STATE OF NORTH DAKOTA IN 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, Appellants, v. North Dakota Public Service Commission, Otter Tail Power Company, and Montana-Dakota Utilities Co., Appellees.	Civil No. 08-2025-CV-02068

RESPONSE BRIEF OF OTTER TAIL AND MONTANA-DAKOTA OPPOSING MOTION TO STAY PUBLIC SERVICE COMMISSION PROCEEDING

[¶1.] Appellants' motion to stay is a spurious attempt to delay administrative proceedings that are not before the Court. This appeal solely concerns the Public Service Commission's denial of Appellants' untimely request to intervene and for reconsideration of a certificate of public convenience and necessity ("CPCN"). By contrast, the motion for stay requests that the court delay a separate siting case for the project, which did not yet exist at the time the Commission issued the order being appealed, or even at the time this motion was filed. As such, the siting

proceeding is not properly before the Court. Appellants cite no authority authorizing a district court to stay anything other than the administrative order being appealed. Separately, Appellants lack standing to appeal the merits of the CPCN, because they failed to participate in the CPCN proceeding. Yet the motion for stay goes well beyond the merits of the Commission's denial of intervention. The Court should deny the motion without reaching its merits, both because the Court lacks jurisdiction to stay proceedings that are not part of the order being appealed and because Appellants lack standing to appeal anything beyond their failed intervention request.

[¶2.] Finally, even if the court did have jurisdiction to consider the requested stay, the motion falls far short of establishing the factors necessary to justify a stay. Most notably, Appellants lack any chance of success on the merits of their appeal, because they wrongly conflate the CPCN inquiry with the independent siting analysis. A CPCN proceeding under N.D.C.C. ch. 49-03 determines whether or not a project is needed, whereas a siting proceeding under N.D.C.C. ch. 49-22 assesses the proposed location of a project and its location-specific impacts. Contrary to Appellants' suggestion, there is no requirement that the Commission consider both public need and siting factors in a single proceeding, nor is there any provision in the North Dakota Century Code suggesting that Chapter 49-03 is obviated by Chapter 49-22. Furthermore, Appellants will suffer no harm by the Commission undertaking the very siting process that Appellants complain the Commission should have performed previously. By contrast, the requested stay would likely delay the project at issue, thereby inflicting significant harm upon Appellees and the public at large. The Court should deny Appellants' motion.

BACKGROUND

[¶3.] On February 29, 2024, Otter Tail Power Company ("Otter Tail") and Montana-Dakota Utilities Co. ("Montana-Dakota") filed a Joint Application for a Certificate of Public Convenience

and Necessity under N.D.C.C. ch. 49-03 for a 345-kV transmission line from Jamestown, North Dakota to Ellendale, North Dakota (the "Project"). *Otter Tail Power Co. / Montana-Dakota Utilities Co. 345kV Transmission Line-Jamestown to Ellendale Pub. Convenience & Necessity*, N.D. PSC. Case No. PU-24-091 (hereinafter "CPCN Case"), at Dkt. No. 1. The North Dakota Public Service Commission (the "Commission") published a Notice of Opportunity for Hearing on March 27, 2024. *Id.* at Dkt. No. 4. The Commission did not receive any hearing requests, but an informal hearing was held on the CPCN application on July 8, 2024. *Id.* at Dkt. Nos. 14, 17. Appellants did not attend or otherwise participate in the hearing. The Commission further held two "work sessions" to discuss the merits of the CPCN Application. *Id.*, Dkt. Nos. 16, 21. On November 20, 2024, the Commission issued the Order approving the CPCN application (the "CPCN Order"). *Id.* at Dkt. No. 23. No party appealed the CPCN Order.

[¶4.] Six months later, on May 21, 2025, Appellants filed a petition to intervene, rescind, and reopen the CPCN proceeding. *Id.* at Dkt. No. 28. On May 27, 2025, Appellants filed an amended petition to intervene, rescind, and reopen (the "Petition"). *Id.* at Dkt. No. 29. The Petition requested that the Commission reopen the record so that Appellants could issue discovery and introduce new evidence. *Id.* at Dkt Nos. 29 pp. 21, 48. Otter Tail and Montana-Dakota opposed the Petition. *Id.* at Dkt. No. 31.

