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

BRIEF OF APPELLEES OTTER TAIL POWER COMPANY AND MONTANA DAKOTA UTILITIES CO.

TABLE OF CONTENTS

Paragraph No.

INTRODUCTION

[¶1.] In this Appeal, Appellants attempt to attack a proceeding in which they did not participate and a certificate of public convenience and necessity ("CPCN") for which the deadline to appeal ran long before Appellants took action. They sought to circumvent these fatal flaws by filing an untimely petition requesting that the Public Service Commission revisit its decision. The Commission denied that petition, and Appellants now seek to attack the CPCN by appealing the denial of their petition. They should not be allowed to do so. Though it is where Appellants focus much of their argument, the order granting the CPCN is not itself on appeal. Rather, the questions before this Court are (1) whether Appellants have standing to challenge a CPCN proceeding in which they failed to participate and, if so, (2) whether the Commission abused its discretion in denying an untimely petition that asked the Commission to revisit a CPCN decision that had long since become final and unappealable. The answer to both questions is "no," and the Court should affirm the Commission's denial of Appellants' petition on those grounds alone.

[¶2.] Due to Appellants' lack of standing and the untimeliness of their petition, the Court should not reach the merits of Appellants' challenge to the CPCN, but if it does, Appellants' arguments do not bear scrutiny. *First*, the challenge hinges on Appellants' misguided attempt to conflate the "need" inquiry of a CPCN with the independent and route-specific inquiries of a siting proceeding. The Commission properly considered the CPCN application here, because the transmission line project at issue requires both a CPCN under Chapter 49-03 of the Century Code and siting permits under Chapter 49-22. *Second*, the Commission's findings were sufficient for an uncontested CPCN proceeding and were supported by the record in the proceeding. The Court should decline Appellants' invitation to substitute the Court's judgment for that of the Commission. *Third*, Appellants' half-hearted due process arguments lack merit. The Commission's procedures afford

due process, and the only thing that deprived Appellants an opportunity to be heard in the CPCN proceeding was their own inaction.

BACKGROUND

A. Procedural History

[¶3.] On February 29, 2024, Otter Tail Power Company ("Otter Tail") and Montana-Dakota Utilities Co. ("Montana-Dakota") filed a Joint Application for a CPCN 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*, Exhibit 1, Dkt. No. 63 (Joint Application). The Commission published a Notice of Opportunity for Hearing in fourteen local newspapers across North Dakota on March 27, 2024. Exhibit 3, Dkt. No. 65 (Notice); Exhibit 6, Dkt. No. 68 (Affidavit of Publication). The Commission did not receive any hearing requests, but nevertheless noticed and held an informal hearing on the CPCN application on July 8, 2024. Exhibit 3, Dkt. No. 65 (Notice of Opportunity for Hearing); Exhibit 8, Dkt. No. 70 (July 8, 2024 - Hearing Transcript). Appellants did not attend or otherwise participate in the hearing. The Commission further noticed and held two "work sessions" to discuss the merits of the CPCN Application. Exhibit 11, Dkt. No. 73 (August 19, 2024 - Work Session Transcript); Exhibit 15, Dkt. No. 77 (October 17, 2024 - Work Session Transcript). On November 20, 2024, the Commission issued the Order approving the CPCN application (the "CPCN Order"). Exhibit 17, Dkt. No. 79 (CPCN Order). On November 25, 2024, the Commission served the CPCN Order on the parties to the CPCN proceeding. Exhibit 18, Dkt. No. 80 (Affidavit of Service). No party appealed the CPCN Order.

[¶4.] 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. Exhibit 19, Dkt. No. 94. On May 27, 2025, Appellants filed an Amended 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 (the "Petition"). Exhibit 20, Dkt. No. 81. The Petition requested that the Commission reopen the record so that Appellants could issue discovery and introduce new evidence, and also requested that Appellants be allowed to intervene in the proceeding. *Id.*, pp. 1, 48. Otter Tail and Montana-Dakota opposed the Petition. Exhibit 22, Dkt. No. 83 (Response in Opposition).

[¶5.] On June 18, 2025, the Commission issued an order denying the Petition (the "Order on Petition"). Exhibit 30, Dkt. No. 91. The Commission found the Petition to be untimely. *Id.* Commission regulations provide a deadline of ten days prior to the hearing for petitions to intervene, except for good cause shown. N.D. Admin. Code § 69-02-02-05(2). Petitions to reopen the record 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 8, 2025, Otter Tail and Montana-Dakota filed 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.*

B. History of CPCN Statute and Siting Act

[¶7.] In 1965, the North Dakota Legislature enacted a requirement that electric public utilities (i.e., investor-owned utilities) obtain a certificate of public convenience and necessity before beginning construction or operation of a public utility system, such as an electric transmission line. N.D.C.C. ch. 49-03 (the "CPCN Statute"); *see* S.L. 1965, ch. 319 § 2. The requirement that electric public utilities establish the need for their project and obtain a CPCN before constructing an electric transmission line applies regardless of whether a territorial dispute exists or whether the electric public utility is extending service to a new territory. N.D.C.C. § 49-03-01. The very first section in Chapter 49-03 provides:

> 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). The CPCN Statute grants the Commission jurisdiction to hear and determine an electric public utility's application for a certificate of public convenience and necessity to construct a new electric transmission line. *Id.*; *see also* N.D.C.C. § 49-03-01. However, the CPCN Statute, does "not authorize the PSC to regulate rural electric cooperatives; instead, it allows cooperatives to extend electric service to customers in rural areas without obtaining a certificate of public convenience and necessity." *Cap. Elec. Co-op., Inc. v. Pub. Serv. Comm'n of State of N.D.*, 534 N.W.2d 587, 592 (N.D. 1995). This exemption for cooperatives applies to construction of new high voltage transmission lines like the one at issue here.

