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

BRIEF OF APPELLEES
OTTER TAIL POWER COMPANY & MONTANA-DAKOTA UTILITIES CO.

ORAL ARGUMENT REQUESTED

213 PU-24-91 Filed 05/13/2026 Pages: 38
SC APPEAL - Brief of Appellees Otter Tail Power Company & Montana-Dakota Utilities Co (Oral Argument Requested)

Crowley Fleck PLLP, Attys for Otter Tail Power Co and Montana-Dakota Utilities
Paul J. Forster, Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph No.

Cases

Statutes

Other Authorities

INTRODUCTION

[¶1.] In this Appeal, Appellants attempt to attack a proceeding in which they did not participate and a certificate of public convenience and necessity ("CPCN") for which the deadline to appeal ran long before Appellants took action. They sought to circumvent these fatal flaws by filing an untimely petition requesting that the Public Service Commission revisit its decision. The Commission denied the petition, and Appellants now seek to attack the CPCN by appealing the denial of their petition. They should not be allowed to do so. Though it is where Appellants focus much of their argument, the order granting the CPCN is not properly before this Court, given that it was not timely appealed. Appellants question its finality, but the order was clearly the Commission's final determination. The Commission properly served its order on the parties to the case, and the deadline to appeal came and went. As a result, the dispositive questions on appeal are (1) whether this Court lacks subject matter jurisdiction to review the CPCN decision; (2) whether Appellants lack standing to challenge a CPCN proceeding in which they failed to participate; and (3) even if appellate jurisdiction exists, whether the Commission properly exercised its discretion in denying a petition that sought to revisit a decision for which the time to appeal had passed. The answer to all three questions is "yes." Because these threshold issues resolve the appeal, the Court should not reach the merits of Appellants' challenge to the CPCN.

[¶2.] Even if the Court reaches the merits, Appellants' arguments do not bear scrutiny. *First*, the challenge hinges on Appellants' misguided attempt to conflate the "public need" inquiry of a CPCN with the independent and location-specific inquiries of a siting proceeding. Here, the Commission properly considered the CPCN application because the project at issue requires ***both*** a CPCN under Chapter 49-03 of the Century Code ***and*** siting

permits under Chapter 49-22. Appellants' suggestion that the Commission should have instead evaluated public need in a siting proceeding contradicts this Court's precedent that "the PSC does not have the authority or duty to determine need" in a siting case. *Matter of Neb. Pub. Power Dist.*, 330 N.W.2d 143, 149 (N.D. 1983). *Second*, the Commission's findings sufficed for an uncontested CPCN proceeding and were supported by the record. The Court should decline Appellants' invitation to substitute the Court's judgment for that of the Commission. *Third*, Appellants' half-hearted due process arguments lack merit. The Commission's procedures afford due process, and the only thing that deprived Appellants of an opportunity to be heard in the CPCN proceeding was their own inaction.

STATEMENT OF THE ISSUES

[¶3.] Whether this Court lacks jurisdiction to review the Public Service Commission's order granting a certificate of public convenience and necessity, where Appellants failed to timely appeal the CPCN and petitioned the Commission for relief long after the deadline to appeal had passed?

[¶4.] Whether Appellants lack standing to challenge any issue beyond the Commission's denial of their untimely petition to intervene?

[¶5.] If appellate jurisdiction exists, whether the Commission properly exercised its discretion in denying Appellants' untimely requests for intervention, reconsideration, and reopening?

[¶6.] If the Court reaches the merits, whether the Commission properly considered the CPCN application, given that the electric transmission line project at issue requires both a CPCN under N.D.C.C. ch. 49-03 and siting permits under N.D.C.C. ch. 49-22?

STATEMENT OF THE CASE

A. CPCN Proceeding

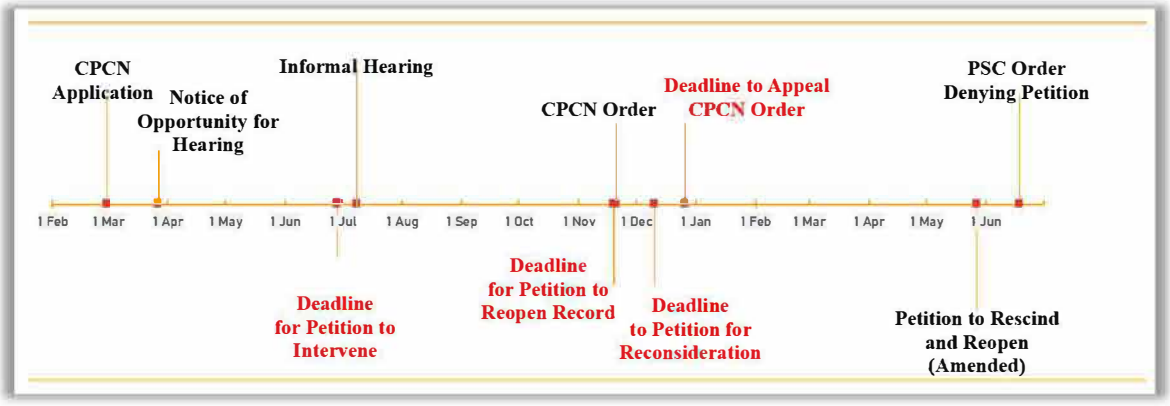
[¶7.] On February 29, 2024, Otter Tail Power Company and Montana-Dakota Utilities Co. (collectively, the "Utilities") filed a Joint Application for a CPCN under N.D.C.C. ch. 49-03 for the 345-kV Jamestown to Ellendale transmission line, or "JETx" (the "Project"). (R63) The Commission published a Notice of Opportunity for Hearing in fourteen local newspapers on March 27, 2024, and it 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; R68) Though Appellants now represent that they "learned of [the CPCN] only after issuance," (Ats. Br. ¶ 6), they have previously suggested they actually knew of the Notice. For instance, they told the district court that they "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 any event, the Notice clearly announced a CPCN case for a large electric transmission line project.

