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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Energy Transfer LP and Dakota Access LLC, Appellants, vs. North Dakota Private Investigative and Security Board and TigerSwan, LLC, Appellees.	**Supreme Ct. No. 20210244** **District Ct. No. 08-2020-CV-03049**

APPEAL FROM THE JULY 1, 2021 JUDGMENT OF THE DISTRICT COURT SOUTH CENTRAL JUDICIAL DISTRICT BURLEIGH COUNTY, NORTH DAKOTA

THE HONORABLE DAVID REICH

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

[¶1] Whether the District Court properly determined that Energy Transfer LP and Dakota Access LLC do not have standing to appeal the Board's Order on the Petition to Intervene and for a Protective Order when Energy Transfer LP and Dakota Access LLC were not a "party" to the administrative proceeding.

[¶2] Whether the District Court properly affirmed the North Dakota Private Investigative and Security Board's Order on the Petition to Intervene and for a Protective Order when it determined the Board's factual conclusions were supported by the weight of the evidence and the Board's conclusion of law were supported by its findings of fact.

[¶3] Whether the District Court properly denied Energy Transfer LP and Dakota Access LLC's Motion to Complete the Certified Record on Appeal or in the Alternative, Remand for Consideration of Relevant and Material Evidence when the purported documents are not a part the certified record on appeal in accordance with North Dakota Century Code § 28-32-44 and are not relevant or material under North Dakota Century Code § 28-32-45.

STATEMENT OF THE CASE

[¶4] Energy Transfer LP and Dakota Access LLC ("Appellants") bring this administrative appeal seeking to use the Administrative Agencies Practices Act ("AAPA") as a vehicle to accomplish the return of thousands of documents that were produced by TigerSwan, LLC ("TigerSwan"), in discovery and

without a protective order, to the North Dakota Private Investigative and Security Board ("Board") during an administrative action adjudicating the unlicensed private investigative and security services provided by TigerSwan and James Patrick Reese to Appellants during the Dakota Access Pipeline protests. (OAH File No. 20190070 "Administrative Action")).

[¶5] The Appellants filed a Petition to Intervene in the Administrative Action on September 29, 2020, after the parties to the Administrative Action had already reached and entered into a settlement agreement. The Board ultimately issued an Order on October 30, 2020, determining that intervention would not be allowed under N.D.C.C. § 28-32-28. App. at 49-50.

[¶6] Appellants filed a Notice of Appeal on November 11, 2020, and an Amended Notice of Appeal on November 30, 2020, pursuant to N.D.C.C. § 28-32-42, seeking judicial review. On appeal, Appellants filed a Motion to Complete the Certified Record on Appeal or in the Alternative, Remand for Consideration of Relevant and Material Evidence ("Appellants' Motion") seeking to add to the certified record on appeal two emails: a September 28, 2020, email from the Board's former counsel and an October 12, 2020 email from the Board's general counsel Assistant Attorney General Allyson Hicks. App. at 97-98. The district court issued an order denying Appellants' Motion, affirming the Board's Order, and finding the Appellants were not a party to the Administrative Action as defined by the Administrative Agencies Practices

Act and did not have standing to bring an administrative appeal. App. at 147-157.

[¶7] Appellants appealed the order of the district court on September 3, 2021. App. at 160-163.

STATEMENT OF FACTS

[¶8] On October 30, 2018, the Board filed an Administrative Action against TigerSwan and Reese alleging TigerSwan and Reese violated Chapter 43-30 of the North Dakota Century Code for providing private investigative and security services without a license issued by the Board. App. at 52.

[¶9] In the Administrative Action, the Board served discovery requests on TigerSwan and Reese. In response to the Board's discovery requests, TigerSwan and Reese made various objections and refused to provide a response to the Board's discovery requests. The Board moved to compel TigerSwan and Reese to respond to its discovery requests. TigerSwan and Reese moved for a protective order requesting an order preventing any discovery by the Board.

[¶10] The Administrative Law Judge ("ALJ") denied TigerSwan and Reese's motion for protective order and ordered TigerSwan and Reese to respond to the Board's discovery requests.

[¶11] On June 1, 2020, TigerSwan and Reese electronically produced over 10,000 documents to the Board in response to the Board's discovery requests ("Disputed Documents").

[¶12] After TigerSwan produced the Disputed Documents to the Board, TigerSwan and Reese filed a motion to seal all of the discovery provided to the Board. As a part of that motion and in response to the principal motion, TigerSwan, Reese, and the Board provided the Disputed Documents to the ALJ. The ALJ denied TigerSwan and Reese's motion, holding TigerSwan and Reese's motion failed to articulate a basis for considering any of the Disputed Documents as trade secret or proprietary information and that, upon the ALJ's review of the Disputed Documents provided, the documents did not constitute trade secrets or proprietary information.

[¶13] On or around June 30, 2020, counsel for the Appellants contacted the Board's prior counsel regarding TigerSwan and Reese's disclosure of the Disputed Documents to the Board in discovery. Appellants made claims that the Disputed Documents produced by TigerSwan to the Board were Appellants', subject to claims of privilege, and considered confidential.

[¶14] The Board and TigerSwan settled the Administrative Action on or around September 15, 2020. App. at 55.

