minnesota (for respondent Xcel Energy Services, Inc.)

Cary R. Stephenson, Otter Tail Power Company, Fergus Falls, Minnesota (for respondent Otter Tail Power Company)

David R. Moeller, Minnesota Power, Duluth, Minnesota (for respondent Minnesota Power)

Elizabeth M. Brama, Kodi Jean Verhalen, Taft Stettinius & Hollister LLP, Minneapolis, Minnesota (for respondents Xcel Energy Services, Inc., Minnesota Power, and Otter Tail Power Company)

David Shaffer, St. Paul, Minnesota (for amici curiae Solar Energy Industries Association and Minnesota Solar Energy Industries Association)

Considered and decided by Larkin, Presiding Judge; Cochran, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

In this certiorari appeal, relators Environmental Law and Policy Center and Institute for Local Self Reliance seek to challenge an order of respondent Minnesota Public Utilities Commission (the commission) accepting trade-secret designations made by respondents Xcel Energy Services Inc., Minnesota Power, and Otter Tail Power Company (the utilities) in annual filings with the commission. The utilities assert that relators do not have standing to challenge the commission's order. We agree and, accordingly, dismiss the appeal.

FACTS

In January 2019, the utilities submitted to the commission their annual cogeneration and small power production tariffs and reports (the annual filings). The annual filings are required by the commission's rules, Minn. R. 7835.0100-.9920 (2019), which implement the requirements of section 210 of title II of the federal Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (2018); PURPA's implementing regulations, 18 C.F.R. §§ 292.101-.602 (2019); and Minn. Stat. § 216B.164 (2020). The utilities designated portions of the filings as trade secret pursuant to the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. §§ 13.01-.90 (2020). Relators filed comments

on the annual filings, objecting to the trade-secret designations as contrary to the federal regulations and the commission's rules.

The commission noticed two successive public-comment periods and discussed the trade-secret designations at meetings in August and December 2019. Relators, the utilities, and the Minnesota Department of Commerce Division of Energy Resources submitted comments and appeared at the commission's meetings. The commission also received a comment letter from Ridge Energy LLC, a South Dakota small-power developer, but Ridge Energy did not appear at the meetings.

In February 2020, the commission issued an order accepting the trade-secret designations. Relators filed a petition for reconsideration, which the commission denied in May 2020. Relators then timely filed a petition for a writ of certiorari seeking this court's review of the commission's order.

DECISION

In accepting the utilities' trade-secret designations, the commission interpreted and applied three statutory schemes: PURPA and its implementing regulations; Minn. Stat. § 216B.164 and the commission's rules; and the MGDPA. We begin with an overview of these schemes, which will inform our analysis of the threshold issue of whether relators have standing to challenge the commission's order. *See State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (analyzing standing in context of claims asserted).

PURPA "seeks to encourage the development of cogeneration and small power production facilities." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 750, 102 S. Ct. 2126, 2132

(1982).¹ PURPA’s implementing regulations, adopted by the Federal Energy Regulatory Commission (FERC), require utilities to “offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities.” *Id.* at 751, 102 S. Ct. at 2133. Generally speaking, a utility must offer to purchase electricity from a “qualifying facility”² at a rate based on the utility’s “avoided costs,” which are defined as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source,” 18 C.F.R. § 292.101(b)(6). *See* 18 C.F.R. §§ 292.101(b)(6), .303(a), .304.

The federal regulations further require that, “[t]o make available data from which avoided costs may be derived,” regulated electric utilities shall provide to state regulatory authorities—in Minnesota, the commission—every other year and “maintain for public inspection” certain data related to avoided costs. 18 C.F.R. § 292.302(b); *see also id.* (d) (allowing state to require provision of different data sufficient to determine avoided costs with notice to FERC). While FERC’s regulations set forth basic requirements, “[t]he implementation of [the] rules is reserved to the [s]tate regulatory authorities.” 45 Fed. Reg. 12,214, 12,216 (Feb. 25, 1980).

¹ “A ‘cogeneration facility’ is one that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. § 796(18)(A). A ‘small power production facility’ is one that has a production capacity of no more than 80 megawatts and uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce electric power. § 796(17)(A).” *F.E.R.C. v. Mississippi*, 456 U.S. at 750 n.11, 102 S. Ct. at 2132 n.11.