[¶8.] In 1975, North Dakota Legislature enacted the North Dakota Energy Conversion and Transmission Facility Siting Act (the "Siting Act") (Chapter 436, S.L.1975 now N.D.C.C. ch. 49-

22). The Siting Act prescribes the procedure for the Commission to study, evaluate, and approve a suitable corridor and transmission facility route for high voltage electric transmission lines. N.D.C.C. ch. 49-22. This procedure is intended to ensure "that energy transmission facilities are developed in an orderly manner compatible with environmental preservation and efficient use of resources." *Eckre v. Pub. Serv. Comm'n.*, 247 N.W.2d 656 (N.D. 1976) at fn. 1. N.D.C.C. § 49-22-09 sets forth the factors to be considered in the evaluation of applications and designation of sites and corridors. The factors considered under the Siting Act are location-specific and primarily relate to environmental considerations and the impacts of the proposed route. N.D.C.C. § 49-22-09. Thus, while only electric public utilities are required to obtain a CPCN, no utility may begin construction of an electric transmission facility "without first having obtained a certificate of site compatibility or a route permit from the commission pursuant to" the Siting Act. N.D.C.C. § 49-22-07.

STANDARD OF REVIEW

[¶9.] The order on appeal must be affirmed unless the Commission abused its discretion in denying the Petition. The abuse of discretion standard applies to a review of an agency's denial of intervention under the Administrative Agencies Practice Act ("AAPA"). *Energy Transfer LP v. N. Dakota Priv. Investigative & Sec. Bd.*, 2022 ND 85, ¶ 15, 973 N.W.2d 394, 400. The North Dakota Supreme Court has not specifically articulated a standard of review when an administrative agency denies a petition to reopen, reconsider, or for rehearing; however, it reviews a court's denial of a motion for reconsideration and motions under N.D.R.Civ. P. 60 under the abuse of discretion

standard. *Ayling v. Sens*, 2019 ND 114, ¶ 20, 926 N.W.2d 147, 153. The Court should likewise apply an abuse of discretion standard for denial of similar requests to an administrative agency.

[¶10.] More broadly, courts exercise limited review in appeals from administrative agency decisions. *Johnson v. North Dakota Workforce Safety & Ins.*, 2010 ND 198, ¶ 10, 789 N.W.2d 565. A court reviewing an agency's findings of fact "do[es] not make independent findings or substitute [its] judgment for the agency's judgment." *Sloan v. N.D. Workforce Safety & Ins.*, 2011 ND 194, ¶ 5, 804 N.W.2d 184. An agency's findings of fact must be supported by the preponderance of the evidence and an agency's decision will be affirmed if "a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record." *Id.*

ARGUMENT

B. Appellants lack standing to appeal any issue beyond the denial of intervention.

[¶11.] In this case, the order being appealed is the denial of Appellants' Petition in the Project's CPCN matter. Exhibit 30, Dkt. No. 91. 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 [e]nsure that a justiciable controversy is

presented to the court." *Kjolsrud v. MKB Mgmt. Corp.*, 2003 ND 144, ¶ 13, 669 N.W.2d 82 (citation omitted).

[¶12.] 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*, 2022 ND 85, ¶ 10, 973 N.W.2d 394, 399.[1]

[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:

[¶13.] Here, Appellants cannot satisfy the standing test articulated in *Bank of Rhame*, because the administrative record is devoid of any evidence that they participated in the CPCN proceedings. Appellants cannot manufacture standing to appeal the merits of the CPCN Order under the guise of petitioning the Commission to reconsider or reopen a proceeding in which Appellants did not participate. As a result, Appellants lack standing to challenge the merits of the CPCN, which is exactly what their Petition seeks to do. Their standing to appeal is limited to the Commission's denial of their request to intervene. *See Energy Transfer* 2022 ND 85, ¶ 10.

C. To the extent Appellants have standing to appeal, the Order on Petition should be affirmed, both because the Petition was untimely, and because the Commission properly exercised its discretion to deny the Petition.

[¶14.] The Petition at issue was untimely in multiple respects. At the time Appellants filed the Petition, the time to appeal the CPCN Order had long since passed, and the Commission was under

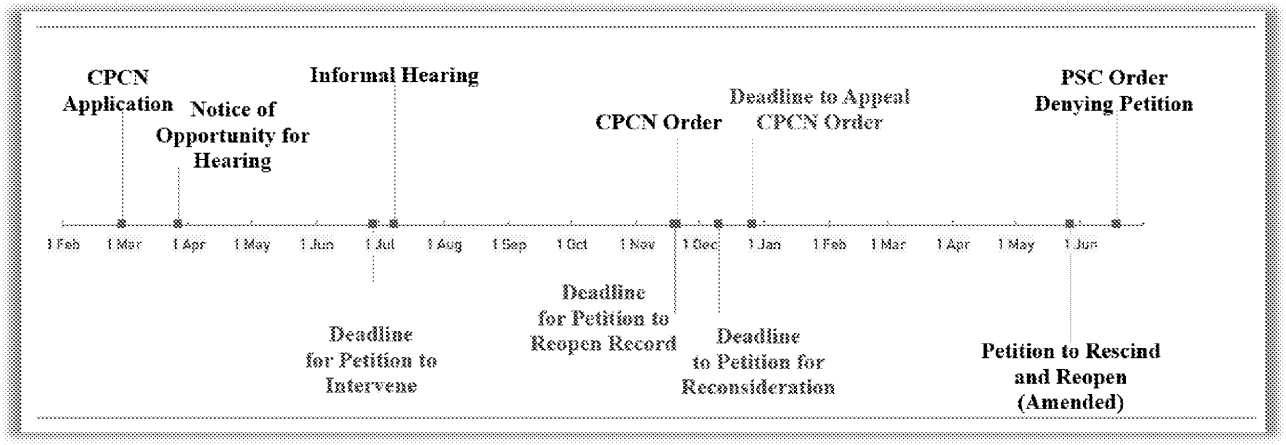
---

> 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.

