STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF BURLEIGH SOUTH CENTRAL JUDICIAL DISTRICT

Wano Township, Willowbank Township, Russell Township, Corwin Township, Valley Township, Mike Bartel, Patty Bartel, Richard Long, Susan R. Long, Steven Nelson, Julia Nelson, Phyllis P. Otterness, Patricia A. Vick, Brandon Schweigert, Tausha Schweigert, Shockman Farm Partnership, LLLP, Debra Sue Wald, Lucas Wald, Jill Wald, Tim Leppert, Orr Farms, Steve M. Rupp, Sandra J. Rupp, David A. Schweigert, Denette M. Schweigert, Allen D. Swiontek, Inna N. Swiontek, David Wald, Holly Wald, Weston Wald, and Willowbank Hutterian Brethren Association, Appellants, v. North Dakota Public Service Commission, Otter Tail Power Company, and Montana-Dakota Utilities Co., Appellees.	Civil No. 08-2025-CV-02068

RESPONSE BRIEF OF OTTER TAIL AND MONTANA-DAKOTA OPPOSING MOTION TO RECONSIDER OR MODIFY ORDER DENYING MOTION TO STAY

[¶1.] Appellants' motion[1] represents a frivolous attempt to revisit their unsuccessful motion for stay and to litigate siting proceedings that are not before the court.[2] Appellants' motion asserts

[1] In addition, Appellants' motion was not served and filed with a notice as required by N.D.R.Ct. 3.2(1), and Appellants failed to file a brief as required by N.D.R.Ct. 3.2(2). "Failure to file a brief by the moving party may be considered an admission that, in the opinion of party or counsel, the motion is without merit." N.D.R.Ct. 3.2(c).

[2] Unless otherwise noted, defined terms in this brief are the same as those used in Brief of Appellees at Dkt. No. 130.

that two "clear errors" require correction: (1) Appellants claim that the Court misunderstands the limits on its jurisdiction to stay administrative order under N.D.C.C. § 28-32-48; and (2) Appellants claim the Court discounted the alleged harm they will suffer in lieu of a stay. Dkt. No. 127 at pp. 1–2. The Court already considered and rejected these arguments in denying the previous motion for stay and should do the same here. Dkt. No. 126.

[¶2.] The siting proceeding is not before the Court, nor is the Commission's CPCN Order. As a result, the Court lacks jurisdiction to direct the Commission how to conduct the siting proceeding and cannot grant the relief requested. Moreover, Appellants fail to demonstrate any irreparable injury, and their alleged harms are unrelated to the Commission's issuance of the CPCN. Finally, Appellants fail to demonstrate any likelihood of success on the merits.

1. The Court already considered and rejected the relief requested.

[¶3.] Although Appellants attempt to repackage their request for relief, they previously requested, and the Court rejected, the same alternative relief at issue in their motion for reconsideration. The following table illustrates that Appellants' final brief in support of their motion for stay requested the same relief that Appellants again request in the present motion.

Appellants' Response to Sur-Reply, Dkt. No. 60 at pp. 3–4	Appellants' Motion for Reconsideration, Dkt. No. 127 at pp. 6–7.
"no party, the PSC, staff, or consultants may cite or rely on the CPCN, directly or indirectly, to establish 'need' or 'benefit,' to shift burdens, or to limit the scope of evidence"	"the PSC and Utilities may not cite or rely upon the CPCN as evidence of 'need' or as predicate authority in that docket during the pendency of this appeal"

As in their initial motion to stay, Appellants fail to cite any authority permitting the Court to dictate the course of a separate administrative proceeding that is not before the Court and instead suggest the Court erred by "treat[ing] any relief touching the siting docket as categorically outside [its] jurisdiction." *Id.* at p. 3.

2. The siting proceeding is not before the Court, and the Court lacks jurisdiction to direct the Commission how to conduct its siting proceeding.

[¶4.] The order being appealed is the Commission's order denying Appellants' untimely petition to intervene and relitigate the CPCN. Dkt. No. 91. As detailed in Appellees' merits briefing, not even the CPCN itself is properly before the Court in this appeal, much less a separate siting case. Dkt. No. 130 at ¶¶ 11–13. The Court correctly limited its analysis of Appellants' motion to "address the stay factors only as they relate to the PSC's June 18, 2025, order" denying Appellants' untimely request to intervene in the CPCN proceeding. Dkt. No. 126 at ¶ 12; *see also* Dkt. No. 130 at ¶¶ 11–13. The Court further recognized that the requested stay of the Order on Petition, "will have no effect on the ongoing siting case." Dkt. No. 126 at ¶ 14; *see also* Dkt. No. 130 at ¶¶ 35–40; *Matter of Nebraska Pub. Power Dist.*, 330 N.W.2d 143, 148–49 (N.D. 1983). Appellants fail to point to any authority under the stay provision of the administrative agencies practice act that permits the relief they request, and the Court already acknowledged that it "lacks jurisdiction to stay [the Siting Proceeding], which is not before this Court." Dkt. No. 126 at ¶ 11. The same analysis applies to Appellants' request that the Court direct the Commission how to conduct the siting proceeding.

3. Appellants fail to demonstrate irreparable injury, and their alleged harm is unrelated to the Commission's issuance of the CPCN or denial of their Petition.