[¶15] On September 29, 2020, after the Administrative Action was settled and effectively closed, Appellants filed a Petition to Intervene in the Administrative Action with the ALJ. App. at 26-38. At no point prior to September 29, 2020, did the Appellants take any steps to become a party in the Administrative Action. Instead, the Appellants chose to attempt to resolve their claims regarding the Disputed Documents through informal discussions with the

Board's prior counsel. The Board and Appellants never reached a resolution concerning the Disputed Documents, in part because of the Board's obligation to comply with the Open Records Laws (N.D.C.C. § 44-04-18). Upon receiving the Petition to Intervene, the ALJ sent the Petition to Intervene to the Board on September 30, 2020, indicating a notice of settlement between the Board and TigerSwan had been provided to the ALJ and that, unless otherwise requested, no further action would be taken on the case. Id. at 45.

[¶16] On October 12, 2020, the Board held a properly noticed special meeting to discuss and consider the Appellants' Petition to Intervene, as well as the final administrative order in the Administrative Action. Id. at 90-92.

[¶17] On October 12, 2020, the Board issued an Order dismissing the Administrative Action pursuant to the terms of the settlement agreement. Id. at 49-50.

[¶18] On October 30, 2020, the Board issued an Order denying the Petition to Intervene. Id. at 56-58. In its Order, the Board explicitly set forth its findings of fact and conclusions of law with respect to the Petition to Intervene. The Board determined that the relief sought by Appellants—the return of the Disputed Documents—was not within the authority of the Board to address, or agree to stipulate to any action, without violating the open records law (N.D.C.C. § 44-04-18) and the record retention law (N.D.C.C. § 54-46-07) and risking significant liability. Id. at 57, ¶ 6. The Board determined that the basis for Appellants' request to return the Disputed Documents—TigerSwan's

alleged breach of contract—was outside the jurisdiction of the Board to consider. Id. at 57, ¶ 5.

[¶19] On November 11, 2020, the Appellants appealed the oral orders of the Board from the October 12, 2020, special meeting regarding the Petition to Intervene and for closing and dismissing the Administrative Action.

[¶20] On November 12, 2020, Appellants were served with the Board's October 30, 2020, Order (App. at 60) and amended their specifications for appeal to include the written order of the Board. App. at 9-24. The district court determined the Appellants did not have standing to appeal and affirmed the Board's Order. App. at 147-157.

[¶21] The Appellants were never a party to the Administrative Action, nor did they seek status as a party through intervention until after the Administrative Action had been settled by the Board and TigerSwan. The Appellants waited for three months, after learning in June of the production by TigerSwan, to take any action to assert their alleged rights in the documents. See generally App. at 82-83 (Attorney Jennifer Recine stating there had been ongoing negotiation for many months; Attorney Tonja De Sloover stating Appellants have been on record with their position over the last couple of months); App. at 85-86 (Attorney Tonja De Sloover on behalf of the Appellants states at the Board's meeting that the issue concerning the documents has gone on for three or four months). The Appellants have affirmatively stated they have no interest in the Administrative Action concerning the disciplinary licensure

action taken by the Board against TigerSwan and Reese. App. at 26; App. at 154, ¶ 22. The only "interest" the Appellants have in the Administrative Action stems from its claims that the documents that were in the possession of TigerSwan and produced to the Board pursuant to discovery requests and an order of the ALJ, should be returned to Appellants in contravention of the Board's legal duty, and contrary to the remedies and powers afforded to the Board by North Dakota Century Code.

STANDARD OF REVIEW

[¶22] The first inquiry in this case is whether the Appellants have standing to appeal under the AAPA. If standing is found, the Court would then proceed to a second inquiry and review the Board's Order pursuant to the standard of review for AAPA appeals. The standard of review for each inquiry is addressed in turn.

I. Standard of review for standing on appeal pursuant to the AAPA.

[¶23] The district court held that the Appellants did not have standing to bring its appeal under the Administrative Agencies Practices Act ("AAPA") because it was not a party to the proceedings. App. at 147-157. "Whether a party has standing to litigate an issue is a question of law which we review de novo on appeal." Evangelical Good Samaritan Soc. v. N.D. Dep't of Human Servs., 2015 ND 96, ¶ 9, 862 N.W.2d 794.

II. Standard of review regarding an appeal from an administrative agency order.

[¶24] "In an appeal from a district court's review of an administrative agency's decision, we review the agency's decision." Heier v. N.D. Dept. of Corrections and Rehabilitation, 2012 ND 171, ¶ 14, 820 N.W.2d 394. The Board is an administrative agency subject to the Administrative Agencies Practices Act ("AAPA"). N.D.C.C. § 28-32-01(2). When judicial review of an agency order is sought, the review is limited and a court must affirm an administrative agency's order unless one of the following is present:

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.

[¶25] When reviewing an agency's findings of fact, "we exercise restraint and do not make independent findings of fact or substitute our judgment for that of the agency; rather, we determine only whether a reasoning mind could have reasonably determined the agency's factual conclusions were supported by the weight of the evidence from the entire record." In re Lewis & Clark Pub. Sch. Dist. #161 of Ward, 2016 ND 41, ¶ 5, 876 N.W.2d 40. Questions of law are reviewed de novo. Id. (internal quotations omitted).

LAW AND ARGUMENT

I. This Court should affirm the district court's holding that Appellants do not have standing to appeal the Administrative Action pursuant to the AAPA because it is not a "party" as defined by the AAPA and as interpreted by established caselaw.

[¶26] This appeal is borne out of the Administrative Action between the Board and TigerSwan adjudicating TigerSwan's private investigative and security licensure. This appeal is controlled by the AAPA and the caselaw interpreting it. The Appellants do not have standing to bring this appeal pursuant to the AAPA because they fail the three-part Bank of Rhame test to determine standing to appeal.

