IN THE SUPREME COURT
STATE OF NORTH DAKOTA

WANO TOWNSHIP, WILLOWBANK TOWNSHIP, RUSSELL TOWNSHIP, CORWIN TOWNSHIP, VALLEY TOWNSHIP, MIKE AND PATTY BARTEL, RICHARD AND SUSAN R. LONG, STEVEN AND JULIA NELSON, PHYLLIS P. OTTERNESS AND PATRICIA A. VICK, BRANDON AND TAUSHA SCHWEIGERT, SHOCKMAN FARM PARTNERSHIP, LLLP, DEBRA SUE WALD, LUCAS AND JULL WALD, TIM LEPPERT, ORR FARMS, STEVE M. AND SANDRA J. RUPP, DAVID A. AND DENETTE M. SCHWEIGERT, ALLEN D. AND INNA N. SWIONTEK, DAVID AND HOLLY WALD, WESTON WALD, AND WILLOWBANK HUTTERIAN BRETHREN ASSOCIATION, Appellants, -vs- NORTH DAKOTA PUBLIC SERVICE COMMISSION, OTTER TAIL POWER COMPANY, AND MONTANA-DAKOTA UTILITIES, CO., Appellees.	Supreme Court No. 20260059 Dist. Ct. No. 08-2025-CV-0268 South Central Judicial District

Brief of Appellee North Dakota Public Service Commission

Appeal from the District Court *Order on Administrative Appeal*, dated February 2, 2026, issued by the South Central Judicial District, Burleigh County, the Honorable Bobbi Weiler Presiding

Oral Argument Requested

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Statement of the Issues

[¶1] The North Dakota Public Service Commission ("Commission") is the constitutional agency that determines whether to grant an investor-owned utility a Certificate of Public Convenience and Necessity ("CPCN") to extend electric service outside a municipality. N.D. Const. Art. V, § 2; N.D.C.C. ch. 49-03. Otter Tail Power Company and Montana-Dakota Utilities Company jointly applied to the Commission for a CPCN to construct a high voltage electric transmission line. (R63). The Commission noticed and held a hearing on the application. (R70). The Commission issued the CPCN on November 20, 2024. (R79). On May 27, 2025, Appellants moved the Commission to intervene in the matter and to reconsider its issuance of the CPCN. (R81). The Commission denied the intervention and reconsideration motion. (R91). There are three issues on appeal:

> First, Appellants' failed to timely appeal the Commission's Order issuing a CPCN and this Court lack's jurisdiction on the appeal;
>
> Second, Appellants' motion to intervene was made more than *ten* months after the hearing on the CPCN application and more than *six* months after the Commission issued its Order on the CPCN. The Commission's decision to deny the intervention motion should be affirmed;
>
> Third, because Appellants are not parties, they lack standing to appeal and the district court's decision that the Appellants lacked standing to appeal should be affirmed; and
>
> Fourth, alternatively, the Commission's decision to grant the CPCN was the process of rational application of the facts to the law. If Appellants are determined to have standing, the Commission's decision granting a CPCN should be affirmed because it is supported by the facts and relevant law.

Jurisdictional Statement

[¶2] Appellants appealed from the Commission's order denying their motion to intervene as parties in the administrative action. This appeal was untimely and the Court

lacks jurisdiction over the appeal. The Court has jurisdiction to determine the denial of intervenor status pursuant to N.D.C.C. § 28-32-42. If the Court affirms the Commission's decision denying intervention, it lacks jurisdiction to consider an appeal on the substantive merits of Appellants' appeal because this Court lacks jurisdiction over cases appealed by non-parties. *See, e.g.*, *Holbach v. City of Minot*, 2012 ND 117, ¶ 5, 817 N.W.2d 340; *Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau*, 2004 ND 60, ¶ 11, 676 N.W.2d 752 (quotation omitted).