[¶5.] On June 18, 2025, the Commission issued an order denying the Petition (the "Order on Petition"). *Id.* at Dkt. No. 39. The Commission found the Petition to be untimely. *Id.* Commission regulations provide a deadline of ten days prior to hearing for petitions to intervene, except for good cause shown. N.D. Admin. Code § 69-02-02-05(2). Petitions to reopen may be filed "[a]t any time after the conclusion of the hearing, but before the final order is issued" and petitions for reconsideration "must be filed within fifteen days after notice of the decision has been given."

N.D. Admin. Code §§ 69-02-06-01; 69-02-06-02(1). The Commission also noted that the time to appeal the CPCN Order had expired under N.D.C.C. ch. 28-32. On July 16, 2025, Appellants filed a notice of appeal and specifications of error with this Court. Dkt. No. 1.

[¶6.] On August 6, 2025, Appellants filed a motion to stay any siting proceedings under N.D.C.C. ch. 49-22 for the Project. Dkt. Nos. 19–24. On August 8, 2025, Otter Tail and Montana-Dakota filed with the Commission a consolidated application for a certificate of corridor compatibility and route permit (the "Siting Application") under N.D.C.C. ch. 49-22. *Otter Tail Power Co. / Montana-Dakota Utilities Co. 345kV Transmission Line-Jamestown to Ellendale Siting Application*, N.D. PSC. Case No. PU-25-236, at Dkt. No. 1. The Siting Application remains pending, and a date for the siting hearing has yet to be set. *See id.*

ARGUMENT

[¶7.] Appellants' motion for stay fails for three independent reasons: (a) the Court lacks jurisdiction to stay other proceedings separate from the order being appealed; (b) Appellants lack standing to move for the requested stay; and (c) even if the Court had jurisdiction to consider the requested stay, Appellants cannot establish the factors necessary to support a stay.

A. The Court lacks jurisdiction to stay other proceedings separate from the order being appealed.

[¶8.] Though Appellants do not cite it, North Dakota's Administrative Agencies Practices Act defines a court's ability to issue a stay in the course of an administrative appeal. The relevant section provides in full:

> An appeal from an order or the rulemaking action of an administrative agency or the commission does not stay the enforcement of the order or the effect of a published rule unless the court to which the appeal is taken, upon application and after a hearing or the submission of briefs, orders a stay. The court may impose terms and conditions for a stay of the enforcement of the order or for a stay in the effect of a published rule. This section does not prohibit the operation of an automatic stay upon the enforcement of an administrative order or commission order as may be required by another statute.

N.D.C.C. § 28-32-48 (emphasis added). Under the plain language of the statute, a reviewing court's authority to issue a stay is limited to "the enforcement of the order" being appealed. *Id.* Here, Appellants do not ask the Court to stay the order being appealed, but instead request the extreme and unprecedented remedy of issuing a stay of "all proceedings before the North Dakota Public Service Commission (PSC) under N.D.C.C. ch. 49-22" for the Project. Dkt. No. 21 at p. 2. Appellants cite no authority that authorizes the district court to stay anything other than the order being appealed, much less a separate administrative proceeding that did not even exist at the time the Order on Petition was issued. *Id.* In this case, the order being appealed is the denial of Appellants' petition to intervene, rescind, and reopen the record in the Project's CPCN matter. *See* N.D. Pub. Serv. Comm. Case No. PU-24-091 at Dkt. No. 39. Yet Appellants' request for relief asks the Court to issue a stay of a separate and distinct administrative proceeding yet to be heard by the Commission. Appellants' attempt to conflate the CPCN process with the siting process is baseless (as discussed in Section C.1, below), but even if the argument had merit, it would not expand the Court's authority to issue a stay beyond "the enforcement of the order" being appealed.

[¶9.] Moreover, a district court's scope of review of an administrative appeal must be "based only on the record filed with the court." N.D.C.C. § 28-32-47(1). This limited scope of review further supports the Court's lack of jurisdiction to issue a stay on grounds outside the record on appeal or in separate administrative proceedings. Because Appellants request a stay broader than the enforcement of the order being appealed, their motion must be denied.