[¶8.] The Commission did not receive any hearing requests, and as such, 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 if no interested party requests a hearing); *see also* N.D.C.C. § 28-32-22 (allowing informal disposition when hearing is waived). Nevertheless, the Commission noticed and held an informal hearing on the CPCN application on July 8, 2024. (R70) Appellants did not attend or seek to participate in the hearing. The Commission later noticed and held two "work sessions" to discuss the merits of the CPCN application. (R73; R77) On November 20, 2024, the Commission issued an

order granting the requested CPCN (the "CPCN Order"). (R79) On November 25, 2024, the Commission served the CPCN Order on the parties to the proceeding. (R80)

[¶9.] Six months later, Appellants filed a Petition that requested the Commission rescind the CPCN Order and reopen the record so that Appellants could issue discovery, introduce new evidence, and intervene in the proceeding. (R81; R94) The Utilities opposed. (R83) On June 18, 2025, the Commission issued an order denying the Petition (the "Petition Order"). (R91) The Commission explained that its regulations provide a deadline of ten days prior to the hearing for petitions to intervene, except for good cause shown. (R91:3 (citing N.D. Admin. Code § 69-02-02-05(2)) A party may file a petition to reopen the record "[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) The following timeline summarizes the proceeding in relation to these 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)

B. Siting Proceeding

[¶10.] On August 8, 2025, the Utilities filed a consolidated application for a certificate of corridor compatibility and route permit 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 ("Siting Proceeding"), at Dkt. No. 1. The Commission held technical hearings on the Utilities' 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, and the matter is pending an order from the Commission.

C. Administrative Appeal

[¶11.] On July 16, 2025, Appellants filed a notice of appeal and specifications of error with the district court, appealing from the Petition Order and also requesting that the district court vacate the CPCN Order. (R1) The district court denied Appellants' motion to stay

the concurrent Siting Proceeding, ruling it lacked jurisdiction to stay a separate proceeding before the Commission and that "Appellants ha[d] failed to meet their burden to justify a stay" of the Petition Order. (R126:6:¶20) Notably, the district court concluded that Appellants failed to demonstrate a likelihood of success on the merits, in part because the district court was "not convinced that MDU and Otter Tail were required to file their CPCN application exclusively under N.D.C.C. ch. 49-22." (R126:4:¶15)

[¶12.] On February 2, 2026, the district court issued its Order on Administrative Appeal. (R146) The district court concluded that it lacked jurisdiction to review the CPCN Order because Appellants had failed to timely perfect their appeal. (R146:8:¶36) The court explained that its appellate jurisdiction over administrative agency decisions is purely statutory, and, "[u]nder N.D.C.C. ch. 28-32, a district court acquires appellate subject-matter jurisdiction only if the appellant strictly complies with the statutory requirements for perfecting an appeal." (R146:4:¶18) The district court concluded the CPCN Order was a final, appealable order, and "[b]ecause Appellants neither served nor filed the *Notice of Appeal* within the statutory 30-day period following notice of the *CPCN Order*, the appeal was not timely perfected as required by ch. 28-32." (R146:8:¶36)

[¶13.] Regarding Appellants' appeal from the Petition Order, the district court determined it had limited jurisdiction to review that order. The court 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 remainder of Appellants' appeal from the Petition Order, concluding it lacked jurisdiction to review the Commission's denial of Appellants' petition for reconsideration (R146:11:¶¶48–50) and

that Appellants lacked standing to challenge the Commission's denial of reopening (R146:13:¶57). The court rejected Appellants' attempt to "characteriz[e] a late collateral challenge as reconsideration," explaining:

> 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 28-32-42 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:¶49 (emphasis added)) Regarding the request to reopen, the district court concluded that, under the three-part test articulated by *In re Bank of Rhame*, Appellants lacked standing to appeal the Commission's denial of reopening. *See* 231 N.W.2d 801, 808 (N.D. 1975). This was so because "Appellants were not named parties to the original adjudicative proceeding, did not participate in that proceeding, and did not seek intervention until after the *CPCN Order* became final." (R146:13¶57)

[¶14.] On February 17, 2026, Appellants filed their notice of appeal (R147) and motion for stay with this Court. The district court entered judgment on March 5, 2026 (R152), and Appellants filed their amended notice of appeal on March 10, 2026. (R157) The Court denied Appellants' motion for stay on March 27, 2026.

