

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

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**SUR-REPLY OF OTTER TAIL AND MONTANA-DAKOTA OPPOSING MOTION TO  
STAY PUBLIC SERVICE COMMISSION PROCEEDING**

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[¶1.] Otter Tail<sup>1</sup> and Montana-Dakota file this Sur-Reply to afford them adequate opportunity to respond to new arguments raised for the first time in Appellants’ Reply in Support of Motion to Stay Proceedings Under N.D.C.C. Chapter 49-22 Pending Appeal (“Appellants’ Reply”). Dkt. No. 39. Appellants’ Reply raises multiple new arguments, in an attempt to reframe the flawed

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<sup>1</sup> Unless otherwise noted, defined terms in the brief are the same as those used in Appellees’ Response Brief Opposing Appellants’ Motion to Stay. Dkt. No. 37.

theories in their motion to stay siting proceedings that are not before the Court. Most notably, Appellants' Reply argues for the first time: (1) that the purpose of a CPCN is not to establish the necessity of new transmission infrastructure, but to resolve territorial disputes among utilities; (2) that the Court should distinguish or reconsider the North Dakota Supreme Court's *Nebraska Public Power* precedent holding that the Commission lacks authority to consider need in a siting proceeding; and (3) that the Court has authority to stay siting proceedings as an "effect" of the CPCN that Appellants seek to attack on this appeal. None of these arguments hold water.

### **NEED FOR A SUR-REPLY**

[¶2.] North Dakota's state courts do not have rules governing when a sur-reply may be filed, but courts often consider sur-replies when a reply brief raises new arguments for the first time. *See Northwest Landowners Association, et al. v. State of North Dakota et al.*, Bottineau County, North Dakota District Court Case No. 05-2023-CV-00065 at Dkt. No. 92. Here, Appellants' "reply" brief is 23 pages long, more than twice as long as their opening brief, and it introduces multiple new arguments. This Sur-Reply is warranted to provide Otter Tail and Montana-Dakota an opportunity to brief several of these new arguments. The briefing is also desirable, because responsive briefing will aid the Court in weighing the new arguments.

### **ARGUMENT**

[¶3.] Appellants' new arguments are meritless and misleading. First, North Dakota Century Code Chapter 49-03 is not limited to territorial disputes. Entities like Otter Tail and Montana-Dakota that meet the definition of an "electric public utility" under Chapter 49-03 must obtain a CPCN for transmission line projects like the one at issue, whether or not a territorial dispute exists. Second, the North Dakota Supreme Court has held that "need" is not a factor to be considered under the Siting Act. Third, siting proceedings are not an "effect" of a CPCN, and the Court lacks

authority to stay the siting proceedings even under Appellants' strained reading of N.D.C.C. § 28-32-48.

**1. The CPCN requirements of Chapter 49-03 are not limited to territorial disputes.**

[¶4.] Appellants miss the mark when they assert that CPCN proceedings are limited to territorial disputes and preventing utilities from unfairly interfering with the service areas of other utilities.

The very first section in ch. 49-03 expressly states:

An electric public utility may not begin construction or operation of a public utility plant or system, or of an extension of a plant or system without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction and operation.

N.D.C.C. § 49-03-01(1) (emphasis added). Although some CPCN proceedings involve territorial disputes, nothing in the statutory language limits the application of the statute to territorial disputes.

[¶5.] Entities like Otter Tail and Montana-Dakota meet the definition of an “electric public utility” under Chapter 49-03 and, therefore, must obtain a CPCN to construct transmission line projects like the Project. Otter Tail and Montana-Dakota’s decision to first obtain a CPCN under ch. 49-03 and then apply for a certificate of corridor compatibility and route permit under ch. 49-22 is the norm where both a CPCN and siting proceedings are required. This two-step permitting process is not a novel approach, much less a nefarious scheme to cut corners, as Appellants seem to suggest. To name just a few examples, the following list cites Commission dockets where public utilities first sought a CPCN and then proceeded to a siting case for an electric transmission line project.<sup>2</sup>

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<sup>2</sup> Filings in cases before the Commission are publicly available and searchable through the Commission’s website at <https://psc.nd.gov/public/casesearch/index.php>.