A. The district court correctly used the three-part test articulated to determine standing.

[¶27] Appellants argue the district court erred in its holding the Appellants did not have standing by applying a three-part test that only applies to determine standing for appeals on the merits, not a petition to intervene. Appellants' Br. at 20-21, ¶ 37. Appellants take the position that there is a

dichotomy between—and therefore a different test or standard that applies to determine standing—for appeals that challenge the merits of an agency decision and those that do not challenge the merits such as a petition to intervene. Id. at ¶¶ 37-39.

[¶28] Appellants rely primarily upon the holdings in Wyatt v. R.D. Werner Co., Inc., 524 N.W.2d 579 (N.D. 1994) and Quick v. Fischer, 417 N.W.2d 843 (N.D. 1988) for the premise that standing to appeal and seek judicial review for a petition to intervene from an administrative action pursuant to the AAPA presents a different procedural posture than the one at issue here. Wyatt v. R.D. Werner Co., Inc., concerns an appeal from a personal injury action originally filed in district court and does not discuss a right or standing to appeal pursuant to the AAPA. 524 N.W.2d 579 (N.D. 1994). The case of Quick v. Fischer, addresses an appeal from a post-judgment motion to intervene on a contract for deed between private parties, also originally filed in district court. 417 N.W.2d 843 (N.D. 1988). These cases are inapplicable given the established caselaw that directly addresses standing to seek judicial review in the AAPA context.

[¶29] Appellants also rely upon a footnote in Shark v. U.S. W. Commc'ns., Inc., 545 N.W.2d 194 (N.D. 1996) as support for this proposition. Id. ¶ 38. The issue presented in Shark concerned whether two plaintiffs—one who had been permitted to intervene in the technical hearing and one who did not participate in the technical hearing but sent a letter to the agency—had standing to appeal

for judicial review of an agency decision. 545 N.W.2d 194 (N.D. 1996). Shark does not, as Appellants suggest, articulate a different standard for determining standing based on the type of appeal presented in contravention of the three-part test used by the district court. The footnote cited to by Appellants is used to compare the definition of party used in the AAPA and that used in the Model State Procedure Acts, observing there is a developing difference between a party to an agency proceeding and a factually aggrieved party entitled to judicial review. 545 N.W.2d 194, 197 n.1 (N.D. 1996). Noting this, the Shark court specifically addressed who is a party for purposes of standing to appeal an administrative decision. Id.

[¶30] The court recognized that the AAPA historically had not contained a definition of "party" and that in the case of Application of Bank of Rhame, 231 N.W.2d 801 (N.D. 1975), the court had to determine what constituted a "party" for purposes of seeking judicial review. Id. 545 N.W.2d at 196-97. The Shark court observed that from Bank of Rhame came a three-part test to determine who is a "party" to appeal. Id. at 197. After Bank of Rhame, the AAPA was amended to include a definition of party to an agency proceeding in N.D.C.C. § 28-32-01(8). Id. "Party" was defined as "each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." N.D.C.C. § 28-32-01(9). The Shark court observed, however, that this definition, "added nothing to the distinct concept of standing for judicial review of an agency decision" and "the legislative history for this amendment does not

imply an intention to overrule or replace the standing doctrine of Bank of Rhame, or to expand the right to judicial review to merely nominal parties who are not aggrieved." Id. at 197. The Shark court then went on to address the standing of each plaintiff to seek judicial review, finding neither had standing even though one plaintiff had timely intervened and participated in the administrative proceeding. Id. at 199. Shark reaffirms that the three-part test announced in Bank of Rhame is used to determine whether an appellant is a "party" and has standing to seek judicial review.

[¶31] Although Appellants state they are not aware of any North Dakota case imposing the three-factor standing analysis in the context of a petition to intervene, the case of Minn-Kota Ag Prod., Inc., v. N.D. Pub. Serv. Comm'n., squarely addresses the issue of standing to seek judicial review from a denial of a petition to intervene, is on-point here, and is relied upon in Appellants' Brief. Minn-Kota Ag Prod., Inc. v. N.D. Pub. Serv. Comm'n., 2020 ND 12, 938 N.W.2d 118; see also Appellants' Br., ¶¶ 38, 40-41.

[¶32] In Minn-Kota, this Court considered whether the appellant Minn-Kota had standing to appeal the North Dakota Public Service Commission's ("PSC") decision when its petition to intervene in a PSC hearing was denied. 2020 ND 12, ¶ 1, 938 N.W.2d 118. In 2017, Minn-Kota had constructed a facility in need of electric service. Id. at ¶ 2. Minn-Kota accepted Otter Tail Power Co.'s proposal to provide services and Otter Tail Power Co. then submitted an "Application for Permanent Authority" with the PSC seeking the requisite

certificates. Id. at ¶¶ 2-3. The PSC issued a notice of opportunity for hearing. Id. at ¶ 3. Another electric company opposing Otter Tail Power Co.'s application requested a hearing. Id. Prior to seeking intervention, Minn-Kota tangentially participated in the proceedings by offering witness testimony at the hearing and entering an "Appearance by Customer" advocating for Minn-Kota's position on the matter before the PSC. Id. at ¶ 20. After the hearing, Minn-Kota determined its interests were not being adequately represented by Otter Tail Power Co., and Minn-Kota petitioned to intervene. Id. at ¶¶ 6-7. The ALJ denied Minn-Kota's petition because it was submitted after the deadline to intervene had passed. Id. at ¶ 7. After the PSC issued its findings of fact, conclusions of law, and order, Minn-Kota appealed to the district court. Id. at ¶ 9. The district court affirmed the ALJ's order denying Minn-Kota's petition to intervene and dismissing its appeal for lack of standing. Id. On appeal, this Court analyzed whether Minn-Kota had standing to appeal utilizing the three-part test set forth in Bank of Rhame. Id. at ¶¶ 13-14.