² A qualifying facility is one that meets certain requirements under FERC’s regulations and either self-certifies or obtains certification from FERC. *See* 18 C.F.R. §§ 292.201-.211.

Minnesota implements PURPA through Minn. Stat. § 216B.164 and the commission's rules, Minn. R. 7835.0100-.9920. Minn. Stat. § 216B.164, subd. 1, provides that the statute "shall at all times be construed in accordance with its intent to give the maximum possible encouragement to cogeneration and small power production consistent with protection of the ratepayers and the public." The commission's rules require that certain utilities submit to the commission for approval on an annual basis a cogeneration and small power production tariff. Minn. R. 7835.0300; *see also* Minn. R. 7835.0100 (specifying utilities subject to requirement), .0500-.1000 (specifying information to be included in tariff). Like the federal regulations, the state rules include a public-inspection requirement. *See* Minn. R. 7835.1200.

In addition to being governed by the statutes and rules on cogeneration and small power generation, the commission, like all state agencies, is governed by the MGDPA. *See* Minn. Stat. §§ 13.01, subd. 3, .02, subds. 7, 7a. The MGDPA "regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities." *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 788 (Minn. 2011) (quoting Minn. Stat. § 13.01, subd. 3). "Trade secret information"³ is classified as

³ "'Trade secret information' means government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." Minn. Stat. § 13.37, subd. 1(b). The commission determined that the utilities properly designated certain portions of the annual filings as trade-secret information as that term is used in the MGDPA, and relators have not challenged that determination on appeal.

nonpublic data under the MGDPA. Minn. Stat. § 13.37, subd. 2. As nonpublic data, trade secret information may not be disclosed by a government entity to a person other than the subject of the data. See Minn. Stat. §§ 13.02, subd. 9 (defining nonpublic data), .03, subd. 3(f) (governing responses to requests for nonpublic data), .08-.09 (providing civil remedies and criminal penalties for violations of the MGDPA).

Relators challenge the commission's interpretation and application of the three statutory schemes as allowing for trade-secret designations in the annual filings, arguing that the MGDPA does not apply and that PURPA and Minn. R. 7835.1200 both require the annual filings to be available for public inspection in their entirety. We may reach these substantive assertions, however, only if we determine that relators have standing to pursue judicial review of the commission's order. *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011) ("Standing is a jurisdictional doctrine, and the lack of standing bars consideration of the claim by the court.").⁴ The burden of demonstrating standing is on relators. See, e.g., *id.* at 512-13 (stating that plaintiff must demonstrate injury-in-fact to support standing); see also *United States v. Hays*, 515 U.S. 737, 743, 115 S. Ct. 2431, 2435 (1995) ("[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor

⁴ Relators suggest that the utilities' standing argument is precluded because the utilities did not raise it before the commission. But the issue of whether relators have standing to appeal is separate from whether they had the right to participate in agency proceedings. *In re Complaint Against Sandy Pappas Senate Comm.*, 488 N.W.2d 795, 798 (Minn. 1992). Moreover, "standing is a jurisdictional prerequisite" that may be raised at any time by a party or by the court. *Minn. Sands, LLC v. County of Winona*, 940 N.W.2d 183, 192 n.9 (Minn. 2020), *cert. denied*, No. 20-0441, 2021 WL 78118 (U.S. Jan. 11, 2021).

clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.” (quotations and citation omitted)).

“Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court.” *Philip Morris Inc.*, 551 N.W.2d at 493. “The purpose of the standing doctrine is ‘to guarantee that there is a sufficient case or controversy between the parties so that the issue is properly and competently presented to the court.’” *Minneapolis Fed’n of Teachers, AFL-CIO, Local 59 v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 109 (Minn. App. 1994) (quoting *Twin Ports Convalescent, Inc. v. Minn. State Bd. of Health*, 257 N.W.2d 343, 346 (Minn. 1977)), review denied (Minn. Mar. 31, 1994).

