IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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.	)	Supreme Court No. 20260059 Burleigh County District Court Civil No. 08-2025-CV-02068

OTTER TAIL POWER COMPANY AND MONTANA-DAKOTA UTILITIES CO. APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS' MOTION FOR STAY PENDING APPEAL

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SC APPEAL - Otter Tail Power and Montana-Dakota Utilities Co Appellees' RSP in Opposition to Appellants' Motion for Stay Pending Appeal

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INTRODUCTION

[¶1] Appellants' Motion for Stay is the latest in a series of spurious attempts to delay and derail separate administrative proceedings that are not before the Court. This appeal solely concerns the denial of Appellants' untimely Petition[1] to rescind and reopen an order granting a certificate of public convenience and necessity ("CPCN") under N.D.C.C. chapter 49-03. The Motion for Stay asks the Court to stay enforcement of a CPCN not properly before the Court and to direct the conduct of a separate siting proceeding pending before the Public Service Commission ("Commission") under N.D.C.C. chapter 49-22 (the "Siting Proceeding").

[¶2] Appellants' confusing request for relief asks that this Court stay enforcement of both the Commission's order denying the Petition (the "Petition Order") and its November 20, 2024 order issuing a CPCN (the "CPCN Order"), "to the extent the Commission and Utilities seek to cite or rely on that CPCN as evidence of need or as predicate authority" in the Siting Proceeding. Motion for Stay, ¶ 2. "In the alternative," Appellants move the Court "to clarify" that the Commission may not "treat[] the disputed Chapter 49-03 CPCN as a settled determination of need or as binding predicate authority for the project." *Id.* ¶ 3. In plain English, Appellants' Motion for Stay seems to request that the Court either halt the Siting Proceeding entirely or strike portions of the existing siting record and order the Commission to conduct a public need analysis in the Siting Proceeding. All of this is beyond the scope of this appeal. The Commission already held five days of hearings in the

[1] *See* Amended Petition to Rescind the November 20, 2024 Order Approving A 345kV Transmission Line and To Reopen the Proceedings to Provide Due Process, Complete the Record, and Protect the Public Interest (the "Petition"). (R81)

Siting Proceeding, and the matter is now under consideration by the Commission.

[¶3] The Siting Proceeding is not before the Court, and Appellants cite no authority authorizing the Court to stay anything other than the subject of the appeal: the June 2025 Petition Order. Furthermore, Appellants cannot use the appeal to attack the CPCN Order, because they failed to timely participate in the CPCN Proceeding or timely request reconsideration. The Court should deny the motion without reaching its merits, both because the Court lacks jurisdiction to stay or direct proceedings that are not part of the order being appealed and because Appellants lack standing to appeal anything beyond their untimely intervention request.

[¶4] Finally, even if the Court did have jurisdiction to consider the requested stay, the motion falls far short of establishing the factors necessary to justify a stay. Most notably, Appellants lack any chance of success on the merits of their appeal, because they wrongly conflate the CPCN inquiry with the independent siting analysis. A CPCN proceeding under Chapter 49-03 determines whether or not a project is needed, whereas a siting proceeding under Chapter 49-22 assesses the proposed location of a project and its location-specific human and environmental impacts. In fact, this Court has held that "***the PSC does not have the authority or duty to determine need***" in a siting case. *Matter of Nebraska Pub. Power Dist.*, 330 N.W.2d 143, 149 (N.D. 1983) (emphasis added). Contrary to Appellants' suggestion, there is no requirement that the Commission consider both public need and siting factors in a single proceeding, nor is there any provision in the North Dakota Century Code suggesting that Chapter 49-03 is abrogated when Chapter 49-22 applies to a project. Furthermore, Appellants will suffer no cognizable harm by the Commission continuing the siting process. In fact, the lack of a siting proceeding for the project was Appellants'

primary complaint in the Petition. Conversely, the requested stay would likely delay the project at issue, thereby inflicting significant harm upon Appellees and the public at large. The Court should deny Appellants' motion.[2]

BACKGROUND

A. Statutory Framework Governing CPCN and Siting Proceedings

[¶5] In 1965, the North Dakota Legislature enacted a requirement that electric public utilities (i.e., investor-owned utilities) obtain a certificate of public convenience and necessity before beginning construction or operation of a public utility system, such as an electric transmission line. N.D.C.C. ch. 49-03 (the "CPCN Statute"); *see* S.L. 1965, ch. 319 § 2. "[T]he question of public necessity is a legislative question that has been delegated to the PSC by the Legislature," *Eckre v. Pub. Serv. Comm'n*, 247 N.W.2d 656, 666 (N.D. 1976), and it often requires technical analysis of complex energy markets, as was the case here. The requirement that electric public utilities establish public need for their project and obtain a CPCN before constructing an electric transmission line applies regardless of whether a territorial dispute exists or whether the electric public utility is extending service into a new territory. N.D.C.C. § 49-03-01. The very first section in Chapter 49-03 provides:

> An electric public utility may not begin construction or operation of a public utility plant or system, or of an extension of a plant or system without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction and operation.

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[2] The body of Appellants' motion states that they "request oral argument on this motion." Motion for Stay, ¶ 5. Oral argument on the motion is not warranted under the rules, nor would it be helpful given the baseless nature of the motion. Nevertheless, the Utilities will participate should the Court decide to grant oral argument.

N.D.C.C. § 49-03-01(1). The CPCN Statute grants the Commission jurisdiction to hear and determine an electric public utility's application for a certificate of public convenience and necessity to construct a new electric transmission line. *Id.* However, the CPCN Statute "does not authorize the PSC to regulate rural electric cooperatives; instead, it allows cooperatives to extend electric service to customers in rural areas without obtaining a certificate of public convenience and necessity." *Cap. Elec. Coop., Inc. v. Pub. Serv. Comm'n of State of N.D.*, 534 N.W.2d 587, 592 (N.D. 1995). This exemption for cooperatives applies to construction of new high voltage transmission lines like the one at issue here. As such, investor-owned utilities must obtain a CPCN before constructing a high-voltage transmission line, while cooperatives need not.

[¶6] In 1975, the North Dakota Legislature enacted the North Dakota Energy Conversion and Transmission Facility Siting Act (the "Siting Act") (S.L. 1975, ch. 436, codified at N.D.C.C. ch. 49-22). The Siting Act prescribes the procedure for the Commission to study, evaluate, and approve a suitable corridor and transmission facility route for high voltage electric transmission lines. N.D.C.C. ch. 49-22. This procedure is intended to ensure "that energy transmission facilities are developed in an orderly manner compatible with environmental preservation and efficient use of resources." *Eckre*, 247 N.W.2d at 665 n.1 (N.D. 1976). Section 49-22-09, N.D.C.C., sets forth the factors to be considered by the Commission in the evaluation of applications and designation of corridors and routes. The factors considered under the Siting Act are location-specific and primarily relate to environmental considerations and the location-specific impacts of the proposed corridor and route. N.D.C.C. § 49-22-09. Thus, while only electric public utilities are required to obtain a CPCN, no company may begin construction of an electric

transmission facility "without first having obtained a certificate of site compatibility or a route permit from the commission pursuant to" the Siting Act. N.D.C.C. § 49-22-07(1). This statutory framework has been in place for over half a century.