[¶33] In the present case, the district court correctly used the three-part test articulated by Bank of Rhame and endorsed in Shark and Minn-Kota to analyze whether Appellants had standing to appeal.

B. The district court correctly determined from the record that Appellants do not have standing because it is not an interested party, not factually aggrieved, and did not participate in the proceeding.

[¶34] The three-part test considers "any person who is directly interested in the proceedings before an administrative agency who may be factually

aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a 'party' to any proceedings for the purposes of taking an appeal from the dicision [sic]." Bank of Rhame, 231 N.W.2d at 808. All three parts of the test must be satisfied to find standing. See Shark, 545 N.W.2d at 199 (citing Washburn Pub. Sch. Dist. No. 4 v. State Bd. of Pub. Sch. Educ., 338 N.W.2d 664 (N.D. 1983) for the proposition that "[w]hen an appellant was not aggrieved in fact, even though it was interested and had participated in the agency proceeding, the appeal was dismissed[.]").

i. The Appellants are not directly interested in the Board's Administrative Action adjudicating the unlicensed private investigative and security services of TigerSwan and Reese.

[¶35] The district court correctly held, and this Court should affirm, that Appellants were not directly interested in the underlying administrative action. App. at 155, ¶¶ 22-23, 27. The record supports this finding.

[¶36] Appellants now assert it has a direct interest in the Administrative Action "because TigerSwan produced documents belonging to Energy Transfer to the Board in the Administrative Action." Appellants Br., ¶ 41. Throughout this case, however, Appellants have stated it has no interest in the Administrative Action. The Appellants' Petition to Intervene expressly states "Intervenors [Appellants] are not parties to this proceeding [the Administrative Action] and have no interest in its outcome." App. at 26. The district court recognized and relied upon this point after hearing oral argument: "[t]he Appellants do not argue they had any direct interest in the

cause of action or the subject matter of the controversy in the underlying administrative action between the Board and TigerSwan." App. at 154, ¶ 22. The district court correctly recognized that Appellants' only interest in the Administrative Action arises out of the production of documents to the Board in discovery that TigerSwan had in its possession. App. at 155, ¶ 27. And to that end, the Appellants' only interest in keeping the Administrative Action open is to litigate its claims concerning the Disputed Documents through untimely seeking intervention into a closed case. Id.

[¶37] This case is factually different than Minn-Kota. In Minn-Kota, the appellant Minn-Kota was directly interested in the proceedings before the PSC because it was the sole customer of Otter Tail Power Co.'s electrical services for construction and was the sole reason for Otter Tail Power Co.'s application to the PSC. 2020 ND 12, ¶ 25, 938 N.W.2d 118. Here, Appellants are not interested in the Administrative Action and have no stake in the outcome. The Administrative Action before the Board concerned claims that TigerSwan and Reese violated Chapter 43-30 of the North Dakota Century Code for providing private investigative and private security services without a license issued by the Board. The Settlement Agreement entered into between the Board, TigerSwan, and Reese, evidences that the subject matter of the controversy of the Administrative Action was limited to claims that TigerSwan and Reese provided unlicensed private security and investigative services in North Dakota. App. at 51-55.

[¶38] The record shows through Appellants own admissions and actions, that Appellants did not have a direct interest in the Administrative Action. Appellants became aware of the ongoing administrative action and the document production, at the latest, on or around June 30, 2020, and proceeded to take no formal action to assert their interests (solely related to the documents) in the Administrative Action until September 29, 2020, after the Administrative Action was settled. Appellants do not have a direct interest in the administrative action and cannot articulate a direct interest in the cause of action or the subject matter of the controversy and cannot meet this part of the test.

ii. The records support the district court's finding that Appellants are not factually aggrieved.

[¶39] The district court correctly determined that Appellants were not factually aggrieved by the Board's decision because "the Board's decision did not enlarge or diminish Appellants claims to the documents." App. at 155, ¶ 26. This Court has said that to be factually aggrieved, "a party must gain or lose something to be aggrieved. Additionally, a mere dissatisfaction or displeasure with a decision is not enough to appeal from such a decision." Minn-Kota, 2020 ND 12, ¶ 16, 938 N.W.2d 118. The district court found that Appellants were not factually aggrieved because the Appellants are currently "pursuing the same relief sought in the Petition to Intervene in an original civil action." Id. Appellants allege it was factually aggrieved by the Board's decision

because "it was denied its right to seek a protective order." Appellants' Br., ¶ 41.

[¶40] Appellants do not cite any authority for the proposition that a non-party has an absolute right to seek a protective order. Appellants alleged aggrievement is not an aggrievement in fact. Assuming for the sake of argument that Appellants had timely intervened and been permitted to do so, Appellants do not have a "right" to a protective order. Appellants' request for a protective order very well could have been denied. Appellants would still be required to make the requisite legal and factual showings to warrant the issuance of a protective order—after an ALJ already considered the same or similar arguments made by TigerSwan concerning the Disputed Documents confidential or privileged nature and denied such a motion twice.

[¶41] Even if Appellants could show that the Board's determination not to allow intervention and closing the Administrative Action had the potential to factually aggrieve Appellants, it cannot show it is aggrieved in fact. The Board's determination not to allow intervention left the Appellants with exactly the same amount of interest it had in the Disputed Documents as it had for the three months preceding its Petition to Intervene wherein the Appellants failed to take any action with respect to its stated interests.

