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 Jill 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 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 No. 08-2025-CV-02068

Hon. Bobbi Weiler

AMENDED APPELLANTS' BRIEF
APPEAL FROM JUDGMENT ON ADMINISTRATIVE APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

[¶1] This appeal arises from the Public Service Commission's issuance of a Certificate of Public Convenience and Necessity ("CPCN") 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).

[¶2] 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. v. N.D. Pub. Serv. Comm'n*, 2022 ND 225, ¶ 21, 982 N.W.2d 592 (holding PSC was "without jurisdiction under N.D.C.C. ch. 49-03" and vacating order); *Env't L. & Pol'y Ctr. v. N.D. Pub. Serv. Comm'n*, 2020 ND 192, ¶ 11, 948 N.W.2d 838 (PSC authority limited to that provided by the Legislature; in the administrative context, "jurisdiction" includes the agency's "scope of authority under statute").

[¶3] 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.

[¶4] 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").

[¶5] Chapter 49-22 also contemplates direct notice, beyond publication, through service of notices of filing and hearing on persons and agencies the Commission deems appropriate. N.D.C.C. §§ 49-22-08(2), 49-22-13(4). Appellants contend those safeguards are the Legislature's design for testing need, alternatives, and local impacts for a new high-voltage line.

[¶6] Appellants contend the Utilities did the opposite. They proceeded

first under Chapter 49-03, where notice could be limited to publication and the Chapter 49-22 local hearing process was absent. The Commission then issued a conclusory CPCN, and the Townships and affected landowners learned of it only after issuance. Nill Decl., Ex. 11(5) (Speaker 1 - 28:34); Nill Decl., Ex. 7, ¶ 1.

ISSUES PRESENTED

[¶7] 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 must be sited and approved under N.D.C.C. Chapter 49-22.

[¶8] 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.

[¶9] 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.

STATEMENT OF THE CASE

[¶10] This appeal arises under N.D.C.C. ch. 28-32 from the PSC's

November 20, 2024 order granting Otter Tail Power Company (Otter Tail Power) and Montana-Dakota Utilities Co. (MDU) a Certificate of Public Convenience and Necessity for a proposed 345-kV transmission line under N.D.C.C. ch. 49-03 (PSC Case No. PU-24-91). R79, Ex. 17. The Commission issued a notice of opportunity for hearing on March 27, 2024 and published that notice in multiple newspapers (R65, Ex. 3). On May 21, 2025, Appellants filed a petition to rescind the November 20, 2024 order and to reopen the proceeding, and sought intervention (R94, Ex. 19); the Commission denied those requests on June 18, 2025. Appellants served an Amended Notice of Appeal and Specifications of Error on July 16, 2025 (R12).

STATEMENT OF FACTS

[¶11] The dispute is whether the PSC may approve a high-voltage transmission line by relying on projections tied to future wind development while bypassing the statutory safeguards the Legislature enacted for projects of this magnitude. The proposed 345-kV line from Ellendale to Jamestown was advanced under Chapter 49-03 by a November 20, 2024 order that issued a CPCN without explicit findings of fact or separate conclusions of law, and without the siting-specific procedures required by Chapter 49-22. Appellants contend the record shows the project primarily facilitates eastbound export of privately developed wind generation, not a verified North Dakota public need.

[¶12] This case concerns where and how the need and routing determinations for high-voltage lines must be made: within 49-22's integrated process (notice to affected landowners and townships with retained zoning authority, a hearing in the project area, environmental review/alternatives analysis, and a "finding with reasons"). *See* N.D.C.C. §§ 49-22-05.1, 49-22-08(6), 49-22-08.1(5), 49-22-09, 49-22-16(2)(d). Treating a 49-03 CPCN as proof of "need" in a later 49-22 docket distorts the required siting record and sidesteps local participation.

A. Overview of the transmission line project and the approval process.

[¶13] On February 29, 2024, Otter Tail Power and MDU filed a joint application for a Certificate of Public Convenience and Necessity to construct, own, and operate approximately 85 miles of 345-kV transmission line from Ellendale to Jamestown (JETx), along with the expansion of four substations located in Stutsman, LaMoure, and Dickey Counties in North Dakota.

[¶14] On March 27, 2024, the Commission issued a Notice of Opportunity for Hearing, published in local newspapers, inviting written comments or requests for a hearing by May 10, 2024. The Commission states that no responses were received.