B. Procedural History

1. CPCN Proceedings before the Commission

[¶7] On February 29, 2024, Otter Tail Power Company ("Otter Tail") and Montana-Dakota Utilities Co. ("Montana-Dakota") (collectively, the "Utilities") filed a Joint Application for a CPCN under N.D.C.C. ch. 49-03 for a 345-kV transmission line from Jamestown, North Dakota to Ellendale, North Dakota (the "Project"). (R63) The Commission published a Notice of Opportunity for Hearing in fourteen local newspapers across North Dakota on March 27, 2024. (R65; R68) This Notice clearly identified the scope of the Project as "approximately 85 miles of 345kV transmission line and expansion of four substations located in Stutsman, LaMoure, and Dickey Counties[.]" (R65) The Commission did not receive any hearing requests but nevertheless noticed and held an informal hearing on the CPCN application on July 8, 2024. (R65; R70) Appellants did not attend or otherwise participate in the hearing. As such, the Commission could have granted the CPCN without the need to hold a hearing or issue formal findings. N.D.C.C. § 49-03-02(2) (Commission may grant a CPCN where no hearing is requested by an interested party); *see also* N.D.C.C. § 28-32-22 (allowing informal disposition when hearing is waived). Nevertheless, the Commission further noticed and held two "work sessions" to discuss the merits of the CPCN Application. (R73; R77) On November 20, 2024, the Commission issued the Order approving the CPCN application (the "CPCN Order"). (R79) On November 25, 2024, the Commission served the CPCN Order on the parties to the proceeding. (R80) No party timely appealed the CPCN Order.

[¶8] Six months later, on May 21, 2025, Appellants filed the Petition. (R81) The Petition requested that the Commission reopen the record so that Appellants could issue discovery and introduce new evidence, as well as that Appellants be allowed to intervene in the proceedings. (R81:1, 8–9, 52) Otter Tail and Montana-Dakota opposed the Petition. (R83)

[¶9] On June 18, 2025, the Commission issued the Petition Order, which denied the Petition as untimely. (R91) Commission regulations provide a deadline of ten days prior to the hearing for petitions to intervene, except for good cause shown. N.D. Admin. Code § 69-02-02-05(2). Petitions to reopen the record may be filed "[a]t any time after the conclusion of a hearing, but before the final order is issued," and petitions for reconsideration "must be filed within fifteen days after notice of the decision has been given[.]" N.D. Admin. Code §§ 69-02-06-01; 69-02-06-02(1). The Commission also noted that the time to appeal the CPCN Order had expired under N.D.C.C. ch. 28-32. (R91:3)

2. Siting Proceeding

[¶10] On August 8, 2025, Otter Tail and Montana-Dakota filed a consolidated application for a certificate of corridor compatibility and route permit (the "Siting Application") under N.D.C.C. ch. 49-22. *Otter Tail Power Co. / Montana-Dakota Utilities Co. 345kV Transmission Line-Jamestown to Ellendale Siting Application*, N.D. Pub. Serv. Comm'n Case No. PU-25-236, at Dkt. No. 1. The Commission held technical hearings on the Siting Application on January 8 and 9, 2026, and public hearings on January 12, 14, and 16, 2026. *Id.*, Dkt. Nos. 25, 27. The hearings in the Siting Proceeding have concluded; the Commission has yet to issue an order in the Siting Proceeding.

3. Administrative Appeal before the District Court

[¶11] On July 16, 2025, Appellants filed a notice of appeal and specifications of error with the district court, appealing from both the CPCN Order and the Petition Order. (R1)

On August 6, 2025, Appellants—"hav[ing] learned that Otter Tail Power intends to file a route permit application with the PSC under Chapter 49-22 on or about August 8, 2025, relying on the previously granted CPCN"—preemptively moved the district court to "stay all proceedings before the [Commission] under N.D.C.C. ch. 49-22 relating to the proposed 345kV transmission line[.]" (R20; R21:2, 4) The court denied Appellants' motion, concluding it lacked jurisdiction to stay the separate siting proceedings and that "Appellants ha[d] failed to meet their burden to justify a stay of the PSC's June 18, 2025, order." (R126:6:¶20)

[¶12] On February 2, 2026, the district court issued its Order on Administrative Appeal. (R146) The district court dismissed Appellants' appeal from the Commission's CPCN Order for lack of appellate subject matter jurisdiction, concluding that Appellants had failed to timely perfect their appeal, as required by N.D.C.C. ch. 28-32. (R146:8:¶36) The district court determined it had limited jurisdiction to review the Commission's Petition Order and affirmed the Commission's denial of Appellants' petition to intervene, concluding that "the Commission acted within its statutory authority, complied with governing procedural requirements, and did not abuse its discretion." (R146:16–17:¶¶69–70, 72) The district court dismissed the rest of Appellants' appeal from the Petition Order, concluding it lacked jurisdiction to review the Commission's denial of Appellants' petition for reconsideration of the CPCN Order because Appellants had not timely perfected their appeal:

> Here, Appellants did not file a petition for reconsideration within 15 days after notice of the *CPCN Order*. They also did not file a notice of appeal within 30 days after notice of the *CPCN Order*. Both statutory deadlines expired months before Appellants filed their *Amended Petition*. Because the statutory prerequisites for reconsideration were not satisfied, the Commission's denial of reconsideration does not provide a new or

> independent basis for appellate jurisdiction over the merits of the *CPCN Order* as it relates to reconsideration.
>
> An appellant may not renew or revive the merits of a final administrative order by filing an untimely petition for reconsideration after the statutory appeal period has expired. ***Chapter 28-32 does not permit a party to circumvent the jurisdictional deadlines of N.D.C.C. §§ 28-32-40 and 28-30-42 by characterizing a late collateral challenge as reconsideration. Once both the 15-day reconsideration period and the 30-day appeal period have lapsed, the underlying order is final and unreviewable.***

(R146:11:¶¶48–49 (emphasis added))

[¶13] On February 17, 2026, Appellants filed their notice of appeal and the Motion for Stay currently before the Court. Appellants moved the Court to "stay enforcement" of the CPCN Order and Petition Order "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 [Siting Application]." Motion for Stay, ¶ 2. "In the alternative," Appellants move the Court "to clarify" that the Commission may not "treat[] the disputed Chapter 49-03 CPCN as a settled determination of need or as binding predicate authority for the project." *Id.* ¶ 3.

ARGUMENT

[¶14] Appellants' Motion for Stay fails for three independent reasons: (1) the Court lacks jurisdiction to stay the enforcement of a final unappealable order or to dictate the conduct of proceedings separate from the order being appealed; (2) Appellants lack standing to move for the requested stay; and (3) even if the Court had jurisdiction to consider the stay, Appellants cannot establish the factors necessary to support a stay.

I. The Court lacks jurisdiction to stay or direct the conduct of other proceedings separate from the order being appealed.

