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 District Court
Civil No. 08-2025-CV-02068

APPELLANTS' REPLY BRIEF
APPEAL FROM JUDGMENT ON ADMINISTRATIVE APPEAL

ORAL ARGUMENT REQUESTED

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SC APPEAL - Appellant's Reply Brief (Oral Argument Requested)

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INTRODUCTION

[¶1] Appellees' briefs rest on one premise: the November 20, 2024 CPCN order was final, Appellants were too late, and every substantive question is therefore beyond review.

[¶2] That premise fails because it assumes what must first be decided. The threshold question is whether the Public Service Commission had statutory authority to use Chapter 49-03 to determine "public convenience and necessity" for a new 85-mile, 345-kV transmission line that Chapter 49-22 requires to be justified through a siting application, direct notice, local hearing, evidence, and findings with reasons.

[¶3] Appellees never overcome that point. They defend a two-step process that North Dakota law does not authorize.

[¶4] Step one: the Utilities obtained a CPCN in a Chapter 49-03 docket noticed by publication. There was no mailed notice to the affected townships and landowners, no local hearing in the project area, no Chapter 49-22 application explaining need, alternatives, impacts, and effects on local government, and no reasoned findings. The Commission issued a conclusory order stating that public convenience and necessity would be served.

[¶5] Step two: the Utilities filed the Chapter 49-22 siting application and treated the CPCN as if it had already established need. The practical effect is obvious. The communities directly in the path of the line are told they are late to the need question because need was decided in a proceeding where they received no direct notice.

[¶6] The point is not blame. The point is notice. Appellees cannot fault affected

townships and landowners for not participating in a proceeding that Chapter 49-22 required to be brought to them through direct notice, local hearing, evidence, and findings with reasons.

[¶7] The Legislature did not create Chapter 49-22 as a routing afterthought. Its policy is to route new high-voltage transmission facilities "in an orderly manner compatible with environmental preservation and the efficient use of resources." N.D.C.C. § 49-22-02. The statute implements that policy through an application explaining need, hearing procedures allowing testimony and evidence, and decisions made in accordance with the evidence and supported by findings with reasons. N.D.C.C. §§ 49-22-08(1)(c), 49-22-09, 49-22-08(6), 49-22-08.1(5). Those protections are the means by which need, alternatives, local impacts, economic consequences, environmental effects, and efficient use of resources are tested before a high-voltage transmission line is approved.

[¶8] Appellees' timeliness argument also depends on a second assumption: that the November 20 CPCN order was a legally sufficient final order that started the appeal clock against Appellants. But that order did not contain explicit findings of fact, separate conclusions of law, or a reasoned explanation tying the evidence to the statutory standard. It cannot both lack the findings necessary for meaningful review and be used to cut off review by the very people who were not directly notified.

[¶9] At minimum, even if the Court treats the November 20 order as final for some purposes, finality does not cure an ultra vires act. An agency has only the authority the Legislature gives it. Where the PSC proceeds under the wrong statute, bypasses the procedures required by the controlling statute, and then uses that order to predetermine

need in the later siting docket, the Court may review and correct the error.

[¶10] Appellees' standing argument fails for the same reason. Appellants are not strangers to a closed dispute. They are affected townships, landowners, and ratepayers whose petition to intervene, reopen, and rescind was denied by the June 18, 2025 order. That order is before the Court.

[¶11] This Court should reverse. The CPCN should be vacated, the denial of intervention and reopening should be reversed, and the matter should be remanded with instructions that any determination of public need for this 345-kV line must be made under Chapter 49-22 on a record built with direct notice, local hearing, evidence, and findings with reasons.

ARGUMENT

I. Appellees' timeliness argument fails because it assumes statutory authority and a valid final order.

[¶12] Appellees treat this appeal as a simple missed-deadline case. It is not. Their argument depends on the validity of the very agency action Appellants challenge.

[¶13] The PSC has only the authority conferred by statute. In the administrative context, "jurisdiction" includes the agency's statutory scope of authority. If the Commission lacked authority to use Chapter 49-03 to predetermine public need for this new 345-kV transmission facility, the November 20 CPCN order cannot be insulated by the deadline Appellees invoke.