[¶15] The March 27 notice outlined two main issues for consideration:

1. Whether public convenience and necessity will be served by

construction and operation of the facilities; and

2. Are [Otter Tail Power/MDU] technically, financially, and managerially fit and able to provide the service?

[¶16] On July 8, 2024, the Commission discussed these issues in an informal hearing, which was electronically recorded (R70, Ex. 8). On August 19, 2024, the Commission held a work session, also electronically recorded (R73, Ex. 11). On October 14, 2024, the Commission received comments from the Midcontinent Independent System Operator, Inc. (MISO) (R75, Ex. 13). Following this, on October 17, 2024, the Commission held another work session, which was electronically recorded (R77, Ex. 15). On November 20, 2024, the Commission issued an Order granting the certificate in a 2-1 vote, with the majority finding that "public convenience and necessity" would be served (R79, Ex. 17). The order gave no rationale for that conclusion, and Commissioner Randy Christmann dissented on the ground that the Utilities' showing remained vague and insufficient. *Id.*

B. Appellants' interests and how they are affected by the project.

[¶17] As detailed in the Petition to Intervene, Appellants include landowners, local governments, and ratepayers whose distinct and directly affected interests warrant intervention under N.D.A.C. § 69-02-02-05.

C. The Commission's majority provides no rationale to support its finding of public convenience and necessity.

[¶18] The November 20 Order largely recites background but gives no explanation for its statement that "the public convenience and necessity will be served." It contains no findings of fact or legal analysis supporting that conclusion, fails to identify a specific North Dakota public need, evaluate alternatives, address land use or community impacts, or connect the asserted facts to the result. That lack of reasoning renders the decision arbitrary and deprives Appellants of a meaningful opportunity to respond.

D. The dissent identifies material omissions and unanswered questions.

[¶19] Commissioner Randy Christmann's dissent identified significant evidentiary gaps. He explained that most of the cited transmission problems were forward-looking rather than present, that examples of future generation were conjectural, that a significant new Ellendale load had not been meaningfully accounted for, and that the Utilities had failed to justify imposing additional costs on North Dakota ratepayers. R79, Ex. 17.

[¶20] In his view, the Certificate should be denied until better justification was provided. *Id.*

E. The transmission line primarily serves private, rather than public, interests.

1. Project motivated by private generation, not public necessity.

[¶21] The Utilities' July 8, 2024 PowerPoint presentation to the Commission explicitly identifies private development—not public need—as the driving force behind the proposed Ellendale to Jamestown transmission line. According to the presentation, the project is intended to:

- "Enable new commercial and industrial loads"
- "Accommodate new electric generation projects"
- "Reduce transmission constraints to export more North Dakota generation"

See R71, Ex. 9.

[¶22] Although the Utilities claim the existing 230 kV system is "heavily constrained" with "[e]xcessive loadings" and "voltage depressions," they acknowledged that these issues are caused by prospective surplus generation in the future from privately-owned wind projects west and north of Ellendale, R70, Ex. 8 (PSC Informal Hearing, July 8, 2024, at 14:9-15 ("contingency analysis of this *future condition*") (emphasis added); and the intent is to move that generation out of state. *See* Oct. 16, 2024 Memorandum by PSC Public Utility Analyst Christopher C. Hanson addressing an October 14, 2024 letter from Jeremiah Doner, the Director of Cost Allocation with MISO: "it creates *additional capacity for more wind to be transmitted from North Dakota eastward*." (Emphasis added).

R76, Ex. 14.

2. MISO's justification is generation-driven, not reliability-driven.

[¶23] Otter Tail Power's spokesperson stated that MISO focused on the project because "the amount of generation being built in this region is far outpacing what's happening in other parts of MISO," and they are "try[ing] to get ahead of the transmission needs" associated with that private generation. R70, Ex. 8 (PSC Informal Hearing, July 8, 2024) at 30:5-12.

3. Claimed public benefits are not part of the MISO case.

[¶24] When asked about the public benefits used to justify the line, such as landowner easement payments and tax revenue, Otter Tail admitted these are not included in MISO's business case for the project:

> (Commissioner Fedorchak): "And the benefits that you mentioned in your discussion … those aren't part of the MISO business case, are they?"
> (Speaker Weirs): "They are not actually [part of the MISO case]."