[¶15] The Motion for Stay exceeds the relief available under Rule 8, N.D.R.App.P. Contrary to Appellants' assertions, neither Rule 8 nor N.D.C.C. § 28-32-48 provide the Court with jurisdiction to issue a stay of enforcement of the CPCN Order or direct the

conduct of a separate proceeding that is not the subject of the appeal. Under Rule 8, a party may move the Court for "a stay of the judgment or order of a district court pending appeal." N.D.R.App.P. 8(a)(1)(A). Rule 8 contemplates a stay of enforcement of an order or judgment pending appeal, and the plain language dictates that the "judgment or order" contemplated ***is the one being appealed***. Appellants offer no authority to support their assertion that the Court may stay enforcement of an order other than the one on appeal, much less dictate how the Commission conducts the Siting Proceeding.

[¶16] The Court also lacks jurisdiction under N.D.C.C. § 28-32-48 to stay enforcement of the CPCN Order. North Dakota's Administrative Agencies Practice Act defines a court's ability to issue a stay in an administrative appeal. Under the plain language of Section 28-32-48, a reviewing court's authority to issue a stay is limited to "the enforcement of the order" being appealed. *Id.*; *see also State by & through Workforce Safety & Ins. v. Jones*, 2025 ND 74, ¶ 4, 19 N.W.3d 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" (cleaned up)).

[¶17] Here, Appellants do not ask the Court to stay the Petition Order properly before the Court on appeal but instead request the extreme and unprecedented remedy of staying the final and non-appealable CPCN Order and the separate Siting Proceeding. Motion for Stay, ¶¶ 2–3. Appellants cite no authority that authorizes the Court to stay anything other than the order being appealed, much less to stay a final unappealable order or to direct the conduct of a separate administrative proceeding that did not even exist at the time the Petition Order was issued. In this case, the order being appealed is the June 2025 order

denying Appellants' Petition in the CPCN Proceeding. (R91) Yet, Appellants attempt to use their appeal of the Petition Order to collaterally attack the CPCN Order, which is final and unappealable, in an effort to derail a separate proceeding not before the Court.

[¶18] Further, the Court's scope of review of an administrative appeal must be "based only on the record filed with the court." N.D.C.C. § 28-32-46; *see also Zent v. N.D. Dep't Health & Hum. Servs.*, 2025 ND 50, ¶ 16, 18 N.W. 3d 621 ("On appeal from the district court, we review the administrative agency's decision in the same manner that the district court reviewed the agency's decision."). This limited scope of review further supports the Court's lack of jurisdiction to issue a stay on grounds outside the record on appeal or in separate administrative proceedings. Because Appellants request a stay broader than the enforcement of the order being appealed, their motion must be denied.

II. Appellants lack standing to move for the requested stay.

[¶19] Appellants failed to participate in the CPCN proceedings and only attempted to intervene six months after the Commission had already approved the requested CPCN. As such, their attempt to intervene came five months after the time to appeal the CPCN Order expired. *See* N.D.C.C. § 28-32-42(1) ("Any party to any proceeding heard by an administrative agency . . . may appeal from the order within thirty days after notice of the order[.]"). "A party is entitled to have a court decide the merits of a dispute only after demonstrating the party has standing to litigate the issues placed before the court." *Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau*, 2004 ND 60, ¶ 11, 676 N.W.2d 752 (citing *State v. Tibor*, 373 N.W.2d 877 (N.D.1985)). Questions of standing implicate a court's subject matter jurisdiction and ensure "a justiciable controversy is presented to the court." *Schmidt v. City of Minot*, 2016 ND 175, ¶ 13, 883 N.W.2d 909.

[¶20] Concerning standing to appeal the merits of an administrative decision, North Dakota applies a three-part test that provides: "[1] any person who is directly interested in the proceedings before an administrative agency [2] who may be factually aggrieved by the decision of the agency, and [3] who participates in the proceeding before such agency" has standing to appeal the agency decision. *Minn-Kota Ag Prods., Inc. v. N.D. Pub. Serv. Comm'n*, 2020 ND 12, ¶ 13, 938 N.W.2d 118 (quoting *In re Bank of Rhame*, 231 N.W.2d 801, 808 (N.D. 1975)). Concerning the last prong, "minimal participation is sufficient to have adequately participated." *Id.* ¶ 21. For instance, an electric services customer satisfied the "participation" requirement for standing to appeal a CPCN proceeding where it filed an "Appearance by Customer" form advocating for the requested CPCN and provided testimony at the CPCN hearing, even though it did not formally intervene. *Id.* ¶ 20. By contrast, a telephone company customer did not adequately participate to establish standing where he sent an informal pre-hearing letter that "praised [one] commissioner's position and complained about the apparent position of the other two commissioners in scheduling the case." *Shark v. U.S. W. Comms., Inc.*, 545 N.W.2d 194, 196, 198–99 (N.D. 1996). Concerning appeal of a denied intervention request, as distinct from standing to appeal the merits of an administrative decision, the Court recently held "we do not impose a standing requirement on the failed intervenor, but instead simply review the denial of intervention." *Energy Transfer LP v. N.D. Priv. Investigative & Sec. Bd.*, 2022 ND 85, ¶ 10, 973 N.W.2d 394.

[¶21] In ruling that a failed intervenor may immediately appeal, the Court in *Energy Transfer* relied on and quoted authorities that hold a failed intervenor lacks standing to appeal anything beyond the denial of intervention:

> Allowing immediate appellate review of an order denying intervention is the established rule across the nation. *See, e.g.*, *City of Cleveland v. Ohio*, 508 F.3d 827, 837 (6th Cir. 2007) (applying constitutional standing principles applicable to federal courts "recogniz[ing] the general rule prohibiting a party who unsuccessfully filed a motion to intervene from appealing anything but the order denying intervention"); *In re Associated Press*, 162 F.3d 503, 506 (7th Cir. 1998) (explaining that a failed intervenor "has no standing to appeal any order other than the denial of intervention"); *Hopper v. Estate of Goard*, 386 P.3d 1245, 1247 n.2 (Alaska 2017) ("Although we review the denial of their motion to intervene, we do not reach their other arguments because '[a] failed intervenor has standing to appeal only the denial of intervention' and not the merits of the adjudication."); *In Interest of EHD*, 2017 WY 134, ¶ 18, 405 P.3d 222 (recognizing "the right to appeal from the denial of a motion to intervene" as distinct from the "ability to challenge any other rulings").

Energy Transfer, 2022 ND 85, ¶ 11. The case thus calls into question whether a failed intervenor may ever appeal more than the denied intervention request. This brief assumes for the sake of argument that the traditional three-prong standing test still applies to an untimely attempt to appeal the merits of an administrative decision, but Appellants' status as a failed intervenor provides an alternative ground to conclude that Appellants lack standing to appeal anything more than the denial of their intervention request.

[¶22] Here, even if Appellants could establish the first two prongs of the three-prong standing test, they cannot establish that they participated in the CPCN proceedings. The administrative record lacks any evidence that Appellants participated in the CPCN Proceeding in a manner that creates standing to appeal the CPCN Order. As a result, Appellants lack standing to challenge the CPCN, and their standing to appeal is limited to the Commission's denial of their request to intervene.