no obligation to revisit it. Moreover, Appellants filed their Petition well beyond the deadlines to petition for reconsideration, petition to reopen the proceedings, or petition to intervene. As such, all of Appellants' requests for relief contained in the Petition were untimely, and the Commission was well within its discretion to deny the Petition. The following timeline summarizes the proceedings in relation to the relevant deadlines:

CPCN Proceeding Timeline (2024–2025)



Date	Event	Reference
2/29/2024	CPCN Application	Dkt. No. 63
3/27/2024	Notice of Opportunity for Hearing	Dkt. No. 65
6/28/2024	Deadline for Petition to Intervene	N.D.A.C. § 69-02-02-05(2)
7/8/2024	Informal Hearing	Dkt. No. 70
11/19/2024	Deadline for Petition to Reopen Record	N.D.A.C. § 69-02-06-01
11/20/2024	CPCN Order	Dkt. No. 79
11/25/2024	Notice of Order	Dkt. No. 80
12/10/2024	Deadline to Petition for Reconsideration	N.D.A.C. § 69-02-06-02(1)
12/26/2024	Deadline to Appeal CPCN Order	N.D.C.C. § 28-32-42(1)
5/27/2025	Petition to Rescind and Reopen (Amended)	Dkt. No. 81
6/18/2025	Commission Order Denying Petition	Dkt. No. 91

1. The CPCN Order was a final, appealable order, and the time to appeal passed before Appellants filed their Petition.

[¶15.] Under N.D.C.C. § 28-32-42, a party to an administrative proceeding "may appeal from the order within thirty days after notice of the order has been given as required by section 28-32-39." Notice of an order is given by "serv[ing] a copy of the final order and the findings of fact and conclusions of law on which it is based upon all parties to the proceeding within thirty days…in the manner allowed for service under the North Dakota Rules of Civil Procedure." N.D.C.C. § 28-32-39. Where an administrative agency order "terminate[s] the issue" and leaves the agency with "nothing more to decide," it becomes "a final order of an administrative agency from which the claimants [are] entitled to appeal to the district court under N.D.C.C. § 28-32-15." *Ash v. Traynor*, 2000 ND 75, ¶ 3, 609 N.W.2d 96; *see also Henry v. Sec. Com'r for State*, 2003 ND 62, ¶ 8, 659

N.W.2d 869, 871. ("Our view of administrative finality mirrors this Court's treatment of final orders or judgments under N.D.C.C. § 28–27–02.").

[¶16.] The deadline to appeal an administrative order is jurisdictional. "Any party to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of the order has been given as required by section 28-32-39." N.D.C.C. § 28-32-42(1). "An appeal shall be taken by serving a notice of appeal . . . and by filing the notice of appeal . . . with the clerk of the district court to which the appeal is taken." N.D.C.C. § 28-32-42(4). "Failure to satisfy the statutory requirements for initiating an appeal to the district court from an administrative decision prevents the district court from obtaining subject matter jurisdiction over the appeal." *Mahad v. Workforce Safety & Ins. Fund*, 2024 ND 21, ¶ 3, 2 N.W.3d 720, 721, *reh'g denied* (Feb. 28, 2024) (citations omitted). In *Mahad*, the North Dakota Supreme Court held that filing a notice of appeal with the district court four days late deprived the court of jurisdiction to hear the appeal and required dismissal of the case. *Mahad*, 2024 ND 21 at ¶ 5; *see also Ellis v. N.D. Workforce Safety and Insurance*, 2020 ND 14, ¶ 11, 937 N.W.2d 513. (concluding district court lacked subject matter jurisdiction to hear appeal where appeal of administrative decision was not timely filed).

[¶17.] Here, the CPCN Order was clearly a final determination in the CPCN proceeding, and it was properly served on the parties to the case. Exhibits 17–18; Dkt. Nos. 79–80. The purpose of the CPCN proceeding was to obtain a Certificate of Public Convenience and Necessity from the Commission. Exhibit 1, Dkt. No. 63. The CPCN Order approved the Application for certificates of public convenience and necessity to construct and operate the Project and issued CPCN Nos. 5998 and 5999 to Montana-Dakota and Otter Tail. Exhibit 17, Dkt. No. 79. The actual Certificates of Public Convenience and Necessity were attached to the CPCN Order. *Id.* And the Commission

properly served its order pursuant to Rule 5 of the North Dakota Rules of Civil Procedure by mailing copies to the parties to the proceeding, as required under N.D.C.C. § 28-32-39. Exhibit 18, Dkt. No. 80. As such, the CPCN Order "terminated the issue" and left the Commission with "nothing more to decide," so it was "a final order of an administrative agency from which the claimants were entitled to appeal to the district court." *Ash*, 2000 ND 75, at ¶ 3. The time to appeal the CPCN Order expired on December 26, 2024, thirty days after notice of the order was served. Therefore, the CPCN Order was no longer subject to appeal when the Appellants filed the Petition nearly six months later.