- *Northern States Power Company 230kV Transmission Line - McHenry and Ward Counties Pub. Convenience and Necessity*, PU-16-644 (2016) (CPCN proceeding), at Dkt. No. 15; *Northern States Power Company 230kV Transmission Line - McHenry and Ward Counties Siting Application*, N.D. PSC. Case No. PU-17-102 (2017) (corresponding siting proceeding), at Dkt. No. 45;
- *Northern States Power Company 345kV Transmission Line - Fargo to Monticello Pub. Convenience & Necessity*, N.D. PSC Case No. PU-10-607 (2010) (CPCN Proceeding), at Dkt. No. 14; *Northern States Power Company 345kV Transmission Line - Fargo to St. Cloud MN Siting Application*, N.D. PSC Case No. PU-07-759 (2007, amended application refiled 2011) (corresponding siting proceeding) at Dkt. No. 117;
- *Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. – 230kV Transmission System, Pub. Convenience and Necessity*, N.D. PSC Case No. PU-10-506 (2010) (CPCN proceeding), at Dkt. No. 10; *Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. – 230kV Transmission Line – McIntosh, Dickey County, Siting Application*, PU-10-164 (2010) (corresponding siting proceeding), at Dkt. No. 78;

[¶6.] As these CPCN and siting cases illustrate, both CPCN and siting proceedings are required for electric public utilities to construct a transmission line project like the one here, and it is common practice to obtain a CPCN first, followed by the more labor-intensive siting process under Chapter 49-22. Importantly, none of the CPCN examples listed above involved territorial disputes.

[¶7.] Appellants' Reply cites to a Basin Electric Power Cooperative siting docket as an example of a siting proceeding that was not accompanied with a CPCN proceeding. Dkt. No. (citing *Basin*

*Electric Power Cooperative 345kV Mercer-McLean-Ward-Mountrail-Williams Cty., Siting Application*, N.D. P.S.C. Case No. PU-24-361). The example, however, does not support their argument. As its name suggests, Basin Electric Power Cooperative is an electric cooperative and therefore is not subject to the CPCN requirements imposed by Chapter 49-03. N.D.C.C. § 49-03-01.5(6) (“An electric cooperative, composed of members as prescribed by law, shall not be deemed to be an electric public utility.”); *see also* N.D.C.C. §§ 49-03-01(1)-(2) (establishing when a CPCN is required); 49-03-01.5(2) (defining “electric public utility”); 49-03-01.5(4) (defining “electric transmission provider”). By contrast, Otter Tail and Montana-Dakota are investor-owned electric public utilities who must obtain a CPCN before constructing an electric transmission line like the one at issue. In short, Appellants’ example only confirms that CPCN and siting requirements operate independently—siting may be required even where a CPCN is not, and vice versa. *See* Dkt. No. 37, at nn. 3 & 4.

**2. Appellants wrongly suggest that *Nebraska Public Power* can be distinguished or “reconsidered.”**

[¶8.] The North Dakota Supreme Court has held that 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). After failing to apprise the Court of this controlling authority in their opening brief, Appellants now suggest that the case “should not control” and that “to the extent it excludes a need determination from ch. 49-22, it should be reconsidered.” Dkt. No. 39. But they fail to offer any explanation for how the case might be distinguished from the situation at hand. Instead, they resort to arguing that *Nebraska Public Power* and its prohibition on considering need in a siting proceeding “misreads the Legislature’s design.” Obviously, this Court cannot “reconsider” the holding of a North Dakota Supreme Court case.

[¶9.] A review of *Nebraska Public Power* reveals both that it is on-point and that the case correctly interpreted the Siting Act. Contrary to Appellants’ discussion of the legislative text and legislative history, the Court “found no direction in the Siting Act or its legislative history giving the PSC the authority to determine if a need has been shown.” 330 N.W.2d 143, 149 (emphasis added). In fact, the North Dakota Supreme Court directly addressed Appellants’ contention that the Siting Act requires the Commission to consider need because a siting application must contain “[a] statement explaining the need for the facility.” N.D.C.C. § 49-22-08. In considering this provision, the Court distinguished the content requirements of a siting application in Section 49-22-08 (which requires a statement of need) from the factors that guide the Commission’s evaluation of siting applications in Section 49-22-09 (which does not list need as a factor to be considered). 330 N.W.2d 143, 149. And the Court directly addressed why the legislature would require a statement of need in a siting application, if it does not instruct the Commission to consider the need for the facility in the siting process. Specifically, the Court noted that the applicant’s statement of need provides context for the siting application: “According to the PSC the information [regarding need] is to be used by itself, the public, and the Legislature in planning and scheduling, and it is used to help the PSC understand the nature of the applicant’s project.” *Id.* The Court further cited independent CPCN requirements as evidence that “[t]he North Dakota Legislature has demonstrated that, when it desires to do so, it can mandate that an administrative agency consider the issue of need.” *Id.* (citing CPCN requirements). Given the lack of a statutory directive to consider need in a siting proceeding, *Nebraska Public Power* concluded that “the PSC does not have the authority or duty to determine need” under the Siting Act. *Id.* (emphasis added). Moreover, the Court reached this conclusion even though Nebraska Public Power District was not required to obtain a CPCN for its project. *See id.* at 150 (Vande Walle, concurring specially).

