STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF BURLEIGH SOUTH CENTRAL JUDICIAL DISTRICT

Wano Township, et al, Appellants, vs. North Dakota Public Service Commission, Otter Tail Power Company, and Montana-Dakota Utilities Co., Appellees.	Case No. 08-2025-CV-02068 **NORTH DAKOTA PUBLIC SERVICE COMMISSION'S RESPONSE TO APPELLANTS' MOTION TO STAY**

INTRODUCTION

[¶1] The North Dakota Public Service Commission ("Commission"), under the authority of N.D.C.C. Ch. 49-03, issued its Order on a joint application of Otter Tail Power Company and Montana-Dakota Utilities Co. for a Certificate of Public Convenience and Necessity ("CPCN") (PSC Dkt. No 23: https://www.psc.nd.gov/database/documents/24-0091/023-010.pdf). A Notice of Appeal and Specifications of Error, dated July 15, 2025, was filed with this Court. Dkt. No. 1. The parties listed in the Notice of Appeal were not parties to the administrative proceeding and seek to appeal from the Commission's denial of a petition to intervene and denial of a petition to rescind the Commission's CPCN Order. The Commission responds in opposition to Appellants' motion to stay separate administrative proceedings the Commission is authorized to consider pursuant to N.D.C.C. Ch. 49-22.

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APPEAL - North Dakota Public Service Commission's Response to Appellants' Motion to Stay
Public Service Commission
Zachary Pelham, SAAG

BACKGROUND

[¶2] Our state's constitution created the Public Service Commission. N.D. Const., Art. V, Sec. 2. Through this, the Legislative Assembly has enacted laws providing for the jurisdiction of the Commission. N.D.C.C. Title 49. The Commission has "general jurisdiction" over "[e]lectric utilities engaged in the generation and distribution of light, heat, or power." N.D.C.C. § 49-02-01(4). The Commission "shall have power to: 1. Investigate all methods and practices of public utilities. . . ." N.D.C.C. § 49-02-02(1). The Legislative Assembly has enacted laws detailing the procedure for an electric transmission provider to construct or operate an electric transmission line:

> An electric transmission provider may not begin construction or operation of an electric transmission line interconnecting with an existing electric transmission line owner or operated by an electric public utility without first obtaining a certificate that public convenience and necessity require or will require the construction or operation.

N.D.C.C. § 49-03-01.

[¶3] In the underlying administrative proceeding, MDU and Otter Tail filed a joint application for a CPCN (Commission Case No. PU-24-91). This application was made pursuant to N.D.C.C. Ch. 49-03. The Commission reviewed the application, issued a notice of opportunity for hearing on May 27, 2024 (https://www.psc.nd.gov/database/documents/24-0091/004-010.pdf), published that notice in the Bismarck Tribune, Dickinson Press, Williston Herald, Jamestown Sun, Valley City Times-Record, The Daily News (Wahpeton), Minot Daily News, The Fargo Forum, Devils Lake Journal, Grand Forks Herald, Dickey County Leader, Oakes Times, Kulm Messenger, and LaMoure Chronicle (https://www.psc.nd.gov/database/documents/24-0091/005-010.pdf). The Commission issued the CPCN on November 20, 2024. Six months later, on May 21, 2025, Appellants filed a "Petition to Rescind the November 20, 2024 Order Approving a 345kV Transmission Line and to Reopen the Proceedings for Failure to Ensure Due Process, Complete

the Record, and Protect the Public Interest." (https://www.psc.nd.gov/database/documents/24-0091/028-020.pdf). That motion was denied by the Commission on June 18, 2025. (https://www.psc.nd.gov/database/documents/24-0091/039-010.pdf). A notice of appeal was served on July 15, 2025.

[¶4] Appellants now seek to stay a separate administrative proceeding that MDU and Otter Tail have since commenced before the Commission (Case No. PU-25-236: https://apps.psc.nd.gov/cases/pscasedetail?getId=25&getId2=236#). MDU and Otter Tail have applied to the Commission for a Certificate of Corridor Compatibility and Route Permit, pursuant to N.D.C.C. Ch. 49-22. The Commission will consider this joint application separately from the already issued Order on the CPCN. The Court should deny Appellants' motion to stay.

ARGUMENT

[¶5] The pending motion to stay should be denied for any of the following reasons:

1) The Court cannot proceed without a record on appeal;
2) The Appellants lack standing to appeal anything other than the denial of their motion to intervene;
3) The Court lacks jurisdiction to order the Commission to stay a separate administrative proceeding; and
4) As a matter of law, the Commission can grant a CPCN separately from a Certificate of Corridor Compatibility and Route Permit.