Oral Argument Statement

[¶3] Appellants requested oral argument. The issues on appeal are straightforward and require Appellants to overcome a difficult standard of review. Because the issues on this appeal are straightforward, the Commission does not believe oral argument is necessary on this matter. The Commission, however, requests to participate in oral argument if it is held.

Statement of the Facts

[¶4] On February 29, 2024, Otter Tail Power Company ("OTP") and Montana-Dakota Utilities Company ("MDU") filed a joint application for a CPCN to construct, own, and operate 85 miles of new double circuit 345 kV electric transmission line from an existing Jamestown 345 kV Substation in Stutsman County to an existing 345 kV substation in Dickey County; it also sought substation expansions as a result of the project. R63). A notice of opportunity for hearing was served; it was published in numerous newspapers across the state, including the Dickey County Leader, Oakes Times, Kulm Messager, and LaMoure Chronicle. (R65-66). No requests for hearing were received, but an informal hearing was held by the PSC on July 8, 2024. (R70). At the hearing, OTP and

MDU made an informal presentation to the PSC on the project, the first on August 19, 2024, and the second on October 17, 2024. (R71). Because there are three commissioners on the PSC, if one commissioner meets to discuss official Commission business with another commissioner, a quorum is established requiring a notice of a meeting. Work sessions are necessary for the Commission to discuss any business that is before it and is commonplace for the Commission. (R73, R77).

[¶5] On November 20, 2024, the Commission issued its Order, with one Commissioner dissenting, granting the CPCN to MDU and OTP. (R79). That same day, the Commission issued Certificate Numbers 5998 and 5999. *Id.* The CPCN states: "This certificate is conditioned upon [OTP and MDU] securing the franchise or other authority of the proper municipal or other public authority for the exercise of these rights and privileges." *Id.* The Commission served the Order and CPCN by certified mail and electronic mail on November 25, 2024. (R80); *see* N.D.C.C. § 28-32-39(2) (requiring the Commission to serve the Order on the parties pursuant to the rules of civil procedure). No appeal was taken by any of the parties within thirty days of the Commission serving the notice of the Order. N.D.C.C. § 28-32-42.

[¶6] Over *ten* months after the public hearing was held, on May 21, 2025, Appellants filed a petition with the Commission seeking to intervene as parties and for the Commission to reconsider granting the CPCN. (R81). MDU and OTP opposed the petition. (R83). Appellants supplemented their petition. (R87). The Commission issued its Order denying the petition on June 18, 2025. (R91). Appellants appealed to the district court and served a notice of appeal and specification of error on July 15, 2025. (R1). The district court issued a February 2, 2026, Order affirming the Commission's denial of

intervention and dismissing the remainder of the appeal for lack of jurisdiction. (R146:17:¶¶ 74-75). This appeal followed. (R147).

Standard of Review

[¶7] Courts exercise limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, and the agency's decision is accorded great deference. *Berger v. N.D. Dep't of Transp.*, 2011 ND 55, ¶ 5, 785 N.W.2d 707. This Court will not reverse an agency decision unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46; *Voigt v. N.D. Public Serv. Comm'n*, 2017 ND 76, ¶ 8, 892 N.W.2d 149. When determining this issue, the Court must "look to the law and its application to the facts." *Plante v. N.D. Workers Comp. Bureau,* 455 N.W.2d 195, 197 (N.D. 1990). In reviewing an agency's findings of fact, the Court does not substitute its judgment for that

of the agency or make independent findings. *Capital Elec. Coop. v. City of Bismarck*, 2007 ND 128, ¶ 31, 736 N.W.2d 788. Rather, in reviewing the Commission's findings of fact, the Court determines "only whether a reasoning mind could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Id.*; *see also Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D. 1979); *North Central Elec. Coop. v. N.D. Pub. Serv. Comm'n*, 2013 ND 158, ¶ 7, 837 N.W.2d 138. The Court does "not reweigh or reevaluate the evidence . . . [or] function as a super board and second guess the PSC's findings." *Capital Elec. Coop.*, 2007 ND 128 at ¶31. Additionally, the subject matter here is of a "highly technical nature," the Commission's "expertise" is "entitled to appreciable deference." *Montana-Dakota Utilities Co. v. N.D. Pub. Serv. Comm'n,* 413 N.W.2d 308, 312 (N.D. 1987).

