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, Timm 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, vs. North Dakota Public Service Commission, Otter Tail Power Company, and Montana-Dakota Utilities, Co., Appellees. PSC Case No. PU-24-91	Civil No. 08-2025-CV-02068 **BRIEF OF APPELLEE NORTH DAKOTA PUBLIC SERVICE COMMISSION**

ISSUES

[¶1] The Public Service Commission ("Commission") is the constitutional agency that determines whether to grant an investor owned utility a Certificate of Public Convenience and Necessity ("CPCN") to extend electric service outside a municipality. N.D.C.C. Ch. 49-03. Otter Tail Power Company and Montana-Dakota Utilities Company jointly applied for a CPCN. Dkt.

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APPEAL - Brief of Appellee North Dakota Public Service Commission

Public Service Commission
Zachary Pelham, SAAG

No. 63. A hearing was held on the application, despite the fact no one submitted any opposition to the application. Dkt. No. 70. The Commission determined the CPCN should be issued on November 20, 2024. Dkt. No. 79. After the issuance of the CPCN, and entry of the Commission's Order, Appellants sought to intervene in the matter and filed a motion asking the Commission to reconsider issuance of the CPCN on May 27, 2025. Dkt. No. 81. There are three issues:

> First, Appellants' motion to intervene was made more than *ten* months after the hearing on the CPCN application and more than *six* months after the Commission issued its Order on the CPCN. The intervention motion was properly denied;
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> Second, because Appellants are not parties, they lack standing to appeal and their appeal should be dismissed; and
>
> Third, alternatively, the Commission's decision to grant the CPCN was the process of rational application of the facts to the law. If Appellants are determined to have standing, the Commission's decision granting a CPCN to Otter Tail and MDU should be affirmed because it is supported by the facts and relevant law.

BACKGROUND

[¶2] On February 29, 2024, Otter Tail Power Company ("OTP") and Montana-Dakota Utilities Company ("MDU") filed a joint application for a CPCN to construct, own, and operate 85 miles of new double circuit 345 kV electric transmission line from an existing Jamestown 345 kV Substation in Stutsman County to an existing 345 kV substation in Dickey County; it also sought substation expansions as a result of the project. Dkt. No. 63. A notice of opportunity for hearing was served; it was published in numerous newspapers across the state, including the Dickey County Leader, Oakes Times, Kulm Messager, and LaMoure Chronicle. Dkt. Nos. 65-66. No requests for hearing were received, but an informal hearing was held by the PSC on July 8, 2024. Dkt. No. 70. At the hearing, OTP and MDU made an informal presentation to the PSC on the project, the first on August 19, 2024, and the second on October 17, 2024. Dkt. No. 71. Because there are three commissioners on the PSC, if one commissioner meets to discuss official

Commission business with another commissioner, a quorum is established requiring a notice of a meeting. Work sessions are necessary for the Commission to discuss any business that is before it and is commonplace for the Commission.

[¶3] On November 20, 2024, the Commission issued its Order, with one Commissioner dissenting, granting the CPCN to MDU and OTP. That same day, the Commission issued Certificate Numbers 5998 and 5999. Dkt. No. 79. The CPCN states: "This certificate is conditioned upon [OTP and MDU] securing the franchise or other authority of the proper municipal or other public authority for the exercise of these rights and privileges." *Id.*

[¶4] Over *ten* months after the public hearing was held, on May 21, 2025, Appellants filed a Petition seeking to intervene as parties and to reconsider the granting of the CPCN. Dkt. No. 81. MDU and OTP filed a response in opposition to the petition. Dkt. No. 83. Appellants supplemented their petition. Dkt. No. 87. The Commission issued its Order denying the petition on June 18, 2025. Dkt. No. 91. Appellants served a notice of appeal and specification of error on July 15, 2025. Dkt. No. 1.