R70, Ex. 8 at 34:5 and 35:1-6.

4. Cost burden on North Dakota ratepayers.

[¶25] Despite the private nature of the need, the cost burden is placed on North Dakota residential customers:

> (Speaker Weirs): "Otter Tail residential customers are going to see a rate impact of 18 cents per month, MDU customers will see an impact of 12 cents per month for just the Jamestown to Ellendale project."

R70, Ex. 8 at 39:1-4.

5. Admission: JETx enables private wind projects.

[¶26] The Utilities themselves concede that the line is essential for enabling further private wind development:

> (Speaker Weirs): "…without projects like this, it's hard to develop additional generation within the state."

R70, Ex. 8 at 46:2-4.

6. Commissioner concerns: benefits disproportionately favor developers.

[¶27] PSC Commissioner Christmann clearly expressed concern that the project disproportionately benefits private developers:

> "So our ratepayers pay to build this and the benefits are … mostly to whoever the new developer is that comes in and builds another wind farm, … [a] few landowners, but not to most of these Otter Tail and MDU customers."

R70, Ex. 8 (PSC Work Session, Aug. 19, 2024) at 18:4-10. He further emphasized:

> "If the issue is somebody else out-of-state's need for energy … fine, pay for it. Not our rates all the time." *Id.* at 19:1-5. And:
>
> "… among the project benefits are to accommodate new electric generation projects. That, to me, that's who out to be paying at least a good part of this, if not all of it … [b]ecause that, to me, is the key benefit in this, is to add the new generators." *Id.* at 24:2-7.

7. Transmission constraints are based on speculative future wind development.

[¶28] According to a PSC memorandum dated October 16, 2024, prepared

by analyst Hanson, the transmission constraints that the proposed line is intended to address are not present conditions, but rather projected issues based on long-term forecasts of load and generation growth. *See* R76, Ex. 14 (Hanson Memo re: letter from Jeremiah Doner, Director of Cost Allocation, MISO) (emphasis added):

> "Specifically, he states that this project will remedy the N-1 and N-1-1 issues noted in the previous memo and he identifies the elements that are projected to be affected by thermal and voltage issues. These N-1 and N-1-1 events are *projected* based upon each company's long-term forecasts of load and generation growth."
>
> [¶29] Further, Hanson quotes Doner as stating:
>
> "These projects will allow for the continued interconnection of new generation resources in areas that offer higher capacity factors for intermittent resources, such as wind generation."

See also R70, Ex. 8 (PSC Informal Hearing, July 8, 2024, at 14:9-15 (referring to "contingency analysis of this future condition"). In other words, the transmission line is being built to enable export capacity for wind projects that have not yet materialized; not to address any present reliability concerns.

F. Local township opposition.

[¶30] Following public meetings in early 2025, Wano and Willowbank Townships denied Conditional Use Permits, and Wano, Willowbank, Russell, Corwin, and Valley Townships formally voted to join the Petition. R94, Ex. 19. These actions post-date the November 20, 2024 CPCN and were presented to the Commission in support of intervention and reopening.

STANDARD OF REVIEW.

[¶31] This appeal is governed by N.D.C.C. §§ 28-32-46 and 28-32-49. On appeal from a district court judgment reviewing agency action, this Court reviews the agency's decision, not the district court's decision, although it gives respect to the district court's sound reasoning. *Keidel v. WSI*, 2023 ND 17, ¶ 11, 985 N.W.2d 711; *Geffre v. N.D. Dep't of Health*, 2011 ND 45, ¶ 26, 795 N.W.2d 681. Questions of law, including statutory interpretation and the scope of agency authority, are fully reviewable on appeal. *Keidel*, 2023 ND 17, ¶ 11, 985 N.W.2d 711; *Peterson v. Sando*, 2011 ND 206, ¶ 8, 806 N.W.2d 172. The Court does not make independent findings or substitute its judgment for that of the agency, but asks whether a reasoning mind reasonably could have determined the agency's findings were proven by the weight of the evidence from the entire record.

SUMMARY OF ARGUMENT

[¶32] The Commission's November 20, 2024 order cannot stand. For a new 345-kV transmission line, Chapter 49-22 provides the Legislature's integrated siting framework. By issuing a Chapter 49-03 CPCN first, the Commission bypassed that framework and its required notice, hearing, and findings-based process.

