

STATE OF NORTH DAKOTA
IN SUPREME COURT

Case No.: _____

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.

Burleigh County No.:
08-2025-CV-02068

Hon. Bobbi Weiler

**APPELLANTS' MOTION FOR STAY PENDING APPEAL AND
MEMORANDUM OF LAW IN SUPPORT**

TABLE OF CONTENTS

MOTION FOR A STAY 1

INTRODUCTION 2

BACKGROUND

- A. Statutory framework and the PSC’s use of Chapter 49-03. 7
- B. Agency action, district court ruling, and posture of this appeal. 9
- C. Recent developments in PU-25-236. 11

ISSUES ON APPEAL. 14

ARGUMENT. 15

- I. N.D.R.App.P. 8 is satisfied and sets the standard for a stay. 15
- II. The Commission lacked authority to grant a CPCN under Chapter 49-03 for a 345-kV line that must proceed under the exclusive siting framework in Chapter 49-22. 20
 - A. Chapter 49-03 is intended to prevent utilities from interfering with the service areas of other utilities. 21
 - B. The 345-kV Jamestown-Ellendale line is a new transmission facility, not a territorial intrusion. 22
 - C. Chapters 49-03 and 49-22 are not two parts of a single process. 23
 - D. A CPCN issued under Chapter 49-03 cannot predetermine need in a Chapter 49-22 siting proceeding. 24
 - E. *Nebraska Pub. Power Dist.* should be confined to its interstate corridor posture and should not be read to exclude need-related evidence from the Chapter 49-22 record. 25

1.	The statutory text of Chapter 49-22 requires consideration of public need.	26
2.	The legislative history confirms that public need is central to the siting process.	27
3.	<i>Nebraska</i> should be confined to its interstate corridor posture and constitutional-avoidance rationale.	28
F.	Appellees cannot both invoke the CPCN and disclaim it; if they say it is irrelevant to Chapter 49-22, they should stipulate to vacate it.	29
III.	The present harms are process-based and immediate.	30
A.	The wrongful use of the 49-03 CPCN as a predicate in PU-25-236.	30
B.	A disregard of township and landowner participation in PU-25-236.	30
C.	Property process burdens.	33
IV.	The district court’s denial of a stay does not resolve these issues.	34
V.	The balance of harms and the public interest favor a stay.	34
	CONCLUSION	36

MOTION FOR A STAY

[¶1] Appellants respectfully move the Court for a stay under N.D.R.App.P. 8 and N.D.C.C. § 28-32-48 while this appeal is pending.

[¶2] Appellants ask the Court to stay enforcement of the Public Service Commission's June 18, 2025 order and the November 20, 2024 Certificate of Public Convenience and Necessity ("CPCN") that it leaves in place in PSC Docket PU-24-91 (N.D.C.C. ch. 49-03), to the extent the Commission or the Utilities seek to cite or rely on that CPCN as evidence of public need or as predicate authority for the Jamestown to Ellendale 345-kV transmission line in PSC Siting Docket PU-25-236 (N.D.C.C. ch. 49-22) while this appeal is pending.

[¶3] In the alternative, Appellants ask the Court to clarify that the Commission may continue to process the Chapter 49-22 siting docket, but without treating the disputed Chapter 49-03 CPCN as a settled determination of need or as binding predicate authority for the project.

[¶4] A stay is necessary to preserve meaningful appellate relief. The Commission is actively processing PU-25-236, and the Utilities are invoking the disputed CPCN as proof of need and as predicate authority. Appellants therefore seek a limited stay that prevents reliance on the CPCN in PU-25-

236 while the Court resolves whether the Commission had statutory authority, and thus jurisdiction to act, to issue a CPCN under Chapter 49-03 for a new 345-kV transmission line that must proceed under Chapter 49-22. *See Nodak Elec. Coop., Inc. v. N.D. Pub. Serv. Comm'n*, 982 N.W.2d 592, 595–96, 598 (N.D. 2022); *Env't L. & Pol'y Ctr. v. N.D. Pub. Serv. Comm'n*, 2020 ND 192, ¶ 11, 948 N.W.2d 838.

[¶5] Appellants request oral argument on this motion. If the Court grants argument, counsel for Appellants are available to appear in person or by remote means at the Court's convenience.

[¶6] This motion is supported by the accompanying memorandum of law, the Declaration of Douglas J. Nill and attached exhibits, the administrative record, and the briefing and orders entered in the district court on Appellants' prior motion for a stay and motion for reconsideration.

INTRODUCTION

[¶7] This appeal arises from the Public Service Commission's issuance of a Certificate of Public Convenience and Necessity for a new 345-kV transmission line from Jamestown to Ellendale under N.D.C.C. ch. 49-03 in PSC Docket PU-24-91 (Nov. 20, 2024), the Commission's order denying Appellants' petition to vacate or reopen that CPCN proceeding (June 18,

2025), and the Burleigh County District Court’s order disposing of Appellants’ administrative appeal on procedural grounds (Feb. 2, 2026). Declaration of Douglas J. Nill, Exs. 5, 4, and 1.

[¶8] The district court did not reach Appellants’ threshold statutory argument that the Commission lacked statutory authority, and thus jurisdiction to act, to issue a Chapter 49-03 CPCN for a new 345-kV line that must proceed under the Energy Conversion and Transmission Facility Siting Act, N.D.C.C. ch. 49-22. *See Nodak Elec. Coop., Inc.*, 982 N.W.2d at 595–96, 598 (holding PSC was “without jurisdiction under N.D.C.C. ch. 49-03” and vacating order); *Env’t L. & Pol’y Ctr.*, 948 N.W.2d at 841-42 (PSC authority limited to that provided by the Legislature; in the administrative context, “jurisdiction” includes the agency’s “scope of authority under statute”).

