

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,

Supreme Court No. 20260059

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

Appellants,

v.

North Dakota Public Service Commission,
Otter Tail Power Company, and
Montana-Dakota Utilities Co.,

Appellees.

APPELLANTS' PETITION FOR REHEARING

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ISSUE PRESENTED

[¶1] Whether the Court overlooked or misapprehended the need to determine whether Chapter 49-22 or Chapter 49-03 governed the public-need proceeding before deciding whether publication notice was legally sufficient, whether Appellants established good cause for intervention, and whether their resulting nonparticipation could bar judicial review.

[¶2] Appellants seek rehearing under N.D.R.App.P. 40 because the opinion's standing and intervention holdings create a procedural catch-22 that the Court did not address. This petition does not attempt to repeat every statutory and merits argument presented in Appellants' briefs. It identifies a discrete flaw in the reasoning of paragraphs 11, 16, and 17.

[¶3] The Court held that Appellants lacked standing to challenge the certificate of public convenience and necessity because they did not participate before the PSC issued it. *Wano Township v. N.D. Pub. Serv. Comm'n*, 2026 ND 146, ¶ 11. Appellants' explanation for that nonparticipation was that the PSC used Chapter 49-03, with publication notice, rather than Chapter 49-22, which they argued required a project-specific application, direct notice to affected landowners, local hearings, evidence, and findings with reasons. *See* Appellants' Brief, Arguments I, III, and V; Appellants' Reply Brief ¶¶ 2–7, 26–34.

[¶4] The Court nevertheless declined to determine which statutory provisions governed. *Wano Township*, ¶ 16. It then held that publication notice was sufficient and that the lack of notice did not establish good cause for intervention. *Id.* ¶ 17. Thus,

Appellants were denied review because they did not participate, without the Court deciding whether the PSC's use of the disputed statutory process deprived them of the notice and opportunity necessary to participate.

ARGUMENT

I. The Court overlooked that the governing statutory framework was logically antecedent to its determination of notice and good cause.

[¶5] The opinion itself recognizes that an agency abuses its discretion when it “misinterprets or misapplies the law.” Id. ¶ 15 (quoting *Energy Transfer LP v. N.D. Private Investigative & Security Board*, 2022 ND 85, ¶ 15, 973 N.W.2d 394). N.D.C.C. § 28-32-28 also directs that intervention may be allowed to promote the interests of justice when the petitioner's legal interests may be substantially affected and intervention will not impair the orderly conduct of the proceeding. Determining whether the PSC misapplied the law in rejecting Appellants' notice argument necessarily required identifying the law governing the proceeding.

[¶6] The same is true of “good cause.” Under the PSC's rule, a late intervention petition requires good cause. N.D.A.C. § 69-02-02-05(2). This Court has defined good cause as a showing why intervention should be allowed late “under the circumstances.” *Minn-Kota Ag Products, Inc. v. N.D. Public Service Commission*, 2020 ND 12, ¶ 42, 938 N.W.2d 118. The most important disputed circumstance was whether the PSC had selected a statutory process that omitted the notice and hearing protections applicable to this 345-kV transmission facility.

[¶7] Paragraph 17 relies on *Eckre v. Public Service Commission*, 247 N.W.2d

656, 664 (N.D. 1976), for the proposition that the reasonableness of notice depends on the “scope and nature of the hearing.” But the scope and nature of the legally required hearing was the very issue the Court declined to decide.

[¶8] If Chapter 49-03 supplied the governing framework, publication notice may have been the applicable statutory procedure. If Chapter 49-22 governed the determination of public need, the Legislature prescribed a materially different process: an application explaining the need for the facility, notice directed to affected interests, hearings in the affected area, an opportunity to present evidence, and findings with reasons. *See* N.D.C.C. §§ 49-22-08 and 49-22-09.

[¶9] Paragraph 17 describes the “main purpose” of the Chapter 49-03 proceeding as determining whether the project served the public interest and concludes that publication notice was consistent with that purpose. But that reasoning assumes that the PSC could lawfully conduct the public-need determination under Chapter 49-03. It therefore assumes the answer to the statutory question that paragraph 16 declined to decide.

[¶10] Appellants were not arguing merely that the newspaper notices were insufficiently descriptive. Their argument was that the PSC used the wrong statutory proceeding and thereby bypassed the project-specific notice, hearing, evidentiary, and decisional procedures prescribed for a new high-voltage transmission facility. The legal sufficiency of notice could not be assessed in the abstract, apart from the statute governing the proceeding.

[¶11] The Court did not need to decide every question concerning the ultimate

validity of the CPCN to resolve the intervention appeal. It could determine whether Chapter 49-22 governed the public-need process for purposes of deciding whether the PSC applied the correct legal standard to notice and good cause. Alternatively, it could remand for the PSC to address intervention under the correct statutory framework.