[¶18.] In an attempt to circumvent this clear jurisdictional bar to their appeal, Appellants contend that the Commissions' findings of fact and conclusions of law in the CPCN Order were insufficient, such that "no deadline to seek reopening, reconsideration, or appeal began to run." Dkt. No. 124 at p. 31. This argument is absurd. If it were the case, there would be no deadline to challenge the sufficiency of an agency's findings of fact and conclusions of law, and no order would ever become final until it was appealed and affirmed. In other words, the finality of an unappealed order could never be assured. Contrary to Appellants' suggestion, whether the CPCN Order contained adequate findings and conclusions and whether it was a final order subject to appeal are two different questions.[2]

[¶19.] Appellants also cite several cases from other jurisdictions, none of which support their argument. Dkt. No. 124 (Appellants' Brief) at p. 32.

- *Rued v. Commissioner of Human Services*, 13 N.W.3d 42 (Minn. 2024). This case addresses the impact of an appellant's failure to serve notice of an appeal on a party. Moreover, the *Rued* court noted that "we have interpreted the 30-day time limit for judicial review prescribed by the Minnesota Administrative Procedure Act as jurisdictional." *Id.* (emphasis added) (*citing Midway Pro Bowl*, 937 N.W.2d 423 (Minn. 2020)).

[2] Although the Court should not reach the issue, the CPCN Order did contain adequate findings and conclusions, as discussed in section C.2.a below.

- *First Minn. Bank v. Overby Dev., Inc.*, 783 N.W.2d 405 (Minn. App. 2021). The issue in this case was whether a letter that did "not indicate that it was a notice being served to limit the time for appeal and was not prepared specifically for that purpose" was a sufficient notice of filing under a Minnesota Statute to trigger the running of a time limit.

- *Alford v. County of L.A.*, 51 Cal.App. 5th 742, (2020). This case involved a failure to provide required notice to a party.

- *Pan Am. Petroleum Corp. v. Wyoming Oil & Gas Conservation Comm'n*, 446 P.2d 550, 551 (Wyo. 1968). This case does not relate to the timeliness of an appeal or statutory deadlines at all.

[¶20.] Appellants may not pretend, as their briefing seems to do, that they are free to simply challenge the merits of the CPCN Order as they would on a timely direct appeal of that order. Instead, Appellants must establish that the Commission abused its discretion in declining to reconsider the CPCN, reopen the proceeding, or allow Appellants to intervene after the CPCN Order had become final and the time to appeal had passed. That cannot be the case. An administrative agency must have broad discretion to preserve the finality of its decisions once the time to appeal has passed. If it were otherwise, parties would be free to disregard the jurisdictional appeal deadline and resurrect long-dead appeal rights simply by petitioning for reconsideration. That is not the law. The Commission's Order on Petition should be affirmed as a valid exercise of its discretion, based on nothing more than the fact that the Commission was under no obligation to revisit its CPCN Order once the time to appeal had passed.

2. Appellants' Petition missed the deadline to petition for reconsideration or reopening.

[¶21.] As stated above, the appeal of the merits of the CPCN Order is time-barred. 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). Moreover, Appellants failed to timely request reconsideration of the CPCN Order. Under N.D.C.C. § 28-32-40, a petition

for reconsideration must be filed "within fifteen days after notice has been given" under N.D.C.C. § 28-32-39; *see also* N.D. Admin. Code. § 69-02-06-02 ("A petition for reconsideration must be filed within fifteen days after notice of the decision."). Here, notice of the CPCN Order was properly given by the Commission on November 25, 2024, or nearly six months before the Petition was filed. To the extent the Petition requests reconsideration of the CPCN Order, it is untimely.

[¶22.] Appellants' Petition to reopen the record was likewise untimely. Under N.D. Admin. Code. § 69-02-06-01, a petition to reopen must be filed, "[a]t any time after the conclusion of a hearing, but before the final order is issued." (emphasis added). Again, the Petition was filed nearly six months after the CPCN Order was issued. As stated above, the CPCN Order was the final order in the CPCN proceeding. As such, Appellants' request to reopen the record was untimely.

3. Appellants' Petition missed the deadlines to intervene.

[¶23.] Even applying the somewhat 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").

[¶24.] 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 failed to address the good cause standard for late intervention, nor did Appellants factually establish any good cause that would excuse their delay.

[¶25.] Seemingly in an attempt to evade the deadline to intervene without offering any evidence of good cause, Appellants argue that because there was no formal hearing, "a deadline tied to 'the hearing' does not bar intervention; the agency must instead ensure that the informal path does not extinguish participation by those whose property and governance rights are at stake." Dkt. No. 124 at p. 25. To be clear, the only thing that "extinguished" Appellants' opportunity to participate in the CPCN proceeding was their own inaction. Moreover, the Commission's intervention regulation does not distinguish between a formal hearing or an informal hearing. N.D. Admin. Code § 69-02-02-05(2) (tying deadline to "the hearing"). The Court should not create a distinction in the regulation where none exists. Despite the lack of any request for a hearing or any hearing requirement, the Commission did hold an informal hearing in the CPCN proceeding. The deadline to intervene was ten days before the hearing date. Appellants have made no showing of good cause to justify their incredibly late attempt to intervene. Finally, even assuming a formal hearing is required to trigger the deadline to intervene, Appellants waived their right to intervene by failing to timely request a formal hearing.

[¶26.] 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. Moreover, even assuming there was no specific deadline to intervene, Appellants' intervention request was futile because the CPCN Order was already final and no longer appealable. *See* Dkt. No. 91, 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.") As such, the Commission was well within its authority to deny intervention on timeliness grounds alone.