[¶9] This case is not a policy dispute about transmission projects generally, nor a request to halt all energy infrastructure. It is a dispute about whether the Legislature’s siting safeguards for a high-voltage facility of this magnitude can be bypassed by proceeding first under a publication-noticed CPCN statute and then importing that CPCN into the Chapter 49-22 record as if “need” were already decided.

[¶10] Chapter 49-22 was enacted to require a front-end siting process

for large energy conversion and transmission facilities. For a transmission line of this size, that framework requires a detailed siting application that includes “a statement explaining the need for the facility,” along with evaluation of alternatives and impacts; public hearings in the affected counties at which “any person may present testimony or evidence”; and a final decision supported by findings with reasons addressing the statutory criteria and considerations. *See* N.D.C.C. §§ 49-22-08(1)(c), (f)–(h), 49-22-09, 49-22-13(1), 49-22-08.1(5); *see also* N.D.C.C. § 49-22-08(5) (designation “in accordance with the evidence presented at the hearings” and “a finding with reasons”).

[¶11] The Siting Act’s structure also contemplates direct notice, beyond publication, through service of notices of filing and hearing on persons and agencies the Commission deems appropriate, in addition to any published notice. N.D.C.C. §§ 49-22-08(2), 49-22-13(4). Appellants contend those notice and hearing safeguards are the Legislature’s design for how “need,” alternatives, and local impacts are to be tested for a new high-voltage line.

[¶12] Appellants contend the Utilities did the opposite. They proceeded first under Chapter 49-03, a statute directed to service territory and line-extension disputes between electric providers, where notice can be limited to

publication and the Chapter 49-22 local hearing process is not required. The Commission then issued a CPCN containing a conclusory “public convenience and necessity” determination, and the Townships and affected landowners learned of the CPCN only after it issued. Nill Decl., Ex. 11(5) (Speaker 1 – 28:34); *see also* Nill Decl., Ex. 7 (Township Limited Objections ¶ 1).

[¶13] The urgency for a stay is practical as well as legal. While judicial review is pending, the Commission is actively processing the Chapter 49-22 siting application in PSC Case No. PU-25-236, and the Utilities are invoking the disputed Chapter 49-03 CPCN as proof of “need” and as predicate authority in that siting docket. In their PU-25-236 application, the Utilities cite the CPCN repeatedly, including in a section titled “Benefit and Need Analysis,” and treat it as an established determination that the project is needed. Nill Decl., Ex. 12.

[¶14] The Townships have responded by filing zoning ordinances, limited objections to reliance on the CPCN as proof of need, statements addressing the Utilities’ request for a declaration of supersession and preemption of local land-use regulations, and questions for the record directed to need, alternatives, and local impacts. Nill Decl., Ex. 7-9. Commission staff has advised that these township filings may be treated as

public input rather than formal evidence unless the Townships obtain party status and present materials under oath. Nill Decl., Ex. 10. The result is that, while judicial review is pending, the siting record is developing under an approach that gives operative effect to the disputed CPCN and risks relegating township evidence and objections to a non-evidentiary track.

[¶15] The January 14, 2026 public hearing in Edgeley illustrates the harm. Russell Township’s zoning administrator appeared on behalf of the Township, explained the Townships received no direct notice of the earlier CPCN proceeding, and asked the Commission not to treat the prior CPCN as conclusive proof of need but instead to decide need within the Chapter 49-22 record with findings and reasons based on evidence presented in that docket. Nill Decl., Ex. 11(3-6) (Edgeley Tr.). When he attempted to read the Township’s limited objection into the record, counsel for the Utilities objected that the Township was “not a party” and could not “lodge objections,” urging that its submissions be treated only as public comment. *Id.*

[¶16] Rule 8 and N.D.C.C. § 28-32-48 authorize the Court to prevent that outcome and preserve meaningful appellate relief. Appellants satisfy Rule 8’s procedural requirement because they sought a stay in the district court, which denied relief and later denied reconsideration. Nill Decl., Exs. 3,

2. Appellants also satisfy the stay factors: this appeal presents serious, threshold statutory-authority questions bearing directly on the Commission’s jurisdiction in this context, the harms are immediate and process-based, and a narrow stay preserves the status quo without halting the siting docket. *See Nodak*, 982 N.W.2d at 595–96; *Trottier v. Bird*, 635 N.W.2d 157, 159 (N.D. 2001).

[¶17] For these reasons, Appellants respectfully request that the Court stay enforcement of the Commission’s June 18, 2025 order and the November 20, 2024 CPCN it leaves in place, to the extent the Commission or the Utilities seek to cite or rely on that CPCN as proof of need or predicate authority in PSC Case No. PU-25-236 while this appeal is pending.

BACKGROUND

A. Statutory framework and the PSC’s use of Chapter 49-03.

[¶18] The project at issue is a new 345-kV high-voltage transmission line between Jamestown and Ellendale. By design and voltage, it fits squarely within the definition of a “transmission facility” in N.D.C.C. § 49-22-03(12)(a) (an electric transmission line and associated facilities with a design in excess of one hundred fifteen kilovolts). Under § 49-22-07, a utility may not begin construction of such a facility without first obtaining a certificate of site

compatibility or a route permit from the Public Service Commission
“pursuant to this chapter.”