[¶5.] Appellants' alleged harms do not amount to irreparable injuries, and Appellants offer no coherent arguments tying the harms they assert to the grant of the CPCN or the denial of their untimely petition. The CPCN Order does nothing more than grant a certificate of public convenience and necessity, and the order on appeal here does nothing more than deny Appellants' request to relitigate the CPCN Order after missing the deadline to appeal it. Neither the CPCN Order nor the order on appeal initiates any siting-related deadlines or locks the record in the siting

proceeding, nor does it give rise to any of the "property-process burdens" identified by Appellants. As further explained below, Appellants fail to cite any legal authority for the proposition that any of these items constitute irreparable injury justifying a stay, and they fail to cite any evidence in the record establishing the harms they allege.

a. Statutory timing pressure.

[¶6.] Appellants allege that Appellees' filing of their Siting Application "triggers hearing-related" deadlines that "compress township/landowner preparation windows and constrain retained zoning authority—harms that occur before construction." Dkt. No. 127 at p. 4. In reality, Appellants attempt to create an emergency where none exists. *First*, the Commission has not yet scheduled any hearing in the Siting Proceeding. *Second*, Appellants were on notice, on or before June 18, 2025 when the Commission issued the Order on Petition, that a siting proceeding for the Project would need to occur. *See* Dkt. No. 91 at. pp. 3-4.[3] Thus, Appellants have had an opportunity for "township/landowner preparation" before the Siting Proceeding even started. *Third*, the merits of this appeal have been fully briefed and the matter is ripe for determination by the Court. *See* Dkt. No. 106 (stating that Appellants "are content to submit on the briefs."); *see also* Order Granting Appellants' Expedited Motion for Leave to File Reply Brief, Dkt. No. 138 ("Briefing on the merits is deemed complete.")

[¶7.] Despite alleging that any delay in obtaining an order on the merits of this appeal "will prejudice Appellants," they now seek to waste the Court's time by filing a frivolous motion for reconsideration, rehashing issues the Court has already ruled on. *See* Dkt. No. 106 at p. 2. The

[3] Noting: "The [Appellants] will have an opportunity to raise [siting concerns] when the Commission receives [a siting application for the Project]. For clarification, the line may not be constructed without obtaining a certificate of corridor compatibility and route permit from the Commission." (Emphasis added).

Court should ignore this distraction and simply rule on the merits. No "statutory timing pressure" exists that would irreparably harm Appellants or justify a stay.

b. Record-locking momentum.

[¶8.] The record in the siting proceeding is open, not "locked," and the Commission will appropriately consider and weigh the siting factors under N.D.C.C. Chapter 49-22. However, public need is not within the Commission's authority in siting proceedings, and the existence of a CPCN will not impact the Commission's evaluation of siting criteria. *See Matter of Nebraska Pub. Power Dist.*, 330 N.W.2d 143, 148–49 (N.D. 1983); *see also* Dkt. No. 130 at ¶¶ 35–40. It is only Appellants' flawed argument that the Siting Act must be used to determine public need for the Project that gives rise to Appellants' claimed harm.

c. Property-process burdens.

[¶9.] Right-of-entry for surveys or route studies and engaging in landowner communications are not contingent on or related to the issuance of a CPCN. *See* N.D.C.C. § 32-15-06; *see also* 32-15-21 (allowing for an order for the taking by eminent domain conditioned on the receipt of the route permit, but imposing no such condition for a CPCN). Section 32-15-06 of the eminent domain chapter "permits entry with or without pre-approval by the district court" and landowners do not have a "constitutionally protected interest in excluding limited, innocuous intrusion by pre-condemnation surveyors." *SCS Carbon Transp. LLC v. Malloy , Tr. of Harry L. Malloy Tr. No. 2 Dated May 25, 2008,* 2024 ND 109, ¶¶ 29; 28, 7 N.W.3d 268, *as amended* (Jan. 9, 2025). The fact that Appellants may be or have been contacted regarding surveys, studies, or easement acquisition does not constitute irreparable harm that could warrant a stay. Regardless, the presence or absence of a CPCN has no bearing on these activities.

4. Appellants fail to demonstrate any likelihood of success on the merits.

[¶10.] The Court has already found that "Appellants have not demonstrated a likelihood of success on the merits or a risk of irreparable harm." Dkt. No. 126 at ¶ 20. Appellants continue to ignore the jurisdictional bar to their attacks on the CPCN Order and their motion continues a pattern of putting forth dubious claims unsupported by case law. Significantly, the alleged errors of the Commission are based on Appellants' flawed premise that the Siting Act is the appropriate vehicle to determine need for the Project. The merits (or lack thereof) of Appellants' claims have been exhaustively briefed and do not need to be restated here. *See* Dkt. No. 130 at ¶¶ 27–44. Appellants' motion merely restates the same dubious likelihood-of-success arguments the Court has already rejected. The Court should reject them again and deny Appellants' motion.[4]

CONCLUSION

[¶11.] For the reasons stated above, Otter Tail and Montana-Dakota respectfully request the Court deny Appellants' motion for reconsideration and instead simply rule on the merits, thereby terminating the proceedings before the district court.

[4] Alternatively, Appellants' request for stay will become moot upon the district court's affirmance of the order on appeal.

Dated this 30th day of October, 2025.

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