[¶42] To further illustrate this point, after the Board held its special meeting on October 12, 2020, Appellants immediately filed a separate, original action seeking review on the exact same issues at issue in this case that the Board

correctly recognized as inherent in addressing the Petition to Intervene, i.e. whether the Disputed Documents are subject to the open records and document retention laws, and whether the Board is required to return them to Appellants. See Case No. 08-2020-CV-02788 (Appellants filed a complaint with the district court seeking immediate return of all the Disputed Documents on October 13, 2020—one day after the Board's special meeting. This appeal was not filed until November 11, 2020). Appellants arguments as to being factually aggrieved are more akin to its dissatisfaction or displeasure with the decision rendered by the Board—that the relief requested would violate the open records and records retention laws.

iii. The record shows Appellants failed to participate in the proceedings before the Board.

[¶43] The district court correctly found that Appellants did not participate in the Administrative Action and despite becoming aware of the production of documents it claimed an interest in, waited months to seek intervention and participate in the Administrative Action until after it had been settled. App. at 155, ¶ 27. Appellants claim it meets the participation requirement because it sent correspondence to the Board's prior attorney and asserted its position in meetings held by the Board. Appellants' Br., ¶ 41.

[¶44] The record before this Court is clear that Appellants did not participate in the proceeding before the Board and do not meet the third part of the test for standing. Although caselaw does not dictate "in what manner or to what extent a person must participate to satisfy the participation element of the

Bank of Rhame standing test," this Court has stated "our cases indicate that so long as the party appealing has a significant or unique stake in the outcome, minimal participation is sufficient to have adequately participated." Minn-Kota Ag Prod., 2020 ND 12, ¶ 21, 938 N.W.2d 118.

[¶45] Appellants failed to participate to any degree in the Administrative Action, even informally through Board meetings despite its claims to the contrary. Appellants learned of TigerSwan's production of the Disputed Documents in June of 2020. After becoming aware of TigerSwan's production, Appellants did not attend or participate in any of the Board's meetings wherein the Administrative Action was on the agenda from July 21, 2020, through September 14, 2020 further evidencing the Appellants' lack of direct interest in the Administrative Action after it was fully aware of the production of the Disputed Documents. See App. at 61-78 ("Minutes July 21, 2020"; "Minutes September 4, 2020"; "Minutes September 11, 2020 10:00 A.M."; "Minutes September 11, 2020 11:40 A.M."; "Minutes September 14, 2020"). The Board's meeting minutes make apparent that Appellants only began attending or participating in Board meetings on September 28, 2020, after the settlement agreement had been entered into closing the case, and the day prior to submitting its Petition to Intervene. The Board's meeting minutes reflect that the only topic of concern or discussion beginning on September 28, 2020, was the Disputed Documents that TigerSwan had in its possession and produced

to the Board in discovery in the Administrative Action; not the outcome of the Administrative Action.

[¶46] Appellants' claims that its informal correspondence to the Board's counsel counts as participation is factually akin to Shark. In Shark, the appellant was a customer of the telephone services at issue in front of the PSC and factually affected by the PSC's determination with respect to that telephone service. 545 N.W.2d at 198. That appellant sent a prehearing letter to a PSC commissioner about the case before the PSC. Id. at 196. This Court held the appellant did not have standing because he failed to significantly participate even though he would have met the other two parts of the test. Id. at 198. Appellants informal emails to the Board's counsel are similar to the letter in Shark. Informal methods of communication with entities associated with the case does not constitute participation. Much like this Court found in Shark, the district court correctly found Appellants failed to participate in the Administrative Action.

[¶47] Appellants fail to meet the test for standing articulated in Bank of Rhame and this Court should affirm the district court's order.

II. Even if the Appellants are a party to the Administrative Action and have standing to appeal pursuant to the AAPA, the Court should affirm the Board's Order because its findings of fact are supported by a preponderance of the evidence and its conclusions of law and order are supported by its findings of fact.

[¶48] The Board's conclusions of law and order are supported by its finding of facts and should be affirmed by this Court. The Board is an administrative agency. "[W]hen an administrative agency's decision is appealed from the

district court to this Court, we review the agency's decision and the record compiled before the agency rather than the district court's decision and findings." In re Lewis & Clark Pub. Sch. Dist. #161 of Ward, 2016 ND 41, ¶ 5, 876 N.W.2d 40 (quoting Sutherland v. N.D. Dep't of Human Servs., 2004 ND 212, ¶ 6, 689 N.W.2d 880). Questions of law are reviewed de novo. In re Lewis & Clark Pub. Sch. Dist. #161 of Ward, 2016 ND 41, ¶ 5, 876 N.W.2d 40. Although Appellants posit its argument as the district court erring, the standard of review focuses on the Board's conclusions of law, rather than the district court. The Board's conclusions of law as to intervention and the authority to provide the relief sought are supported by its finding of facts.

A. The Board correctly concluded that permitting intervention would impair the prompt and orderly conduct of the proceeding.

[¶49] Under N.D.C.C. § 28-32-28:

> An administrative agency **may** grant intervention in an adjudicative proceeding to promote the interests of justice **if** intervention will not impair the orderly and prompt conduct of the proceeding and if the petitioning intervenor demonstrates that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of statute or rule.

(emphasis added). The plain language of the statute indicates that intervention is within the discretion of the administrative agency to grant even if the petitioner meets the criteria that intervention will not impair the prompt and orderly conduct of the proceeding and demonstrates its legal rights will be substantially affected.