B. Appellants lack standing to move for the requested stay.

[¶10.] Appellants failed to participate in the CPCN proceeding and attempted to intervene six months after the Commission had already approved the requested CPCN. Notably, the attempt to intervene came five months after the time to appeal the CPCN Order expired. *See* N.D.C.C. § 28-32-42(1) ("Any party to any proceeding heard by an administrative agency . . . may appeal from

the order within thirty days after notice of the order."). A party is entitled to have a court decide the merits of a dispute only after demonstrating the party has standing to litigate the issues placed before the court. *Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau*, 2004 ND 60, ¶ 11, 676 N.W.2d 752, 757 (citing *State v. Tibor*, 373 N.W.2d 877 (N.D.1985)). Questions of standing implicate a court's subject matter jurisdiction, because they "determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court." *Schmidt v. City of Minot*, 2016 ND 175, ¶ 13, 883 N.W.2d 909 (citation omitted).

[¶11.] Concerning standing to appeal the merits of an administrative decision, North Dakota applies a three-part test that provides: "[1] any person who is directly interested in the proceedings before an administrative agency [2] who may be factually aggrieved by the decision of the agency, and [3] who participates in the proceeding before such agency" has standing to appeal the agency decision. *Minn-Kota Ag Prods., Inc. v. N. Dakota Pub. Serv. Comm'n*, 2020 ND 12, ¶ 13, 938 N.W.2d 118, 124–25 (quoting *In re Bank of Rhame*, 231 N.W.2d 801, 808 (N.D. 1975). Concerning the last prong, "minimal participation is sufficient to have adequately participated." *Minn-Kota Ag*, 2020 ND 12, ¶ 21. For instance, an electric services customer satisfied the "participation" requirement for standing to appeal a CPCN proceeding, where it filed an "Appearance by Customer" form advocating for the requested CPCN and provided testimony at the CPCN hearing, even though it did not formally intervene. By contrast, a telephone company customer did not adequately participate to establish standing where he sent an informal pre-hearing letter that "praised [one] commissioner's position and complained about the apparent position of the other two commissioners in scheduling the case." *Shark v. U.S. W. Commc'ns, Inc.*, 545 N.W.2d 194, 196, 198–99 (N.D. 1996). Concerning appeal of a denied intervention request, as distinct from standing to appeal the merits of an administrative decision, the North Dakota

Supreme Court recently held, "we do not impose a standing requirement on the failed intervenor, but instead simply review the denial of intervention." *Energy Transfer LP v. N. Dakota Priv. Investigative & Sec. Bd.*, 2022 ND 85, ¶ 10, 973 N.W.2d 394, 399.[1]

[¶12.] Here, even assuming for the sake of argument that Appellants could establish the first two prongs of the standing test, they cannot establish that they participated in the CPCN proceedings. The record has yet to be certified, but Otter Tail and Montana-Dakota are not aware of any evidence in the administrative record that will establish Appellants participated in the CPCN proceedings in a manner that gives rise to standing to appeal the CPCN Order. As a result, Appellants lack standing to challenge the merits of the CPCN and their standing to appeal is limited to the Commission's denial of their request to intervene. *See Energy Transfer* 2022 ND 85, ¶ 10.

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[1] In holding that a failed intervenor may immediately appeal, the *Energy Transfer* opinion relied upon and favorably quoted authorities from around the nation that have held a failed intervenor lacks standing to appeal anything beyond the denial of intervention:

> Allowing immediate appellate review of an order denying intervention is the established rule across the nation. *See, e.g.*, *City of Cleveland v. Ohio*, 508 F.3d 827, 837 (6th Cir. 2007) (applying constitutional standing principles applicable to federal courts "recogniz[ing] the general rule prohibiting a party who unsuccessfully filed a motion to intervene from appealing anything but the order denying intervention"); *In re Associated Press*, 162 F.3d 503, 506 (7th Cir. 1998) (explaining that a failed intervenor "has no standing to appeal any order other than the denial of intervention"); *Hopper v. Estate of Goard*, 386 P.3d 1245, 1247 n.2 (Alaska 2017) ("Although we review the denial of their motion to intervene, we do not reach their other arguments because '[a] failed intervenor has standing to appeal only the denial of intervention' and not the merits of the adjudication."); *In Interest of EHD*, 2017 WY 134, ¶ 18, 405 P.3d 222 (recognizing "the right to appeal from the denial of a motion to intervene" as distinct from the "ability to challenge any other rulings").