[¶10.] In a last-ditch effort to save their dubious argument that need must be considered in Siting Act proceedings, Appellants for the first time cite to N.D.C.C. § 49-22-16(2)(c). Section 49-22-16, however, does not relate to siting criteria, but rather governs when Commission siting determinations preempt local rules, regulations, and ordinances. The “needs of consumers” language quoted by Appellants appears in a provision that governs the Commission’s power to preempt requirements in road use agreements from political subdivisions. *Id.* It provides that the Commission may preempt requirements that are “unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of location, or are in direct conflict with state or federal laws or rules.” *Id.* The Commission’s preemption power is not before the Court, and Appellants’ reliance on the “needs of consumers” language in the above provision is strained, to say the least.

[¶11.] In sum, Appellants ask the Court to conclude that need is a factor to be considered in siting proceedings under the Siting Act. To reach that result, the Court would have to ignore North Dakota Supreme Court precedent and the plain language of the Siting Act. The Court should decline to do so.

**3. Siting proceedings are not an “effect” of a CPCN, and the Court lacks authority to stay the siting proceedings here under such a theory.**

[¶12.] Appellants’ motion requests simply that the Court stay siting proceedings for the Project, without any suggestion that Appellants are requesting a stay of the CPCN that they seek to attack. In their reply, however, Appellants posit that the Court’s authority to impose a stay extends to the “effect” of the order being appealed and that siting proceedings may be stayed as an “effect” of the CPCN. Dkt. No. 39 at p. 14–15. As an initial matter, the statutory “effect” language upon which Appellants rely relates only to the “the effect of a published rule,” whereas a court’s authority to stay orders is limited to the “enforcement of the order” on appeal. N.D.C.C. § 28-32-

48 (“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.”) (emphasis added). In this case, moreover, the order being appealed is not the CPCN Order itself, but rather the denial of Appellants’ untimely 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. Therefore, even assuming Appellants could stay the “effect” of the order being appealed, that “effect” is a denial of an untimely request to intervene in and reopen a closed matter, not any effect that the CPCN Order may have on siting proceedings.

[¶13.] Finally, even setting aside the above problems with Appellants’ new “effect” argument, a siting proceeding is not an “effect” of a CPCN. Again, the criteria for a CPCN and for siting are independent of each other, given that need is not a factor to be decided in a siting proceeding. The Siting Application explains that the Commission has granted a CPCN, but as in *Nebraska Public Power*, the statement of need in the Siting Application is simply contextual and “used to help the PSC understand the nature of the applicant’s project.” 330 N.W.2d 143, 148.

[¶14.] Appellants nevertheless argue that “allowing a CPCN under 49-03 to predetermine ‘necessity’ reduces the subsequent ch. 49-22 [siting] proceeding to a rubber stamp.” Dkt. No. 39 at p. 9. This bald assertion lacks any support in the record and ignores the robust review process a siting application must undergo before the Commission. In addition to the factors under N.D.C.C. § 49-22-09 that guide the Commission’s evaluation of a siting application, the Commission has adopted comprehensive administrative rules that govern its evaluation of siting applications. Specifically, the Commission has adopted regulations defining exclusion areas, avoidance areas, selection criteria, and policy criteria under N.D. Admin. Code § 69-06-08-02 to guide the



Commission's review of siting applications. The Siting Application for the Project is over 2,500 pages long and includes detailed information regarding the studies and surveys completed by the Project to demonstrate compliance with the Commission's siting criteria. *See* N.D. Pub. Serv. Comm. Case No. PU-25-236 at Dkt. No. 1. Once filed, the Siting Application will undergo review by Commission staff, and the Commission will hold one or more public hearings on the Siting Application, in the counties where the Project is proposed to be located. N.D.C.C. § 49-22-13(1). At hearing, members of the public will be afforded an opportunity to provide testimony, regardless of whether any member of the public has formally intervened in the proceeding. *See, id.* Contrary to Appellants' claim, nothing about the Commission's siting process is "rubber stamped" by virtue of its prior approval of the Project's CPCN, and Appellants will not be harmed if the siting proceeding moves forward while this appeal is pending.

### **CONCLUSION**

[¶15.] For the reasons stated above and in their response brief, Otter Tail and Montana-Dakota respectfully request the Court deny Appellants' motion for stay.

Dated this 3<sup>rd</sup> day of September, 2025.

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