[¶23] Because Appellants' standing is limited to their request to intervene, they lack standing to request a stay on other grounds. Their motion, however, attacks the CPCN Order itself and argues that the Commission acted contrary to law by issuing it. As such, the Motion for Stay exceeds the scope of any issue that Appellants have standing to appeal.

The analysis should end there. The Court should deny the motion and make clear that Appellants' standing in this appeal is limited to review of their request to intervene.

III. Even if the Court had jurisdiction to consider the requested stay, Appellants cannot establish the factors necessary to support a stay.

[¶24] The Court considers four criteria when deciding whether to grant a motion for stay: "(1) a strong showing that the appellant is likely to succeed on appeal; (2) that unless the stay is granted, the appellant will suffer irreparable injury; (3) that no substantial harm will come to any party by reason of the issuance of the stay; and (4) that granting the stay will do no harm to the public interest." *Access Indep. Health Servs. Inc. v. Wrigley*, 2025 ND 26, ¶ 14, 16 N.W.3d 902 (cleaned up). The moving party has the burden to prove that these four factors weigh in favor of granting a stay. *Id.*

[¶25] This Court has held "that for the purpose of determining whether to grant a stay pending appeal, appreciable weight is given to the decision of the trial court." *Bergstrom v. Bergstrom*, 271 N.W.2d 546, 554–55 (N.D. 1978). As such, a district court's decision to deny a motion for stay "ordinarily will not be set aside unless the trial court is found to have abused its discretion." *Cass Cnty. Elec. Coop., Inc. v. Wold Props., Inc.*, 253 N.W.2d 323, 327 (N.D. 1977).

[¶26] Appellants fail to establish appropriate grounds for issuing a stay because: (1) they are unlikely to succeed on appeal, because they missed every operative deadline to challenge the CPCN Order and their entire merits argument is based on a flawed understanding of the relevant statutes; (2) their alleged "process-based" harms are illusory or self-inflicted by their own failure to meet statutory deadlines; (3) the Utilities will suffer real harm in the form of project delays should the stay be granted; and (4) the public interest is not served by the requested stay.

A. Appellants are not likely to succeed on appeal.

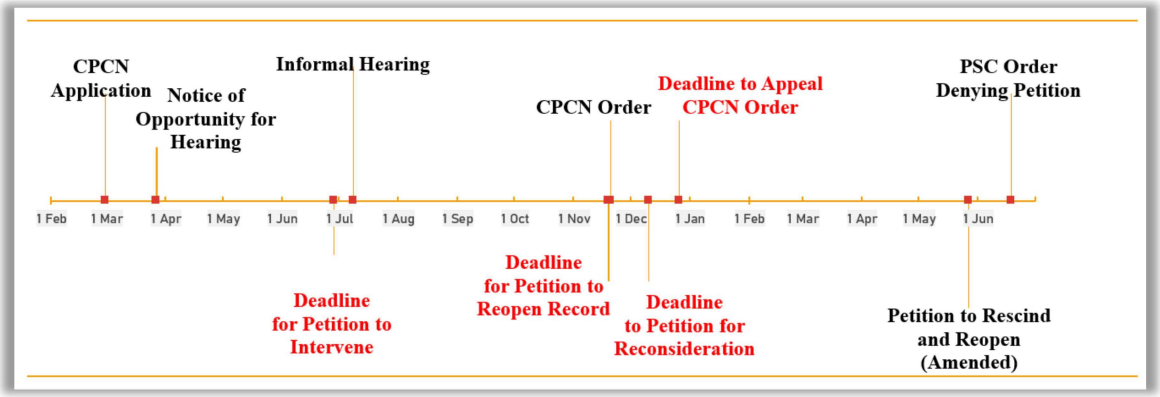
[¶27] As a threshold matter, the requested relief is time-barred, because Appellants missed every deadline to participate in the CPCN proceedings, request reconsideration or reopening, or challenge the CPCN Order. Even setting aside the time-barred nature of Appellants' Petition, their arguments badly miss the mark. This appeal centers on the baseless assertion that the Siting Act abrogates the requirement of a CPCN under N.D.C.C. ch. 49-03. Throughout both their briefing to the district court and in their motion currently before the Court, Appellants repeatedly refer to the Siting Act as an "exclusive" permitting framework. (R124:1, 2, 4, 18, 20, 28, 33, 40); Motion for Stay, ¶¶ 23, 43, 46, 52, 84. However, nowhere do Appellants support this contention with any legal authority. Merely declaring the Siting Act "exclusive" does not make it so. The Utilities acknowledge that they must obtain a siting certificate and route permit under Chapter 49-22 before constructing the Project. That is why the Utilities submitted a siting application under Chapter 49-22, five days of hearings were held in the Siting Proceeding, and the matter is currently under consideration by the Commission. Appellants continue to ignore that a CPCN under Chapter 49-03 is ***also*** required for the Project. Appellants suggest that the Utilities can simply rescind the CPCN and proceed solely under the Siting Act, but they fail to address that Section 49-03-01 plainly mandates the Project obtain a CPCN. For these reasons, detailed below, Appellants are unlikely to succeed on the merits.

1. To the extent Appellants have standing to appeal, the Petition Order is likely to be affirmed, because the Petition was untimely, and because the Commission properly exercised its discretion to deny the Petition.

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

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

CPCN Proceeding Timeline (2024–2025)



Date	Event	Reference
2/29/2024	CPCN Application	(R63)
3/27/2024	Notice of Opportunity for Hearing	(R65)
6/28/2024	Deadline for Petition to Intervene	N.D.A.C. § 69-02-02-05(2)
7/8/2024	Informal Hearing	(R70)
11/19/2024	Deadline for Petition to Reopen Record	N.D.A.C. § 69-02-06-01
11/20/2024	CPCN Order	(R79)
11/25/2024	Service of CPCN Order	(R80)
12/10/2024	Deadline to Petition for Reconsideration	N.D.A.C. § 69-02-06-02(1)
12/26/2024	Deadline to Appeal CPCN Order	N.D.C.C. § 28-32-42(1)
5/27/2025	Petition to Rescind and Reopen (Amended)	(R81)
6/18/2025	Commission Order Denying Petition	(R91)

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

[¶29] Where an administrative agency order "terminate[s] the issue" and leaves the agency with "nothing more to decide," it becomes "a final order of an administrative agency from which the claimants [are] entitled to appeal to the district court." *Ash v. Traynor*, 2000 ND 75, ¶ 3, 609 N.W.2d 96; *see also Henry v. Sec. Comm'r for State*, 2003 ND 62, ¶ 8, 659 N.W.2d 869 ("Our view of administrative finality mirrors this Court's treatment of final orders or judgments under N.D.C.C. § 28-27-02."). "If the agency head . . . is presiding, the order issued ***is the final order***." N.D.C.C. § 28-32-39(2) (emphasis added).