STATEMENT OF THE FACTS

I. The JETx Project

[¶15.] The Project is a joint undertaking of Otter Tail and Montana-Dakota to construct, build, and operate approximately 85 miles of new 345 kV transmission line from Otter Tail's existing Jamestown 345 kV substation in Stutsman County to Montana-Dakota's existing Ellendale 345 kV substation in Dickey County. (R63:10) The Project is part of a large, multi-state transmission plan developed by the Midcontinent Independent System

Operator (MISO) to address reliability and resiliency issues that have arisen with evolution of the grid. (R63:8, 14–15; R71:5) Over the last several decades, the generation mix in North Dakota and other MISO-served states has become more diverse, with increasing amounts of non-dispatchable generation. (R63:8) This shift has resulted in insufficient transmission capacity, increased transmission congestion, and generation curtailments. (R63:8) Of particular concern is the reliability of the existing 230 kV system in eastern North Dakota, eastern South Dakota, and west-central Minnesota, which is heavily constrained during peak load conditions. (R63:12; R75:5) Locally, extreme weather events in North Dakota have revealed resiliency issues with the existing 230 kV system that serves the Jamestown area. (R70:16:15 – 17:15) The Project will create a looped 345 kV system that improves the reliability and resiliency of the system serving Jamestown while also mitigating voltage stability concerns with the system serving Ellendale. (R70:17:2–15) Regionally, the Project, as one of several MISO-coordinated transmission projects, will bring: "(1) more reliable and resilient energy delivery; (2) congestion and fuel savings; (3) avoided resource and transmission investment; (4) improved distribution of renewable energy; and (5) reduced carbon emissions." (R63:15) The Project is estimated to cost $440 million and is expected to be in service by the end of 2028. (R63:12; R71:11)

II. Statutory Framework for CPCN and Siting Proceedings

[¶16.] In 1965, the Legislative Assembly 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 of 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.

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.

[¶17.] In 1975, the Legislative Assembly 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. Section 49-22-09 sets forth the factors to be considered by the Commission in evaluating applications and designating corridors and routes. The factors considered under the Siting Act are location-specific and relate primarily to human and environmental 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 framework has been in place for over half a century.

ARGUMENT

[¶18.] The substantive issues raised by Appellants are not properly before the Court. Critically, the Court lacks jurisdiction to review the CPCN Order because Appellants failed to timely appeal that order. They cannot use their Petition to evade the jurisdictional deadline to appeal. Independently, Appellants lack standing to appeal any issue beyond the denial of intervention. This is so because they failed to participate in the CPCN proceeding until well after the CPCN Order was issued and the deadlines to appeal or request reconsideration had passed. Next, to the extent this Court has jurisdiction to review the Petition Order, the Commission properly exercised its discretion in denying Appellants' untimely requests for intervention, reconsideration, and reopening. Finally, even if the Court reaches the merits (it should not), Appellants' arguments are groundless. The Project here required a CPCN; the Commission made adequate findings supported by the record; and the Commission's procedures afforded due process.

I. The Court lacks jurisdiction to review the CPCN Order because Appellants failed to timely appeal it.

[¶19.] North Dakota law provides a 30-day deadline to appeal from the final order of an administrative agency. N.D.C.C. § 28-32-42(1). Where an administrative agency order "terminate[s] the issue" and leaves "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). Once the agency enters a final order, a party "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). The agency provides notice 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).

[¶20.] "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. In *Mahad*, the 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. *Id.* ¶ 5. "When jurisdictional facts are not disputed, the issue of subject matter jurisdiction is a question of law, which [the Court] review[s] de novo." *Id.* ¶ 3 (cleaned up).

[¶21.] Here, Appellants failed to timely appeal the CPCN Order to the district court. The CPCN Order was clearly a final determination in the CPCN proceeding and was properly served on the parties to the case. (R79–80) The CPCN Order approved the Utilities' application and issued CPCN Nos. 5998 and 5999. (R79) A majority of the Commissioners, i.e., "agency head[s]," signed the CPCN Order, such that "the order issued [was] the final order." N.D.C.C. § 28-32-39(2). Executed certificates were attached to the CPCN Order. (R79:3–4) Because the CPCN Order "terminated the issue" and left the Commission with "nothing more to decide," it constituted "a final order of an administrative agency from which the claimants were entitled to appeal to the district court." *Ash*, 2000 ND 75, ¶ 3. And the Commission properly served notice of the CPCN Order by mailing copies of the order to the parties to the proceeding. *See* N.D.C.C. § 28-32-39(2); N.D.R.Civ.P. 5. The time to appeal the CPCN Order expired on December 26, 2024, thirty days after the Commission served notice of the order. The CPCN Order was thus no longer subject to appeal when Appellants filed their Petition nearly six months later.