[¶50] Although Appellants correctly observe that intervention has been historically and liberally granted in North Dakota, "post-judgment intervention is unusual and not often granted." Minn-Kota, 2020 ND 12, ¶ 41, 938 N.W.2d 118 (internal quotations omitted). In Minn-Kota, the court set forth considerations for post-judgment motions to intervene:

> The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case. If prejudice is found, the motion will be denied as untimely. Conversely, the absence of prejudice supports finding the motion to be timely. . . . Delay is not the only possible form of prejudice to the existing parties, but if the intervention will not delay the termination of the litigation intervention ordinarily will be allowed.

2020 ND 12, ¶ 41, 938 N.W.2d 118 (citing Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co., 2011 ND 154, ¶ 40, 801 N.W.2d 677.

[¶51] The Board in addressing the Petition to Intervene determined that intervention would impair the orderly and prompt conduct of the proceedings as the Administrative Action had concluded with settlement between the Board, TigerSwan, and Reese. App. at 56 ¶ 4. The Board further determined that continuing to hold open the litigation with TigerSwan and Reese—which had been ongoing since 2017 (App. at 51)—had the potential to affect the settlement and conclusion of the case. App. at 56 ¶ 4. The Board concluded based on those findings of facts that intervention would impair the orderly and prompt conduct of the proceeding because the Administrative Action had ended.

[¶52] Appellants allege it is undisputed that the Administrative Action was open. The record does not support this contention. The Board and TigerSwan and Reese signed a settlement agreement dismissing the action on September 15, 2020. App. at 51-55. The Board had already sent notice of settlement to the ALJ conducting the Administrative Action who, in turn, recognized that when parties reach a settlement, the ALJ takes no further action. Id. at 45. Appellants filed its Petition to Intervene on September 29, 2020. The Administrative Action had been settled between the parties.

B. The Board correctly concluded that it did not have the authority to provide the relief sought by the petition to intervene.

[¶53] Appellants allege the Board's conclusion of law that "it could not address or consider the relief sought by the Appellants, namely the return of the discovery documents without violating the law" (App. at 57, ¶ 6) is not supported by its finding of facts. Appellants' Br., ¶ 56. The findings of fact set forth in the Board's Order support the Board's determinations. The Board specifically found that the Petition to Intervene included claims concerning breach of contract between TigerSwan and Appellants—private contractual claims that do not affect the Board and that the Board does not have the authority to adjudicate. App. at 29; 33-34. The Board further found the Disputed Documents in its possession were subject to the open records laws; that the Board is required by law to follow the record retention law at N.D.C.C. § 54-46-07; and that the Board was subject to a litigation hold that required it

to preserve the Disputed Documents for a federal case concerning the same or similar subject matter as the Administrative Action. App. at 57, ¶ 6.

[¶54] The Board determined that because it is obligated to comply with those laws, the Board did not have the authority to address or agree to any action with respect to the documents produced by TigerSwan. The Board's determination with respect to the open records laws, records retention laws, and the Board's obligations pursuant to those laws is supported by the law and the factual manner in which the documents came into the possession of the Board.

[¶55] Appellants contend the Board possessed the authority to issue a protective order as to the documents TigerSwan produced to the Board and that the Board is mistaken that the documents are open records subject to North Dakota's Open Records laws. Appellants' Br., ¶ 57. Appellants rely on protective orders that have been entered in other litigation the State of North Dakota is a party to in state district court or federal district court. App. at 101-146. This argument has no merit. TigerSwan produced documents in its possession to the Board. The Board received the documents in the course of its public duties while adjudicating a licensing matter. Private contractual obligations on documents simply cannot control public obligations under law. The law clearly states that:

> all records made or received by or under the authority of or coming into the custody, control, or possession of public officials of this state in the course of their public duties are the property of the state and may not be mutilated, destroyed, transferred,

> removed, sold, or otherwise damaged or disposed of, in whole or in part, except as provided by law.

N.D.C.C. § 54-46-07. Therefore, any records received by, or coming into the custody, control, or possession of public officials of the Board, in the course of the Board's public duties are the property of the state. Once a record is received by an agency of the state, those records are immediately considered to be public records, open and accessible to the public, unless made or recognized as confidential or exempt by statute. N.D.C.C. § 44-04-18(1).

[¶56] The law provides that a record must have a link or association with public business, which is defined as "all matters that relate or may foreseeably relate in any way to . . . [t]he performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or . . . [t]he public entity's use of public funds." N.D.C.C. 44-04-17.1(12). The Disputed Documents undoubtedly relate or foreseeably relate to the Board's public functions in adjudicating a licensing issue in an administrative matter, especially considering that it has supervision, control, or jurisdiction over the alleged unlicensed private security services provided by TigerSwan and Reese and used public funds to adjudicate the licensing matter including funds expended to conduct discovery through which the Board received the Disputed Documents.

[¶57] There exists no authority for a retroactive protective order and protective orders agreed to by state agencies, or entered by an ALJ, must always remain consistent with open records obligations, not in contravention

of those obligations. The Board's findings of fact with respect to its obligations under the open records laws and document retention are supported by a preponderance of the evidence.

[¶58] Appellants cite to several cases concerning post-judgment intervention for the proposition that the Board's findings of fact are erroneous and, therefore, affect its conclusion of law that it could not provide the relief requested. Appellants' Br. at 27, ¶ 48. However, the cases cited to by Appellants are not applicable or persuasive because none of the cited to cases include a public entity that has obligations to comply with open records and records retention laws such as the Board.

[¶59] In the context of requesting a protective order in a proceeding that includes a government entity, an administrative agency or ALJ on its behalf must limit the confines of such an order to materials that are expressly made confidential or exempt by statute. If the records are not otherwise specifically protected by law, then those records cannot be closed pursuant to a protective order, especially when those records come directly from a party to the proceeding.