Standing may be acquired either because a party suffered an injury-in-fact or through a statutory grant of standing. *Philip Morris Inc.*, 551 N.W.2d at 493. Relators appeal pursuant to Minn. Stat. § 216B.52, subd. 1 (2020), which provides: “Any party to a proceeding before the commission or any other person, aggrieved by a decision and order and directly affected by it, may appeal from the decision and order of the commission in accordance with chapter 14.” Thus, in order to establish standing, relators must demonstrate that they are aggrieved and directly affected by the commission’s order.

“[A]n ‘aggrieved party’ . . . is one who is injuriously or adversely affected by the judgment or decree when it operates on his rights of property or bears directly upon his personal interest.” *In re Getsug*, 186 N.W.2d 686, 689 (Minn. 1971). “The word ‘aggrieved’ refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation.” *Id.* The considerations for

determining whether a party is aggrieved are “similar to the considerations of the ‘injury-in-fact’ test for standing” in its judicial manifestation. *Minn. Educ. Ass’n v. Indep. Sch. Dist. No. 404*, 287 N.W.2d 666, 669 (Minn. 1980); *see also D.T.R.*, 796 N.W.2d at 513 (“The appellant’s status as an aggrieved party depends on whether there is injury to a legally protected right.” (quotation omitted)).

Participation in agency proceedings alone is not sufficient to confer standing, nor can a “mere ‘interest’ in the problem, regardless that the interest is longstanding . . . confer standing on an individual or organization.” *Sandy Pappas Senate Comm.*, 488 N.W.2d at 798. The Minnesota Supreme Court has stated that, in order to pursue a certiorari appeal,

a person must assert more than dissatisfaction with an agency’s interpretation of statutes: the person must articulate with a degree of clarity some legally cognizable interest of his which has sustained injury in fact by the agency action—i.e., that he has in fact sustained injury to some interest which differs from injury to the interests of other citizens generally.

Id. at 797; *see also Stansell v. City of Northfield*, 618 N.W.2d 814, 818-19 (Minn. App. 2000) (holding that residents were not aggrieved parties with standing to challenge ordinances where they did “not allege that they [had] suffered any specific injuries” and instead “seem[ed] to be litigating a matter of public interest”), *review denied* (Minn. Jan. 26, 2001). “[M]erely possible or hypothetical injury is not enough to satisfy this standard.” *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn. 1996); *see also State v. Knutson*, 523 N.W.2d 909, 911 (Minn. App. 1994) (“A party must have more than an abstract concern and the injury must not be merely speculative.”), *review denied* (Minn. Jan. 13, 1995).

Following the lead of the United States Supreme Court, the Minnesota Supreme Court has recognized the doctrine of associational standing, “which recognizes that an organization may sue to redress injuries to itself or injuries to its members.” *Philip Morris Inc.*, 551 N.W.2d at 497-98. In this case, relators assert that they have standing based on their own injuries,⁵ a type of standing that this court and others have referred to as “organizational standing.” See *Rukavina v. Pawlenty*, 684 N.W.2d 525, 532 (Minn. App. 2004), review denied (Minn. Oct. 19, 2004); *All. for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 914-15 (Minn. App. 2003); see also, e.g., *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) (“An association or organization can establish an injury-in-fact through either of two theories, appropriately called ‘associational standing’ and ‘organizational standing.’”).⁶

In relation to organizational standing, Minnesota courts have “recognize[d] impediments to an organization’s activities and mission as an injury sufficient for standing.” *Rukavina*, 684 N.W.2d at 533; *All. for Metro. Stability*, 671 N.W.2d at 914. In addition, we have explained:

Where an organization attempts to claim an interest in a statute, there are two key questions to ask to determine if organizational standing is more likely: (1) if these

⁵ Relators do not assert that they have standing based on the interests of their members. Thus, we do not further address this basis for standing.

⁶ Although the Minnesota Supreme Court has not used the term “organizational standing,” it has clearly recognized that an organization may have standing based on its own interests, thereby treating what we have referred to as “organizational standing” as a subset of “associational standing.” See *Philip Morris Inc.*, 551 N.W.2d at 497-98 (defining associational standing to encompass standing based on interests of organization or its members and rejecting argument that associational standing applies only to organizations with members).

organizations were denied standing, would that mean that no potential plaintiff would have standing to challenge the regulation in question? and (2) for whose benefit was the regulation at issue enacted?

