

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Wano Township, Willowbank
Township, Russell Township, Corwin
Township, Valley Township, Mike
Bartel, Patty Bartel, Richard Long,
Susan R. Long, Steven Nelson, Julia
Nelson, Phyllis P. Otterness, Patricia
A. Vick, Brandon Schweigert, Tausha
Schweigert, Shockman Farm
Partnership, LLLP, Debra Sue Wald,
Lucas Wald, Jill Wald, Tim Leppert,
Orr Farms, Steve M. Rupp, Sandra J.
Rupp, David A. Schweigert, Denette
M. Schweigert, Allen D. Swiontek,
Inna N. Swiontek, David Wald, Holly
Wald, Weston Wald, and Willowbank
Hutterian Brethren Association,

Case No. 08-2025-CV-02068

Appellants,

v.

North Dakota Public Service
Commission, Otter Tail Power
Company, and Montana-Dakota
Utilities Co.,

Appellees.

**MEMORANDUM IN SUPPORT OF MOTION TO STAY PUBLIC
SERVICE COMMISSION PROCEEDINGS UNDER N.D.C.C. CH. 49-22**

INTRODUCTION

Appellants respectfully request that the Court stay all proceedings before the North Dakota Public Service Commission (PSC) under N.D.C.C. ch. 49-22 relating to the proposed 345kV transmission line between Jamestown and Ellendale, pending resolution of Appellants' appeal challenging the PSC's prior grant of a Certificate of Public Convenience and Necessity (CPCN) under N.D.C.C. ch. 49-03.

Appellants' appeal presents a threshold statutory question: Did the PSC lack legal authority to issue a CPCN under N.D.C.C. ch. 49-03 for a high-voltage transmission line that is subject to the exclusive siting and permitting requirements of N.D.C.C. ch. 49-22? Appellants contend that the answer is yes. Once a project qualifies as an "electric transmission facility" under Chapter 49-22, the Commission must apply the integrated, front-end siting framework of that chapter. Nothing in the Century Code permits a public utility to bypass that framework by first obtaining a CPCN under Chapter 49-03 and then initiating route proceedings under Chapter 49-22.

Although the Utilities may argue that both a CPCN and a route permit are ultimately required, that is not the issue presented here. The legal question is whether the PSC may issue a standalone CPCN under Chapter

49-03 before initiating proceedings under Chapter 49-22. It may not. Chapter 49-22 governs the entire permitting process for high-voltage lines from the outset.

Allowing the PSC to move forward under Chapter 49-22 while the lawfulness of the initial CPCN remains under review would prejudice Appellants' rights, create jurisdictional confusion, and risk mooted the appeal by treating the disputed 49-03 approval as a settled matter.

BACKGROUND

On November 20, 2024, the PSC granted Otter Tail Power and Montana-Dakota Utilities Co. (the "Utilities") a CPCN under N.D.C.C. ch. 49-03 for the proposed high-voltage transmission line. Appellants challenged that action before the PSC and, on July 16, 2025, filed a timely appeal to the Burleigh County District Court pursuant to N.D.C.C. § 28-32-42.

That appeal argues that the PSC lacked jurisdiction to grant the CPCN because the proposed 345kV line meets the statutory definition of an "electric transmission facility" under N.D.C.C. § 49-22-03(7), and thus could only be authorized through the procedures set forth in Chapter 49-22. Those procedures include a comprehensive application process, environmental and routing analysis, landowner notice, and public hearings. *See* N.D.C.C. §§ 49-

22-07 through 49-22-09.

Despite this, Appellants have learned that Otter Tail Power intends to file a route permit application with the PSC under Chapter 49-22 on or about August 8, 2025, relying on the previously granted CPCN. Proceeding in this manner would allow the project to advance before this Court has an opportunity to determine whether the initial CPCN was lawfully issued. It would effectively treat the 49-03 approval as final and binding, prejudicing Appellants and undermining the exclusive framework that the Legislature enacted for high-voltage transmission projects.

ARGUMENT

I. Chapter 49-22 Provides the Exclusive Framework for Siting and Approval of High-Voltage Transmission Lines

The 345kV Jamestown–Ellendale project falls squarely within the scope of Chapter 49-22. Under N.D.C.C. § 49-22-03(7), an “electric transmission facility” is defined as:

“an electric transmission line and associated facilities with a design in excess of one hundred fifteen kilovolts.”

Under N.D.C.C. § 49-22-07(1):

“A utility may not begin construction of an electric energy conversion facility or an electric transmission facility in the state without first having obtained a certificate of site compatibility or a route permit from the commission pursuant to this chapter.”

This is not a discretionary or optional process. Chapter 49-22 requires that transmission facilities meeting the statutory voltage threshold obtain a route permit before any construction begins. It is a self-contained, mandatory framework that includes environmental evaluation, landowner notice, public hearings, and detailed findings under § 49-22-09.

Although Chapter 49-03 also requires a CPCN for transmission lines interconnecting with existing utility infrastructure (*see* § 49-03-01(2)), that chapter applies only where a project is not otherwise governed by Chapter 49-22. Once a project meets the definition of a “transmission facility” under § 49-22-03(7), the permitting process must proceed under Chapter 49-22 exclusively.