[¶19] Chapter 49-22 was enacted in 1975 as the North Dakota Energy Conversion and Transmission Facility Siting Act. *See* N.D.C.C. § 49-22-01. For lines of this magnitude, it requires a front-end siting process that includes: (1) a detailed application with “a statement explaining the need for the facility” and an evaluation of alternatives and impacts, N.D.C.C. § 49-22-08(1)(c), (f), (g), (h); and (2) public hearings in each affected county at which “any person may present testimony or evidence” on the statutory factors, N.D.C.C. § 49-22-09; § 49-22-13(1). The Commission’s designation of a site, corridor, or route must be made “in accordance with the evidence presented at the hearings,” the application, the siting criteria, and the statutory considerations “in a finding with reasons for the designation.” N.D.C.C. §§ 49-22-08(5), 49-22-08.1(5).

[¶20] Instead of initiating this project under Chapter 49-22, Otter Tail and MDU first filed for a Certificate of Public Convenience and Necessity under Chapter 49-03 in PSC Case No. PU-24-91. Chapter 49-03 is the Territorial Integrity Act. It was enacted to regulate competition between utilities and to prevent unfair encroachment into each other’s service

territories; it historically deals with extensions and service disputes, not new 345-kV lines.

[¶21] In the Chapter 49-03 CPCN proceeding, the Utilities relied on publication notice. The townships and landowners along the proposed route did not receive direct mailed notice. Nill Decl., Exs. 7, 11(3-5). There was no on-the-ground siting hearing in the project area comparable to what Chapter 49-22 contemplates, and the November 20, 2024 CPCN order did not contain the kind of explicit findings and separate conclusions of law that the Administrative Agencies Practice Act requires for final agency orders. *See* N.D.C.C. § 28-32-39(1), (2).

B. Agency action, district court ruling, and posture of this appeal.

[¶22] The five Appellant townships and the individual landowners learned of the CPCN only after it had been granted.¹ They petitioned the Commission to intervene, to rescind the CPCN, and to reopen the proceeding.

¹ The Township Appellants are Wano, Willowbank, and Russell Townships in LaMoure County, Corwin Township in Stutsman County, and Valley Township in Dickey County. North Dakota’s Constitution commits the State to “maximum local self-government.” N.D. Const. art. VII, § 1. Chapter 49-22’s notice-and-hearing framework reflects that design by ensuring affected local governments and residents have a meaningful opportunity to participate in the record on which the Commission must issue findings with reasons.

On June 18, 2025, the Commission denied that relief, left the CPCN in place, and took the position that the CPCN could stand as a determination of public convenience and necessity that would carry into a later Chapter 49-22 siting docket. Nill Decl., Ex. 5.

[¶23] Appellants appealed under N.D.C.C. § 28-32-42 to the Burleigh County District Court. They argued, among other things, that the Commission lacked statutory authority, and thus jurisdiction to act, to issue a CPCN under Chapter 49-03 for a new high-voltage (345-kV) transmission facility that must proceed under the exclusive siting framework in Chapter 49-22. *See Nodak Elec. Coop., Inc.* at 595–96 (N.D. 2022) (PSC jurisdiction limited to Legislature’s grant; “jurisdiction” includes agency’s scope of authority under statute); *Env’t L. & Pol’y Ctr.*, 2020 ND 192, ¶ 11, 948 N.W.2d 838 (same). Appellants further argued that the November 20, 2024 CPCN did not satisfy Chapter 28-32 final-order requirements and was not properly served, so intervention and appeal deadlines did not run as the Commission contended, and that public need for this line must be determined within a Chapter 49-22 record with direct notice, a local hearing, and findings with reasons.

[¶24] While the district court appeal was pending, the Utilities filed

their Chapter 49-22 siting application in PSC Case No. PU-25-236 and have invoked the disputed CPCN as proof of need and as predicate authority in that docket. Appellants sought a stay under N.D.C.C. § 28-32-48 to prevent reliance on the CPCN in PU-25-236 while judicial review was pending; the district court denied that request. Nill Decl., Ex. 3.

[¶25] On February 2, 2026, the district court dismissed the portion of the administrative appeal seeking review of the November 20, 2024 CPCN order, holding that the CPCN order was a final, appealable agency action and that no timely appeal had been perfected. Nill Decl., Ex. 1. The court also held that its appellate jurisdiction over the June 18, 2025 petition order was limited. It affirmed the Commission’s denial of intervention and dismissed the remainder of the appeal for lack of jurisdiction. This appeal challenges those threshold determinations and seeks relief that preserves meaningful judicial review, including preventing the Commission and the Utilities from treating the contested CPCN as a settled determination of need or as operative predicate authority in the Chapter 49-22 siting docket while this appeal is pending.

C. Recent developments in PU-25-236.

[¶26] While this appeal has been moving forward, the Commission and

the Utilities have continued to press ahead in the Chapter 49-22 siting docket for the same 345-kV line, PSC Case No. PU-25-236. Those developments show why a stay is needed now.

[¶27] After the Utilities' August 8, 2025 siting application, the Appellant townships filed their zoning regulations in November 2025, and submitted three sets of written filings in January 2026: limited objections to reliance on PU-24-91 as proof of need, statements regarding Applicants' request to declare local land-use and zoning ordinances superseded and preempted, and questions for the record directed to need, alternatives, and local impacts. Nill Decl., Exs. 7, 9, and 9 (same for each Appellant Township). Those filings were captioned in PU-25-236 and served on the Commission and parties. In response, Commission staff advised that written submissions from townships that were not formal parties might be placed in a public-input file rather than the formal evidentiary record unless presented under oath and subject to cross-examination. Nill Decl., Ex. 10.