All. for Metro. Stability, 671 N.W.2d at 915 (citing *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 165 (Minn. 1974)).

In support of their argument that they have organizational standing, relators assert that they “are harmed by the lack of access to the contested avoided cost information because it impacts their ability to further their organizations’ missions.” Based on our careful review of the record and the parties’ arguments, we conclude that relators lack standing to challenge the commission’s order because (A) they have not demonstrated that they are aggrieved and directly affected by the commission’s order; and (B) there are other potential challengers to the trade-secret designations who have direct interests and for whose benefit the relevant statutes and regulations were adopted.

A. Relators have not demonstrated that they are aggrieved and directly affected by the commission’s order.

Neither this court nor the Minnesota Supreme Court has explained what type of impediments are sufficient to confer standing on an organization in its own right. But the decisions of federal courts provide a helpful framework for our analysis. See *Philip Morris Inc.*, 551 N.W.2d at 497-98 (stating that associational standing is derived from United States Supreme Court decisions); *Snyder's Drug*, 221 N.W.2d at 165 (relying on decisions by United States Supreme Court and federal courts of appeals to guide standing analysis); *All. for Metro. Stability*, 671 N.W.2d at 914 (relying on decisions by United States Supreme Court to guide standing analysis).

We begin with the proposition that “[i]n determining whether [an organization] has standing . . . , we conduct the same inquiry as in the case of an individual.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378, 102 S. Ct. 1114, 1124 (1982). And, just as an individual may not demonstrate standing through mere interest in a problem, *Sandy Pappas Senate Comm.*, 488 N.W.2d at 798, “an injury to organizational purpose, without more, does not provide a basis for standing,” *S. Walk at Broadlands Homeowner’s Ass’n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 183 (4th Cir. 2013). See also *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S. Ct. 1361, 1368 (1972) (stating that “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the APA”). Organizations that “seek to do no more than vindicate their own value preferences through the judicial process” do not have standing. *Id.* at 740, 92 S. Ct. at 1369. Instead, the federal courts have recognized a distinction between allegations that the *activities* of an organization have been impeded and “those that merely allege that their *mission* has been compromised.” *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) (emphasis added). Organizational standing exists when an organization demonstrates that the challenged conduct has “perceptibly impaired” the organization’s ability to provide services with a “consequent drain on the organization’s resources” rather than “simply a setback to the organization’s abstract social interests.” *Havens Realty*, 455 U.S. at 379, 102 S. Ct. at 1124.

With this understanding of the nature of interests necessary to support organizational standing, we turn to the information that relators have provided to demonstrate standing. In their comments to the annual filings, relators identified themselves as public-interest organizations with interests in promoting small-power development:

ELPC [the Environmental Law and Policy Center] is a nonprofit public interest organization that works to achieve cleaner air and cleaner water, promote renewable energy and energy efficiency resources, and preserve natural resources in Minnesota and the Midwest. ELPC has an office in Minneapolis and has members throughout the state of Minnesota and the Midwest. ELPC and its members have an interest in promoting the development and availability of renewable energy through implementation of PURPA.

The Institute for Local Self-Reliance is a national nonprofit organization focused on public policy that supports energy customers, individually and collectively, being able to access the financial and economic benefits of distributed renewable energy. The Institute for Local Self-Reliance has an office in Minneapolis.

When questioned by the commission about their interest in access to the annual filings, counsel for relators stated: “We have an interest in seeing all sorts of different programs in the state being implemented in a way that promotes clean energy development.” And, in their brief to this court, relators assert that they “are harmed by the [commission’s] failure to ensure public access to avoided cost information because it discourages investment in renewable qualified facilities and harms their ability to pursue advocacy to further their organizational missions.”

The information and arguments offered by relators do not demonstrate injuries to their organizational interests sufficient to support standing. They do not explain how or why the commission’s order has “perceptibly impaired” their ability to provide services with a “consequent drain on [their] resources”; rather they seem to assert “simply a setback to the organization’s abstract social interests.” *Id.* Absent specific allegations⁷ of impediments to the *activities* of their organizations, this court is left to speculate as to the nature of relators’ injuries. Standing cannot be based on speculation. *See Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226, 231 (Minn. App. 1993) (affirming dismissal of union for lack of standing because asserted injury to members was speculative), *review denied* (Minn. Apr. 20, 1993).