[¶33] The November 20 order is also legally insufficient. It contains no explicit findings of fact, separate conclusions of law, or reasoned explanation

sufficient to support finality or judicial review. The June 18 order did not cure those defects.

[¶34] The Commission further erred in denying intervention to directly affected landowners, townships, and ratepayers whose interests were substantial and unrepresented.

[¶35] Even if Chapter 49-03 applied, the record does not show public convenience and necessity by a preponderance of the evidence, and the Commission's procedures independently denied due process. The Court should vacate the CPCN, reverse the denial of intervention, and remand for proceedings under Chapter 49-22.

ARGUMENT

I. 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.

[¶36] 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.

[¶37] 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.

[¶38] 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.

[¶39] The 345-kV Jamestown–Ellendale high-voltage line at issue here, a

new line conceived by MISO 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.

[¶40] 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."

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

[¶42] 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 into a prior CPCN granted under a different statute.

[¶43] 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.

[¶44] 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.

[¶45] 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.

[¶46] Allowing a prior CPCN under 49-03 to fix "need" before the 49-22 hearing prejudges 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.

[¶47] *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).

[¶48] 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.

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

[¶49] 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).

[¶50] 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).

[¶51] 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.

[¶52] 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).

[¶53] 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.

[¶54] *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).

II. The November 20, 2024 Order is not a final, reviewable agency action because it lacks the findings, conclusions, and reasoned analysis the law requires.

[¶55] North Dakota law ties the running of any deadline for reopening, reconsideration, or appeal to issuance and service of a *final* order. *See* N.D.A.C. §§ 69-02-06-01, -02; N.D.C.C. § 28-32-42. Although the Public Service Commission is generally exempt from portions of the Administrative Agencies Practice Act, N.D.C.C. § 54-57-03(1), the finality principles codified in N.D.C.C. § 28-32-39 remain the touchstone for what makes an order judicially reviewable: (1) explicit findings of fact and separate conclusions of law and (2) service of those findings, conclusions, and the order on all parties. N.D.C.C. § 28-32-39(1)–(2).

[¶56] The November 20 order meets none of these requirements. It contains no findings, no conclusions of law, and no reasoned explanation. It offers only a bare statement that "public convenience and necessity will be served." That

is legally inadequate. "[A]n agency's findings are adequate when they enable a reviewing court to understand the agency's decision." *State v. Sandberg*, 956 N.W.2d 342, 347 (N.D. 2021). Without findings and rationale, neither the parties nor a reviewing court can discern the basis for the agency's action, so statutory clocks do not run.

A. The PSC's June 18 order confirms—not cures—this defect.

[¶57] It asserts that although the November 20 order "lacked specific title headings" for findings and conclusions, its "discussion section" contains the facts and legal conclusions the Commission relied on, and that the case was resolved by "informal disposition" under N.D.C.C. § 28-32-22. But § 28-32-39(1) requires *explicit findings* and *separate conclusions of law*; a narrative that recites background and announces a result is not enough. Findings must tie specific, record-based facts to the governing statutory criteria so that a reviewing court can follow the agency's reasoning. *Sandberg*, 956 N.W.2d at 347. Nor may a court supply a rationale the agency did not articulate. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). And § 28-32-22 authorizes informal disposition only if it does *not* "substantially prejudice the rights of any party"—it cannot be used to dispense with findings where another statute independently requires them. Here, proceeding informally while omitting findings and conclusions *did* substantially prejudice directly affected landowners, townships, and ratepayers by foreclosing meaningful

review.

B. The Siting Act independently compels the same result.

[¶58] For high-voltage transmission facilities, the Commission must decide in accordance with the hearing record and must issue a "finding with reasons" for any designation. N.D.C.C. §§ 49-22-08(6), 49-22-08.1(5) (requiring decisions grounded in the evidence, the application, § 49-22-05.1 criteria, and § 49-22-09 considerations). Judicial review under § 49-22-19 presupposes a decision containing enough findings and legal reasoning to permit meaningful appellate scrutiny, and rehearings must be conducted pursuant to Chapter 28-32. The Commission's bare conclusion falls short of these statutory commands.