1. The Court cannot proceed without a record on appeal.

[¶6] The record on appeal has not yet been prepared by the Commission. Why? The Commission is required to prepare the record on appeal within thirty days of the appeal being taken "and *after* payment by the appellant of the estimated cost of preparation and filing of the entire record of the proceedings before the" Commission. N.D.C.C. § 28-32-44 (emphasis added). The

Commission filed the Notice to Appellant of Estimated Costs on August 13, 2025. Dkt. No. 29. "The transcript of the hearing prepared for the person presiding at the hearing, including all testimony taken, and any written statements, exhibits, reports, memoranda, documents, or other information or evidence considered before final dispositions of the proceedings" is part of this administrative record. N.D.C.C. § 28-32-44(4)(h). The Commission "may contract with any person or another agency to prepare and file the record of any proceeding before the agency." N.D.C.C. § 28-32-44(2). To date, payment of the estimated costs of preparing the "entire record of the proceedings" has not been made. This is why the Court does not have the administrative record.

[¶7] The Commission is one of the few, if not only, state administrative agencies that maintains a publicly accessible electronic docket. But that docket is not the record. The Commission has not certified the record to this appellate court because it first requires payment from the appealing parties to prepare transcripts of the administrative proceedings. N.D.C.C. § 28-32-44

[¶8] Because the record has not been certified to this Court, the motion is not ripe for review. For an administrative appeal, district courts are appellate courts. They do not establish a record: the record *is* the record. And if the record has not yet been filed by the administrative agency, the district court cannot proceed. Judge Reich recently held as much in a separate administrative appeal in this district. *See Burleigh County v. N.D. PSC*, South Central Judicial District Court, Case No. 08-2024-CV-3614, Dkt. No. 49, at ¶ 4 (holding district courts have appellate jurisdiction as provided by law only and that appeals of administrative actions "are not matters of original jurisdiction for the district courts. . . " and ordering appellants to pay the cost to prepare the record or face dismissal of the appeal). The Court should deny the motion to stay because the record has not yet been certified to the Court.

2. The Appellants lack standing to appeal anything other than the denial of their motion to intervene.

[¶9] If the Court decides to proceed with the pending motion without the certified record, the motion should be denied because the Appellants lack standing. The Commission denied an application to intervene, *after* issuing its Order for the CPCN. While Appellants' choice not to engage in the CPCN process will be addressed in future briefings, for purposes of this motion, the Appellants only have standing under N.D.C.C. Ch. 28-32 to appeal from the Commission's Order. N.D.C.C. § 28-32-42(1) (explaining that a "party to any proceeding heard by an administrative agency. . . may appeal from the order…"). The pending motion involves an entirely separate administrative proceeding before the Commission and does not relate to the pending appeal involving the Commission's unanimous decision to deny intervention and rescission of the Order it issued for the CPCN.

[¶10] The Appellants have standing to appeal from the Commission's denial of their intervention motion. N.D.C.C. § 28-32-42. While this issue may be more appropriate to fully brief on the merits of the appeal, the Appellants were not parties to the CPCN case. They chose not to intervene in the CPCN case while the Commission considered the joint application. The Appellants only moved to intervene *after* the Commission issued its final order on the PCN case. The CPCN order is dated November 20, 2024; the May 21, 2025, motion to intervene was filed with the Commission *six months* after the CPCN Order was issued. The Commission's administrative rules require any intervention petition to be "filed at least ten days prior to the hearing, but not after except for good cause shown." N.D.A.C. § 69-02-02-05(2). In any event, the Commission denied the motion to intervene on June 18, 2025 (https://www.psc.nd.gov/database/documents/24-0091/039-010.pdf). Because the Appellants are not parties to the administrative action, and only have standing to

appeal the denial of their petition to intervene as parties to the administrative action, they do not have standing to do anything more than this. The motion should be denied because the movants lack standing.

3. The Court lacks jurisdiction to order the Commission to stay a separate administrative proceeding.

[¶11] When the motion for stay was filed, MDU and Otter Tail had not yet filed an application for a certificate of site compatibility and route permit under N.D.C.C. Ch. 49-22. Since then, they have. *See* PSC PU-25-236, https://apps.psc.nd.gov/cases/pscasedetail?getId=25&getId2=236# . That newly filed administrative case is separate from the CPCN administrative case that Appellants appeal from, PU-24-91. Our Legislative Assembly has declared that no injunction can be granted by a court "[t]o prevent the execution of a public statute by officers of the law for the public benefit." N.D.C.C. § 32-05-05(4). The Commission is a constitutionally created agency of the executive branch that is authorized by law to consider siting applications pursuant to N.D.C.C. Ch. 49-22.