[¶22.] Attempting to sidestep this clear jurisdictional bar to their appeal, Appellants contend that the Commission's findings of fact and conclusions of law in the CPCN Order were insufficient, such that "[t]he November 20, 2024 Order is not a final, reviewable agency action." (Ats. Br. at 29) Contrary to Appellants' suggestion, whether the CPCN Order contained adequate findings and conclusions and whether it was a final, appealable order are two different questions. 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). Even setting that aside, the sufficiency of an agency's findings cannot be 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 thus an order would never become truly final unless its sufficiency were tested on appeal and affirmed. In other words, the finality of an unappealed order could never be assured, a result that is fundamentally contrary to North Dakota law. *See Lang v. Bank of N.D.*, 377 N.W.2d 575, 579 (N.D. 1985) ("In resolving legal controversies the public interest demands that, at some point, there be an end to litigation[.] . . . At some point, the public and third parties must be able to rely on the finality of a decision.").

[¶23.] Nor can Appellants use their untimely Petition as an end-around the deadline to appeal the CPCN Order. As the district court noted, "Chapter 28-32 does not permit a party to circumvent the jurisdictional deadlines of N.D.C.C. §§ 28-32-40 and 28-32-42 by characterizing a late collateral challenge as reconsideration." (R146:11:¶49) The same is true of attempts to relitigate the otherwise final, unreviewable CPCN Order through late requests to reopen and intervene. 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 appeal of that order. If it were otherwise, parties would be free to disregard the jurisdictional appeal deadline and resurrect long-dead appeal rights simply by petitioning an agency to revisit a past order. North Dakota law does not countenance such a ploy. The Court lacks jurisdiction to review the CPCN Order, either directly or under the guise of Appellants' untimely Petition.

II. Appellants lack standing to appeal any issue beyond the denial of late intervention because they did not participate in the CPCN proceeding.

[¶24.] Independently, Appellants' failure to take any action until six months after the Commission issued its CPCN Order precludes their standing to appeal any issue beyond the Commission's denial of their request to intervene. Importantly, Appellants' Petition for the Commission to revisit its CPCN decision came five months after the time to appeal the CPCN Order expired. *See* N.D.C.C. § 28-32-42(1). "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 (citation omitted). 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 (cleaned up). "The existence of standing is a question of law" reviewed de novo. *Nodak Mut. Ins.*, 2004 ND 60, ¶ 12.

[¶25.] Concerning standing to appeal the merits of an administrative decision, North Dakota applies a three-part test: "[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's decision. *Minn-Kota Ag Prods., Inc. v. N.D. Pub. Serv. Comm'n*, 2020 ND 12, ¶ 13, 938 N.W.2d 118 (quoting *Bank of Rhame*, 231 N.W.2d at 808). To satisfy 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.* ¶¶ 22–24,

27. By contrast, a telephone company customer failed 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. Commc'ns, Inc.*, 545 N.W.2d 194, 196, 198–99 (N.D. 1996).

[¶26.] Standing to appeal a denied intervention request presents a separate question, distinct from standing to appeal other decisions of the agency. Concerning standing to appeal a denial of intervention, the Court "do[es] not impose a standing requirement on the failed intervenor, but instead simply review[s] the denial of intervention." *Energy Transfer LP v. N.D. Private Investigative & Sec. Bd.*, 2022 ND 85, ¶ 10, 973 N.W.2d 394. In ruling that a failed intervenor may appeal the denial of intervention, 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. *Id.* ¶ 11 (collecting cases). *Energy Transfer* 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 the remainder of the appeal, but Appellants' status as failed intervenors provides an alternative reason that Appellants lack standing to appeal anything beyond the denial of their intervention request.

[¶27.] Here, Appellants cannot satisfy the three-prong standing test articulated in *Bank of Rhame* because the administrative record is devoid of any evidence that they participated in the CPCN proceeding. Appellants cannot manufacture standing to appeal the merits of the CPCN Order under the guise of petitioning the Commission to reconsider or reopen a proceeding in which Appellants did not participate. As a result, Appellants lack standing to challenge the merits of the CPCN, which is exactly what their Petition seeks to do. Their

standing to appeal is limited to the Commission's denial of their request to intervene. *See Energy Transfer* 2022 ND 85, ¶ 10.

III. The Petition Order should be affirmed because the Petition was untimely and the Commission properly exercised its discretion in denying it.