C. Finality and timing follow from § 28-32-39—just as the PSC itself recognized.

[¶59] The June 18 order acknowledges that the outdated reference in N.D.A.C. § 69-02-06-02 should be "updated" to § 28-32-39. That concession underscores Appellants' point: § 28-32-39(1)–(2) is the trigger for finality and notice. Because the November 20 order did not satisfy those requirements, no deadline to seek reopening, reconsideration, or appeal began to run.

[¶60] Constitutional due process leads to the same place. Even where formal adjudicative rules are relaxed, due process requires notice, an opportunity to be heard, and a reasoned decision supported by the record. *Goldberg v. Kelly*, 397 U.S. 254 (1970). And Chapter 28-32 expressly authorizes courts to set aside

decisions that are unlawful, unsupported by evidence, or issued without fair procedure. N.D.C.C. § 28-32-46. An order devoid of findings and reasoning is unreviewable and arbitrary.

[¶61] The Commission's continuing jurisdiction underscores that this defect is not merely technical. Agencies retain authority to reopen where statutes provide. N.D.C.C. § 28-32-40(5). The Siting Act preserves ongoing oversight, including revocation or suspension for false statements, noncompliance, or unfair land-acquisition tactics. N.D.C.C. § 49-22-20. That framework confirms the Commission's obligation to issue reasoned, reviewable decisions and correct course when required.

[¶62] Finally, the North Dakota Supreme Court's recent summary of judicial-review obligations confirms the governing standard: courts examine whether the agency acted within the law, complied with ch. 28-32, afforded due process, and supported its conclusions with evidence and rationale. *Zent v. N.D. Dep't of Health & Human Servs.*, 2025 ND 50, ¶ 16. The November 20 order satisfies none of these criteria.

D. Even if the Court deems the November 20 order "final," it must be vacated as unlawful.

[¶63] A final order that omits explicit findings and separate conclusions violates §§ 49-22-08(6), 49-22-08.1(5) and 28-32-39(1), and is arbitrary under § 28-32-46. The remedy is the same: vacatur and remand for issuance of a

reasoned, served order grounded in the evidentiary and statutory criteria.

III. The denial of intervention was not in accordance with law and deprived directly affected parties of a fair hearing.

A. Legal standard.

[¶64] Intervention should be liberally allowed where substantial rights may be affected and existing parties do not adequately represent those interests. N.D.A.C. § 69-02-02-05; *Minn-Kota Ag Prods., Inc. v. N.D. Pub. Serv. Comm'n*, 938 N.W.2d 118, 130-31 (N.D. 2020). Informal disposition is permissible only if it does not substantially prejudice party rights. N.D.C.C. § 28-32-22.

B. The PSC's timeliness rationale collapses under its own premises.

1. The 10-day "before the hearing" rule presupposes a hearing.

[¶65] The PSC denied intervention because the petition "was filed more than one year after the expiration of the Notice" and because N.D.A.C. § 69-02-02-05(2) requires intervention "at least ten days prior to the hearing." But the Commission chose not to hold an evidentiary hearing, instead disposing of the CPCN by "informal disposition." When there is no hearing, a deadline tied to "the hearing" does not bar intervention; the agency must instead ensure that the informal path does not extinguish participation by those whose property and governance rights are at stake. N.D.C.C. § 28-32-22.

2. No final order—no running clock.

[¶66] Even if a hearing-based deadline could be imported into an informal disposition, the November 20, 2024 CPCN order was not "final" because it lacks explicit findings, separate conclusions of law, and a reasoned explanation. *See* N.D.C.C. § 28-32-39(1)–(2); Section II, *supra.* Statutory clocks for reconsideration, reopening, or appeal do not run until a legally sufficient, served final order issues. *Id.* The June 18 order's assertion that Appellants "missed the time allowed to appeal" simply assumes finality that does not exist.

3. Continuing jurisdiction and good cause.

[¶67] The Commission retains continuing authority to revisit its orders where provided by statute. N.D.C.C. § 28-32-40(5); *see also* N.D.C.C. ch. 49-22. And the Commission's own intervention rule contains a good-cause safety valve; the combination of (a) the Commission's choice to forego a hearing and (b) the emergence of material new facts (township CUP denials and formal votes to intervene in early 2025) constitutes good cause. Denying intervention despite those developments "substantially prejudice[d]" Appellants' rights and contravened § 28-32-22.

C. Appellants' interests are direct, substantial, and unrepresented.

[¶68] Appellants include Townships exercising zoning authority, landowners in the project path facing easements and takings risk, and OTP and

MDU ratepayers who will bear the project's rate consequences. None of those interests is represented by the Utilities or any existing party.

