

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

WANO TOWNSHIP, WILLOWBANK TOWNSHIP,
RUSSELL TOWNSHIP, CORWIN TOWNSHIP,
VALLEY TOWNSHIP, MIKE AND PATTY BARTEL,
RICHARD AND SUSAN R. LONG, STEVEN AND
JULIA NELSON, PHYLLIS P. OTTERNESS AND
PATRICIA A. VICK, BRANDON AND TAUSHA
SCHWEIGERT, SHOCKMAN FARM PARTNERSHIP,
LLLP, DEBRA SUE WALD, LUCAS AND JULL
WALD, TIM LEPPERT, ORR FARMS, STEVE M.
AND SANDRA J. RUPP, DAVID A. AND DENETTE
M. SCHWEIGERT, ALLEN D. AND INNA N.
SWIONTEK, DAVID AND HOLLY WALD,
WESTON WALD, AND WILLOWBANK
HUTTERIAN BRETHERN ASSOCIATION,

Appellants,

-vs-

NORTH DAKOTA PUBLIC SERVICE COMMISSION,
OTTER TAIL POWER COMPANY, AND
MONTANA-DAKOTA UTILITIES, CO.,

Appellees.

Supreme Ct. 20260059

District Ct. 08-2025-CV-0268
South Central Judicial District

**NORTH DAKOTA PUBLIC SERVICE COMMISSION'S RESPONSE IN
OPPOSITION TO APPELLANTS' MOTION FOR STAY**

INTRODUCTION

[¶1] The North Dakota Public Service Commission (“Commission”), under the authority of N.D.C.C. Ch. 49-03, issued its Order in Case No. PU-24-91 on a joint application of Otter Tail Power Company (“OTP”) and Montana-Dakota Utilities Co. (“MDU”) for a Certificate of Public Convenience and Necessity (“CPCN”) for a high voltage transmission line project on November 20, 2024. (R79). A Notice of Appeal and Specifications of Error, dated July 15, 2025, was filed with the district court. (R1). Following briefing on the merits of the appeal to the district court, the district court issued an Order on Administrative Appeal dismissing the appeal for lack of appellate subject

matter jurisdiction, dismissing appellants appeal of the Commission’s denial of reconsideration order, and affirming the Commission’s denial of intervention. (R146:¶¶74-75).

[¶2] During the pendency of the district court appeal of the issuance of the CPCN, MDU and OTP filed an application with the Commission for a Certificate of Corridor Compatibility and Route Permit (“Siting Case”) for a high voltage transmission line pursuant to N.D.C.C. Ch. 49-22. (Commission Case No. PU-25-236, electronic docket available at <https://apps.psc.nd.gov/cases/pscasedetail?getId=25&getId2=236#>). Appellants moved to stay the Siting Case at the district court; the district court denied the stay. (R19-24, 126). Appellants then appealed the district court’s Order to this Court and have again moved to stay a wholly separate Commission case that is currently pending before the Commission. The Commission responds in opposition to Appellants’ motion to stay separate administrative proceedings the Commission is authorized to consider pursuant to N.D.C.C. Ch. 49-22.

BACKGROUND

[¶3] Our state’s constitution created the Commission. N.D. Const., Art. V, Sec. 2. Through this, the Legislative Assembly has enacted laws providing for the jurisdiction of the Commission. N.D.C.C. Title 49. The Commission has “general jurisdiction” over “[e]lectric utilities engaged in the generation and distribution of light, heat, or power.” N.D.C.C. § 49-02-01(4). The Commission “shall have power to: 1. Investigate all methods and practices of public utilities. . . .” N.D.C.C. § 49-02-02(1). The Legislative Assembly has enacted laws detailing the procedure for an electric transmission provider to construct or operate an electric transmission line:

An electric transmission provider may not begin construction or operation of an electric transmission line interconnecting with an existing electric transmission line owner or operated by an electric public utility without first obtaining a certificate that public convenience and necessity require or will require the construction or operation.

N.D.C.C. § 49-03-01.

[¶4] In the underlying CPCN administrative proceeding (PU-24-91), MDU and OTP filed a joint application for a CPCN. (R63). This application was made pursuant to N.D.C.C. Ch. 49-03. The Commission reviewed the application, issued a notice of opportunity for hearing on May 27, 2024, and published that notice in the Bismarck Tribune, Dickinson Press, Williston Herald, Jamestown Sun, Valley City Times-Record, The Daily News (Wahpeton), Minot Daily News, The Fargo Forum, Devils Lake Journal, Grand Forks Herald, Dickey County Leader, Oakes Times, Kulm Messenger, and LaMoure Chronicle. (R65, 68). No hearing was requested, nonetheless, the Commission held a hearing on the CPCN application on July 8, 2024. (R70). None of the Appellants participated in any manner prior to the hearing or the eventual issuance of the CPCN by the Commission on November 20, 2024. (R79). 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.” (R81). That motion was denied by the Commission on June 18, 2025. (R91). A notice of appeal to the district court was served on July 15, 2025. (R1). The district court affirmed the Commission’s issuance of the CPCN and the Appellants appealed that decision. (R146).