D. Even if the Court reaches the merits, Appellants' arguments are groundless.

[¶27.] Even setting aside the time-barred nature of Appellants' Petition, their arguments badly miss the mark. 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." Throughout their brief, Appellants repeatedly refer to the Siting Act as an "exclusive" framework. Dkt. No. 124, at pp. 1; 2; 4; 18. However, nowhere in Appellants' brief do they support this contention with any legal authority. Merely declaring the Siting Act "exclusive" does not make it so. Appellees acknowledge that a siting certificate and route permit under Chapter 49-22 are needed to construct the Project. That is why the Appellees submitted a siting application under Chapter 49-22, and the Project is currently going through the siting process. Appellants continue to ignore that a CPCN under Chapter 49-03 is also required for the Project. Without explaining why the plain language of N.D.C.C. § 49-03-01 does not mandate that the Project obtain a CPCN, Appellants suggest that Appellees can simply rescind this required certificate and proceed solely under the Siting Act.

4. The Commission properly considered the CPCN application, because the Project requires both a CPCN under N.D.C.C. ch. 49-03 and siting permits under N.D.C.C. ch. 49-22.

[¶28.] Despite Appellants' unsupported statements otherwise, Chapter 49-22 is not the sole or exclusive statutory framework for the permitting of transmission lines before the Commission. Both the CPCN Statute and the Siting Act apply to the Project, and the Appellees must obtain a CPCN and siting permits before the Project can be constructed. The North Dakota Supreme Court and the Commission have recognized that a need determination is not a part of the inquiry under the Siting Act. Furthermore, collapsing the need inquiry into the Siting Act would thwart the Legislature's long-standing policy of requiring a CPCN for investor-owned utility projects, but not for electric cooperative projects.

a. Chapter 49-03 applies to the Project and requires that a CPCN be obtained for the Project, regardless of the existence of a territorial dispute.

[¶29.] Contrary to Appellants' conclusory statement, Chapter 49-03 is not limited to territorial disputes and Appellees were required to obtain a CPCN for the Project. The very first section in Chapter 49-03 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.

[¶30.] 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. Their decision to first obtain a CPCN under Chapter 49-03 and then apply for a certificate

of corridor compatibility and route permit under Chapter 49-22 is the norm where both a CPCN and siting proceeding are required. This two-step permitting process is not a novel approach, much less a nefarious scheme to cut corners, as Appellants have suggested. 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:[3]

- *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.

[3] 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.

[¶31.] 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.

[¶32.] 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 fail to recognize that CPCN and siting requirements operate independently—siting may be required even where a CPCN is not,[4] and vice versa.[5]

b. Chapter 49-22 applies to the Project and requires a siting inquiry assessing the proposed route of a project and its location-specific impacts.

[¶33.] The purpose of the Siting Act is to "ensure that the location, construction, and operation of . . . transmission facilities will produce minimal adverse effects on the environment and upon the welfare of the citizens of" North Dakota. N.D.C.C. § 49-22-02. Under the act, an electric transmission facility "means an electric transmission line . . . with a design in excess of one hundred fifteen kilovolts." N.D.C.C. § 49-22-03(7).

[¶34.] The inquiry under the Siting Act focuses on environmental and location-specific criteria for determining whether a transmission facility produces minimal adverse effects. Section 49-22-05.1 directs the Commission to develop exclusion and avoidances areas "to guide the site, corridor, and route suitability evaluation." These relate to the physical characteristics of the land and

[4] See Section C.1.d, below.

[5] 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").

proximity to existing land uses. *Id.*; *see also* N.D. Admin Code ch. 69-06-08 (Commission regulations regarding exclusion areas, avoidance areas, and selection/policy criteria). Moreover, the siting factors relate to site-specific issues. *See* N.D.C.C. § 49-22-09. Appellants attempt to cast the siting factors as "expressly requir[ing] consideration of need in light of alternatives, environmental compatibility, and system configuration." Dkt. No. 124 at pp. 23 (citing N.D.C.C. §§ 49-22-09(1)(a), (b), (e), (f), (h)). However, a review of the statutory language reveals that Appellants mischaracterize these factors. All of the siting factors cited by Appellants contain language that makes clear they are location or route-specific considerations:

- "[T]he effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment." N.D.C.C. 49-22-09(1)(a) (emphasis added);
- The "effects of new electric energy conversion and electric transmission technologies and systems designed to minimize adverse environmental effects." N.D.C.C. § 49-22-09(1)(b) (emphasis added);
- "Alternatives to the proposed site, corridor, or route." N.D.C.C. § 49-22-09(1)(e) (emphasis added);
- "Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated." N.D.C.C. § 49-22-09(1)(f) (emphasis added);
- "Existing plans . . . for other developments at or in the vicinity of the proposed site, corridor, or route." N.D.C.C. § 49-22-09(1)(h) (emphasis added).

Even a cursory review of Appellants' cherry-picked provisions reveals they have nothing to do with the necessity of the Project or "need."

c. The Commission lacks authority to determine need for a project under the Siting Act, and Appellants' arguments to the contrary are spurious.

[¶35.] 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). A review of *Nebraska Public Power* reveals both that it is on point and that the case established the correct interpretation of 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). The *Nebraska Public Power* decision also noted that "when it desires to do so, [the North Dakota Legislature] can mandate that an administrative agency consider the issue of need." *Id.* (citing CPCN requirements).

[¶36.] Moreover, 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.*

[¶37.] 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). Appellants' suggestion that the Siting Act requires a determination of public need flies in the face of this holding.