[¶12] Respectfully, this Court, in an administrative appeal of a *separate* administrative proceeding, does not have the jurisdiction to order the Commission to not do what it is constitutionally and statutorily authorized to do by "staying" a separate administrative proceeding. Indeed, that other administrative proceeding does not directly implicate any of the issues in the Notice of Appeal. Certainly, participation in the siting application process pursuant to North Dakota statutory and administrative law is permitted. Perhaps the named Appellants will decide to timely intervene and participate in the administrative process this time. But this Court cannot take the proverbial "ball" away from the Commission by staying a separate administrative proceeding premised on a different statutory foundation (N.D.C.C. Ch. 49-22). Because the pending motion asks the Court to exercise jurisdiction beyond its authority to determine the

appealed issues in Commission case PU-24-91, the Court should deny the motion. N.D. Const. art. VI, § 8 (reminding district courts they have "such appellate jurisdiction as may be provided by law or by rule of the supreme court"); *State by & through Workforce Safety & Ins. v. Jones*, 2025 ND 74, ¶4 (quotation omitted) (explaining administrative appeals to district courts "are statutory in nature and are not matters of original jurisdiction for the district courts but rather involve exercise of appellate jurisdiction of the district courts conferred by statute"). Here, the Commission's decision on a CPCN application made pursuant to N.D.C.C. Ch. 49-03 has been appealed from, but the Commission's pending administrative case (PU-25-236) that was brought by MDU and Otter Tail pursuant to N.D.C.C. Ch. 49-22 has not been considered by the Commission and is not subject to any appeal. Indeed, it can only be appealed from the district court upon completion of that separate matter and a final appealable order being issued by the Commission. N.D.C.C. § 28-32-42.

4. As a matter of law, the Commission can grant a CPCN separately from a Certificate of Corridor Compatibility and Route Permit.

[¶13] The motion should be denied on the merits, if the Court gets this far. Appellants argue that they would have to duplicate efforts to resist the siting application (PU-25-236) *if* the appeal of the CPCN order (PU-24-91) is reversed. While there may be duplication of efforts on some levels, this ignores the procedural and substantive laws of our state that are in place. The Commission determined the CPCN case on the merits, the Appellants (who chose not to attempt to appear in that administrative proceeding until six months after the Order was issued) seek to have the order reversed and have the Commission effectively re-hear that which has been heard on the CPCN application. And the Appellants seek this because they believe if they prevail on the current appeal, then the CPCN issue will have to be re-heard by the Commission.

[¶14] This ignores logic and reality—and the law. Let us say for argument sake only that Appellants prevailed on the merits of the present appeal and the North Dakota Supreme Court held that Appellants should have been permitted to intervene after being more than six months late and that reconsideration (which was filed just about six months late) should have been granted by the Commission: this would not mean a completely *new* proceeding on the CPCN case would occur. It simply would mean that the Commission would have to reconsider its decision and allow the Appellants to formally place their arguments to the Commission. The hearing on the CPCN administrative proceeding was held. Due process has been afforded—notice was provided pursuant to law. And statutory requirements for notice and a public hearing were satisfied as a matter of fact and law. That Appellants missed the boat for the CPCN administrative case does not merit staying a separate siting application (PU-25-236)—this is especially so because the listed Appellants can all freely choose to participate in that separate siting case.

[¶15] Neither is there any requirement in statute or administrative rule that requires the Commission to consider an application for a corridor and site compatibility permit at the same time as applying for a CPCN. While it is not uncommon for applications for a siting permit and CPCN to be filed with the Commission contemporaneously, there is no requirement in statute to do so. *Compare* N.D.C.C. Ch. 49-03 *with* Ch. 49-22. For practical considerations, it is entirely conceivable that *before* a public utility seeks a siting permit (which is an intensive process) that it would want to ensure that the Commission would grant a CPCN. Here, this is quite evidence: the Commission only granted a CPCN on a split 2-1 vote. That utilities choose to proceed in this order is not something statutory or administrative law dictates. *Compare* N.D.C.C. Ch. 49-03 *with* Ch. 49-22. And, with the utmost respect to the judiciary: it is certainly not for the judiciary to legislate what has not been legislated. The motion to stay should be denied.

CONCLUSION

[¶16] For any one, or all, of arguments the Commission presented in opposition to the pending motion, the Court should deny the Appellants Motion to Stay Public Service Commission Proceedings Under N.D.C.C. Ch. 49-22. Afterall, this Court is considering only that which has been appealed to it from Commission Case No. PU-24-91.

Respectfully submitted this 20th day of August, 2025.

/s/ Zachary E. Pelham
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