STANDARD OF REVIEW

[¶5] Courts exercise limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, and the agency's decision is accorded great deference. *Berger v. N.D. Dep't of Transp.*, 2011 ND 55, ¶ 5, 785 N.W.2d 707. This Court will not reverse an agency decision unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46; *Voigt v. N.D. Public Serv. Comm'n*, 2017 ND 76, ¶ 8, 892 N.W.2d 149. When determining this issue, the Court must "look to the law and its application to the facts." *Plante v. N.D. Workers Comp. Bureau,* 455 N.W.2d 195, 197 (N.D. 1990). In reviewing an agency's findings of fact, the Court does not substitute its judgment for that of the agency or make independent findings. *Capital Elec. Coop. v. City of Bismarck*, 2007 ND 128, ¶ 31, 736 N.W.2d 788. Rather, in reviewing the Commission's findings of fact, the Court determines "only whether a reasoning mind could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Id.*; *see also Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D. 1979); *North Central Elec. Coop. v. N.D. Pub. Serv. Comm'n*, 2013 ND 158, ¶ 7, 837 N.W.2d 138. The Court does "not reweigh or reevaluate the evidence . . . [or] function as a super board and second guess the PSC's findings." *Capital Elec. Coop.*, 2007 ND 128 at ¶31. Additionally, the subject matter here is of a "highly technical nature," the Commission's "expertise" is "entitled to appreciable deference." *Montana-Dakota Utilities Co. v. N.D. Pub. Serv. Comm'n,* 413 N.W.2d 308, 312 (N.D. 1987).

[¶6] A mixed standard of review applies to the review of an Administrative Law Judge's denial of a motion to intervene brought under N.D.A.C. § 69-02-02-05. *See, e.g., In re Juran and Moody, Inc.*, 2000 ND 136, ¶¶ 22-24, 613 N.W.2d 503 (applying a deferential standard of an ALJ's factual findings; applying a *de novo* standard of an ALJ's legal conclusions). While, here, the Commission decided the denial of the intervention and reconsideration motion instead of a substantive ALJ, the Commission effectively was the ALJ and the rationale applied in the *In re Juran* matter should apply here. The Commission's denial of the intervention and reconsideration petition should be analyzed under the deferential standard of review. *Id.* at ¶ 25.

LAW AND ARGUMENT

[¶7] The Appellants challenge the Legislative Assembly's authority granted to the Commission under N.D.C.C. Ch. 49-03. In essence, the Appellants claim that the Commission does not have authority under this chapter to issue a CPCN *before* a siting hearing occurs under N.D.C.C. Ch. 49-22. Our supreme court explains: "The Territorial Integrity Act was enacted by the Legislature in 1965. It amended §§ 49-03-01 and 49-03-05, N.D.C.C., which required a public utility, before beginning construction or operation of a public utility plant or system, or an extension thereof, to obtain from the PSC a certificate of public convenience and necessity. The *primary purpose* of the Act was to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts *between* suppliers of electricity." *Cass Cty. Elec. Coop. v. N. States Power Co.*, 419 N.W.2d 181, 184-85 (N.D. 1988) (internal citations omitted) (emphasis added). There is no requirement in N.D.C.C. Ch. 49-03 or Ch. 49-22 that requires a utility to apply for a CPCN prior to seeking a certificate of site compatibility and route permit under N.D.C.C. Ch. 49-22. Neither is there any case law that supports such a proposition.

A. Intervention

[¶8] The Commission unanimously rejected Appellants motion for intervention. Dkt. No. 91. The rationale is detailed in its Order. On appeal, the Commission takes the position its decision was appropriate for all the reasons stated in its Order. *Id.* Appellants have no one to blame for its intervention motion being denied but themselves. Appellants chose not to intervene timely. Proper notice had been achieved.

[¶9] Appellants have to provide "good cause" as to why it should have been allowed to intervene. Our administrative code provides in relevant part:

> Any person with a substantial interest in a proceeding may petition to intervene in that proceeding by complying with this section. An intervention may be granted if the petitioner has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be substantially affected by the proceeding, and the intervention would not unduly broaden the issues or delay the proceeding. The commission may impose conditions and limitations on an intervention to promote the interests of justice.
>
> 1. Contents of petition to intervene. A petition to intervene must be in writing and must set forth the grounds for intervention, the position and interest of the petitioner in the proceeding, what the petitioner would contribute to the hearing, and whether the petitioner's position is in support of or in opposition to the relief sought.
> 2. When filed. 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 (emphasis added).

[¶10] Appellants failed to provide "good cause." This factor is necessarily discretionary with the Commission. Just as this Court's discretionary decision-making authority is not second-guessed by the North Dakota Supreme Court, neither should this Court second-guess the Commission's discretionary authority. Barring an abuse of discretion, the decision to deny the motion to intervene should be affirmed.