[¶60] Therefore, the Board's conclusion of law that it could not consider the relief sought by ETP are supported by its finding of facts. The Court should affirm the Board's Order.

III. This Court should affirm the district court's denial of Appellants' Motion because the district court correctly held the emails are not a part of the certified record in an administrative appeal as defined by N.D.C.C. § 28-32-44 and are not relevant and material to the issues involved.

[¶61] Appellants allege the Board certified an incomplete record on appeal and that the district court erred in denying the Appellants' Motion to include certain emails as a part of the record on appeal. Appellants allege the district court should have included the following:

1) The September 28, 2020 email from the North Dakota Private Investigative and Security Board's counsel, Monte Rogneby, to Energy Transfer LP; and

2) Assistant Attorney General ("AAG") Allyson Hicks' October 12, 2020 email "noticing" the October 12, 2020, Board meeting.

The district court correctly held that the emails were not relevant or material to the subject matter of the case. App. at 152, ¶ 15.

[¶62] An agency is required to "make a record of all testimony, written statements, documents, exhibits, and other evidence presented at any adjudicative proceeding or other administrative proceeding heard by it." N.D.C.C. § 28-32-36. The agency is required to maintain an official record of each adjudicative proceeding heard by it and provide a certified copy of the entire record of proceedings before the agency, or an abstract of the record. N.D.C.C. § 28-32-44(1)-(2). The agency's record of the proceedings, may consist only of the following:

a. The complaint, answer, and other initial pleadings or documents.

b. Notices of all proceedings.

c. Any prehearing notices, transcripts, documents, or orders.

d. Any motions, pleadings, briefs, petitions, requests, and intermediate rulings.

e. A statement of matters officially noticed.

f. Offers of proof and objections and rulings thereon.

g. Proposed findings, requested orders, and exceptions.

h. The transcript of the hearing prepared for the person presiding at the hearing, including all testimony taken, and any written statements, exhibits, reports, memoranda, documents, or other information or evidence considered before final disposition of proceedings.

i. Any recommended or proposed order, recommended or proposed findings of fact and conclusions of law, final order, final findings of fact and conclusions of law, or findings of fact and conclusions of law or orders on reconsideration.

j. Any information considered pursuant to section 28-32-25.

k. Matters placed on the record after an ex parte communication.

N.D.C.C. § 28-32-44(4).

A. AAG Hicks' email is not a pre-hearing notice.

[¶63] Appellants claim that the district court erred in concluding that AAG Hicks' email should not be included in the record on appeal because the Board did not hold a hearing but rather a special meeting. App. at 36 ¶ 67. Appellants contend AAG Hicks' email should have been included in the record on appeal because it "clearly constitutes a pre-hearing notice or notice of proceeding that should be included in the record." Id. Appellants' position is wrong.

[¶64] Appellants' claim that the Board held a hearing is unsupported by the record. App. at 90 ("Minutes October 12, 2020" noting the Special Board

Meeting); see also App. at 92 ("North Dakota Public Meeting Notices noting the Special Meeting and the agenda topics). The Board's meeting agenda for October 12, 2020, sets forth the topics for discussion; the topics do not include a hearing on Appellants' Petition to Intervene nor that the Board would hear arguments on it. Id. at 92. The email from AAG Hicks merely provides Appellants notice as a professional courtesy of a special meeting held by the Board on October 12, 2020, that had been noticed on October 9, 2020. Id. The email is not "testimony, written statements, documents, exhibits, and other evidence presented at any adjudicative proceeding or other administrative proceeding part of the record as defined by law." N.D.C.C. § 28-32-36. The email does not fall into any of the stated categories for what constitutes the record pursuant to N.D.C.C. § 28-32-44(4) and Appellants do not argue that it does.

B. The email from Mr. Rogneby to Appellants is not a part of the record.

[¶65] Appellants assert that the email from Mr. Rogneby on September 28, 2020, should be considered a part of the record because it constitutes an intermediate ruling by the Board or is considered a pre-hearing document. Appellants' Br. at 37, ¶ 68. Correspondence between counsel is not an intermediate ruling, a prehearing document, nor a part of the record.

[¶66] As discussed under subsection A, the Board did not hold a hearing. Based on that premise, Mr. Rogneby's email cannot be construed as a "pre-hearing" document and is not considered a part of the record.

[¶67] Appellants fail to specify what, if anything, the Board could have issued an intermediate ruling on. App. at 37, ¶ 68. Rather, on September 28, 2020, the Board in a special meeting considered an open records request, threatened litigation, and consideration of a final order in the Administrative Action. App. at 84 ("North Dakota Public Meeting Notices September 28, 2020"). Ms. Jennifer Recine, Mr. Thomas Kelly, and Ms. Tonja De Sloover were in attendance. Id. at 82 ("Minutes September 28, 2020"). The meeting minutes set forth that Ms. Recine addressed the Board concerning ongoing negotiations. Id. After entering executive session, the Board made a motion to release the pleadings and exhibits in response to the open records request. Id. The Board then directed its attorney to "continue discussions with ETP" and the meeting adjourned at 3:51 PM. Id. at 82-83. At 4:06 PM, Mr. Rogneby emailed Ms. De Sloover outlining the same information as articulated in the Board meeting (as documented by the minutes) that the Appellants attended and were presumably already aware of because they were in attendance. The Appellants attempted to file their Petition to Intervene with the ALJ on September 29, 2020.