[¶28] As a result, the townships have been treated as if they are on the margins of the siting process. At the January 14, 2026 public hearing in Edgeley, Russell Township zoning administrator Tim Leppert appeared on behalf of Russell Township. Nill Decl., Ex. 11(3-6). He explained on the record

that Russell Township had submitted written filings in PU-25-236, including a limited objection on need, a response to Applicants' House Bill 1258 zoning preemption request, and questions for the record. Nill Decl., Exs. 7, 8, and 9. He also explained that Russell Township did not receive direct mailed notice of the earlier Chapter 49-03 CPCN proceeding and that the Commission's June 18, 2025 order is now under judicial review in Burleigh County District Court, Case No. 08-2025-CV-02068.

[¶29] When Mr. Leppert attempted to read Russell Township's limited objection into the record, counsel for the Utilities objected on the ground that "the township is not a party" and therefore "does not have the ability to lodge objections in this proceeding." The presiding administrative law judge directed Mr. Leppert to summarize the township's position rather than read the full filings, while indicating that the distributed documents would "become part of the record" and would be reviewed by the Commission. Mr. Leppert responded that the townships "have never had a say" before the Commission, that they received no direct notice of the CPCN proceeding because the notice was placed as a news item rather than in the public-notice section of local papers, and that this siting docket is the first real opportunity for townships to be heard about the project.

[¶30] These events illustrate how the Commission and the Utilities are already using the disputed Chapter 49-03 CPCN in PU-25-236 and how the lack of direct notice and party status for townships in PU-24-91 is carrying over into the Chapter 49-22 process. The siting record is developing under a framework in which “need” is treated as decided, while affected townships struggle to secure formal-record treatment for their objections and questions.

[¶31] Against that backdrop, a stay that prevents reliance on the disputed CPCN in PU-25-236 while this Court decides its legality is necessary to preserve meaningful appellate relief and to keep the Chapter 49-22 process from being distorted by a contested order.

ISSUES ON APPEAL

[¶32] This appeal presents a narrow set of legal questions.

[¶33] The first is whether the Public Service Commission had statutory authority to issue a Certificate of Public Convenience and Necessity under N.D.C.C. Chapter 49-03 for a new 345-kV transmission line that meets the definition of an “electric transmission facility” and must be sited and approved under N.D.C.C. Chapter 49-22.

[¶34] The second is whether public need for such a line must be determined within a Chapter 49-22 record, with direct mailed notice, a local

hearing, and findings with reasons, or whether the Commission may rely on a publication-only Chapter 49-03 CPCN as a substitute for that need determination in the siting process.

[¶35] The third is whether the November 20, 2024 CPCN and the Commission's June 18, 2025 order leaving it in place comply with the final-order and service requirements of N.D.C.C. Chapter 28-32, including the requirement of explicit findings of fact and separate conclusions of law, and what effect any defects have on the running of intervention and appeal deadlines.

[¶36] Those are questions of statutory interpretation and administrative authority. They are the same questions that drive the stay request: if the Commission lacked authority to proceed under Chapter 49-03, or if public need must be decided in a Chapter 49-22 record, the disputed CPCN cannot lawfully be used now as proof of need or predicate authority in PU-25-236 while this appeal is pending.

ARGUMENT

I. N.D.R.App. 8 is satisfied and sets the standard for a stay.

[¶37] Rule 8 governs stays pending appeal. The Court considers whether the movant has raised serious legal questions and shown a

likelihood of success sufficient to justify interim relief, whether irreparable harm will occur absent a stay, whether the balance of harms favors preservation, and whether the public interest supports a stay. Appellants satisfy these factors. Appellants also satisfy Rule 8’s procedural requirement that a stay first be sought in the district court.

[¶38] Appellants sought a stay in the district court through a motion and supporting memorandum filed August 6, 2025, Nill Decl., Ex. 13, with a reply filed August 27, 2025. Nill Decl., Ex. 14. The district court denied a stay on October 8, 2025, and later denied reconsideration. Nill Decl., Exs. 3, 2. Rule 8’s district court requirement is therefore met.

[¶39] This appeal presents threshold jurisdictional and statutory-authority questions that go directly to whether the Commission’s November 20, 2024 CPCN may be given operative effect while judicial review is pending. This Court has held the PSC’s jurisdiction is limited to the authority provided by the Legislature and that, in the administrative context, “jurisdiction” includes the agency’s scope of authority under statute. *Nodak Elec. Coop., Inc.*, 982 N.W.2d at 595–96 (citing *Env’t L. & Pol’y Ctr.*, 2020 ND 192, ¶ 11, 948 N.W.2d 838). Subject-matter jurisdiction cannot be conferred by agreement, consent, or waiver. *Trottier*, 635 N.W.2d at 159. And where

jurisdiction is lacking, the issue is predominant and must be addressed before the merits. *Nodak*, 982 N.W.2d at 595–96 (quoting *Smith v. City of Grand Forks*, 478 N.W.2d 370, 373 (N.D. 1991)).