Utilities may argue that the statutes are silent on the sequence of approvals or that there is no express prohibition against seeking a CPCN first. But the absence of an express bar does not imply legislative approval. To the contrary, the statutory structure and legislative policy—as set forth in § 49-22-02—make clear that Chapter 49-22 is intended to govern both the initiation and conclusion of the siting process. It is not a supplemental routing procedure to be applied after a CPCN has been granted under a different statute.

Treating the process as bifurcated undermines the Legislature’s design. The route-permitting requirements in Chapter 49-22 are not merely procedural—they are substantive protections for landowners, local governments, and the public. Bypassing them at the front end by securing a CPCN first improperly prejudices the outcome and renders the Chapter 49-22 process a formality. The statutory right to object during route siting is hollow if the project’s “necessity” has already been determined and relied upon. The statutory analysis under Chapter 49-22 includes consideration of the need for the proposed facility in light of alternative sites, technologies, and system configurations. *See* N.D.C.C. § 49-22-09(1)(a), (b), (e), (f), and (h). That evaluation is compromised if the project’s necessity has already been resolved under Chapter 49-03 before route permitting begins.

Appellants’ appeal therefore presents a valid threshold legal question: whether the PSC acted ultra vires in granting a CPCN outside the Chapter 49-22 process. That issue should be resolved by this Court before the PSC proceeds under 49-22 based on a potentially unlawful initial certificate.

II. A Stay Is Necessary to Prevent Irreparable Harm and Protect the Court’s Jurisdiction

If the PSC proceeds with the Utilities’ 49-22 route permit application before this Court determines whether the CPCN was lawfully issued, the

entire process will rest on a contested foundation. Appellants and other affected landowners will be forced to engage in a route siting process that presumes the lawfulness of a certificate now under judicial review. This would frustrate meaningful judicial review, risk the creation of vested interests or irreversible regulatory action, and invite arguments that any procedural defect was later cured.

The Utilities may argue that no harm has occurred because the 49-22 process has not yet begun. That argument ignores the reality that the PSC has already issued a CPCN under a disputed statute, and the Utilities have publicly stated their intent to file under Chapter 49-22 imminently. Each step taken under 49-22 builds administrative momentum and public perception that the project is inevitable. Affected parties are placed in a defensive posture, facing a regulatory process they contend is void from inception.

Moreover, if the route permit process proceeds based on a legally defective CPCN, landowners may be forced to incur legal and procedural expenses, respond to environmental reports and condemnation threats, and navigate regulatory inertia that becomes difficult to reverse. These burdens could arise even if the CPCN is later vacated. Proceeding in this manner

risks not only inefficiency but substantial hardship to parties who would be required to participate in a process they allege is void from the outset.

North Dakota courts possess equitable authority to stay administrative proceedings to preserve the integrity of judicial review. See *Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau*, 676 N.W.2d 752, 761 (N.D. 2004); *Vorachek v. Citizens State Bank*, 461 N.W.2d 580, 585 (N.D. 1990). This appeal presents exactly the kind of circumstance that warrants interim relief: a statutory challenge that goes to the legality of the PSC’s threshold action and that, if successful, would nullify any downstream permitting under Chapter 49-22.

III. The Balance of Harms and Public Interest Favor a Stay

The equities weigh heavily in favor of a stay. Appellants and other landowners face regulatory uncertainty, potential condemnation actions, and the burden of responding to a PSC process that may later be declared unlawful. The Utilities, by contrast, will suffer no meaningful harm from a short delay while this appeal is resolved—particularly because they chose to proceed under Chapter 49-03 rather than initiate the correct Chapter 49-22 process from the outset.

Their approach appears designed to secure a simplified “public

convenience and necessity” determination under Chapter 49-03 and then carry that finding forward into a more demanding Chapter 49-22 route process. But the statutes do not authorize such a bifurcated or sequential procedure. Once a line qualifies under § 49-22-03(7), the entire siting and approval process must begin and end under Chapter 49-22.

The public interest favors judicial clarification of this statutory framework before the PSC proceeds under Chapter 49-22. Landowners, local governments, and the public are entitled to participate in a lawfully initiated siting process—not one built on a disputed and potentially unlawful prior approval. A stay will ensure that the PSC does not prematurely act on a legally defective foundation and will protect the integrity of both this Court’s jurisdiction and the comprehensive regulatory scheme enacted by the Legislature.

CONCLUSION

A stay would not prevent the Utilities from eventually seeking a route permit. It would only postpone the process until this Court determines whether the CPCN was lawfully issued. This limited interim relief ensures that the PSC does not act on a foundation that may later be ruled unlawful. It also protects the jurisdiction of this Court and preserves the statutory

integrity of the permitting framework enacted by the Legislature. A brief delay to allow for judicial review is consistent with orderly governance and fair process.

For these reasons, Appellants respectfully request that the Court:

1. Stay any proceedings by the Public Service Commission under N.D.C.C. ch. 49-22 relating to the proposed 345kV transmission line between Jamestown and Ellendale;
2. Alternatively, issue an order temporarily enjoining the PSC from acting on any 49-22 siting application relating to the project until the Court resolves Appellants' pending appeal; and
3. Grant such other and further relief as the Court deems just and appropriate.

Dated: August 6, 2025

Respectfully submitted,

By: /s/ Douglas J. Nill

Douglas J. Nill (ND # P00392)

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