[¶38.] The Commission itself has previously recognized this limitation on its authority under Chapter 49-22 in an order finding evidence of need is irrelevant in a siting proceeding because need is not a factor for the Commission's consideration under N.D.C.C. § 49-22-09. *See Brady Wind, LLC 150 MW Wind Energy Ctr. - Stark Cnty. Siting Application Brady Wind, LLC 230 kV Transmission Line - Stark Cnty. Siting Application,* N.D. P.S.C. Case No. PU-15-690, 2016 WL 1638879, at **4–5 (Apr. 20, 2016) ("[N]eed is not a criterion for determination by this Commission in deciding whether to approve or deny" an application under the Siting Act.)

[¶39.] Moreover, the North Dakota Legislature recently rejected an amendment that would add "need" to the siting factors under Section 49-22-09. Specifically, the N.D. Legislature considered and rejected an amendment in Senate Bill No. 2314 (2017) that would have amended subsection 7 of section 49-22-09 as follows:

> 7. The direct and indirect economic ~~impacts of~~impact and need for the proposed facility."

Senate Bill No. 2314 (2017) (version 17.0884.06004).[6] Appellants' assertion that "need" is or should be within "the integrated framework the Legislature established in ch. 49-22" is both contrary to North Dakota Supreme Court precedent and was rejected by the North Dakota Legislature as recently as 2017. The legislature would have had no reason to consider adding "need" to the statutory factors if it was already there.

[6] https://ndlegis.gov/assembly/65-2017/regular/documents/17-0884-06004a.pdf; *see also https://ndlegis.gov/assembly/65-2017/regular/bill-actions/ba2314.html?bill_year=2017&bill_number=2314*

[¶40.] Desperate to shore up their dubious argument, Appellants cite to legislative history surrounding the Siting Act. Dkt. No. 124 at pp. 26–27. But Appellants have not argued that any of the statutes at issue are ambiguous. Where the statutory language is clear and unambiguous, "legislative intent is presumed clear" and "there is no room for construction." *State by & through Workforce Safety & Ins. v. Boechler, PC*, 2025 ND 132, ¶ 14, 24 N.W.3d 91, 96, *as amended* (July 24, 2025). Regardless, the soundbites of legislative history cited by Appellants are taken out of context and do not, in any way, support their position. For example, the cited testimony from the Hearing on S.B. 2050 was not related to need as a consideration in a siting proceeding; rather, the testimony discussed the interplay of permitting by the Commission and requirements of local subdivisions. Dkt. No. 124 at pp. 26–27; *see also Hearing on S.B. 2050 Before the H. Comm. on Natural Resources* (N.D. Mar. 6, 1975). Even less helpful to Appellants' position is the N.D. Legislative Council Staff Report to which they cite. Appellants purport that this report "explained that construction of a 'major utility transmission facility' may not begin absent a 'certificate of environmental compatibility and public need,' supported by a statement of need, alternatives, and findings on need and environmental impacts." *Id.* However, the quoted language appears only under the section of the Report titled "Legislation in Other States" and describes the law in New York State, not the proposed legislation that would become North Dakota law. N.D. Legis. Council Staff, *Background Information on Power Transmission Lines and Land Disturbing Operations* 4 (Jan. 1974) at p. 4.

d. Collapsing the need inquiry and the siting inquiry would thwart the Legislature's long-standing policy of requiring a CPCN for investor-owned utility projects but not for electric cooperative projects.

[¶41.] Although a CPCN is required for certain transmission projects constructed by an "electric public utility," 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.[7] Rural electric cooperatives nevertheless remain subject to siting requirements under Chapter 49-22 if they propose to construct facilities within the scope of the Commission's jurisdiction under that chapter. Under North Dakota's statutory framework, "electric public utilities must, with few exceptions, secure a certificate of public convenience and necessity from the PSC in order to extend their electric distribution facilities." *N. States Power Co. v. N. Dakota Pub. Serv. Comm'n*, 452 N.W.2d 340, 344 (N.D. 1990) (citing N.D.C.C. §§ 49–03–01 through 49–03–01.3; *Tri–County Electric Cooperative, Inc. v. Elkin,* 224 N.W.2d 785 (N.D.1974)). By contrast, "electric cooperatives are largely unregulated in the sense that they have the ability to expand their electrical services without having to first obtain a certificate of public convenience and necessity. *Id.* (emphasis added). *See also Application of Montana–Dakota Utilities Co.,* 219 N.W.2d 174, 180 (N.D.1974) (noting that extensions of electric distribution facilities by electric cooperatives are not regulated by the PSC because the Legislature determined that members of the cooperative, who own and control the business, would adequately protect their own economic investment and interest by preventing unwarranted wasteful expansion).

[7] 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," and a rural electric cooperative "shall not be deemed to be an electric public utility." N.D.C.C. §§ 49-03-01.5(2), 49-03-01.5(6). An "electric transmission provider" means "an owner or operator, other than a rural electric 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 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.

[¶42.] In 1975, a decade after the CPCN Statute was enacted, the North Dakota Legislature enacted the Siting Act, which requires both electric public utilities and rural electric cooperatives to obtain a Certificate of Corridor Compatibility and Route permit before constructing new transmission lines under the Commission's jurisdiction. *See* S.L. 1975 ch. 436. After the Siting Act was enacted, the North Dakota Supreme Court held that need is not a factor for consideration in a proceeding under the Siting Act. *Nebraska*, 330 N.W.2d 143.

[¶43.] Thus, for 50 years North Dakota law has required electric cooperatives to comply with the Siting Act but exempted them from making a showing of need or obtaining a CPCN for their projects. Appellants now ask the Court to effectively rewrite that statutory scheme, by imposing a need requirement in the Siting Act, and therefore on rural electric cooperatives, that does not exist in statute. Such a reading would also render the CPCN requirement for electric public utilities largely superfluous. The Siting Act and the CPCN Statute must be read in harmony. The Court should decline Appellants' invitation to re-write North Dakota's utility laws in the manner requested by Appellants.