[¶30] The deadline to appeal a final administrative order is jurisdictional. "Any party to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of the order has been given as required by section 28-32-39." N.D.C.C. § 28-32-42(1). Notice of an order is given by "serv[ing] a copy of the final order and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within thirty days . . . in the manner allowed for service under the North Dakota Rules of Civil Procedure." N.D.C.C. § 28-32-39(2). "An appeal shall be taken by serving a notice of appeal . . . and by filing the notice of appeal . . . with the clerk of the district court to which the appeal is taken." N.D.C.C. § 28-32-42(4). "Failure to satisfy the statutory requirements for initiating an appeal to the district court from an administrative decision prevents the district court from obtaining subject matter jurisdiction over the appeal." *Mahad v. Workforce Safety & Ins. Fund*, 2024 ND 21, ¶ 3, 2 N.W.3d 720, *reh'g*

denied (Feb. 28, 2024) (citation omitted). In *Mahad*, the North Dakota Supreme Court held that filing a notice of appeal with the district court four days late deprived the court of jurisdiction to hear the appeal and required dismissal of the case. *Mahad*, 2024 ND 21, ¶ 5; *see also Ellis v. N.D. Workforce Safety and Ins.*, 2020 ND 14, ¶ 11, 937 N.W.2d 513 (concluding district court lacked subject matter jurisdiction to hear appeal where appeal of administrative decision was not timely filed).

[¶31] Here, the CPCN Order was clearly a final determination in the CPCN proceeding, and it was properly served on the parties to the case. (R79–80) The CPCN Order approved the Application for certificates of public convenience and necessity to construct and operate the Project and issued CPCN Nos. 5998 and 5999 to Montana-Dakota and Otter Tail. (R79) It was signed by the agency heads, such that "the order issued [was] the final order." N.D.C.C. § 28-32-39(2). The actual Certificates of Public Convenience and Necessity were attached to the CPCN Order. (R79) And the Commission properly served its order pursuant to Rule 5 of the North Dakota Rules of Civil Procedure by mailing copies to the parties to the proceeding, as required under N.D.C.C. § 28-32-39(2). (R80) As such, the CPCN Order "terminated the issue" and left the Commission with "nothing more to decide," so it was "a final order of an administrative agency from which the claimants were entitled to appeal to the district court." *Ash*, 2000 ND 75, ¶ 3. The time to appeal the CPCN Order expired on December 26, 2024, thirty days after notice of the order was served. Therefore, the CPCN Order was no longer subject to appeal when the Appellants filed the Petition nearly six months later.

[¶32] In an attempt to circumvent this clear jurisdictional bar to their appeal, Appellants contend that the Commissions' findings of fact and conclusions of law in the CPCN Order

were insufficient, such that "the November 20 CPCN Order was not a final, reviewable agency action[.]" Motion for Stay, ¶ 40. This argument is absurd. As a threshold matter, the Commission would have been justified in issuing the CPCN without any formal findings, given that no hearing was requested. *See* N.D.C.C. § 49-03-02(2) (Commission may grant CPCN where no hearing is requested by an interested party); *see also* N.D.C.C. § 28-32-22 (allowing informal disposition when hearing is waived). And even setting that aside, the sufficiency of an agency's findings is not the test for final agency action. If insufficient reasoning precluded an agency action from becoming final, there would be no deadline to challenge the sufficiency of an agency's findings of fact and conclusions of law, and no order would ever become final unless it was appealed and affirmed. In other words, the finality of an unappealed order could never be assured. Contrary to Appellants' suggestion, whether the CPCN Order contained adequate findings and conclusions and whether it was a final order subject to appeal are two different questions. The Court should not reach the sufficiency of the findings and conclusions in the CPCN Order, but the Utilities will further address that issue in their merits briefing, if necessary.

[¶33] Appellants may not pretend, as their briefing seems to do, that they are free to simply challenge the merits of the CPCN Order as they would on a timely direct appeal of that order. Instead, Appellants must establish that the Commission ***abused its discretion*** in declining to reconsider the CPCN, reopen the proceeding, or allow Appellants to intervene after the CPCN Order had become final and the time to appeal had passed. That cannot be the case. An administrative agency must have broad discretion to preserve the finality of its decisions once the time to appeal has passed. If it were otherwise, parties would be free to disregard the jurisdictional appeal deadline and resurrect long-dead appeal rights simply

by filing an untimely petition for reconsideration, as Apellants did here. That is not the law. The Commission's Petition Order should be affirmed as a valid exercise of its discretion, based on nothing more than the fact that the Commission was under no obligation to revisit its CPCN Order once the time to appeal had passed.

b. Appellants likewise missed the deadline to request reconsideration, reopening, or intervention.

[¶34] As stated above, the appeal of the merits of the CPCN Order is time-barred. Appellants only attempted to intervene after the CPCN Order was final and non-appealable. *See* N.D.C.C. § 28-32-42 (establishing 30-day deadline to appeal agency determination). Moreover, Appellants failed to timely request reconsideration of the CPCN Order. Under N.D.C.C. § 28-32-40, a petition for reconsideration must be filed "within fifteen days after notice has been given as required by section 28-32-39[.]" N.D.C.C. § 28-32-40(1); *see also* N.D. Admin. Code. § 69-02-06-02(1) ("A petition for reconsideration must be filed within fifteen days after notice of the decision[.]"). Here, notice of the CPCN Order was properly served by the Commission on November 25, 2024, nearly six months before the Petition was filed. The request for reconsideration is time-barred.

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

[¶36] Even applying the slightly more flexible deadline to request intervention, Appellants' attempted intervention was likewise time-barred. Under the applicable regulation, "[a] petition to intervene in any proceeding must be filed at least ten days prior

to the hearing, but not after except for good cause shown." N.D. Admin. Code § 69-02-02-05(2). "Good cause" under this regulation "should be interpreted to mean a showing of good cause as to why a petitioning intervenor should be allowed to intervene late under the circumstances." *Minn-Kota Ag*, 2020 ND 12, ¶¶ 42–47 (affirming denial of intervention where the failed intervenor did not provide a good reason for its delay and where other parties to the proceeding would be prejudiced by the delays caused by late intervention); *see also Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co.*, 2011 ND 154, ¶ 42, 801 N.W.2d 677 (affirming denial of intervention where: (1) failed intervenors "sought to intervene months after learning of the court's decision,"; (2) "[n]o explanation ha[d] been given for the delay," and (3) intervention would result in "relitigation of the issues, and other expensive delays at a cost to the existing parties and to the orderly processes of the court"). Here, Appellants' request to intervene was filed extremely late—six months after the CPCN Order was issued. It came after the deadlines to appeal the CPCN Order or request reconsideration by the Commission had expired, and as such was also futile.