[¶12] Because an abuse of discretion includes a misapplication of law, the Court could not affirm the intervention ruling without resolving the legal premise on which that ruling depended. *See Energy Transfer*, ¶ 15. Publication notice could defeat good cause only if publication was the legally applicable notice procedure.

[¶13] Rehearing is therefore warranted to correct the conclusion in paragraph 16 that the governing-statute question was unnecessary to review of the intervention ruling.

II. The Court’s paired holdings create a procedural catch-22 that prevents review of whether the PSC’s chosen procedure caused the absence of participation.

[¶14] The Court correctly recognizes that administrative standing is broad and that the participation requirement is “minimal.” *Wano Township*, ¶¶ 7–9; *Minn-Kota*, ¶¶ 11, 21. Yet the opinion applies the participation requirement without deciding whether the agency’s choice of statutory process prevented the participation that the Court requires.

[¶15] The resulting sequence is:

- (a) Appellants cannot challenge the CPCN because they did not participate before it was issued;
- (b) their nonparticipation does not establish good cause for intervention because publication notice was sufficient;

- (c) whether Chapter 49-22 governed and required materially different procedures need not be decided; and
- (d) because that question is not decided, the absence of participation is attributed to Appellants rather than examined as the possible consequence of the PSC's use of the wrong statutory procedure.

[¶16] That is the procedural catch-22. Appellants were denied review for failing to participate, without the Court deciding whether the process selected by the PSC deprived them of the notice and meaningful opportunity necessary to participate.

[¶17] Standing doctrine ordinarily prevents a stranger who presented no position to an agency from obtaining judicial review after a decision. But Appellants are not strangers seeking to raise an issue they ignored despite receiving the process prescribed by law. They are affected Townships and landowners who contend the PSC placed the public-need question in a proceeding that was not brought to them through the notice and local-hearing framework enacted for high-voltage transmission facilities.

[¶18] The opinion's treatment of standing separately from the statutory notice issue gives dispositive effect to the alleged consequence of the statutory violation while refusing to determine whether the violation occurred.

[¶19] The same problem affects due process. Appellants preserved their argument that their property interests, local governmental authority, and utility interests could not be affected without notice and a meaningful opportunity to be heard. Appellants' Brief, Argument V. The Court's reasoning permits an agency's disputed choice of procedure both to cause nonparticipation and to foreclose judicial review of

whether the procedure was lawful.

[¶20] Rehearing does not require the Court to abandon the participation requirement. It requires recognition that nonparticipation cannot fairly be treated as conclusive until the Court determines whether the governing statute required the notice and opportunity that would have enabled participation.

[¶21] The Court should therefore vacate the affirmance of the intervention ruling and remand for the PSC to reconsider good cause under the statutory framework applicable to this transmission facility.

III. Paragraphs 16 and 17 do not cure the procedural bar created by the Court's standing and intervention holdings.

[¶22] Paragraph 17 states that Appellants may advance their claims when defects in the CPCN process affect their individual interests or due-process rights in the future. But before the opinion issued, Appellants advised the Court that the Chapter 49-22 proceeding had culminated in a June 24, 2026 final order granting corridor certificates and route permits. *See* Appellants' July 7, 2026 Motion for Leave to File Notice of Subsequent Agency Action Relevant to Pending Appeal, Ex. A. The Townships had submitted materials, appeared at the Edgeley hearing, and sought intervention before the PSC issued an order addressing need and preemption of local authority. The future effects identified in paragraph 17 have therefore begun to arise.

[¶23] Paragraphs 16 and 17 nevertheless leave the underlying statutory question unresolved while permitting the CPCN to retain operative effect. If the CPCN is treated in the Chapter 49-22 proceeding as conclusive or substitute proof of need, Appellants

remain subject to the consequences of the disputed Chapter 49-03 process without any court deciding whether that process was lawful. The possibility of raising future claims therefore does not cure the present procedural bar. Rehearing is required so the Court can decide the governing statutory framework before Appellants' resulting nonparticipation is used to foreclose judicial review.

CONCLUSION

[¶24] Appellants respectfully request that the Court grant rehearing, amend paragraphs 16 through 18, reverse the affirmance of the PSC's denial of intervention, and remand for reconsideration of intervention and good cause under the statutory framework governing this transmission facility.

CERTIFICATE OF COMPLIANCE

[¶25] Pursuant to N.D.R.App.P. 32(d) and 40(b), I certify that this Petition for Rehearing complies with the ten-page limitation. The filed electronic document totals 10 pages.

Respectfully submitted,

Dated: August 3, 2026

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