[¶40] Those principles matter here because the district court’s February 2, 2026 order disposed of this case on procedural grounds. The court dismissed appellate review of the November 20, 2024 CPCN Order and limited review of the Commission’s June 18, 2025 Petition Order, without reaching the Townships’ threshold statutory argument that the Commission lacked statutory authority, and thus jurisdiction to act, to issue a Chapter 49-03 CPCN for a new 345-kV line that must proceed under Chapter 49-22. Appellants challenge those procedural rulings. In particular, Appellants contend the November 20 CPCN Order was not a final, reviewable agency action because it lacks the explicit findings of fact, separate conclusions of law, and reasoned explanation North Dakota law requires for finality and for the running of reconsideration and appeal deadlines. *See* N.D.C.C. § 28-32-39(1)–(2); *see also State v. Sandberg*, 956 N.W.2d 342, 347 (N.D. 2021) (findings must enable meaningful review). A decision that contains only a conclusory statement that “public convenience and necessity will be served,” Nill Decl., Ex. 5, does not permit a reviewing court to understand the

agency's reasoning, and statutory clocks should not be treated as having run on an unreviewable, noncompliant decision. Nor may a court supply a rationale the agency did not articulate. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

[¶41] Even if the Court were to conclude the November 20, 2024 CPCN Order is a final agency action, Appellants contend the Townships had no meaningful opportunity to participate because the CPCN proceeding was noticed by publication and the affected Townships received no direct notice. *See, e.g.*, Wano Township Limited Objection ¶ 1 (CPCN “issued in a proceeding noticed by publication and without direct notice to the affected townships”), Nill Decl., Ex. 7; Tr. of Jan. 14, 2026 Edgeley public hearing (Leppert testimony: “We didn’t get a notice before you guys voted on granting them the CPCN... The townships were never notified”), Nill Decl., Ex. 11(5) (Speaker 1 – 28:34). That lack of notice underscores why interim relief is necessary to prevent the CPCN from being treated as settled “need” or predicate authority in PU-25-236 while this Court resolves the threshold statutory-authority issues presented on appeal.

[¶42] Those finality and notice questions are serious, and they matter now. The Commission’s June 18 Petition Order did not cure the defect. It

instead attempted to justify the lack of findings by characterizing the CPCN as an “informal disposition.” Nill Decl., Ex. 4, pp. 2-3. But informal disposition under N.D.C.C. § 28-32-22 does not authorize dispensing with findings where the governing statutes require them, and it cannot be used in a way that substantially prejudices directly affected parties. Appellants also challenge the Commission’s denial of intervention, which the district court affirmed, and they have a substantial likelihood of success on that issue under the governing intervention standards and due process principles.

[¶43] Independently, Appellants raise serious statutory questions on the merits that go to the Commission’s authority and the Legislature’s design, including whether Chapter 49-22 supplies the exclusive framework for siting and approving new high-voltage transmission facilities and whether a Chapter 49-03 CPCN may be used as a stand-alone determination of need and then carried into the Chapter 49-22 siting docket as predicate authority.

[¶44] Absent a stay, the harms are immediate and process-based. The Commission and Utilities are already invoking the CPCN as “benefit” and “need” in PU-25-236, Nill Decl., Ex. 12, while township and landowner submissions risk being treated as public comment rather than formal evidence unless presented under oath and subject to cross-examination. Once

the Chapter 49-22 record is developed and decisions are made under a framework that treats “need” as settled by the CPCN, later appellate relief may be practically ineffective even if Appellants prevail on the finality, intervention, or statutory authority issues.

[¶45] The Court therefore may exercise its authority under Rule 8 and N.D.C.C. § 28-32-48 to preserve meaningful appellate relief by preventing the Commission and the Utilities from treating the disputed CPCN as a settled determination of need or as operative predicate authority in PSC Case No. PU-25-236 while this appeal is pending.

II. The Commission lacked authority to grant a CPCN under Chapter 49-03 for a 345-kV line that must proceed under the exclusive siting framework in Chapter 49-22.

[¶46] For lines at 115 kV and above, Chapter 49-22 is the Legislature’s exclusive, integrated process. A utility may not “begin construction” without a route permit or site certificate “pursuant to this chapter,” and the Commission’s decision must be guided by a record that includes the applicant’s statement of need and detailed findings under N.D.C.C. §§ 49-22-08(1)(c) and 49-22-09. A prior “need” determination under Chapter 49-03 bypasses this required process and is fundamentally incompatible with the framework the Legislature enacted.

A. Chapter 49-03 is intended to prevent utilities from interfering with the service areas of other utilities.

[¶47] N.D.C.C. ch. 49-03, known as the Territorial Integrity Act, was enacted to regulate competition among utilities by preventing unfair encroachments into each other's service territories. It requires a utility to obtain Commission approval before constructing or extending facilities outside municipal limits or to serve new customers. *See* N.D.C.C. § 49-03-01.

[¶48] The purpose of a certificate under Chapter 49-03 is not to establish the necessity of new high-voltage transmission infrastructure, but to resolve disputes over overlapping service and avoid inefficient duplication. As this Court explained, customer preference is only a “minor consideration” that “cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice.” *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 104 (N.D. 1990). Legislative history likewise confirms that “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.” N.D. Legis. Council, *Territorial Integrity Act – History and Operation* (Oct. 1997).

B. The 345-kV Jamestown-Ellendale line is a new transmission facility, not a territorial intrusion.

[¶49] The 345-kV Jamestown–Ellendale high-voltage line at issue here, a new line conceived by MISO² to carry electricity from wind projects west of Ellendale to Jamestown and then eastward into Minnesota, is not a mere territorial intrusion into an existing system or an extension of an existing line. It is a brand-new transmission facility that falls squarely within the scope of Chapter 49-22.

[¶50] By statute, a “transmission facility” includes “an electric transmission line and associated facilities with a design in excess of one hundred fifteen kilovolts.” N.D.C.C. § 49-22-03(12)(a). Section 49-22-07(1) further provides that “[a] utility may not begin construction of an energy conversion facility or an electric transmission facility in the state without first having obtained a certificate of site compatibility or a route permit from the commission pursuant to this chapter.”