5. The Court should decline Appellants' invitation to second-guess the Commission's factual findings.

[¶44.] "Courts exercise limited review in appeals from administrative agency decisions." *Zent v. N. Dakota Dep't of Health & Hum. Servs.*, 2025 ND 50, ¶ 16, 18 N.W.3d 621, 627 (citations omitted). Whether the CPCN Order contained adequate findings and conclusions and whether the Commission's judgment was supported by the entirety of the record are separate questions. Generally, "[a]n administrative agency's findings of fact must be adequate for a reviewing court to understand the factual basis upon which the agency reached its conclusion." *Aggie Invs. GP v. Pub. Serv. Comm'n of N. Dakota*, 470 N.W.2d 805, 813 (N.D. 1991). "In reviewing the agency's findings of fact, [the reviewing court] does not make independent findings or substitute our

judgment for the agency's judgment." *Zent*, 18 N.W.3d 627. The inquiry for the reviewing court to decide is "whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record." *Zent*, 18 N.W.3d 627. (emphasis added).

a. CPCN Order contains adequate findings and conclusions.

[¶45.] An agency's findings and conclusions should be upheld as adequate so long as they provide some basis for the decision. *See Matter of Boschee*, 347 N.W.2d 331, 337 (N.D. 1984) (stating, "[a]lthough the Commission's findings and conclusions in this case are not artfully drawn, we are able to understand the basis of the agency's decision."). 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 at 336 (quoting *Colorado Interstate Gas Co. v. Federal P. Com.*, 324 U.S. 581, 595, 65 S.Ct. 829, 835, 89 L.Ed. 1206, 1219 (1945)); *see also Nw. Bell Tel. Co. v. Hagen*, 234 N.W.2d 841, 847 (N.D. 1975) (Holding the Commission's failure to make specific findings (in that case, concerning the public interest) is not reversible error so long as the administrative record supports the conclusion.)

[¶46.] Here, the Commission's "Discussion" section of the CPCN Order sets forth the factual basis for its decision. Dkt. No. 79. Specifically, the CPCN Order notes that the Project was approved as part of the Midcontinent Independent System Operator's ("MISO") "Long-Range Transmission Planning (LRTP)," discusses the Project's costs, and the impact on the rates charged to the Applicants' rate-payers. *Id.* (Noting, "an additional cost of $0.123 per month for MDU and $0.177 per month for OTP residential customers consuming 1000 kWh per month."). Furthermore, the CPCN Order notes how costs are to be recovered. *Id.* ("Costs for all projects approved under MISO's LRTP Tranche 1 will be recovered on a [*pro rata*] basis utilizing each company's energy use as a proportion of the MISO Subregion total."). The reference to MISO's approval of the

Project as part of its long-range transmission process is notable. MISO is a regional transmission operator charged with reliably operating the electric grid across 15 states, including North Dakota, and the Canadian province of Manitoba.[8] The fact that MISO approved the Project as part of its long-range transmission planning process in itself is sufficient evidence of need for the Project to support the Commission's approval of the CPCN Order.

[¶47.] As a result, the CPCN Order makes the conclusions of law 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.* No further findings or conclusions are required from the Commission in a CPCN proceeding. Appellants' attack on the Commission's Order as lacking sufficient findings and conclusions are without merit and appears to be based on a failure to distinguish the CPCN and siting processes.

[¶48.] Consistent with the CPCN process, the Commission correctly described the issues to be considered in the CPCN proceeding for a new transmission line 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 concludes 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.* The CPCN order closes 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 were required from the Commission in an uncontested CPCN proceeding like the one at issue. Even

[8] *See* https://www.misoenergy.org/meet-miso/media-center/corporate-fact-sheet/

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

[¶49.] Moreover, the Commission was authorized under N.D.C.C. §§ 28-32-22 and 49-03-02(2) to make an informal disposition of the CPCN proceeding. "Notwithstanding any other provision of this section, the commission may grant a certificate if an interested party, including any local electric cooperative, has not requested a hearing on an application after receiving at least twenty days' notice of opportunity to request such hearing." N.D.C.C. § 49-03-02(2) (emphasis added). "Unless otherwise prohibited by specific statute or rule," the Commission has authority under N.D.C.C. § 28-32-22 to make "informal disposition . . . of any adjudicative proceeding . . . by waiver of hearing . . . or other informal disposition." N.D.C.C. § 28-32-22 (emphasis added). Here, the Commission issued a Notice of Hearing on March 27, 2024, allowing for comments and requests for hearing until May 10, 2024, and thereby provided well over twenty days' notice of opportunity to request a hearing. Dkt. 91, at 1. Appellants admit that one or more of its members received that notice. Exhibit 20, Dkt. No. 81 at p. 14. The Commission published this notice in fourteen separate North Dakota newspapers, including newspapers local to Appellants. Dkt. 91, at 3. Because no interested party requested a hearing, the Commission would have been within its authority to grant the CPCN without any findings of fact or conclusions of law. *See* N.D.C.C. § 49-03-02(2). As such, the findings and conclusions in the CPCN Order exceeded what was required in this case.

b. The Commission's findings are supported by the record.

[¶50.] Contrary to the Appellants' assertions, the Commission's findings are also supported by the administrative record. *See* Dkt. No. 79. "In reviewing the agency's findings of fact, [the North Dakota Supreme] Court does not make independent findings or substitute [its] judgment for the agency's judgment. Rather, [it] decide[s] whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record." *Zent*, 18 N.W.3d 627 (*quoting Jahner v. North Dakota Dep't of Health & Hum. Servs.*, 2023 ND 71, ¶ 7 989 N.W.2d 466).