[¶14] Appellees say Appellants should have appealed the November 20 order within thirty days. But Chapter 28-32 ties appeal deadlines to notice of a final order

served as required by law. N.D.C.C. §§ 28-32-39, 28-32-42. A final administrative order must disclose the agency's factual findings, legal conclusions, and reasoning so parties and reviewing courts can determine whether the agency acted within the law, complied with required procedure, and supported its decision by the record.

[¶15] The November 20 order did not do that. It made no explicit findings on present North Dakota need, alternatives, future wind generation, export capacity, rate impacts, local zoning concerns, or the affected townships' interests. It did not contain separate conclusions of law. It simply declared the result.

[¶16] Nor can the PSC cure the problem by invoking "informal disposition." Informal disposition is permitted only where it does not substantially prejudice party rights. N.D.C.C. § 28-32-22. Here, the prejudice is concrete: the affected townships and landowners were not directly notified, were not heard on need before the CPCN issued, and were denied intervention and reopening after they came forward.

[¶17] The June 18, 2025 order is therefore properly before the Court. It denied intervention, denied reopening, refused to correct the lack of findings, and left in place an order the Utilities now use as proof that need has already been decided. This appeal is not an improper collateral attack. It is a direct challenge to the agency's refusal to reopen and correct an unlawful proceeding.

[¶18] Even if this Court treats the November 20 order as final, the remedy is not affirmance. A final order issued without statutory authority and without required findings is still unlawful. Under N.D.C.C. § 28-32-46, the Court may reverse agency action that is not in accordance with law, violates constitutional rights, fails to comply with required

procedure, or rests on insufficient findings and reasoning.

II. Chapter 49-22 is not a cleanup step after Chapter 49-03.

[¶19] Appellees' merits argument is that both chapters apply: Chapter 49-03 decides public need first, and Chapter 49-22 later addresses location-specific impacts. That reading drains Chapter 49-22 of its central function.

[¶20] Chapter 49-22 expressly applies to electric transmission facilities over 115 kV. N.D.C.C. § 49-22-03. A utility may not begin construction without a route permit issued "pursuant to this chapter." N.D.C.C. § 49-22-07. The statute's policy is to route transmission facilities in a manner compatible with environmental preservation and the efficient use of resources. N.D.C.C. § 49-22-02. The application must include "a statement explaining the need for the facility." N.D.C.C. § 49-22-08(1)(c). The Commission must conduct the hearing process and decide the matter in accordance with the evidence, supported by findings with reasons. N.D.C.C. §§ 49-22-08(6), 49-22-08.1(5), 49-22-09.

[¶21] Those provisions mean what they say. Need for a new high-voltage line must be tested inside the Chapter 49-22 process, not decided beforehand in a publication-noticed Chapter 49-03 docket and then imported into Chapter 49-22 as an established fact.

[¶22] Chapter 49-03 may have continuing application in ordinary utility extension and service-area matters. It cannot be used to bypass the specific notice, hearing, evidence, and findings requirements of Chapter 49-22 for a new 345-kV line.

[¶23] This case is not a small extension to serve a discrete local load or a

territorial dispute between utilities. It is a major high-voltage transmission corridor tied to future generation development, export capacity, projected congestion, and long-term system assumptions. Those are precisely the kinds of need, alternatives, impacts, and local consequences Chapter 49-22 requires the Commission to examine in the affected area.

[¶24] Appellees rely heavily on *Matter of Neb. Pub. Power Dist.*, 330 N.W.2d 143 (N.D. 1983), but that case should not be read as a blank check to remove need from Chapter 49-22. *Nebraska* involved an interstate transmission corridor and a constitutional-avoidance posture. It did not hold that the Commission may use Chapter 49-03 to predetermine need for an in-state 345-kV project, without direct notice to affected townships and landowners, and then treat that need determination as binding in the later siting docket.