[¶5] Appellants now seek to stay a separate administrative proceeding that MDU and OTP have since commenced that is pending before the Commission (Commission Case

No. PU-25-236: <https://apps.psc.nd.gov/cases/pscasedetail?getId=25&getId2=236#>). MDU and OTP applied to the Commission for a Certificate of Corridor Compatibility and Route Permit, pursuant to N.D.C.C. Ch. 49-22. The Commission has held hearings on the Siting Case in Bismarck, Ellendale, Edgeley, and Jamestown. (Commission Case No. PU-25-236, at Dkt. Nos. 25, 27, 42, 43, 52, 57, 64). Appellants chose not to seek a stay of PU-25-236 from the Commission. The undersigned represents the Commission in PU-25-236 and the Commission is considering the application. The Court should deny Appellants' motion to stay PU-25-236.

ARGUMENT

[¶6] The pending motion to stay should be denied for any of the following reasons:

- 1) The Appellants lack standing to appeal anything other than the denial of their motion to intervene;
- 2) The Court lacks jurisdiction to order the Commission to stay a separate administrative proceeding; and
- 3) As a matter of law, the Commission can grant a CPCN separately from a Certificate of Corridor Compatibility and Route Permit.

1. The Appellants lack standing to appeal anything other than the denial of their motion to intervene.

[¶7] The Appellants' motion should be denied because they lack standing as determined by the district court. The Commission denied the Appellants' application to intervene, *after* issuing its Order for the CPCN. (R91). While Appellants' choice not to engage in the CPCN process will be addressed in the merit briefings, for purposes of this motion the Appellants only have standing under N.D.C.C. Ch. 28-32 to appeal from the Commission's Order. N.D.C.C. § 28-32-42(1) (explaining that a "party to any proceeding heard by an administrative agency. . . may appeal from the order..."). Appellants seek to

stay an entirely separate administrative proceeding that is currently pending before the Commission and this Siting Case does not relate to the pending appeal involving the Commission's unanimous decision to deny intervention and rescission of the Order it issued for the CPCN.

[¶8] The Appellants have standing to appeal from the Commission's denial of their intervention motion. N.D.C.C. § 28-32-42. While this issue may be more appropriate to fully brief on the merits of the appeal, the Appellants were not parties to the CPCN case. Unlike *Minn-Kota Ag Products v. N.D. Public Service Commission*, 2020 ND 12, 938 N.W.2d 118, where this Court determined the appearance of a Minn-Kota Ag corporate representative at a Commission hearing afforded adequate standing for Minn-Kota Ag to appeal from a final Commission Order, Appellants did not participate or appear in any fashion before the Commission issued the CPCN. They chose not to intervene in the CPCN case while the Commission considered the joint application. The CPCN order is dated November 20, 2024; the May 21, 2025, motion to intervene was filed with the Commission *six months* after the CPCN Order was issued. The Commission's administrative rules require any intervention petition to be "filed at least ten days prior to the hearing, but not after except for good cause shown." N.D.A.C. § 69-02-02-05(2). In any event, the Commission denied the motion to intervene on June 18, 2025. (R91). Constitutionally created administrative bodies, such as the Commission, must be afforded the ability to conduct their constitutionally and legislatively slated mission. Because the Appellants chose not to be parties to this administrative action, and only have standing to appeal the denial of their petition to intervene, they do not have standing to do anything more than this. The motion for a stay should be denied because the movants lack standing.

2. The Court lacks jurisdiction to order the Commission to stay a separate administrative proceeding.

[¶9] MDU and OTP filed an application for a certificate of site compatibility and route permit under N.D.C.C. Ch. 49-22 with the Commission (PU-25-236). This administrative proceeding is a wholly separate case from the CPCN case. *See* Docket PU-25-236, <https://apps.psc.nd.gov/cases/pscasedetail?getId=25&getId2=236#>. Hearings on this separate matter were recently held before the Commission in Bismarck, Ellendale, Edgeley, and Jamestown; the matter is currently pending and no decision has been made on this separate case by the Commission at this time. While the Appellants argue that PU-24-91 and PU-25-236 involve similar issues that justify staying the latter Commission case (PU-25-236), they are entirely separate matters.

[¶10] Appellants' motion to stay a non-final and separate administrative proceeding fails. Our Legislative Assembly has declared that no injunction can be granted by a court "[t]o prevent the execution of a public statute by officers of the law for the public benefit." N.D.C.C. § 32-05-05(4). The Commission is a constitutionally created agency of the executive branch that is authorized by law to consider siting applications pursuant to N.D.C.C. Ch. 49-22. The Commission is proceeding, as authorized by law, to consider the pending Siting Case. Appellants' motion for a stay of the Siting Case is essentially an attempt to make an "end run" around established procedure and bypass the Commission's authority to execute its constitutional and statutory roles.