Energy Transfer, 2022 ND 85, ¶ 10. This passage calls into question whether a failed intervenor may ever appeal more than the denied intervention request. This brief assumes for the sake of argument that the traditional three-prong standing test still applies to a failed intervenor's attempt to appeal the merits of an administrative decision, but Appellants' status as a failed intervenor provides an alternative ground to conclude that Appellants lack standing to appeal anything more than the denial of their intervention request.

[¶13.] Because Appellants' standing is limited to their request to intervene, they lack standing to request a stay on other grounds. Their motion for stay, however, requires the validity of its challenge to the merits of the Commission's CPCN Order and argues that the Commission acted contrary to law by issuing it. As such, the request for stay exceeds the scope of any issue that Appellants have standing to appeal. The analysis should end there. The Court should deny the motion and make clear that Appellants' standing in this appeal is limited to seeking review of their request to intervene.

C. Even if the Court had jurisdiction to consider the requested stay, Appellants cannot establish the factors necessary to support a stay.

[¶14.] Appellants fail to address the legal standard and factors relevant to a request to stay administrative orders.[2] N.D.C.C. § 28-32-48 is silent as to what standards should apply to a motion for stay. When reviewing an application for stay under Rule 8(a)(2) of the North Dakota Rules of Appellate Procedure, the North Dakota Supreme Court has considered the following four factors: "1) a strong showing that the appellant is likely to succeed on appeal; 2) that unless the stay is granted, the appellant will suffer irreparable injury; 3) that no substantial harm will come to any party by reason of the issuance of the stay; and 4) that granting the stay will do no harm to the public interest." *Cass Cnty. Joint Water Res. Dist. v. Aaland*, 2020 ND 196, ¶ 4, 948 N.W.2d 829 (citing *Bergstrom v. Bergstrom*, 271 N.W.2d 546, 549 (N.D. 1978)). Other state and federal courts have used this same standard when reviewing requests for a stay of an administrative order. *See, e.g.,* Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 538 (8th Cir. 1994); *Bob Krihwan*

[2] Appellants cite *Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau*, 676 N.W.2d 752, 761 (N.D. 2004) and *Vorachek v. Citizens State Bank*, 461 N.W.2d 580, 585 (N.D. 1990) as supporting their position that "courts possess equitable authority to stay administrative proceedings to preserve the integrity of judicial review." *See* Dkt. No. 21 at p. 8. These cases relate to the court's authority to grant preliminary injunctions which require the application of a standard similar to an application for a stay under N.D.R.App. 8(a)(2). However, Appellants wholly fail to apply the preliminary injunction or stay on appeal analysis to their request for stay.

Pontiac-GMC Truck, Inc. v. Gen. Motors Corp., 141 Ohio App. 3d 777, 783, 753 N.E.2d 864, 868 (2001); *Nken v. Holder*, 556 U.S. 418, 425–26 (2009); *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002). "The moving party has the burden to show that these four criteria are satisfied and weigh in favor of granting a stay." *Access Indep. Health Servs., Inc. v. Wrigley*, 2025 ND 26, ¶ 14, 16 N.W.3d 902, 910, *as amended* (Apr. 17, 2025). Applying the above factors, Appellants fail to establish appropriate grounds for issuing a stay of any order in the CPCN proceeding, let alone an expansive stay of a separate siting proceeding.

1. Appellants are not likely to succeed on appeal.

[¶15.] Appellants' appeal is limited to the Commission's Order on Petition and is unlikely to succeed. As a threshold matter, the requested relief is time-barred, because Appellants missed every deadline to participate in the CPCN proceeding, request reconsideration or reopening, or challenge the CPCN Order. Appellants only attempted to intervene after the CPCN Order was final and non-appealable. *See* N.D.C.C. § 28-32-42 (establishing 30-day deadline to appeal agency determination). Indeed, the Order on Petition suggests that Appellants' intervention request was futile as the CPCN Order was already final and unappealable. *See* Order on Petition, p. 3 ("Petitioners have also missed the time allowed to appeal the Commission's decision to a district court as it is also very untimely.") Appellants failed to meet the hard deadlines to request reconsideration, request reopening of the proceeding, or to appeal the CPCN Order itself. *See* Dkt. No. 13; *see also* N.D. Admin. Code §§ 69-02-06-02, 69-02-06-02(1); N.D.C.C. § 28-32-42.