[¶51.] Here, the record is robust for a CPCN proceeding. *See* Exhibits 1–31; Dkt. Nos. 63–92; 94. Need for the Project is set forth in the CPCN application, comments submitted by MISO, and the Appellees' presentation and testimony at the hearing. CPCN Proceeding at Dkt. Nos. 1, 14, 17, 19. Appellants belatedly attempt to rebut the need for the Project by cherry picking the record to cast the Project as only benefitting private developers. Dkt. No. 124 at pp. 12–16. Contrary to Appellants' assertions, however, accommodating additional generation development and future load growth is as much a public benefit as any public utility function.

[¶52.] Moreover, Appellants ignore the evidence in the record regarding the reliability benefits the Project will bring. *See* Exhibit 8, Dkt. No. 70 at p. 11:11–21 (Testimony of Jason Weiers) (the Project will "allow for an alternative transmission path for the generation to flow from Ellendale up to Jamestown where it will then be able to jump onto the 345 kV line from Jamestown towards Fargo and make its way to the rest of the region."); *Id.* at p. 14:9–15 (the Project will "relieve excessive loadings on 70 transmission facilities and address 97 voltage violations."); *Id.* at p. 14:23–25 ("The project will also increase transmission capacity that will have the ability to enable new commercial and industrial loads."); *Id.* at p. 16:15–25 ("the project will also increase

resilience to extreme weather events" citing 2023 ice storm leading to emergency conditions in the Jamestown area). Additionally, MISO noted the Project "will help ensure that the transmission system in North Dakota is able to continue operating reliably and economically well into the future." Exhibit 13, Dkt. No. 75 (MISO Comments). "The addition of the JETx Project and the better utilization of these existing 345 kV lines have been shown to unload the existing 230 kV system of concern and improve reliability across the greater area of Eastern North Dakota, South Dakota, and Western/Central Minnesota." *Id.*

[¶53.] An examination of the entire record supports the Commission's findings and its conclusion that "public convenience and necessity will be served by the construction and operation of the" the Project. Exhibit 17, Dkt. No. 79. The Court should affirm the Commission's order issuing the Project certificates of public convenience and necessity.

6. The Commission's procedures afford due process.

[¶54.] Appellants' due process claims are meritless. The Commission properly provided notice of the CPCN proceeding; Appellants had the opportunity to request a hearing, participate in the informal hearing, and/or timely request to intervene in the CPCN proceeding. Here, the only thing that prevented Appellants' participation in the CPCN proceeding was their own inaction. The Commission published a Notice of Opportunity for Hearing on March 27, 2024. Dkt. Nos. 65, 68. Appellants did not request a hearing, but an informal hearing was held on the CPCN application on July 8, 2024. Dkt. No. 70–71. Appellants did not attend or otherwise participate in the hearing.

[¶55.] "Unlike some other legal rules, due process, 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Whitecalfe v. N. Dakota Dep't of Transp.*, 2007 ND 32, ¶ 20, 727 N.W.2d 779, 787 (citing *Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Due process is flexible and must be considered on a case-by-case

basis. *Wahl v. Morton County Soc. Serv.*, 1998 ND 48, ¶ 6, 574 N.W.2d 859. "When deciding a due process claim, we consider whether a constitutionally protected property or liberty interest is at stake and, if so, whether minimum procedural due process requirements were met." *Whitecalfe*, 727 N.W.2d at 787.

[¶56.] As relevant here, holding Appellants to statutory deadlines and agency regulations does not amount to a due process violation. *See Berger v. N.D. DOT*, 2011 ND 55, ¶ 9, 795 N.W.2d 707 (where a party to an administrative proceeding's due process right to notice and an opportunity to be heard are adequately protected and accommodated, no due process violation occurs). In fact, even in the context of the termination of parental rights (a fundamental right), the North Dakota Supreme Court has held it lacks jurisdiction to consider a due process argument where an appeal is untimely. *Int. of C.A.S.*, 2023 ND 122, ¶ 3, 993 N.W.2d 347, 349, *reh'g denied* (July 18, 2023); *see also Eckre v. Pub. Serv. Comm'n*, 247 N.W.2d 656, 665 (N.D. 1976) (holding landowners in project corridor "are not entitled to a judicial hearing on the legislative question of public convenience and necessity, but, rather, are limited to the type of hearing and determination afforded by statute."

[¶57.] In this case, Appellants seemingly admit they were aware of the notice of opportunity for hearing issued by the Commission. Appellants' Brief at pp. 7-8. Yet, Appellants only attempted to intervene when the proceeding had concluded and the CPCN Order was final and no longer appealable. Here, Appellants were adequately informed of the CPCN proceeding and had an opportunity to participate, but they chose not to do so until every applicable deadline had passed. Moreover, Appellants fail to articulate any good cause that would excuse their delayed attempt to intervene. The Commission's procedures afforded Appellants an opportunity to be heard and their due process rights were not violated.

CONCLUSION

[¶58.] For the reasons stated above, Appellees respectfully request that the Court affirm the Commission's denial of Appellants' Petition.

Dated this 21st day of October, 2025.

CROWLEY FLECK PLLP
Attorneys for Appellees Otter Tail Power Company
and Montana-Dakota Utilities Co.
100 West Broadway, Suite 250
P.O. Box 2798
Bismarck, North Dakota 58502-2798
701-223-6585

By: */s/ Paul J. Forster*
PAUL J. FORSTER (#07398)
pforster@crowleyfleck.com
ERIK J. EDISON (#08790)
ejedison@crowleyfleck.com
CASEY A. FUREY (#08035)
cfurey@crowleyfleck.com