[¶37.] Despite this, Appellants' Petition wholly failed to address the good cause standard for late intervention, nor did it factually establish any good cause that would excuse their delay. (R81) In the current motion, Appellants complain that "townships and landowners along the proposed route did not receive direct mailed notice" of the CPCN Proceeding. Motion for Stay, ¶ 21. Yet Appellants elsewhere acknowledge that the CPCN Proceeding was conducted under "a publication-noticed CPCN statute" and refer to Chapter 49-03 as "publication-only." Motion for Stay, ¶¶ 9, 34, 82; *see also* N.D.A.C. § 69-02-04-01 (requiring only notice by publication "[i]n any proceeding, except rulemaking proceedings, involving the rights of persons who are members of the public generally"). They urge the

Court to import additional "mailed notice" requirements from the Siting Act, but the Siting Act cannot be conflated with a CPCN proceeding, as explained further below. Concerning their actual knowledge, Appellants now represent they "learned of the CPCN only after it had been granted." Motion for Stay, ¶ 22. However, they told the district court that "[b]ased on subsequent discussions with residents and township officials, affected landowners did not recognize the Notice as pertaining to a major electric transmission line project and were not aware of its significance at the time." (R124:7–8) In other words, Appellants previously acknowledged that they knew of the published Notice. In any event, the Notice clearly announced a large electric transmission line project—it described a proceeding to decide the "public convenience and necessity" for "approximately 85 miles of 345kV transmission line and expansion of four substations located in Stutsman, LaMoure, and Dickey Counties." (R65; R68) Appellants, and the public at large, were afforded proper notice of the CPCN Proceeding. As such, the Commission was well within its rights to deny intervention on timeliness grounds alone, not to mention that a request to intervene is futile once the deadlines to appeal or seek reconsideration have lapsed.

2. The Commission properly issued a CPCN because the Project requires both a CPCN under N.D.C.C. ch. 49-03 and siting permits under N.D.C.C. ch. 49-22.

[¶38.] Despite Appellants' unsupported statements otherwise, Chapter 49-22 is not the sole or exclusive statutory framework for the permitting of electric transmission lines by electric public utilities. Both the CPCN Statute and the Siting Act apply to the Project, and the Utilities must obtain both a CPCN and siting permits before the Project can be constructed. In fact, this Court and the Commission have recognized that a public need determination is not a part of the inquiry under the Siting Act. Shoe-horning a public need

inquiry into the Siting Act would thwart the Legislature's long-standing policy of requiring a CPCN for investor-owned utility projects, but not for electric cooperative projects.

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

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

> ***An electric public utility may not begin construction or operation of a public utility plant or system***, or of an extension of a plant or system ***without first obtaining from the commission a certificate that public convenience and necessity*** require or will require the construction and operation.

N.D.C.C. § 49-03-01(1) (emphasis added). Although some CPCN proceedings involve territorial disputes, nothing in the statutory language limits the application of the statute to territorial disputes.

[¶40.] Entities like Otter Tail and Montana-Dakota that meet the definition of an "electric public utility" under Chapter 49-03 must obtain a CPCN for electric transmission line projects like the one at issue. Their decision to first obtain a CPCN under Chapter 49-03 and then apply for a certificate of corridor compatibility and route permit under Chapter 49-22 is the norm where both a CPCN and siting proceeding are required. This two-step permitting process is not a novel approach, much less a nefarious scheme to cut corners, as Appellants have suggested. To name just a few examples, the following list cites

Commission dockets where public utilities first sought a CPCN and then proceeded to a siting case for an electric transmission line project[3]:

- *Northern States Power Company 230kV Transmission Line - McHenry and Ward Counties Pub. Convenience and Necessity*, PU-16-644 (2016) (CPCN proceeding), at Dkt. No. 15; *Northern States Power Company 230kV Transmission Line - McHenry and Ward Counties Siting Application*, N.D. PSC Case No. PU-17-102 (2017) (corresponding siting proceeding), at Dkt. No. 45;
- *Northern States Power Company 345kV Transmission Line - Fargo to Monticello Pub. Convenience & Necessity*, N.D. PSC Case No. PU-10-607 (2010) (CPCN Proceeding), at Dkt. No. 14; *Northern States Power Company 345kV Transmission Line - Fargo to St. Cloud MN Siting Application*, N.D. PSC Case No. PU-07-759 (2007, amended application refiled 2011) (corresponding siting proceeding), at Dkt. No. 117;
- *Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. – 230kV Transmission System, Pub. Convenience and Necessity*, N.D. PSC Case No. PU-10-506 (2010) (CPCN proceeding), at Dkt. No. 10; *Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. – 230kV Transmission Line – McIntosh, Dickey County, Siting Application*, PU-10-164 (2010) (corresponding siting proceeding), at Dkt. No. 78.

[3] *See* (R130); Filings in cases before the Commission are also available through the Commission's online docket at https://psc.nd.gov/public/casesearch/index.php.

[¶41.] As these CPCN and siting cases illustrate, both CPCN and siting proceedings are required for electric public utilities to construct a transmission line project like the one here, and it is common practice to obtain a CPCN first, followed by the more labor-intensive and costly siting process under Chapter 49-22. Importantly, none of the CPCN examples listed above involved territorial disputes. It also makes sense that an evaluation of need under Chapter 49-03 would precede an evaluation of a project's location and an assessment of potential human and environmental impacts, as required by the Siting Act. If there is no public need for a project, proceeding with siting would be a futile effort.

[¶42.] Otter Tail and Montana-Dakota are investor-owned electric public utilities who must obtain a CPCN before constructing an electric transmission line like the one at issue. In short, Appellants fail to recognize that CPCN and siting requirements operate independently—siting may be required even where a CPCN is not,[4] and vice versa.[5]

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

[¶43.] The purpose of the Siting Act is to "ensure that the location, construction, and operation of . . . transmission facilities will produce minimal adverse effects on the

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[4] *See* Section III.A.2.d, below.

[5] For example, an electric public utility may need to obtain a CPCN to construct infrastructure to connect customers outside of its service territory, but if the electric infrastructure is rated at 115kV or less, or if it is less than one mile in length, it would not meet the Commission's definition of an "electric transmission facility" under Ch. 49-22 and would not require siting before the Commission. *See* N.D.C.C. § 49-22-03(7) (defining "electric transmission facility").

environment and upon the welfare of the citizens of" North Dakota. N.D.C.C. § 49-22-02. Under the Siting Act, an electric transmission facility "means an electric transmission line . . . with a design in excess of one hundred fifteen kilovolts." N.D.C.C. § 49-22-03(7). [¶44.] The inquiry under the Siting Act focuses on environmental and location-specific criteria for determining whether a transmission facility produces minimal adverse effects. Section 49-22-05.1, N.D.C.C., directs the Commission to "develop criteria to be used in identifying exclusion and avoidances areas and to guide the site, corridor, and route suitability evaluation and designation process." N.D.C.C. § 49-22-05.1. These relate to the physical characteristics of the land and proximity to existing land uses. *Id; see also* N.D. Admin Code ch. 69-06-08 (Commission regulations regarding exclusion areas, avoidance areas, and selection and policy criteria). Moreover, the siting factors relate to site-specific issues. *See* N.D.C.C. § 49-22-09. Appellants attempt to cast the siting factors as "expressly requir[ing] consideration of need in light of alternatives, environmental and economic impacts, and existing plans." Motion for Stay, ¶ 54 (citing N.D.C.C. §§ 49-22-02, 49-22-08, 49-22-09). However, a review of the statutory language reveals that Appellants mischaracterize the siting factors. In reality, the siting factors contain language that makes clear they are location/corridor/route-specific considerations, for example:

- "[T]he effects of the ***location, construction, and operation of the proposed facility*** on public health and welfare, natural resources, and the environment." N.D.C.C. § 49-22-09(1)(a) (emphasis added);

- "The effects of new electric energy conversion and electric transmission technologies and systems ***designed to minimize adverse environmental effects***." N.D.C.C. § 49-22-09(1)(b) (emphasis added);

- "Alternatives ***to the proposed site, corridor, or route***[.]" N.D.C.C. § 49-22-09(1)(e) (emphasis added);

- "Irreversible and irretrievable commitments of natural resources ***should the proposed site, corridor, or route be designated***." N.D.C.C. § 49-22-09(1)(f) (emphasis added);

- "Existing plans . . . for other developments at or ***in the vicinity of the proposed site, corridor, or route***." N.D.C.C. § 49-22-09(1)(h) (emphasis added).