[¶51] This framework is not discretionary. Chapter 49-22 establishes a mandatory, front-end process for high-voltage lines that exceed the statutory

² MISO (the Midcontinent Independent System Operator) is a regional transmission organization that manages the high-voltage grid and wholesale power markets in the region. Otter Tail Power and MDU are MISO members.

threshold. It requires the utility to obtain a route permit or site certificate before construction begins and prescribes a comprehensive procedure: environmental review, landowner notice, public hearings, detailed application submissions under § 49-22-08, and explicit findings of fact under §§ 49-22-08(5) and 49-22-09.

C. Chapters 49-03 and 49-22 are not two parts of a single process.

[¶52] The Utilities contend that because Chapter 49-03 contains no express prohibition, they may seek a CPCN for a high-voltage transmission facility under that statute. But the absence of an express bar does not equate to legislative approval. The statutory framework and policy statement in § 49-22-02 make clear that Chapter 49-22 was designed to govern both the initiation and completion of the siting process for new high-voltage lines. It is a comprehensive, exclusive process, not a supplemental routing step to be layered onto a prior CPCN granted under a different statute.

[¶53] Treating the process as bifurcated, with a CPCN first obtained under Chapter 49-03 and then imported into a 49-22 route application, undermines the Legislature's scheme. The requirements of 49-22 are not mere formalities. They are substantive safeguards for landowners, local governments, and the public. Allowing a CPCN under 49-03 to predetermine

“necessity” reduces the subsequent 49-22 proceeding to a rubber stamp.

[¶54] By statute, the route-permitting process expressly requires consideration of need in light of alternatives, environmental and economic impacts, and existing plans. *See* N.D.C.C. §§ 49-22-02, 49-22-08(1)(c), 49-22-09(1), (4), (5), (7), (8). That analysis cannot be meaningful if the Commission has already resolved the threshold question of necessity under Chapter 49-03 before the siting process begins.

D. A CPCN issued under Chapter 49-03 cannot predetermine need in a Chapter 49-22 siting proceeding.

[¶55] Even if Chapter 49-03 may apply in other contexts, it cannot be used to resolve “need” for a new 345-kV line outside the integrated framework the Legislature established in Chapter 49-22. By statute, a 49-22 application must include “[a] statement explaining the need for the facility.” N.D.C.C. § 49-22-08(1)(c). The Commission is then required to make findings guided by the statutory considerations, including alternatives, environmental impacts, economic impacts, existing plans, and related factors. N.D.C.C. § 49-22-09.

[¶56] Allowing a prior CPCN under 49-03 to fix “need” before the 49-22 hearing prejudices that evaluation. It strips the siting process of its substance and reduces it to a procedural formality. That outcome is irreconcilable with

the text, structure, and purpose of 49-22, which was enacted to ensure that high-voltage transmission lines are fully justified and publicly scrutinized before construction begins.

E. *Nebraska Pub. Power Dist.* should be confined to its interstate corridor posture and should not be read to exclude need-related evidence from the Chapter 49-22 record.

[¶57] *Matter of Nebraska Pub. Power Dist.*, 330 N.W.2d 143, 148–49 (N.D. 1983), is being cited for the proposition that the Siting Act contains “no direction” to assess need and therefore any need-related evidence must be excluded from the Chapter 49-22 record. That reading cannot be reconciled with the statute’s text. Chapter 49-22 requires the applicant to submit “a statement explaining the need for the facility,” N.D.C.C. § 49-22-08(1)(c), and it directs the Commission to make routing and preemption decisions guided by considerations that necessarily engage the project’s asserted need in relation to alternatives, resource efficiency, impacts, and consumer considerations. *See* N.D.C.C. §§ 49-22-02, 49-22-09, 49-22-16(2).

[¶58] Properly understood, *Nebraska* does not authorize a categorical exclusion of need-related evidence the statute itself makes relevant; at most, it rejected a free-standing “need veto” in the posture of an interstate corridor access case. And because the Utilities are invoking *Nebraska* in PU-25-236 to

foreclose the Townships' participation on need-related statutory factors, Nill Decl., Ex. 11(1) (Speaker 3 – 02:10:24), a stay is warranted to prevent the Chapter 49-22 record from being irreversibly shaped by reliance on a CPCN whose validity is presently on appeal.

1. The statutory text of Chapter 49-22 requires consideration of public need.

[¶59] Chapter 49-22 itself makes clear that public need is part of the siting analysis. The Legislature's policy statement provides:

“[I]t is a policy of this state to site energy conversion facilities and to route transmission facilities in an orderly manner compatible with environmental preservation and the *efficient use of resources*.” N.D.C.C. § 49-22-02 (emphasis added).

[¶60] The “efficient use of resources” necessarily reflects a need inquiry, balancing demand against environmental and economic impacts. The statute reinforces this requirement in multiple provisions. Section 49-22-08(1)(c) requires an applicant to submit “[a] statement explaining the need for the facility.” Section 49-22-09 directs the Commission to be guided by specific considerations in reaching its decision, including adverse environmental effects, alternatives that minimize those effects, and the direct and indirect economic impacts of the facility. N.D.C.C. § 49-22-09(1), (4), (5), (7). And § 49-22-16(2) requires the Commission, in deciding whether to

preempt local land-use and zoning rules, to consider “*needs of consumers regardless of their location.*” (Emphasis added).

[¶61] Taken together, these provisions demonstrate that a Chapter 49-22 proceeding necessarily entails an evaluation of public need, grounded in statutory text and not imported from any other chapter.