At oral argument, relators asserted that they, and all other members of the public, necessarily have standing because both the federal regulations implementing PURPA and Minn. R. 7835.1200 include public-disclosure requirements that relators assert have been violated. We disagree. Notwithstanding the public-disclosure requirements, Minn. Stat. § 216B.52, subd. 1, limits the class of persons who may appeal orders of the commission

⁷ Appellate courts generally review issues of standing in the context of the procedural posture in which the issue was raised. *Compare Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 663 (Minn. 2014) (applying summary-judgment standard to standing issue), *with Forslund v. State*, 924 N.W.2d 25, 32 (Minn. App. 2019) (applying motion-to-dismiss standard to standing issue). Because relators have not made allegations sufficient to support standing, we need not determine what evidentiary standard applies to standing issues raised in certiorari appeals.

to those “aggrieved by a decision and order and directly affected by it.” As we explain above, relators have not demonstrated that they fall within this class.⁸

In determining that relators lack standing, we are cognizant that public-interest organizations have often been recognized as having standing to pursue judicial relief for environmental harms. *See, e.g., No Power Line, Inc. v. Minn. Envtl. Quality Council*, 250 N.W.2d 158, 160 (Minn. 1976) (holding that organizations had standing to challenge issuance of certificate for power line based on the interests of their members who owned land within the proposed corridor). But even public-interest organizations must demonstrate injuries to interests—either their own or those of their members—that are different from those held by the general public. *See Sandy Pappas Senate Comm.*, 488 N.W.2d at 798; *see also Havens Realty*, 455 U.S. at 379, 102 S. Ct. at 1124; *Sierra Club*, 405 U.S. at 734-35, 92 S. Ct. at 1366. Relators have not done so in this case.

⁸ The United States Supreme Court has recognized that in some cases informational injury supports the existence of standing. *See, e.g., Fed. Election Comm’n v. Akins*, 524 U.S. 11, 21, 118 S. Ct. 1777, 1784 (1998). Relators do not explicitly argue informational injury or rely on these cases. We note that, even in informational-injury cases, the Supreme Court has required a demonstration of injury-in-fact. *Id.* As the D.C. Circuit has explained: “In some instances, a plaintiff suffers the type of harm Congress sought to remedy when it simply seeks and is denied specific agency records,” but “[i]n others, a plaintiff may need to allege that nondisclosure has caused it to suffer the kind of harm from which Congress, in mandating disclosure, sought to protect individuals or organizations like it.” *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (quotation omitted). We are not persuaded that relators suffered the type of harm Congress and the Minnesota Legislature sought to remedy simply because the commission allowed trade-secret designations in the annual filings. The purpose of the public-disclosure requirements in the federal regulations and Minn. R. 7835.1200 is to encourage development of cogeneration and small-power projects. *F.E.R.C. v. Mississippi*, 456 U.S. at 750, 102 S. Ct. at 2132. Relators must therefore assert concrete harm related to this purpose. As we have explained, relators have not met their burden to do so.

B. There are other potential challengers to the trade-secret designations who have direct interests and for whose benefit the relevant statutes and regulations were adopted.

Our conclusion that relators have not demonstrated that they are aggrieved and directly affected by the commission's order likely is dispositive of the issue of whether they have standing. See Minn. Stat. § 216B.52, subd. 1. We nevertheless address two considerations that we have stated "determine if organizational standing is more likely." *All. for Metro. Stability*, 671 N.W.2d at 915. First, we consider whether denying relators standing would mean that no potential relator would have standing. *Id.* We answer this question in the negative because the trade-secret designations could be challenged by small-power developers who seek to become qualifying facilities under PURPA. We second consider for whose benefit the relevant statutes and regulations were adopted. *Id.* Again, here, our focus is directed to the small-power developers. Accordingly, we conclude that neither of the considerations that make organizational standing more likely is implicated in this case.

In sum, because relators have not demonstrated that they are aggrieved and directly affected by the commission's order, and because there are no considerations that make organizational standing more likely, we discharge the writ of certiorari and dismiss this appeal.

Appeal dismissed.