[¶8] A mixed standard of review applies to the review of an Administrative Law Judge's denial of a motion to intervene brought under N.D.A.C. § 69-02-02-05. *See, e.g., In re Juran and Moody, Inc.*, 2000 ND 136, ¶¶ 22-24, 613 N.W.2d 503 (applying a deferential standard of an ALJ's factual findings; applying a *de novo* standard of an ALJ's legal conclusions). While, here, the Commission decided the denial of the intervention and reconsideration motion instead of a substantive ALJ, the Commission effectively was the ALJ and the rationale applied in the *In re Juran* matter should apply. The Commission's denial of the intervention and reconsideration petition is entitled to deference. *Id.* at ¶ 25.

Argument

[¶9] The Appellants challenge the Legislative Assembly's authority granted to the Commission under N.D.C.C. ch. 49-03. In essence, the Appellants claim that the Commission does not have authority under this chapter to issue a CPCN *before* a siting

hearing occurs under N.D.C.C. Ch. 49-22. This Court explained: "The Territorial Integrity Act was enacted by the Legislature in 1965. It amended §§ 49-03-01 and 49-03-05, N.D.C.C., which required a public utility, before beginning construction or operation of a public utility plant or system, or an extension thereof, to obtain from the PSC a certificate of public convenience and necessity. 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." *Cass Cty. Elec. Coop. v. N. States Power Co.*, 419 N.W.2d 181, 184-85 (N.D. 1988) (internal citations omitted) (emphasis added). There is no requirement in N.D.C.C. Ch. 49-03 or Ch. 49-22 that requires a utility to apply for a CPCN prior to seeking a certificate of site compatibility and route permit under N.D.C.C. Ch. 49-22. Neither is there any case law that supports such a proposition.

[¶10] Before, however, getting to the substantive aspect of the appeal, the Court must first determine whether Appellants even have standing to appeal the substantive merits. The Appellants were not parties to the administrative proceeding. They did not appeal from the Commission's Order granting the CPCN within thirty days of it being properly served. Appellants attempted to intervene as parties long after the Commission decided the substantive merits of the CPCN application. Because the Appellants lack standing, this threshold jurisdictional issue is addressed first. The substantive merits of whether the Commission's decision to issue the CPCN is addressed in the alternative only.

I. The District Court's Order on Lack of Subject Matter Jurisdiction Should be Affirmed.

[¶11] Only final orders are appealable. N.D.C.C. § 28-32-39; § 28-32-42. The Commission's November 20, 2024, CPCN Order was a final order: it was issued by the agency, resolved the merits of the proceeding, and left nothing further for the Commission

to decide. (R79). The Order was properly served on the parties on November 25, 2024. (R 80). No one appealed on or before the expiration of thirty days of service of the Commission's Order. The Commission's Order concluded the adjudicative proceeding. The district court's decision that the CPCN Order was final, that the Appellants failed to timely appeal from that final Order, which was properly served on the parties by the Commission as required by N.D.C.C. § 28-32-39(2), and ultimately that the district court lacked subject matter jurisdiction over the appeal of the Order, should be affirmed. (R146:4-8:¶¶16-36).