[¶11] The decision to deny the motion to intervene was sound. MDU and OTP presented their evidence at the hearing and the Commission asked questions and held two work sessions

before issuing the CPCN. Only *after* this statutory process had occurred, many months after, did Appellants choose to try to intervene and provide additional evidence that could have been made available at the hearing had they chose to timely intervene. In effect, Appellants seek an advantage over the parties by waiting until evidence and arguments presented by the parties during the proceeding was known. This "wait and see attitude," even if unintentional, creates a distinct advantage to a litigant in a case—to *know* what one's opponent *has* argued is simply unfair to those parties who followed the rules. And once the evidence has been presented, there is no putting it back in the proverbial bottle. This may seem a bit sanctimonious. But if the rule exists, it ought to be followed. And if the rule exists and provides for an exception, application of the exception should not come at the expense of those parties that followed the procedures and played by the rules. Bottom line—Appellants had all the tools at its disposal to timely and appropriately intervene. The Commission is entitled to deference in its decision to deny the intervention motion. The decision was supported by circumstances of this case.

B. Standing

[¶12] If it is determined intervention was properly denied, the appeal must be dismissed because Appellants lack standing. Appellants did not appear at the hearing as a party.

[¶13] The Appellants must meet the requisite statutory requirements pursuant to N.D.C.C. § 28-32-42 and the three-part standing requirement to appeal an administrative agency's decision. *See Shark v. U.S. West Communications, Inc.*, 545 N.W.2d 194, 196 (N.D. 1996) ("[L]imits of judicial power to review agency and executive action are marked by several doctrinal boundaries, including the concept of standing"); *In Re Juran and Moody, Inc.*, 2000 ND 136, ¶ 16, 613 N.W.2d 503 (A person has standing if the person: 1) participates in the proceeding before an administrative agency; 2) is directly interested in the proceedings; and 3) is factually aggrieved by

the agency's decision). In *O'Connor v. Northern States Power Co.*, the Court held that an electric ratepayer who did not participate in the proceeding at the PSC could not contest the resulting rate increase in the courts. 308 N.W.2d 365, 371 (N.D. 1981). Likewise, the *Shark* Court denied the parties judicial review because they failed to meet the three-part standing test. 545 N.W.2d at 200.

[¶14] Appellants fail to meet the first requirement that it participated in the proceeding before the Commission. The North Dakota Supreme Court has made it clear that a party must satisfy the standing requirement to seek judicial review of an administrative order. *Application of Bank of Rhame,* 231 N.W.2d 801, 806 (N.D. 1975). Not only does the failure to participate by Appellants mean they do not have standing, but its arguments regarding the Commission's alleged errors regarding the evidence were waived due to the failure to raise them below. The Commission asserts the issues now raised for the first time on appeal highlight the problem of conferring standing to a party who did not participate and raise those arguments at the administrative hearing. Appellants' appeal should be dismissed as a matter of law because it lacks standing to appeal.

C. In the alternative, the Commission properly issued the CPCN.

[¶15] The Territorial Integrity Act ("TIA") requires a public utility, before extending its service lines outside of the corporate limits of a municipality, to obtain a certificate that public convenience and necessity require such extension. N.D.C.C. §§ 49-03-01, 49-03-01.1; *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 417 (N.D. 1969). The authority to make such a decision is vested in the Commission. *Application of Otter Tail Power*, 169 N.W.2d at 417. The legislature provides that "[a]n electric public utility may not begin construction or operation of a public utility 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).

[¶16] The primary purpose of the TIA is to keep wasteful duplication of capital-intensive utility services and conflicts between providers to a minimum. *Northern States Power Co. v. N.D. Pub. Serv. Comm'n*, 452 N.W.2d 340, 344 (N.D. 1990); *Cass Cnty. Elec. Coop.*, 419 N.W.2d at 187. Considering the current regulatory constructs, "it may not always be possible to prevent some of the actual duplication of distribution facilities which may occur in practice when cooperatives extend their existing electrical systems," and the question of which facilities are duplicative and wasteful "is one of fact for the PSC to determine." *Northern States*, 452 N.W.2d at 344-45.