[¶28.] To the extent appellate jurisdiction exists to review it, the Court should affirm the Petition Order. The abuse of discretion standard applies to a review of an agency's denial of intervention. *Energy Transfer*, 2022 ND 85, ¶ 15. This Court has not specifically articulated a standard of review when an administrative agency denies a petition to reopen, reconsider, or for rehearing. However, it has reviewed district court denials of motions for reconsideration and Rule 60 motions under the abuse of discretion standard, and the same standard should apply here. *See Ayling v. Sens*, 2019 ND 114, ¶ 20, 926 N.W.2d 147; N.D. Admin. Code § 69-02-06-01(4) (Commission "may" issue order to reopen).

[¶29.] 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 proceeding, or petition to intervene. As such, all the relief requested in the Petition was untimely, and the Commission was well within its discretion to deny the Petition. It was no abuse of discretion to preserve the finality of an order for which the time to appeal had passed.

A. Appellants missed the deadlines to petition for reconsideration or reopening.

[¶30.] Appellants failed to timely request reconsideration of the CPCN Order. A petition for reconsideration of a final order must be filed "within fifteen days after notice has been given." N.D.C.C. § 28-32-40(1); *see also* N.D. Admin. Code. § 69-02-06-02 ("A petition

for reconsideration must be filed within fifteen days after notice of the decision[.]"). Here, notice of the CPCN Order was given by the Commission on November 25, 2024 (R80), nearly six months before Appellants filed their Petition. To the extent the Petition requests reconsideration of the CPCN Order, it was properly denied as untimely.

[¶31.] Appellants' Petition to reopen the record was likewise untimely. 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). The Petition was filed nearly six months after the Commission issued the CPCN Order, i.e., the final order in the CPCN proceeding. Appellants' request to reopen the record was thus untimely.

B. Appellants missed the deadline to intervene and failed to show good cause to intervene late.

[¶32.] Even applying the somewhat 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 failed intervenors "sought to intervene months after learning of the court's decision," "[n]o explanation ha[d] been given for the delay,"

and 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").

[¶33.] Here, Appellants' request to intervene was exceptionally late, coming ten months after the hearing in the CPCN proceeding. Appellants' request to intervene also came six months after the CPCN Order issued and five months after the deadline to appeal expired. *See* N.D.C.C. § 28-32-42. Despite the clear statutory bar to untimely intervention "except for good cause shown," Appellants' Petition neither addressed the good cause standard for late intervention nor factually established any good cause that would excuse their delay. Appellants now argue that the "Commission's choice to forego a hearing" combined with the Townships' later decision to deny zoning permits and vote to intervene "constitutes good cause." (Ats. Br. ¶ 67) But the Commission did not forego a hearing. (R70) And the Townships' zoning decisions are irrelevant to the CPCN, as the Commission alone has authority to determine public need for a project. That some Appellants decided to oppose the Project after issuance of the CPCN Order does not explain or justify their delay.

[¶34.] In a bid to evade the intervention deadline, Appellants also argue that because there was no ***formal*** 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." (Ats. Br. ¶ 65) To be clear, the only thing that "extinguished" Appellants' opportunity to participate in the CPCN proceeding was their own inaction. Moreover, the Commission's intervention regulation does not distinguish between formal hearing and informal hearings. N.D. Admin. Code § 69-02-02-05(2) (tying deadline to "the hearing"). The Court should not create a distinction in the regulation where none exists. The deadline to intervene was ten days

before the hearing date. Moreover, even if a formal hearing were required to trigger the deadline to intervene, Appellants waived their right to intervene by failing to timely request a formal hearing in response to the Notice of Opportunity for Hearing (R65). *See* N.D.C.C. § 49-03-02(2) (Commission may grant a CPCN if no interested party requests a hearing). [¶35.] Finally, even setting aside the deadline to intervene, Appellants' intervention request was futile. The CPCN Order was no longer appealable, and the hard deadlines to petition for reconsideration or reopening had also passed. Appellants had no remaining avenue to contest the CPCN Order by the time they petitioned to intervene. The Commission thus acted well within its discretion in denying the Petition.

IV. Even if the Court reaches the merits, Appellants' arguments are groundless.

[¶36.] The Court should not reach the merits, but if it does, Appellants' arguments badly miss the mark. Contrary to Appellants' unsupported argument, the Siting Act is not the sole or exclusive statutory framework for permitting high-voltage transmission lines before the Commission. Rather, the Commission properly considered the CPCN application because the Project requires both a CPCN and siting permits. In addition, the Court should decline Appellants' invitation to second-guess the Commission's factual findings in the CPCN Order. Lastly, the Commission's procedures afforded due process.