[¶16.] Moreover, even applying the slightly more flexible deadline to request intervention, Appellants' attempted intervention was likewise time-barred. Under the applicable regulation, "[a] petition to intervene in any proceeding must be filed at least ten days prior to the hearing, but not after except for good cause shown." N.D. Admin. Code § 69-02-02-05(2). "Good cause"

under this regulation "should be interpreted to mean a showing of good cause as to why a petitioning intervenor should be allowed to intervene late under the circumstances." *Minn-Kota Ag*, 2020 ND 12, ¶ 42–47 (affirming denial of intervention where the failed intervenor did not provide a good reason for its delay and where other parties to the proceeding would be prejudiced by the delays caused by late intervention); *see also Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co.*, 2011 ND 154, ¶ 42, 801 N.W.2d 677 (affirming denial of intervention where failed intervenors sought "to intervene months after learning of the court's decision" and where "[n]o explanation has been given for the delay" and where intervention would result in "relitigation of the issues, and other expensive delays at a cost to the existing parties and to the orderly processes of the court"). Here, Appellants' request to intervene was extremely late, having been filed ten months after the informal hearing was held in the CPCN proceeding. It also came six months after the CPCN Order was issued and the time to appeal the CPCN decision on the merits had expired. *See* N.D.C.C. § 28-32-42. Despite this, Appellants' Petition wholly failed to address the good cause standard for late intervention, nor did they factually establish any good cause that would excuse their delay. As such, the Commission was well within its rights to deny intervention on timeliness grounds alone.

[¶17.] Even setting aside the time-barred nature of Appellants' Petition, their arguments are specious and counterintuitive. This appeal centers on the baseless assertion that the granting of a CPCN under N.D.C.C. ch. 49-03 requires consideration of the factors in N.D.C.C. ch. 49-22, the "Siting Act." Entities like Otter Tail and Montana-Dakota that meet the definition of an "electric public utility" under Chapter 49-03 are required to obtain a CPCN for transmission line projects like the one at issue. The threshold question in a CPCN proceeding is whether a project serves public convenience and necessity or, in other words, whether the project is needed. In addition,

this transmission line project must obtain a certificate of corridor compatibility and route permit under the Siting Act. In a proceeding under the Siting Act, the Commission assesses the proposed location of a project and the scope of its potential impacts. The Project must obtain both a CPCN under Chapter 49-03 and a certificate of corridor compatibility and route permit under Chapter 49-22 before it can proceed with construction—neither statute precludes operation of the other. The inquiry in a CPCN proceeding under Chapter 49-03 is separate and distinct from the factors for a siting proceeding under Chapter 49-22. *Compare* N.D.C.C. § 49-03-01 (requiring "certificate that public convenience and necessity require or will require the construction or operation" of transmission line projects) *with* N.D.C.C. § 49-22-09 (listing different factors to be considered by Commission in siting proceeding). As such, the pendency of Appellants' appeal in this matter will have no bearing on the criteria and factors considered by the Commission in evaluating the Siting Application. Contrary to Appellants' assertion, CPCN determinations must be resolved independently from siting determinations.

[¶18.] Appellants argue that the Commission may not "issue a standalone CPCN under Chapter 49-03 before initiating proceedings under Chapter 49-22." Dkt. No. 21 at p. 2. However, Appellants cite no authority to support this assertion, and they ignore the plain language of the statutes at issue and the Commission's historical treatment of CPCN proceedings. For example, N.D.C.C. § 49-03-02 expressly lists the prerequisites to issuance of a CPCN. If the legislature intended to require siting proceedings be initiated before a CPCN could be issued, it would have codified that requirement among the prerequisites to issuing a CPCN. It did not. In fact, although applicants under the Siting Act must include a statement in their siting application explaining the need for a facility, a determination of need for the project is not listed among the factors to be considered by the Commission in evaluating siting applications. N.D.C.C. §§ 49-22-08(1)(c); 49-

22-09. For that reason, the North Dakota Supreme Court has held an evaluation of need is not within the Commission's authority in siting proceedings. *Matter of Nebraska Pub. Power Dist.*, 330 N.W.2d 143, 148–49 (N.D. 1983) ("We have found no direction in the Siting Act or its legislative history giving the PSC the authority to determine if a need has been shown."). Thus, Appellants' suggestion that the Commission should consider need for the project in a siting proceeding contradicts binding precedent from the North Dakota Supreme Court. *See id.* By contrast, the North Dakota Legislature has mandated that the Commission consider the issue of need in CPCN proceedings. *Id.*; *see also* N.D.C.C. ch. 49-03.