[¶11] Respectfully, this Court, in an administrative appeal of the issuance of a CPCN (PU-24-91), whereby a request is made by Appellants to stay a *separate* administrative proceeding (PU-25-236), does not have the jurisdiction to order the Commission to not do what it is constitutionally and statutorily required to do. Indeed, that

other administrative proceeding does not directly implicate any of the issues in the Notice of Appeal—this will be argued in this appeal on the merits. Certainly, participation in the Siting Case pursuant to North Dakota statutory and administrative law may be permitted. In fact, some Appellants have appeared in PU-25-236. And, some of the Appellants have moved to intervene in PU-25-236 (that motion is presently pending determination). *See* PU-25-236 Dkt. Nos. 86, 89, 91, 92.

[¶12] This Court cannot take the proverbial “ball” away from the Commission by staying a separate administrative proceeding premised on a different statutory foundation (N.D.C.C. Ch. 49-22). Because the pending motion asks the Court to exercise jurisdiction beyond its authority to determine the appealed issues in Commission case PU-24-91, the Court should deny the motion. N.D. Const. art. VI, § 2; *State by & through Workforce Safety & Ins. v. Jones*, 2025 ND 74, ¶4, 19 N.W.2d 793 (explaining administrative appeals to district courts “are statutory in nature and are not matters of original jurisdiction for the district courts but rather involve exercise of appellate jurisdiction of the district courts conferred by statute”) (quotation omitted). Appellants’ motion for stay should be denied because this Court lacks jurisdiction to enjoin the Commission from proceeding with its constitutionally and statutorily charged duties in PU-25-236.

3. As a matter of law, the Commission can grant a CPCN separately from a Certificate of Corridor Compatibility and Route Permit.

[¶13] The motion should also be denied on the merits. Appellants argue that they would have to duplicate efforts to resist the Siting Case (PU-25-236) *if* the appeal of the CPCN order (PU-24-91) is reversed. Hardly the case, given a large portion of the work on the Siting Case has been completed. While there may be duplication of efforts on some levels, this ignores the procedural and substantive laws that are in place. The Commission

determined the CPCN case on the merits, the Appellants (who chose not to attempt to appear in that administrative proceeding until six months after the Order was issued) seek to have the order reversed and have the Commission effectively re-hear that which has been heard on the CPCN application. And the Appellants seek this because they believe if they prevail on the current appeal, then the CPCN issue will have to be re-heard by the Commission.

[¶14] This ignores logic and reality—and the law. Let us say for argument sake only that Appellants prevailed on the merits of the present appeal and this Court holds that Appellants should have been permitted to intervene after being more than six months late and that reconsideration (which was filed just about six months late) should have been granted by the Commission: this would not mean a completely *new* proceeding on the CPCN case would occur. It simply would mean that the Commission would have to reconsider its decision and allow the Appellants to formally place their arguments to the Commission. The hearing on the CPCN administrative proceeding was held. Due process was afforded—notice was provided pursuant to law. And statutory requirements for notice and a public hearing were satisfied as a matter of fact and law. That Appellants missed the boat for the CPCN administrative case does not merit staying a separate siting application (PU-25-236) that has proceeded through evidentiary hearings and is presently being considered for a determination by the Commission (which, if a party so chooses, can be appealed to the district court).

[¶15] Neither is there any requirement in statute or administrative rule that requires the Commission to consider an application for a corridor and site compatibility permit at the same time as applying for a CPCN. While it is not uncommon for applications

for a siting permit and CPCN to be filed with the Commission contemporaneously, there is no requirement in statute to do so. *Compare* N.D.C.C. Ch. 49-03 *with* Ch. 49-22. For practical considerations, it is entirely conceivable that *before* a public utility seeks a siting permit under N.D.C.C. Ch. 49-22 (which is an intensive process) that it would want to ensure that the Commission would grant a CPCN under N.D.C.C. Ch. 49-03. Here, this is quite evident: the Commission only granted a CPCN on a split 2-1 vote. (R79). That public utilities choose to proceed in this order is not something that statutory or administrative law dictates. *Compare* N.D.C.C. Ch. 49-03 *with* Ch. 49-22. It is certainly not for the judiciary to legislate what has not been legislated. The motion to stay should be denied.

CONCLUSION

¶16 For any one, or all, of arguments the Commission presented in opposition to the pending motion, the Court should deny the Appellants' Motion for Stay Pending Appeal. After all, the appeal from the district court involves the CPCN case (PU-24-91), not the currently undecided and pending Siting Case (PU-25-236).

Respectfully submitted this 10th day of March, 2026.

/s/ Zachary E. Pelham
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