A. 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, the Commission properly considered the CPCN application.

[¶37.] Appellants' challenge to the merits of the CPCN Order centers on their baseless assertion that the requirement of a CPCN under N.D.C.C. ch. 49-03 is somehow obviated when a siting permit is required under N.D.C.C. ch. 49-22, the "Siting Act." In their briefing to the district court as well as this Court, Appellants repeatedly refer to the Siting

Act as the "exclusive" framework for permitting the Project. (R124:1, 2, 4, 18, 20, 28, 33, 40); (Ats. Motion for Stay, ¶¶ 23, 43, 46, 52, 84); (Ats. Br. ¶¶ 36, 42) Nowhere in Appellants' briefing, however, do they support this contention with any legal authority. Merely declaring the Siting Act "exclusive" does not make it so. As explained below, 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. Indeed, this Court and the Commission have recognized that a need determination is not a part of the inquiry under the Siting Act. Furthermore, collapsing the public need inquiry into the Siting Act would thwart the Legislature's long-standing policy of requiring a determination of public need for investor-owned utility projects, but not for electric cooperative projects.

1. Chapter 49-03 applies to the Project and requires that a CPCN be obtained for the Project.

[¶38.] Contrary to Appellants' conclusory argument, 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 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.

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

[¶39.] First obtaining a CPCN under Chapter 49-03 and then applying for siting permits under Chapter 49-22 is common practice where a project requires both a CPCN and siting permits. The Utilities have identified several examples of Commission dockets that follow this pattern. (R130:21:¶30) None of those examples involved territorial disputes. *See* (R130:21:¶30) The two-step permitting approach that the Utilities pursued before the Commission is not a novel approach, much less a scheme to cut corners. It also makes sense that evaluating public need under Chapter 49-03 would precede analyzing a project's location-specific human and environmental impacts under the Siting Act. If there is no public need for a project, siting the project would be a futile effort.

2. Chapter 49-22 applies to the Project and requires a siting inquiry assessing location-specific impacts of the Project's corridor and route.

[¶40.] 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 environment and upon the welfare of the citizens of" North Dakota. N.D.C.C. § 49-22-02. An electric transmission facility "means an electric transmission line and associated facilities with a design in excess of one hundred fifteen kilovolts." N.D.C.C. § 49-22-03(7).

[¶41.] The inquiry under the Siting Act focuses on environmental and location-specific criteria for determining whether a transmission facility minimizes adverse impacts. The statute 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 factors 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." (Ats. Br. ¶ 44 (citing N.D.C.C. §§ 49-22-02, 49-22-08, 49-22-09)) But the policy statement they quote (Ats. Br. ¶ 49) relates to how "sites and routes shall be chosen." N.D.C.C. § 49-22-02. And the siting factors they cite are "to aid the evaluation and designation of sites, corridors, and routes," not public need. N.D.C.C. § 49-22-09(1). In fact, the specific factors Appellants appear to reference contain language that makes clear those factors are location, corridor, and route-specific considerations:

> a. . . . the effects of the ***location, construction, and operation of the proposed facility*** on public health and welfare, natural resources, and the environment.
>
> . . .
>
> d. Adverse direct and indirect environmental effects ***that cannot be avoided should the proposed site or route be designated***.
>
> e. Alternatives ***to the proposed site, corridor, or route***[.]
>
> f. Irreversible and irretrievable commitments of natural resources ***should the proposed site, corridor, or route be designated***.
>
> g. The direct and indirect economic impacts ***of the proposed facility***.
>
> h. 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) (emphasis added). The plain language of the siting factors does not suggest a public need inquiry.

[¶42.] In a last-ditch effort to save their dubious argument that public need must be determined in Siting Act proceedings, Appellants quote the "needs of consumers" language in N.D.C.C. § 49-22-16(2)(c). (Ats. Br. ¶ 50) Section 49-22-16, however, does not relate

to siting criteria. Rather, it governs when the Commission may preempt local rules, regulations, and ordinances. The "needs of consumers" language quoted by Appellants appears in a provision that defines the Commission's power to preempt requirements regarding 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, at best. The actual siting factors under N.D.C.C. § 49-22-09 do not implicate public need, and indeed this Court has held as much, as discussed in the following section.

3. The Commission lacks authority under the Siting Act to determine public need for a project.

[¶43.] This Court has held that an evaluation of public need is not within the Commission's authority under the Siting Act. *Matter of Neb. Pub. Power Dist.*, 330 N.W.2d 143, 148–49 (N.D. 1983). A review of *Nebraska Public Power* reveals that it is both on point and correctly decided. 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***." *Id.* at 149 (emphasis added). The Court in *Nebraska Public Power* also noted that "when it desires to do so, [the Legislative Assembly] can mandate that an administrative agency consider the issue of need." *Id.* (citing CPCN requirements under N.D.C.C. ch. 49-03).