[¶19.] It also makes sense that an evaluation of need under Chapter 49-03 would precede an evaluation of a project's location and an assessment of potential human and environmental impacts, as required by the Siting Act. If there is no need for a project, proceeding with the rigorous process under the Siting Act would be a futile effort. As the Commission noted in its Order on Petition, Appellants' reliance on the Siting Act would be entirely appropriate in a siting proceeding, but siting considerations do not provide a basis for reconsideration of a CPCN proceeding. Dkt. No. 13, p. 3. In fact, many projects that require a CPCN do not trigger the Siting Act.[3] Similarly, some Siting Act applications are made by entities that do not trigger a CPCN requirement.[4] In sum, CPCN and siting proceedings are conducted separately for good reasons:

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[3] For example, an electric public utility may need to obtain a CPCN to construct infrastructure to connect customers outside of its service territory, but if the electric infrastructure is rated at 115kV or less, or if it is less than one mile in length, it would not meet the Commission's definition of an "electric transmission facility" under Ch. 49-22, and would not require siting before the Commission. *See* N.D.C.C. § 49-22-03(7) (defining "electric transmission facility").

[4] The requirement to obtain a CPCN under Chapter 49-03 only applies to certain entities including "electric public utilities" and "electric transmission providers." *See* N.D.C.C. §§ 49-03-01, 49-03-01.1. An "electric public utility" is defined to include a "privately owned supplier of electricity offering to supply or supplying electricity to the general public." N.D.C.C. § 49-03-01.5(2). An "electric transmission provider" means "an owner or operator, other than a rural electric

they are governed by separate statutory frameworks that mandate different inquiries, they are triggered by different statutory thresholds, and they are analyzed independently by the Commission. Appellants fail to allege any discernable statutory violation with respect to the CPCN proceeding.

[¶20.] Additionally, Appellants advance a meritless argument that the CPCN Order was not a final, appealable decision. Consistent with the CPCN process, the Commission correctly described the issues to be considered in the CPCN proceeding as, "(1) Whether public convenience and necessity will be served by construction and operation of the facilities; [and] (2) Are OTP/MDU technically, financially, and managerially fit and able to provide the service?" CPCN Case at Dkt. Nos. 4, 23. The Commission's "Discussion" section of the CPCN Order sets forth the factual basis for its order and finds that "public convenience and necessity will be served by the construction and operation of the facilities and that OTP and MDU are technically, financially, and managerially fit to be able to provide the service." *Id.* It concludes by unequivocally stating that the CPCN application is "APPROVED" and that a CPCN for the Project "is issued," leaving no doubt that it is a final decision. *Id.* No further findings or conclusions are required from the Commission in an uncontested CPCN proceeding like the one at issue. Even when an agency's findings leave "much to be desired," courts will accept "them when they are not so vague and obscure as to make judicial review perfunctory." *Matter of Boschee*, 347 N.W.2d 331, 336 (N.D. 1984). (quoting *Colorado*

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cooperative, of a transmission line the costs of which are recovered directly or indirectly through transmission charges to an electric public utility." N.D.C.C. § 49-03-01.5(4) (emphasis added). As such, member-owned entities like "rural electrical cooperatives" do not meet the definitions of either an electric public utility or an electric transmission provider, and are not subject to the CPCN requirements imposed by Chapter 49-03. Such entities nevertheless remain subject to siting requirements under Chapter 49-22 if they propose to construct facilities with the scope of the Commission's jurisdiction under that chapter.

Interstate Gas Co. v. Federal P. Com., 324 U.S. 581 (1945)). The CPCN Order contains sufficient findings and conclusions and was a final, appealable order.

[¶21.] Appellants have failed to demonstrate any likelihood of success on their appeal, so the Court should decline to issue any stay during the pendency of the appeal.