[¶12] The district court properly dismissed the appeal for lack of appellate subject-matter jurisdiction. The Commission's Order was a final order that terminated the adjudicative proceeding and resolved the merits of the case. Service of the order on November 25, 2024, by certified mail commenced the thirty-day period for perfecting an appeal under the Administrative Agencies Practices Act. Appellants' service of their notice of appeal on July 15, 2025, occurred approximately seven months after the statutory deadline had expired. The statutory requirements for perfecting an appeal are mandatory and jurisdictional and cannot be waived or extended by the courts. *Benson v. Workforce Safety & Ins.*, 2003 ND 193, ¶ 6, 672 N.W.2d 640. Appellants' failure to comply with these requirements deprived the district court of subject-matter jurisdiction to hear their appeal: they deprive this Court of that same jurisdiction. Alleged defects in the Order's findings, conclusions, or service do not negate the order's finality or extend the jurisdictional deadline; such defects would have been properly addressed in a timely appeal. The district court's dismissal should be affirmed.

II. Intervention Was Properly Denied

[¶13] Appellants' moved to reconsider the Commission's Order and sought to intervene as parties—ten months after the decision. The Commission properly rejected Appellants' motion for intervention and reconsideration. (R91). The rationale is detailed in its Order. On appeal, the Commission takes the position its decision was appropriate for all the reasons stated in its Order. Appellants have no one to blame for their intervention motion being denied but themselves. Appellants chose not to intervene timely.

[¶14] Appellants have to provide "good cause" as to why they should have been allowed to intervene. Our administrative code provides in relevant part:

> Any person with a substantial interest in a proceeding may petition to intervene in that proceeding by complying with this section. An intervention may be granted if the petitioner has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be substantially affected by the proceeding, and the intervention would not unduly broaden the issues or delay the proceeding. The commission may impose conditions and limitations on an intervention to promote the interests of justice.
>
> 1. Contents of petition to intervene. A petition to intervene must be in writing and must set forth the grounds for intervention, the position and interest of the petitioner in the proceeding, what the petitioner would contribute to the hearing, and whether the petitioner's position is in support of or in opposition to the relief sought.
>
> 2. When filed. 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 (emphasis added).

[¶15] Appellants failed to provide "good cause." This factor is necessarily discretionary with the Commission. The Commission's discretionary authority to determine whether "good cause" was established should not be second-guessed and the

Commission is entitled to deference in reaching its decision. The decision to deny the motion to intervene should be affirmed.

[¶16] The decision to deny the motion to intervene was sound. MDU and OTP presented their evidence at the hearing and the Commission asked questions and held two work sessions before issuing the CPCN. Only *after* this statutory process had occurred, many months after, did Appellants choose to try to intervene and provide additional evidence that could have been made available at the hearing had they chose to timely intervene. In effect, Appellants seek an advantage over the parties by waiting until evidence and arguments presented by the parties during the proceeding was known. This "wait and see attitude," even if unintentional, creates a distinct advantage to a litigant in a case—to *know* what one's opponent *has* argued is simply unfair to those parties who followed the rules. And once the evidence has been presented, there is no putting it back in the proverbial bottle. This may seem a bit sanctimonious. But if the rule exists, it ought to be followed. And if the rule exists and provides for an exception, application of the exception should not come at the expense of those parties that followed the procedures and played by the rules. Bottom line—Appellants had all the tools at its disposal to timely and appropriately intervene. The Commission is entitled to deference in its decision to deny the intervention motion. The decision was supported by circumstances of this case

III. Appellants Lack Standing to Appeal.

[¶17] If it is determined intervention was properly denied, the appeal must be dismissed because Appellants lack standing. Appellants did not appear at the hearing as a party.

[¶18] The Appellants must meet the requisite statutory requirements pursuant to N.D.C.C. § 28-32-42 and the three-part standing requirement to appeal an administrative agency's decision. *See Shark v. U.S. West Communications, Inc.*, 545 N.W.2d 194, 196 (N.D. 1996) ("[L]imits of judicial power to review agency and executive action are marked by several doctrinal boundaries, including the concept of standing"); *In Re Juran and Moody, Inc.*, 2000 ND 136, ¶ 16, 613 N.W.2d 503 (A person has standing if the person: 1) participates in the proceeding before an administrative agency; 2) is directly interested in the proceedings; and 3) is factually aggrieved by the agency's decision). In *O'Connor v. Northern States Power Co.*, the Court held that an electric ratepayer who did not participate in the proceeding at the PSC could not contest the resulting rate increase in the courts. 308 N.W.2d 365, 371 (N.D. 1981). Likewise, the *Shark* Court denied the parties' judicial review because they failed to meet the three-part standing test. 545 N.W.2d at 200.