[¶17] Here, the Commission analyzed the joint CPCN application. It held a hearing, even though no one stated any opposition to the application. The Commission held two work sessions on the application. Ultimately, it issued an Order that detailed the reasons for granting the CPCN. The Commission's order, while it did not have specific headings stating finding of fact and conclusions of law, the content of the order includes this. Also, the Commission can make an informal disposition of any adjudicative proceeding. N.D.C.C. § 28-32-22. The Certificate itself makes it clear that its grant is "conditioned" on MDU and OTP "securing the franchise or other authority of the proper municipal or other public authority for the exercise of these rights and privileges." Dkt. No. 79 (Certificate Numbers 5998 and 5999). In other words, the utilities must receive any local permits needed. Further, the utilities cannot construct anything until their site compatibility and route permit application is reviewed by the Commission under N.D.C. 49-22.

[¶18] Appellants attempt to re-frame the circumstances in which the CPCN was granted is an attempt to re-frame reality. There was no opposition to the application. This was akin to a motion for a default when one party does not respond to a complaint or a motion. The Commission cannot presume to know what has not been presented to it. That is, if Appellants wanted to put

forth evidence in response to the application, the Commission cannot possibly presume to know what that would be, let alone whether it would be evidence opposing the CPCN application.

[¶19] On appeal, Appellants seem more intent on attacking a proceeding that has not yet occurred than the issuance of the CPCN under N.D.C.C. ch. 49-03. Appellants attempt to frame issues that can be, and should be, argued in the wholly separate siting case under N.D.C.C. ch. 49-22. That application process is underway before the Commission. It is a process that is found in an entirely different chapter of our Century Code than the process that has been determined under N.D.C.C. ch. 49-03. Appellants attempt to resurrect opposition to the CPCN application under N.D.C.C. ch. 49-03, on the basis that it impacts their apparent opposition to the siting case under N.D.C.C. ch. 49-22, must be rejected. Primarily because the Commission's procedural and substantive requirements and procedures have been complied with by MDU and OTP. And if our statutes are to mean anything, if they are followed then they ought to be enforced. Nothing will preclude Appellants from intervening and arguing what they believe is appropriate in the proceedings the Commission will hold under N.D.C.C. ch. 49-22.

[¶20] The Commission weighed the application and evidence presented by the applicants and its decision more than satisfies N.D.C.C. § 28-32-46. The Commission did this while considering all the factual evidence that was presented. The Commission actively participated in the hearing, reviewed the evidence presented, and held two work sessions to discuss the case. The Commission's decision was premised upon the statutory framework and the relevant case law. The Commission's decision was not arbitrary or capricious. The Commission's decision contained the facts relevant to the proceeding. The Commission considered this case and the circumstances of this case in applying the factors to reach its decision. The Commission's decision is supported by the facts presented in this case. The Commission's application of the law to the facts it

determined were supported from the evidence are not contrary to law. The Commission's decision is entitled to deference by the Court.

[¶21] In the end, it is the *public* convenience and necessity, not the perceived convenience (or inconvenience) of Appellants. "It is the Public Convenience and Necessity, after all, with which the Commission is concerned, not private preference." *Tri-County Elec. Coop.*, 224 N.W.2d at 792. The MDU and OTP extension has been determined by the Commission, the body our Legislative Assembly has determined makes this decision, to satisfy the requirements under N.D.C.C. ch. 49-03. Based on the evidence presented to the Commission, a reasoning mind could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record and that public convenience and necessity does not favor MDU and OTP to provide a line extension as stated in their joint application. Truth be told, any decision that contains a dissenting opinion is indicative of full attention and consideration. A dissenting opinion means the matter was carefully considered and weighed by all involved. And, in this case, this occurred in a matter that was *uncontested*.

CONCLUSION

[¶22] The Court should affirm the denial of Appellants' intervention motion. The motion came more than ten months after the hearing occurred and when a motion would have to be made under the Commission's administrative rules. In affirming the intervention denial, Appellants' lack standing to appeal. The Appellants' lack standing and the appeal should be dismissed.

[¶23] Alternatively, if the Court determines Appellants' have standing, considering the evidence presented on the record to the Commission, the Commission's findings of fact are supported by the evidence and satisfy N.D.C.C. § 28-32-46. The Commission considered testimony and reviewed exhibits when it properly applied the law to the facts in making its

decision, which even included a dissenting opinion. Absent a reweighing of the evidence or substitution of the Court's judgment for the Commission's, the Commission respectfully requests that this Court find that a "reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Capital Elec. Coop.,* 2007 ND 128 at ¶ 31. For these reasons, the Commission respectfully requests that this Court affirm its Order.

Dated this 21st day of October, 2025.

/s/ Zachary E. Pelham
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