The plain language of the siting factors do not suggest a public need inquiry.

[¶45.] In a last-ditch effort to save their dubious argument that public need must be considered in Siting Act proceedings, Appellants quote the "needs of consumers" language in N.D.C.C. § 49-22-16(2)(c). Motion for Stay, ¶ 60. Section 49-22-16, however, does not relate to siting criteria, but rather governs when the Commission may preempt local rules, regulations, and ordinances. The "needs of consumers" language quoted by Appellants appears in a provision that governs the Commission's power to preempt requirements in road use agreements from political subdivisions. N.D.C.C. § 49-22-16(2)(c). The Commission's preemption power is not before the Court, and Appellants' reliance on the "needs of consumers" language in the above provision is strained, to say the least. The actual siting factors under Section 49-22-09 do not implicate public need, and indeed this Court has held as much, as discussed in the following section.

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

[¶46.] The Court has held that an evaluation of public need is not within the Commission's authority in siting proceedings. *Matter of Nebraska Pub. Power Dist.*, 330 N.W.2d 143, 148–49 (N.D. 1983). A review of *Nebraska Public Power* reveals both that it is on point and that the case established the correct interpretation of the Siting Act. Contrary to Appellants' discussion of the legislative text and legislative history, the Court "found ***no***

direction in the Siting Act or its legislative history giving the PSC the authority to determine if a need has been shown." 330 N.W.2d at 149 (emphasis added). The *Nebraska Public Power* decision also noted that "when it desires to do so, [the North Dakota Legislature] can mandate that an administrative agency consider the issue of need." *Id.* (citing CPCN requirements under N.D.C.C. ch. 49-03).

[¶47.] Moreover, the Court directly addressed Appellants' contention that the Siting Act requires the Commission to consider public need because a siting ***application*** must contain "a 'statement explaining the need for the facility.'" *Id.* at 148 (quoting N.D.C.C. § 49-22-08). In considering this provision, the Court distinguished the content requirements of a siting application in Section 49-22-08 (which requires a statement of need) from the factors that guide the Commission's evaluation of siting applications in Section 49-22-09 (which does not list need as a factor to be considered). *Id.* And the Court directly addressed why the legislature would require a statement of need in a siting application if it does not instruct the Commission to consider the need for the facility in the siting process. Specifically, the Court noted that the applicant's statement of need provides context for the siting application: "According to the PSC the information [regarding need] is to be used by itself, the public, and the Legislature in planning and scheduling, and it is used to help the PSC understand the nature of the applicant's project." *Id.*

[¶48.] Given the lack of a statutory directive to consider public need in a siting proceeding, *Nebraska Public Power* concluded that "***the PSC does not have the authority or duty to determine need***" under the Siting Act. *Id.* at 149 (emphasis added). Moreover, the Court reached this conclusion even though Nebraska Public Power District was not required to obtain a CPCN for its project. *See id.* at 150 (Vande Walle, J., concurring specially).

Appellants' suggestion that the Siting Act requires a determination of public need flies in the face of this holding. In passing, Appellants argue that the Court's decision in *Nebraska Public Power* is confined to "the posture of an interstate corridor access case." Motion for Stay, ¶ 58. Yet, Appellants fail to point to any language in *Nebraska Public Power* that suggests the Court intended to limit its holding to projects that cross state lines. And even if it did, the CPCN Order here demonstrates that the Project is part of a large, multi-state transmission plan developed by the Midcontinent Independent System Operator (MISO). (R79) MISO is a "Regional Transmission Organization (RTO) responsible for overseeing and managing the electric power transmission grid across 15 U.S. states as well as the Canadian province of Manitoba." (R79:1)

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

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

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

Senate Bill No. 2314 (2017) (v. 17.0884.06004), https://ndlegis.gov/assembly/65-2017/regular/documents/17-0884-06004a.pdf; *see also* N.D. Legis. Council, S.B. 2314 (2017), Actions, https://ndlegis.gov/assembly/65-2017/regular/bill-actions/ba2314.html?bill_year=2017&bill_number=2314. Appellants' assertion that "need" is or should be within "the integrated framework the Legislature established in ch. 49-22" is both contrary to this Court's precedent and was overwhelmingly rejected by the Legislature as recently as 2017. Motion for Stay, ¶ 55. The Legislature would have had no reason to consider adding "need" to the statutory factors if it were already there.

[¶51.] Desperate to shore up their argument, Appellants cite to legislative history surrounding the Siting Act. Motion for Stay, ¶¶ 62–63. But Appellants have not argued that any of the statutes at issue are ambiguous. Where the statutory language is clear and unambiguous, "legislative intent is presumed clear" and "there is no room for construction." *State by & through Workforce Safety & Ins. v. Boechler, PC*, 2025 ND 132, ¶ 14, 24 N.W.3d 91. Regardless, the soundbites of legislative history cited by Appellants are taken out of context and do not, in any way, support their position. For example, the cited testimony from the Hearing on S.B. 2050 (1975) was not related to addressing public need in a siting proceeding; rather, the testimony discussed the interplay of permitting by the Commission and requirements of local subdivisions. *Hearing on S.B. 2050 Before the H. Comm. on Natural Resources* (N.D. Mar. 6, 1975). Even less helpful to Appellants' position is the N.D. Legislative Council Staff Report to which they cite. Appellants assert that this report "explained that construction of a 'major utility transmission facility' may not begin absent a 'certificate of environmental compatibility and public need,' supported by a statement of need, alternatives, and findings on need and environmental impacts."

Motion for Stay, ¶ 62. However, the quoted language appears only under the section of the Report titled "Legislation in Other States" and ***describes the law in New York State***, not the proposed legislation that would become North Dakota's Siting Act. N.D. Legis. Council Staff, *Background Information on Power Transmission Lines and Land Disturbing Operations* (Jan. 1974) at pp. 3–4.