2. The legislative history confirms that public need is central to the siting process.

[¶62] The legislative history of 49-22, enacted as an emergency measure effective April 9, 1975, confirms that route and site approval for high-voltage lines requires a showing of public need. *See* 1975 N.D. Sess. Laws ch. 436 (S.B. 2050) (eff. Apr. 9, 1975). For example, in testimony on S.B. 2050 before the House Committee on Natural Resources, Ken Ziegler of Basin Electric emphasized that robust public review was essential so that “the total public convenience and necessity can finally be met.” *Hearing on S.B. 2050 Before the H. Comm. on Natural Resources* (N.D. Mar. 6, 1975) (statement of Ken Ziegler, Basin Electric). Legislative Council materials from the same period echo the point: a January 1974 background 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. N.D. Legis. Council Staff, *Background Information on Power Transmission Lines and Land Disturbing Operations* 4 (Jan. 1974).

[¶63] This history underscores the Legislature’s design: public need is central to the 49-22 process, and no high-voltage line may be approved without reasoned findings tied to that requirement. The appeal therefore presents a threshold question of statutory construction: whether the PSC acted *ultra vires* in issuing a CPCN under the Territorial Integrity Act (49-03) rather than proceeding under 49-22. That question should be resolved before the PSC proceeds under 49-22 in reliance on a legally defective CPCN.

3. *Nebraska* should be confined to its interstate corridor posture and constitutional-avoidance rationale.

[¶64] *Nebraska* arose as an interstate corridor case in which the Commission concluded it lacked “authority or jurisdiction to determine the need for the line or to deny access across the State of North Dakota,” and the parties briefed (but the Court did not reach) a Commerce Clause argument that a “need” veto would unduly burden interstate commerce. *Matter of Nebraska Pub. Power Dist.*, 330 N.W.2d at 148–49 & n.2. Justice VandeWalle’s concurrence further underscores the posture-driven nature of the decision, noting that *Nebraska’s* own regulatory determination of need

occurred only shortly before oral argument, long after the North Dakota siting proceeding and district court appeal were underway. *Id.* at 150 (VandeWalle, J., concurring specially). *Nebraska* should therefore be confined to its corridor-stage, interstate-access posture and should not be read to nullify the Legislature’s express requirement that an applicant submit a “statement explaining the need for the facility,” or to preclude the Commission from considering need-related factors within the Chapter 49-22 record, including “needs of consumers regardless of their location” when deciding preemption. N.D.C.C. §§ 49-22-02, 49-22-08(1)(c), 49-22-09(1), (4), (5), (7), (8), 49-22-16(2).

F. Appellees cannot both invoke the CPCN and disclaim it; if they say it is irrelevant to Chapter 49-22, they should stipulate to vacate it.

[¶65] If Appellees truly believe the November 20, 2024 Chapter 49-03 CPCN has no bearing on the Chapter 49-22 siting application they filed on August 8, 2025, they should stipulate to vacate it. They have not. Instead, Appellees disclaim the CPCN’s relevance in this appeal while repeatedly invoking it in PU-25-236, including in their “Benefit and Need Analysis,” as proof of need and as predicate authority. Nill Decl., Ex. 12. That inconsistency underscores the need for interim relief. A Chapter 49-03 CPCN

cannot be used to predetermine “need” within the Legislature’s Chapter 49-22 framework or to narrow the Chapter 49-22 record while judicial review is pending.

III. The present harms are process-based and immediate

[¶66] Appellants are not asking this Court to halt all PSC action forever. They are asking the Court to prevent the PSC and the Utilities from using the disputed CPCN to shape the Chapter 49-22 siting docket while this appeal is pending.

[¶67] The harms are not speculative. They include:

A. The wrongful use of the 49-03 CPCN as a predicate in PU-25-236.

[¶68] The Utilities’ Chapter 49-22 application cites the November 20, 2024 CPCN repeatedly as proof of benefit and need. Nill Decl., Ex. 12. That gives operative effect to an order whose jurisdictional basis is on appeal. It compresses the issues in the siting docket and signals that “need” is settled before affected townships and landowners have had a fair opportunity to be heard in the forum the Legislature prescribed.

B. A disregard of township and landowner participation in PU-25-236.

[¶69] Once a Chapter 49-22 application is filed in a siting docket,

statutory timelines for hearings and decisions begin to run. Townships must call special meetings, coordinate with landowners, evaluate zoning implications, and decide whether to retain counsel or experts, all while the Utilities point to a prior CPCN as proof of need. That is a present, practical burden on local governments and residents.

[¶70] On February 4, 2026, the same five townships that are Appellants here filed a Petition to Intervene and related motion in PU-25-236. Nill Decl., Ex. 6. In that filing, the townships explained that they had already submitted three sets of captioned filings in the siting docket: limited objections to reliance on the PU-24-91 CPCN as proof of need, statements responding to the Utilities' request to declare local land-use and zoning ordinances superseded and preempted, and questions for the record directed to the Chapter 49-22 need showing and the Commission's required findings with reasons. Nill Decl., Exs. 7, 8, 9. The townships asked for limited-purpose intervention and for those filings to be treated as formal evidentiary exhibits so the Commission's final order would address them in its findings with reasons and preserve them for judicial review. Nill Decl., Ex. 6.

[¶71] Commission staff, however, has advised the townships in writing that written submissions made outside a formal or technical hearing may be

placed in a public-input file and not treated as part of the formal evidentiary record unless submitted under oath and subject to cross-examination. Nill Decl., Ex. 10. That means the townships' objections and questions may never be addressed in the Commission's final findings with reasons under Chapter 49-22. That is not a theoretical risk; it is the posture they face today in PU-25-236.