D. The PSC's "you can raise it later in the route-permit case" rationale is legally mistaken.

[¶69] The June 18 order says Appellants can raise these concerns later in a corridor-compatibility or route-permit proceeding because the line cannot be constructed without that permit. That misses the point. The CPCN is an antecedent authorization that the Utilities themselves invoke as the foundation for their Chapter 49-22 filings. Allowing a conclusory CPCN to stand while deferring hearing rights to a different docket deprives directly affected parties of a meaningful opportunity to contest need at the stage where the statute requires the Commission to act in accordance with the evidence and to issue a finding with reasons. N.D.C.C. §§ 49-22-08(6), -08.1(5). Promising a later hearing on different criteria does not cure that defect.

E. Material new evidence compelled, not foreclosed, participation.

[¶70] Between January and April 2025, Wano and Willowbank denied CUPs and multiple Townships voted to join the Petition. Those official acts were new and material. The Commission acted arbitrarily in treating them as irrelevant rather than admitting the affected parties and developing the record.

F. The PSC's reliance on "informal disposition" cannot cure the due-process problem it created.

[¶71] The June 18 order invokes N.D.C.C. § 28-32-22 to justify an informal path, citing notice by publication and an opportunity to submit comments/requests for hearing in spring 2024. But § 28-32-22 authorizes informal disposition only if it does not "substantially prejudice" rights. Here, informal disposition became a shield against participation: there was no hearing; there were no findings and conclusions to make the decision reviewable; and those with the most at stake were denied entry when they sought to intervene after new developments. That is the definition of substantial prejudice. And because the November 20 order is not final under § 28-32-39, telling Appellants they "missed their opportunity" simply compounds the error. *See also* N.D.C.C. § 28-32-46 (courts set aside agency action that is unlawful, unsupported by the record, or issued without fair procedure); *Zent*, 2025 ND 50, ¶ 16 (courts review whether the agency acted within law, complied with ch. 28-32, afforded due process, and supported its conclusions with evidence and rationale).

IV. Even if Chapter 49-03 applied, the record does not support the statutory elements by a preponderance of the evidence.

[¶72] Even under Chapter 49-03, the Utilities had to prove public convenience and necessity on a reasoned record, and the Commission had to connect specific facts to that standard in explicit findings and separate

conclusions. It did not. *See* N.D.C.C. §§ 28-32-39, -46; *Sandberg*, 956 N.W.2d at 347.

[¶73] The record instead shows a project driven by projected future generation growth and export capacity rather than demonstrated present North Dakota public necessity. MISO's materials and the PSC analyst's memorandum describe projected N-1 and N-1-1 issues based on long-term forecasts, and Commissioner Christmann's dissent identified the same problem: forward-looking assumptions, conjectural future projects, and insufficient justification. R70, Ex. 8, R75, Ex. 13, R76, Ex. 14, R79, Ex. 17,

[¶74] The record also reflects that the project's benefits accrue primarily to private generation developers while North Dakota ratepayers bear the costs, with no meaningful analysis of alternatives, present-system adequacy, or the significance of township permit denials and local opposition. On this record, a reasoning mind could not find public convenience and necessity proven by a preponderance of the evidence.

V. The Commission's procedures violated due process under the North Dakota and United States Constitutions.

[¶75] Appellants have protected interests in property, local land-use authority, and utility rates. Yet the Commission proceeded by informal disposition, denied intervention to directly affected parties, and issued a conclusory CPCN without explicit findings or separate conclusions. That denied a

meaningful opportunity to be heard and a reasoned, reviewable decision. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Goldberg*, 397 U.S. 254; N.D.C.C. §§ 28-32-22, -39, -46; *Zent*, 2025 ND 50, ¶ 16. The remedy is vacatur and remand.

CONCLUSION

[¶76] The Commission lacked authority to issue the CPCN under Chapter 49-03 and did so without the procedures and findings required by North Dakota law. The Court should vacate the CPCN, reverse the denial of intervention, and remand for proceedings under Chapter 49-22.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to N.D.R.App.P. 32(d), I certify that this brief complies with N.D.R.App.P. 32(a)(8)(A). I relied on the page count of the filed electronic document, which totals 38 pages.

Dated: March 30, 2026

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