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

[¶52.] Although a CPCN is required for certain transmission projects constructed by an "electric public utility," member-owned entities like "rural electrical cooperatives" do not meet the definitions of either an electric public utility or an electric transmission provider and are not subject to the CPCN requirements imposed by Chapter 49-03. Rural electric cooperatives nevertheless remain subject to siting requirements under Chapter 49-22 if they propose to construct facilities within the scope of the Commission's jurisdiction under that chapter. Under North Dakota's statutory framework, "electric public utilities must, with few exceptions, secure a certificate of public convenience and necessity from the PSC in order to extend their electric distribution facilities." *N. States Power Co. v. N.D. Pub. Serv. Comm'n*, 452 N.W.2d 340, 344 (N.D. 1990) (citing N.D.C.C. §§ 49-03-01 through 49-03-01.3; *Tri-County Elec. Coop., Inc. v. Elkin,* 224 N.W.2d 785 (N.D.1974)). By contrast, "electric cooperatives are largely unregulated in the sense that they have the ability to expand their electrical services ***without having to first obtain a certificate of public convenience and necessity***." *N. States Power Co.* 452 N.W.2d at 344. (emphasis added); *see also Application of Montana-Dakota Utils. Co.,* 219 N.W.2d 174, 180 (N.D. 1974) (noting that extensions of electric distribution facilities by electric cooperatives are not

regulated by the PSC because the Legislature determined that members of the cooperative, who own and control the business, would adequately protect their own economic investment and interest by preventing unwarranted wasteful expansion).

[¶53.] In 1975, a decade after the CPCN Statute was enacted, the North Dakota Legislature enacted the Siting Act, which requires both electric public utilities and rural electric cooperatives to obtain a certificate of corridor compatibility and route permit before constructing new transmission lines under the Commission's jurisdiction. *See* S.L. 1975, ch. 436. Nothing in the Siting Act remotely suggests a repeal of the CPCN requirements under Chapter 49-03. In fact, this Court later held that public need is not a factor for consideration in a siting proceeding. *Neb. Pub. Power*, 330 N.W.2d 143.

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

[¶55.] Appellants have failed to demonstrate any likelihood of success on appeal, so they fail the test for a stay on that factor alone.

B. Appellants have not met their burden to show they will suffer cognizable harm in the absence of a stay.

[¶56.] The harms Appellants allege they will suffer in absence of a stay correspond to their own failure to timely participate in the CPCN proceeding. First, Appellants claim they will

suffer harm in the absence of a stay, because citation in the Siting Application to the CPCN "gives operative effect to an order whose jurisdictional basis is on appeal," "compress[ing] the issues in the siting docket and signal[ing] that 'need' is settled before affected townships and landowners have had a fair opportunity to be heard in the forum the Legislature prescribed." Motion for Stay, ¶ 68. But Appellants' argument continues to ignore the fact that public need is not part of the siting inquiry. *Neb. Pub. Power*, 330 N.W.2d at 149. Thus, any reference to the existence of the CPCN in the Siting Application is not a cognizable harm under a stay analysis. *Id.*

[¶57.] Next, Appellants claim that "[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 [township and landowner] participation and to preserve the statutory framework the Legislature enacted." Motion for Stay, ¶ 74. Appellants then cite to instances during public hearings on the Siting Application when counsel for Otter Tail and Montana-Dakota objected to Appellants' attempt to use those hearings as a forum to reopen and introduce evidence and argument about public need or the closed CPCN Proceeding. *Id.* ¶¶ 70–72. That the CPCN Order is beyond judicial review is a product of Appellants' failure to timely intervene or appeal that decision. That issue cannot be cured by a stay.

[¶58.] Appellants also complain about how their public comments were received in the separate Siting Proceeding and attempt to connect this "harm" to the issues on appeal. Motion for Stay, ¶¶ 69–74. Appellants made no attempt to intervene in the Siting Proceeding before the hearing, and Appellants' participation was limited in the same way as any other non-party member of the public. That is not a harm. Similarly, Appellants suffered no harm when their written submissions in the separate Siting Proceeding were

accepted as public comments. If anything, this section of the motion only highlights the fact that they received ample opportunity to voice their opinions of the Project throughout the five days of hearings held in the Siting Proceeding. Nevertheless, the manner in which the Commission or the hearing officer conducted the Siting Proceeding is not before the Court, and Appellants' complaints about the Siting Proceeding do not amount to harm that could be mitigated by the issuance of a stay in this separate appeal.

[¶59.] Finally, Appellants argue, without factual support, that "[w]ithout a stay, the PSC and Utilities can continue to use the challenged CPCN to shape the siting record and practical expectations on the ground." Motion for Stay, ¶ 76. This argument is inconsistent with the Commission's Petition Order, which makes clear that the Commission understands it must undertake a separate siting analysis before the Project may proceed to construction. (R91:3–4 ("For clarification, the line may not be constructed without obtaining a certificate of corridor compatibility and route permit from the Commission.")) Appellants fail to articulate how the Commission, absent a stay, will use its CPCN Order to "shape the siting record" when the Commission has expressly explained it must undertake the separate siting analysis. Further, Appellants fail to explain how the CPCN Order impacts landowner decisions regarding "whether to allow entry, whether to negotiate, and whether to resist," let alone how that alleged impact will cause irreparable harm to Appellants. Motion for Stay, ¶ 76. Appellants fail to identify any actual harm that would warrant a stay.

C. Otter Tail and Montana-Dakota will suffer substantial harm if a stay is issued.

[¶60.] Appellants fail to address the substantial harm that the requested stay would cause to Otter Tail and Montana-Dakota. If the Commission approves the Project's Siting

Application, construction of the Project is expected to begin this year. (R63) Construction may not commence until the Commission issues siting permits. The Court has previously held that "substantial harm in the form of project delays weighs against the issuance of a stay." *Cass Cnty. Joint Water Res. Dist v. Aaland*, 2020 ND 196, ¶ 6, 948 N.W.2d 829. Here, granting a stay of the CPCN Order on the dubious grounds cited by Appellants would unnecessarily delay the Siting Proceeding and thereby risk Project delay.

[¶61.] Both N.D.C.C. § 28-32-48 and N.D.R.App.P. 8(E) permit the Court to impose appropriate conditions for a stay. If the Court were inclined to grant the requested stay, a bond hearing should be set and a significant bond should be required against the harm caused by project delays. Appellants' argument that "no bond should be required" because project delays caused by a stay "are generalized schedule concerns and are largely self-created" (Motion for Stay, ¶ 83) ignores reality and clear precedent of this Court that project delays constitute a substantial harm that weighs against issuance of a stay. *Aaland*, 2020 ND 196, ¶ 6. Otter Tail and Montana-Dakota are likely to suffer substantial harm should a stay be imposed that delays the Project's siting proceeding, especially in the absence of such a bond. This factor weighs against issuance of a stay.

D. A stay is not in the public interest.

[¶62.] Consideration of the public interest favors denial of the requested stay. In July 2022, the Board of Directors for the Midcontinent Independent System Operator ("MISO") approved the Project as part of MISO's long-range transmission planning. (R63) Moreover, the Commission already determined there is a public need for the Project, finding "that public convenience and necessity will be served by the construction and operation of the facilities" and that Otter Tail and Montana-Dakota are "technically, financially, and managerially fit to be able to provide the service." (R14:2) The stay requested by

Appellants could function to stay the siting proceeding and thereby delay and frustrate the public interest in the completion of the Project.

CONCLUSION

[¶63.] For the reasons stated above, Otter Tail and Montana-Dakota respectfully request the Court deny Appellants' Motion for Stay.

DATED this 10th day of March, 2026.

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