[¶72] The January 14, 2026 public hearing in Edgeley further illustrates the problem. Russell Township zoning administrator Tim Leppert appeared and spoke on behalf of Russell Township, explained that the township received no direct mailed notice of the earlier Chapter 49-03 CPCN proceeding, and asked the Commission not to treat the prior CPCN as conclusive proof of need but instead to decide need within the Chapter 49-22 record with findings and reasons based on the evidence presented in that docket. When he attempted to read the township's limited objection into the record, counsel for the Utilities objected that the township was not a party and "does not have the ability to lodge objections," urging that its submissions be treated only as public comment. Nill Decl., Ex. 11(3-6).

[¶73] These developments are offered not to supplement the PU-24-91 administrative record, but to show the present, ongoing effect of the disputed

CPCN in PU-25-236 and the risk that township and landowner objections will be relegated to a non-evidentiary track while the formal siting record develops.

[¶74] For purposes of this motion, that is the harm. It is occurring now inside the Chapter 49-22 process that is supposed to protect local governments and landowners. A stay that prevents reliance on the disputed CPCN in PU-25-236 while this appeal is pending is needed to halt that erosion of meaningful participation and to preserve the integrity of the statutory framework the Legislature enacted.

C. Property-process burdens.

[¶75] Experience in these kinds of cases shows that survey requests, right-of-entry demands, and related communications typically begin well before any shovel hits the ground. Landowners must decide whether to allow entry, whether to negotiate, and whether to resist, all under the shadow of a CPCN they were never notified about and whose legality is now in dispute.

[¶76] These harms are precisely why stay mechanisms exist. Without a stay, the PSC and the Utilities can continue to use the challenged CPCN to shape the siting record and practical expectations on the ground. By the time the appeal is resolved, administrative and practical momentum may have

built on a potentially defective foundation, and meaningful relief may be difficult to restore.

IV. The district court's denial of a stay does not resolve these issues.

[¶77] In the district court, Appellants laid out these concerns in the original stay motion, in the reply, and in the motion to reconsider. The court denied relief based on a narrow view of N.D.C.C. § 28-32-48 and a conclusion that process-based harms were either premature or could be cured by later participation.

[¶78] Respectfully, that ruling confirms that Appellants have done what N.D.R.App.P. 8 requires at the district court level, but it does not foreclose stay relief here. This Court has independent authority to weigh the Rule 8 factors and to interpret § 28-32-48 in light of the statutes and record.

[¶79] Seen properly, Appellants are asking for classic stay-of-enforcement relief: a pause on giving operative effect to the appealed CPCN in a related docket until the Court decides whether that CPCN was lawfully issued at all.

V. The balance of harms and the public interest favor a stay.

[¶80] The balance of harms favors preservation. The Utilities chose to pursue this project through a Chapter 49-03 CPCN, even though it is a new

345-kV line that fits squarely within Chapter 49-22. Any delay in relying on that CPCN while this appeal is decided flows from that choice.

[¶81] The Commission can still process the Chapter 49-22 siting docket. The Utilities can still present their case for siting. The only thing a stay would prevent is the use of the disputed CPCN as a substitute for the Chapter 49-22 need showing.

[¶82] The public interest favors clarity and adherence to the statutory framework the Legislature enacted. Landowners, townships, and the broader public are entitled to a siting process that starts in the right place, under the right statute, with the right notice, and with a need determination made in the right record. Allowing a publication-only Chapter 49-03 CPCN to substitute for that process undermines confidence in the regulatory scheme and shifts the burdens of a large regional export project onto local communities without the protections the law provides.

[¶83] For these reasons, no bond should be required. This is a public law appeal about statutory authority and process, not a private damages case. The harms the Utilities posit are generalized schedule concerns and are largely self-created. A bond would not meaningfully protect any interest that is not already within the control of the Utilities and the Commission.

CONCLUSION

[¶84] This appeal arises from a simple but important question: whether the Public Service Commission may authorize a new 345-kV transmission line by granting a CPCN under Chapter 49-03 and then carrying that order forward into a Chapter 49-22 siting docket as proof of need, even though Chapter 49-22 is the Legislature's exclusive framework for siting and approving new high-voltage facilities.

[¶85] Appellants respectfully ask the Court to protect its ability to answer that question in a way that still matters on the ground.

[¶86] For the reasons set out above, Appellants request that the Court:

1. Stay enforcement of the Commission's June 18, 2025 order, and the November 20, 2024 CPCN it leaves in place, to the extent the Commission and the Utilities wish to cite or rely on that CPCN as evidence of need or as predicate authority for the Jamestown to Ellendale 345-kV transmission line in PSC Siting Docket PU-25-236 while this appeal is pending.
2. Clarify that the Commission may continue to process the Chapter 49-22 siting docket, but without treating the disputed Chapter 49-03 CPCN as a settled determination of need or as binding predicate authority.

3. Decline to require a bond.
4. Grant such other and further relief as the Court finds just and appropriate.

Dated: February 17, 2026

Respectfully submitted,

By: /s/ Douglas J. Nill

Douglas J. Nill (ND # P00392)

DOUGLAS J. NILL, PLLC

1850 Fifth Street Towers

150 South Fifth Street

Minneapolis, MN 55402

(612) 573-3669

dnill@farmlaw.com

Steven J. Leibel (ND # 07361)

KNOLL LEIBEL LLP

P. O. Box 858

1915 N. Kavaney Drive, Ste. 3

Bismarck, ND 58501

(701) 255-2010

steve@bismarck-attorneys.com

Attorneys for Appellants