[¶68] The Board did not have before it a motion or petition of any kind to rule upon as evidenced by its agenda and meeting minutes. App. at 82-84. The minutes of the Board do not contain any motions or "rulings" on motions beyond determining how the Board should proceed to respond to an open records request. Id. at 82-83. Mr. Rogneby's email communication to counsel

does not somehow constitute an "intermediate ruling" of the Board especially when the Board had nothing to rule on.

[¶69] Correspondence between counsel concerning negotiations is not an intermediate ruling nor a pre-hearing notice and does not fall under the definition of a record as set forth in N.D.C.C. §§ 28-32-36 and 28-32-44.

C. The district court correctly determined the proffered records were not relevant and material and properly denied Appellants' Motion.

[¶70] Appellants contend the district court further erred in denying its Motion because the district court construed the term "records" too narrowly since the agency record of proceedings may include a wide range of documents that were not presented at a formal hearing. Appellants' Br. at 37, ¶ 69. The district court did not deny Appellants' Motion on the basis that the emails were not presented at a formal hearing. See App. at 150-52, ¶¶ 9-15. The district court first determined that the emails did not fall into any of the categories set forth in N.D.C.C. § 28-32-44. App. at 151-52, ¶¶ 13-14. The district court then went on to determine that the emails did not meet the "relevant and material" standard to constitute additional evidence pursuant to N.D.C.C. § 28-32-45: "[t]he court has reviewed the emails, and concludes they are not relevant or material to the subject matter in this case." App. at 152, ¶ 15. The district court made apparent in its order that it reviewed and considered the emails in light of the circumstances stating, "neither email would change this Court's decision, nor has it been shown to the [c]ourt's satisfaction that the emails are

relevant and material to the issues involved." Id. The district court did not err in denying Appellants' Motion and this Court should affirm.

IV. This Court should deny Appellants' due process claims.

[¶71] Appellants argue that the district court failed to address Appellants due process claims and that the case should be remanded back to the district court to address this issue. Appellants allege the Board violated its due process rights by failing to provide notice of the "hearing" on October 12, 2020, in accordance with N.D.C.C. §§ 28-32-21(3)(b) and 28-32-35. Appellants' Br., ¶ 63. Appellants allege that the noticed special meeting must have been a hearing because the Petition to Intervene was argued and decided at the meeting. Id. at ¶ 64. This is not supported by the record. The meeting notice and the meeting minutes do not contain any reference to arguing the Petition to Intervene and no argument was taken. App. at 90-93.

[¶72] N.D.C.C. § 28-32-21(3)(b) sets forth a procedure for adjudicative proceedings against an unspecified respondent. That provision is not applicable to this case because the Administrative Action from which Appellants' claims flow, involved a complaint against a specifically named respondent—TigerSwan and Reese.

[¶73] The record supports the proposition that the Board did not hold a hearing on the Petition to Intervene on October 12, 2020, but rather held a special meeting to discuss matters before it. App. at 90-91. The Board noticed the special meeting in accordance with the open meetings laws and posted

notice of the special meeting on October 9, 2020 at 6:20 PM. App. at 92. Appellants' argument that the special meeting was a hearing—it was not—and they were entitled to notice under N.D.C.C. § 28-32-21(3)(b) is without merit. Appellants do not identify any statutory or other authority to support its contention that it was entitled to a hearing or that the Board was required to hold one.

V. The relief sought, to remand this case to an ALJ for consideration, is improper.

[¶74] Appellants request this Court remand the case to the ALJ for consideration of its Petition to Intervene. Appellants' Br., ¶¶ 52-54. Such relief is inappropriate. Under the AAPA, an administrative agency may request the designation of a hearing officer to preside over an administrative proceeding. See generally N.D.C.C. § 28-32-27. Unless otherwise specifically required by law, administrative agencies are not required to request an ALJ to preside over an administrative matter, but rather the ALJ acts as a hearing officer only as to the matters and in the capacity requested by the administrative agency. N.D.C.C. § 28-32-31.

CONCLUSION

[¶75] Based on the foregoing argument, the Board respectfully requests this Court affirm the district court's holding the Appellants do not have standing to appeal. The Board respectfully request this Court affirm the Board's order.

Dated this 20th day of December, 2021.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Energy Transfer LP and Dakota Access LLC, Appellants, vs. North Dakota Private Investigative and Security Board and TigerSwan, LLC, Appellees.	**Supreme Ct. No. 20210244** **District Ct. No. 08-2020-CV-03049** **CERTIFICATE OF COMPLIANCE**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellee contains 39 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Century 12 point font.

Dated this 20th day of December, 2021.

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[¶1] I hereby certify that on December 20, 2021, the following documents: **BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court and electronically served upon Randall J. Bakke at rbakke@bgwattorneys.com; Shawn A. Grinolds at sgrinolds@bgwattorneys.com; Jennifer S. Recine at jrecine@kasowitz.com; Thomas B. Kelly at tkelly@kasowitz.com; and Lynn M. Boughey at lynnboughey@midconetwork.com.

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STATE OF NORTH DAKOTA

Energy Transfer LP and Dakota Access LLC, Appellants, vs. North Dakota Private Investigative and Security Board and TigerSwan, LLC, Appellees.	**Supreme Ct. No. 20210244** **District Ct. No. 08-2020-CV-03049** **CERTIFICATE OF SERVICE**

[¶1] I hereby certify that on December 21, 2021, the following documents: **BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court and electronically served upon Randall J. Bakke at rbakke@bgwattorneys.com; Shawn A. Grinolds at sgrinolds@bgwattorneys.com; Jennifer S. Recine at jrecine@kasowitz.com; Thomas B. Kelly at tkelly@kasowitz.com; and Lynn M. Boughey at lynnboughey@midconetwork.com.

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