[¶44.] Moreover, *Nebraska Public Power* directly addressed Appellants' point that 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 for a siting application in Section 49-22-08 (requiring a statement of need) from the siting factors that guide the Commission's analysis in Section 49-22-09

(which does not list "need" as a factor to be considered). *Id.* And the Court expounded on why the Legislature would require a statement of need in a siting application even though it did not instruct the Commission to consider the need for the facility in the siting factors. The Court explained that an applicant's statement of need simply 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.*

[¶45.] Given the lack of a statutory directive to consider public need in a siting proceeding, the Court held in *Nebraska Public Power* 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 the 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 need flies in the face of this holding. Appellants argue that the Court's decision in *Nebraska Public Power* is confined to "the posture of an interstate corridor access case." (Ats. Br. ¶ 48) 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 Project here is part of a multi-state transmission plan developed by MISO. (R79)

[¶46.] The Commission itself has likewise recognized that 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.).

[¶47.] More recently, the Legislative Assembly rejected a proposed amendment to add "need" to the siting factors under Section 49-22-09. Specifically, the Legislature considered and rejected an amendment proposed in Senate Bill No. 2314 (2017) that would have amended the "economic impacts" factor in 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) https://ndlegis.gov/assembly/65-2017/regular/bill-actions/ba2314.html?bill_year=2017&bill_number=2314 (bill failed 13 to 77). Appellants' assertion that "need" is or should be within "the integrated framework the Legislature established in Chapter 49-22" (Ats. Br. ¶ 45) is both contrary to this Court's precedent and was overwhelmingly rejected by the Legislature as recently as 2017. The Legislature would have had no reason to consider adding "need" to the statutory siting factors if it was already there.

[¶48.] Desperate to shore up their argument, Appellants cite to legislative history surrounding the Siting Act. (Ats. Br. ¶¶ 52–53) But Appellants have not argued that any of the statutes at issue are ambiguous. Where the statutory language "is clear and unambiguous," the "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 that Appellants cite 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 North Dakota 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." (Ats. Br. ¶ 52) However, the quoted language appears only under a 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 3–4.

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

[¶49.] Although a CPCN is required for certain transmission projects constructed by an "electric public utility," member-owned entities such as "rural electrical cooperatives" do not qualify as either an electric public utility or an electric transmission provider and thus 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***." *Id.* (emphasis added). This is because the Legislature determined that members of the cooperative, who own and control the business, will protect their own economic investment and interest by preventing unwarranted wasteful expansion. *Application of Montana-Dakota Utils. Co.,* 219 N.W.2d 174, 180 (N.D. 1974).

[¶50.] In 1975, a decade after the CPCN Statute was enacted, the Legislative Assembly 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 at 149.

[¶51.] 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 public need inquiry 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 to give effect to each provision. The Court should decline Appellants' invitation to re-write North Dakota's utility laws.

B. The Court should decline Appellants' invitation to second-guess the Commission's factual findings.

[¶52.] "Courts exercise limited review in appeals from administrative agency decisions." *Zent v. N.D. Dep't Health & Hum. Servs.,* 2025 ND 50, ¶ 16, 18 N.W.3d 621. Whether the CPCN Order contained adequate findings and conclusions and whether the Commission's judgment was supported by the entirety of the record are separate questions. Generally, "[a]n administrative agency's findings of fact must be adequate for a reviewing court to understand the factual basis upon which the agency reached its conclusion." *Aggie Invs. GP v. Pub. Serv. Comm'n of N.D.*, 470 N.W.2d 805, 813 (N.D. 1991). "In reviewing the agency's findings of fact, this Court does not make independent findings or substitute [its] judgment for the agency's judgment. Rather, [it] decide[s] whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence ***from the entire record***." *Zent*, 2025 ND 50, ¶ 17 (quotation omitted) (emphasis added).

1. The CPCN Order contains adequate findings and conclusions.

[¶53.] An agency's findings and conclusions should be upheld as adequate so long as they provide some basis for the decision. *Matter of Boschee*, 347 N.W.2d 331, 337 (N.D. 1984) ("Although the Commission's findings and conclusions in this case are not artfully drawn, we are able to understand the basis of the agency's decision[.]"). Even when an agency's findings "leav[e] much to be desired," courts will accept those findings "when they are not so vague and obscure as to make judicial review perfunctory." *Id.* at 336; *see also Nw. Bell Tel. Co. v. Hagen*, 234 N.W.2d 841, 847 (N.D. 1975) (holding the Commission's failure to make specific findings concerning the public interest was not reversible error where the administrative record supported the conclusion).

[¶54.] Here, the Commission's "Discussion" section of the CPCN Order sets forth the factual basis for its decision. (R79:1–2) Specifically, the CPCN Order notes that the Project was approved as part of MISO's "Long-Range Transmission Planning (LRTP)," and discusses the Project's costs and impact on ratepayers. (R79:1–2 ("an additional cost of $0.123 per month for MDU and $0.177 per month for OTP residential customers consuming 1000 kWh per month")) Further, the CPCN Order states how costs are to be recovered. (R79:2 ("Costs for all projects approved under MISO's LRTP Tranche 1 will be recovered on a prorata [*sic*] basis utilizing each company's energy use as a proportion of the MISO Subregion total.")) The reference to MISO's approval of the Project as part of its long-range transmission process is notable. MISO is a regional transmission operator charged with reliably operating the electric grid across 15 states, including North Dakota, and the Canadian province of Manitoba. (R79:1) The fact that MISO approved the Project as part of its long-range transmission planning process is in itself sufficient evidence of public need for the Project to support the Commission's approval of the CPCN Order.