2. Appellants will suffer no injury in the absence of a stay.

[¶22.] This appeal centers on a complaint that the Commission failed to undertake a siting analysis for the Project before issuing a CPCN, but the motion for stay counterproductively now seeks to prevent the Commission from undertaking the very siting process that they complain it did not perform. The alleged harm that Appellants claim they will suffer is speculative at best, especially given that a siting proceeding is now pending before the Commission. Appellants claim, without factual support, that because the Commission has already issued a CPCN Order, the Commission will be prone to ignore the siting criteria and factors outlined in N.D.C.C ch. 49-22, and the Project will build "administrative momentum" or "regulatory inertia." However, the Commission's Order on Petition makes clear that the Commission understands it must undertake a separate siting analysis before the Project may proceed to construction. *See* Order on Petition ("For clarification, the line may not be constructed without obtaining a certificate of corridor compatibility and route permit from the Commission."). The Appellants fail to articulate how the Commission's consideration (or actual approval) of the Siting Application will result in any harm to them.

[¶23.] Appellants also express concern that allowing the Siting Application to proceed may moot their appeal. However, the potential that the appeal will be mooted when the Commission undertakes its siting process speaks more to Appellants' low probability of success on the merits than to any actual harm they will suffer. According to courts that have considered irreparable harm in considering requests for a stay pending appeal, "[i]t is well settled that an appeal being rendered

moot does not itself constitute irreparable harm." *Matter of 203 N. LaSalle St. P'ship*, 190 B.R. 595, 598 (N.D. Ill. 1995); *see also, e.g.*, *In re Betteroads Asphalt, LLC*, 610 B.R. 28, 49 (Bankr. D.P.R. 2019); *In re Pub. Serv. Co. of New Hampshire*, 116 B.R. 347, 349 (Bankr. D.N.H. 1990).

[¶24.] Finally, the absence of a stay will not frustrate judicial review in any meaningful sense. Anyone with standing to do so may seek to intervene in the siting case for the Project, for which a hearing has yet to be set. That the CPCN Order is beyond judicial review here is a product of Appellants' failure to timely intervene or timely appeal that decision. That issue cannot be cured by a stay of the Project's siting proceeding.

3. Otter Tail and Montana-Dakota will suffer substantial harm if a stay is issued.

[¶25.] Appellants fail to address the substantial harm that the requested stay would cause to Otter Tail and Montana-Dakota. If the Commission approves the Project's Siting Application, construction of the Project is expected to begin in 2026 and finish in 2028. CPCN Case at Dkt. No. 1. The Project is expected to be in-service by the end of 2028. *Id.* The North Dakota Supreme Court has previously held that "substantial harm in the form of project delays weighs against the issuance of a stay." *Aaland*, 2020 ND 196, ¶ 6, 948 N.W.2d at 831. Here, improperly granting a stay of the siting proceeding throughout the pendency of this appeal would likely result in Project delay, especially if this appeal proceeds to the North Dakota Supreme Court.

[¶26.] N.D.C.C. § 28-32-48 permits the court to impose appropriate conditions for a stay. If the Court were inclined to grant the requested stay, a significant bond should be required against the harm caused by project delays, but Appellants have not offered to post any such bond. Otter Tail and Montana-Dakota are likely to suffer substantial harm should a stay be imposed on the Project's siting proceeding, especially in the absence of such a bond. This factor weighs against issuance of a stay.

4. A stay is not in the public interest.

[¶27.] Consideration of the public interest favors denial of the requested stay. In July 2022, the Board of Directors for the Midcontinent Independent System Operator ("MISO") approved the Project as part of MISO's long-range transmission planning. CPCN Case at Dkt. No. 1. Moreover, the Commission already determined there is a public need for the Project, finding "that public convenience and necessity will be served by the construction and operation of the facilities" and that Otter Tail and Montana-Dakota are "technically, financially, and managerially fit to be able to provide the service." Dkt. No. 14. A stay of the siting proceeding would delay and frustrate the public interest in the completion of the Project.

CONCLUSION

[¶28.] For the reasons stated herein, Otter Tail and Montana-Dakota respectfully request the Court deny Appellants' motion for stay.

Dated this 20th day of August, 2025.

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