[¶19] Appellants fail to meet the first requirement, that they participated in the proceeding before the Commission. This Court has made it clear that a party must satisfy the standing requirement to seek judicial review of an administrative order. *Application of Bank of Rhame,* 231 N.W.2d 801, 806 (N.D. 1975). Not only does the failure to participate by Appellants mean they do not have standing, but its arguments regarding the Commission's alleged errors regarding the evidence were waived due to the failure to raise them below. This is not a situation like the facts of *Minn-kota Ag Products v. N.D. Public Service Commission*, 2020 ND 12, 938 N.W.2d 118, where this Court held testimony by an unrepresented corporate official of Minn-Kota Ag at a Commission hearing conveyed standing on the corporation for purposes of appealing from the Commission's decision. Here, *no one* from the Appellants appeared or participated in any respect in the proceedings

prior to the Commission issuing its November 20, 2024, Order granting the CPCN. The Commission asserts the issues now raised for the first time on appeal highlight the problem of conferring standing to a party who did not participate and raise those arguments at the administrative hearing. Appellants' appeal should be dismissed as a matter of law because it lacks standing to appeal.

IV. Alternatively, the Commission's Decision to Issue a CPCN Should be Affirmed.

[¶20] The Territorial Integrity Act ("TIA") requires a public utility, before extending its service lines outside of the corporate limits of a municipality, to obtain a certificate that public convenience and necessity require such extension. N.D.C.C. §§ 49-03-01, 49-03-01.1; *Application of Otter Tail Power Co.*, 169 N.W.2d 415, 417 (N.D. 1969). The authority to make such a decision is vested in the Commission. *Application of Otter Tail Power*, 169 N.W.2d at 417. The legislature provides that "[a]n electric public utility may not begin construction or operation of a public utility 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).

[¶21] The primary purpose of the TIA is to keep wasteful duplication of capital-intensive utility services and conflicts between providers to a minimum. *Northern States Power Co. v. N.D. Pub. Serv. Comm'n*, 452 N.W.2d 340, 344 (N.D. 1990); *Cass Cnty. Elec. Coop.*, 419 N.W.2d at 187. Considering the current regulatory constructs, "it may not always be possible to prevent some of the actual duplication of distribution facilities which may occur in practice when cooperatives extend their existing electrical systems," and the question of which facilities are duplicative and wasteful "is one of fact for the PSC to determine." *Northern States*, 452 N.W.2d at 344-45.

[¶22] Here, the Commission analyzed the joint CPCN application. It held a hearing, even though no one stated any opposition to the application. The Commission held two work sessions on the application. Ultimately, it issued an Order that detailed the reasons for granting the CPCN. (R65; R66; R68; R70; R73; R77; R79). The Commission's Order, while it did not have specific headings stating finding of fact and conclusions of law, the content includes this. (R79). Also, the Commission can make an informal disposition of any adjudicative proceeding. N.D.C.C. § 28-32-22. The CPCN itself makes it clear that its grant is "conditioned" on MDU and OTP "securing the franchise or other authority of the proper municipal or other public authority for the exercise of these rights and privileges." (R79 (Certificate Numbers 5998 and 5999)). In other words, the utilities must receive any local permits needed. Further, the utilities cannot construct anything until their site compatibility and route permit application is reviewed by the Commission under N.D.C.C. ch. 49-22.