[¶55.] As a result of these findings, the CPCN Order makes the conclusions of law that "public convenience and necessity will be served by the construction and operation of the facilities and that OTP and MDU are technically, financially, and managerially fit to be able to provide the service." (R79:2) No further findings or conclusions are required from the Commission in a CPCN proceeding.

[¶56.] Moreover, it is doubtful that any written findings were necessary, given the Commission was authorized under N.D.C.C. §§ 28-32-22 and 49-03-02(2) to make an informal disposition of the CPCN proceeding. "***Notwithstanding any other provision of this section***, the commission ***may grant a certificate*** if an interested party, including any

local electric cooperative, ***has not requested a hearing*** on an application after receiving at least twenty days' notice of opportunity to request such hearing." N.D.C.C. § 49-03-02(2) (emphasis added). Here, the Commission issued a Notice of Hearing on March 27, 2024, allowing for comments and requests for hearing until May 10, 2024, and thereby provided far more than the required twenty days' notice of opportunity to request a hearing. (R91:1) The Commission published this notice in fourteen separate North Dakota newspapers, including newspapers local to Appellants. (R91:3) Because no interested party requested a hearing, the Commission would have been within its authority to grant the CPCN without any findings of fact or conclusions of law. *See* N.D.C.C. § 49-03-02(2). As such, the findings and conclusions in the CPCN Order exceeded what was required. Appellants err by suggesting informal disposition would "substantially prejudice the rights of [a] party," N.D.C.C. § 28-32-22, both because the provision only applies to parties who have participated and because the procedures afforded them ample opportunity to participate.

2. The Commission's findings are supported by the record.

[¶57.] Contrary to Appellants' assertions, the Commission's findings are also supported by the administrative record, which is robust for a CPCN proceeding. (R63–92; R94) Public need for the Project is detailed in the CPCN application, comments submitted by MISO, and the Appellees' presentation and testimony at the hearing. (R63; R70–71; R75) Contrary to Appellants' assertions, accommodating additional generation development and future load growth is as much a public benefit as any public utility function. In fact, the CPCN Statute explicitly embraces future need, by requiring the Commission to certify "that public convenience and necessity require ***or will require***" the proposed project. N.D.C.C. § 49-03-01 (emphasis added). Moreover, Appellants ignore evidence in the record

regarding reliability benefits the Project will bring. As detailed in the Statement of Facts, the Project creates a looped 345 kV system that will take pressure off the existing 230 kV system in the area, improving the reliability and resiliency of the system serving Jamestown while also mitigating voltage stability concerns with the system serving Ellendale. *See supra* ¶ 15.

[¶58.] The record supports the Commission's findings and its conclusion that "public convenience and necessity will be served by the construction and operation" of the Project. (R79:2) The Court should affirm the CPCN Order.

C. The Commission's procedures afford due process.

[¶59.] Holding parties to statutory deadlines and agency regulations does not amount to a due process violation. *See Berger v. N.D. Dep't of Transp.*, 2011 ND 55, ¶ 9, 795 N.W.2d 707 (no due process violation where agency provided right to notice of the hearing and an opportunity to be heard). In fact, even with the termination of parental rights (a fundamental right), this Court lacks jurisdiction to consider a due process argument where an appeal is untimely. *Int. of C.A.S.,* 2023 ND 122, ¶ 3, 993 N.W.2d 347, *reh'g denied* (July 18, 2023). Concerning CPCN proceedings specifically, landowners in a project corridor "are not entitled to a judicial hearing on the legislative question of public convenience and necessity, but, rather, are limited to the type of hearing and determination afforded by statute." *Eckre*, 247 N.W.2d at 665.

[¶60.] Appellants' due process claims are meritless. The Commission properly noticed the CPCN proceeding. Appellants had the opportunity to request a formal hearing, appear at the informal hearing, and timely move to intervene in the CPCN proceeding. They did not do so. The only thing that prevented Appellants' participation was their own inaction. The

Commission's procedures afforded Appellants both actual and constructive notice and an opportunity to be heard, and their due process rights were not violated.

CONCLUSION

[¶61.] Appellees respectfully request that the Court dismiss Appellants' appeal from the CPCN Order and affirm the Commission's denial of Appellants' Petition.

DATED this 13th day of May, 2026.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶62.] This Brief contains 38 pages. I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

By: */s/ Paul J. Forster*