[¶25] If *Nebraska* is read as Appellees read it, Chapter 49-22's requirement that the application include a statement explaining need becomes meaningless. The better reading harmonizes the statutes: Chapter 49-22 controls the process by which need, alternatives, local impacts, and siting criteria are tested, and Chapter 49-03 cannot be used to predetermine need, avoid direct notice, or narrow the later Chapter 49-22 proceeding to routing alone.

III. The notice problem defeats Appellees' blame and waiver arguments.

[¶26] The PSC states that Appellants "have no one to blame" but themselves because they did not intervene sooner. PSC Br., ¶ 13. That argument proves the due-process problem.

[¶27] Affected townships and landowners cannot be faulted for failing to participate in a proceeding that should have been conducted under Chapter 49-22, with direct notice and a local hearing, but instead was conducted first under Chapter 49-03 with publication notice. The issue is not whether a newspaper notice existed. The issue is whether the Commission used the correct statutory procedure for a project of this size and consequence.

[¶28] Appellees also argue that the townships and landowners can raise their concerns later in the siting docket. But later participation is not an adequate substitute if the Utilities may rely on the CPCN as proof that need has already been decided. That changes the posture of the siting case and converts Chapter 49-22 from a proceeding about need, alternatives, impacts, and route into a narrower proceeding about where to place a line already blessed as necessary.

[¶29] Chapter 49-22 was enacted to prevent that result. The affected communities should not have to claw back the threshold need question after the Commission has already issued a public convenience and necessity certificate without direct notice, local hearing, or findings with reasons.

IV. Appellants have standing to seek review of the June 18 order.

[¶30] Appellees' standing argument depends on the same circular reasoning as their timeliness argument. They say Appellants cannot challenge the CPCN because they were not parties. But Appellants were not parties because they were not directly notified and because the PSC denied their petition to intervene.

[¶31] *Energy Transfer LP v. N.D. Private Investigative & Security Bd.*, 2022 ND

85, 973 N.W.2d 394, confirms that a denied intervenor may obtain review of the denial of intervention. That is enough to bring the June 18 order before this Court. Once the Court reviews that order, it must decide whether the Commission lawfully denied intervention and reopening in a proceeding that affected Appellants' property interests, township zoning authority, and ratepayer interests.

[¶32] *Minn-Kota Ag Prods., Inc. v. N.D. Pub. Serv. Comm'n*, 2020 ND 12, 938 N.W.2d 118, also defeats Appellees' rigid participation argument. Minimal participation may be sufficient where a person is directly interested and factually aggrieved. Here, Appellants did more than submit a stray letter. After learning of the CPCN, the townships held meetings, acted through their local governments, denied conditional use permits, and jointly petitioned the PSC to intervene, reopen, and rescind. The landowners and ratepayers joined that request. The Commission then directly adjudicated and denied it.

[¶33] Appellees' position would create an impossible rule. Affected persons who were not directly notified under the statute that should have governed would lack standing because they did not participate before they were notified. That is not a standing doctrine. It is a forfeiture trap.

[¶34] The Court should reject it. Appellants have standing to challenge the June 18 order denying intervention and reopening. And because the lawfulness of that order depends on the legality and effect of the CPCN it left in place, the Court necessarily may decide whether the PSC exceeded its statutory authority and whether the CPCN may continue to be used as proof of need in the Chapter 49-22 docket.

CONCLUSION

[¶35] Appellees reduce this case to timing. But timing does not answer statutory authority. The PSC used Chapter 49-03 to issue a public convenience and necessity certificate for a new 345-kV transmission line that Chapter 49-22 required to be justified through direct notice, local hearing, evidence, and findings with reasons. The affected townships and landowners were then told they were too late.

[¶36] The Court should reverse the judgment, vacate the CPCN, reverse the June 18, 2025 denial of intervention and reopening, and remand with instructions that any determination of need, public convenience and necessity, corridor, or route for this 345-kV line proceed under Chapter 49-22.

CERTIFICATE OF COMPLIANCE

[¶37] 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 12 pages. This brief was prepared in Microsoft Word using Times New Roman, 12-point, proportionally spaced font.

Respectfully submitted,

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By: /s/ Douglas J. Nill

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