[¶23] Appellants attempt to re-frame the circumstances in which the CPCN was granted is an attempt to re-frame reality. There was no opposition to the application. This was akin to a motion for a default when one party does not respond to a complaint or a motion. The Commission cannot presume to know what has not been presented to it. That is, if Appellants wanted to put forth evidence in response to the application, the Commission cannot possibly presume to know what that would be, let alone whether it would be evidence opposing the CPCN application.

[¶24] On appeal, Appellants seem more intent on attacking an entirely separate proceeding than the issuance of the CPCN under N.D.C.C. ch. 49-03. Appellants attempt to frame issues that can be, and should be, argued in the wholly separate siting case under

N.D.C.C. ch. 49-22. That application process is proceeding before the Commission. It is a process that is found in an entirely different chapter of our Century Code than the process that has been determined under N.D.C.C. ch. 49-03. Appellants attempt to resurrect opposition to the CPCN application under N.D.C.C. ch. 49-03, on the basis that it impacts their apparent opposition to the siting case under N.D.C.C. ch. 49-22, must be rejected. Primarily because the Commission's procedural and substantive requirements have been complied with by MDU and OTP. And if our statutes are to mean anything, if they are followed, then they ought to be enforced. Nothing precluded Appellants from intervening and arguing what they believe is appropriate in the proceedings the Commission held under N.D.C.C. ch. 49-22.

[¶25] The Commission weighed the application and evidence presented by the applicants and its decision more than satisfies N.D.C.C. § 28-32-46. The Commission did this while considering all the factual evidence that was presented. The Commission actively participated in the hearing, reviewed the evidence presented, and held two work sessions to discuss the case. The Commission's decision was premised upon the statutory framework and the relevant case law. The Commission's decision was not arbitrary or capricious. The Commission's decision contained the facts relevant to the proceeding. The Commission considered this case and the circumstances of this case in applying the factors to reach its decision. The Commission's decision is supported by the facts presented in this case. The Commission's application of the law to the facts it determined were supported from the evidence are not contrary to law. The Commission's decision is entitled to deference by the Court.

[¶26] In the end, it is the *public* convenience and necessity, not the perceived convenience (or inconvenience) of the Appellants. "It is the Public Convenience and Necessity, after all, with which the Commission is concerned, not private preference." *Tri-County Electric Coop., Inc. v. Elkin*, 224 N.W.2d 785, 792 (N.D. 1974). The MDU and OTP line extension has been determined by the Commission, the body our Legislative Assembly has determined makes this decision, to satisfy the requirements under N.D.C.C. ch. 49-03. Based on the evidence presented to the Commission, a reasoning mind could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record and that public convenience and necessity favors MDU and OTP to provide a line extension as stated in their joint application. Truth be told, any decision that contains a dissenting opinion is certainly indicative of full attention and consideration. A dissenting opinion means the matter was carefully considered and weighed by all involved. And, in this case, this occurred in a matter that was *uncontested*.

Conclusion

[¶27] The Court should affirm the district court's dismissal of the appeal because the Appellants did not timely appeal. The Court should also affirm the Commission's denial of Appellants' intervention petition. In affirming the intervention denial, the Court should affirm the district court's decision that Appellants' lack standing to appeal. The Appellants' lack standing and the appeal should be dismissed.

[¶28] Alternatively, if the Court determines Appellants' have standing, considering the evidence presented on the record to the Commission, the Commission's findings of fact are supported by the evidence and satisfy N.D.C.C. § 28-32-46. The Commission considered testimony and reviewed exhibits when it properly applied the law

to the facts in making its decision, which even included a dissenting opinion. Absent a reweighing of the evidence or substitution of the Court's judgment for the Commission's, the Commission respectfully requests that this Court find that a "reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Capital Elec. Coop.*, 2007 ND 128 at ¶ 31. For these reasons, the Commission respectfully requests that this Court affirm the Commission's granting of the CPCN to OTP and MDU.

Certificate of Compliance

[¶29] This 19-page brief complies with N.D.R.App.P. 32(a)(8).

Dated: May 13, 2026

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