20210244

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ENERGY TRANSFER LP and DAKOTA ACCESS LLC,	)	
Appellants,	)	Supreme Court Case No.: 20210244
vs.	)	**ORAL ARGUMENT REQUESTED**
NORTH DAKOTA PRIVATE INVESTIGATIVE AND SECURITY BOARD and TIGERSWAN, LLC;	)	
Appellees.	)	

APPEAL FROM THE ORDER ENTERED JUNE 23, 2021 AND JUDGMENT ENTERED JULY 1, 2021, IN THE SOUTH CENTRAL JUDICIAL DISTRICT, BURLEIGH COUNTY, NORTH DAKOTA, THE HONORABLE DAVID REICH, CIVIL NO. 08-2020-CV-03049

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph Number(s)

Cases

Statutes

Other Authorities

[¶1] Appellants Energy Transfer LP and Dakota Access LLC ("Dakota Access" and with Energy Transfer LP, "Energy Transfer" or "Appellants") respectfully submit this brief in support of their appeal of an order entered on June 23, 2021 (the "Order"), and judgment entered July 1, 2021 (the "Judgment"), by the Honorable David Reich, Burleigh County District Court, State of North Dakota (the "District Court"), in Civil Case No. 08-2020-cv-03049 (the "District Court Action"), on appeal from the October 30, 2020 order (the "Board Order") of the North Dakota Private Investigative and Security Board (the "Board") denying Appellants' Petition to Intervene (the "Petition") in the administrative action captioned *North Dakota Private Investigative and Security Board v. TigerSwan, LLC, et al.*, OAH File No. 20190070 (the "Administrative Action").

STATEMENT OF THE COURT'S JURISDICTION

[¶2] The District Court had jurisdiction to hear this case pursuant to N.D.C.C. § 28-32-42. The North Dakota Supreme Court has jurisdiction to hear and decide this appeal pursuant to N.D.C.C. §§ 28-27-01, 28-27-02(2), and 28-27-02(5).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶3] Appellants present the following issues for review:

1. Whether the District Court erroneously determined that Appellants lacked standing to appeal the Board's order denying the Petition?

2. Whether the District Court erroneously affirmed the Board's conclusion that intervention post-settlement would impair the prompt and orderly conduct of proceedings in the Administrative Action, where intervention was for the limited purpose of addressing a discrete and ancillary issue of obtaining a protective order?

3. Whether the District Court erroneously determined that the Board's determination in the Administrative Action that it could not properly and/or lawfully

address the relief sought by the Petition was in accordance with law?

4. Whether the Board violated Appellants' constitutional due process rights and the provisions of N.D.C.C. Ch. 28-32 when its counsel provided notice to Appellants of an October 12, 2020 Board hearing to consider the Petition at 3:32 a.m. on October 12, 2020 (the "October 12 email")?

5. Whether the District Court erroneously determined that the October 12 email and a September 28, 2020 email from the Board's prior counsel, Monte Rogneby, to Appellants' counsel were properly excluded from the administrative record?

STATEMENT OF THE CASE

[¶4] Energy Transfer seeks reversal of the District Court's order erroneously (1) holding that Energy Transfer lacked standing to appeal the Board's decision denying Appellants' petition to intervene in the Administrative Action; (2) affirming the Board's order holding that intervention would impair the prompt conduct of proceedings because the Petition was filed after the Board and TigerSwan had executed a settlement; and (3) affirming the Board's order that it could not address or consider the relief sought by Energy Transfer in the Petition. Energy Transfer sought to intervene in the Administrative Action for the limited purpose of seeking a protective order for a set of 16,000 documents unlawfully produced by TigerSwan to the Board in that action in or around June 1, 2020 (the "Energy Transfer Documents"), in violation of Appellants' contract with TigerSwan prohibiting the disclosure of its confidential and proprietary documents without Appellants' written consent and protections satisfactory to Appellants.

[¶5] The Energy Transfer Documents include (i) documents that are protected by the attorney-client or other privilege; (ii) confidential commercial documents belonging to Appellants; (iii) thousands of documents that have no relevance to the Administrative

Action or anything related to the State of North Dakota; and (iv) documents that contain information central to the security of critical infrastructure in North Dakota, specifically the Dakota Access Pipeline ("DAPL").

[¶6] After Energy Transfer learned of the production in late June 2020, counsel for Energy Transfer and the Board negotiated a process by which the Board would return privileged, irrelevant, and inadvertently produced documents to Energy Transfer. The Board's counsel repeatedly acknowledged to Appellants' counsel that (1) the documents were Appellants' property, (2) based upon his own review, the documents contained materials that were privileged and simply not responsive to the document requests, and (3) such documents could be returned. But in September 2020, after the Board reached a settlement agreement with TigerSwan to resolve the Administrative Action, the Board reversed its position, asserting that it could not return the documents without violating open records and document retention laws. Both before and after the settlement was executed, the Board's counsel represented to Energy Transfer that it would keep the Administrative Action open so that Administrative Law Judge Hope Hogan (the "ALJ") could resolve document disputes should the Board and Energy Transfer be unable to reach agreement.

[¶7] Immediately after the Board changed its position and while the Administrative Action remained pending, Energy Transfer filed the Petition. But the Board reneged on its promise to allow the ALJ to consider the Petition. The Board refused to refer the Petition to the ALJ, asserting that having the ALJ consider the Petition "would impair the prompt conduct of the proceeding in that" the Board had reached a settlement with TigerSwan, "the case was effectively closed," and "continuation of the administrative case could detrimentally affect the parties' settlement and conclusion of the case." The

Board further determined that it could not address or consider the relief sought by Energy Transfer without violating the open records and document retention laws. The Board thus denied the Petition and closed the Administrative Action.

[¶8] Energy Transfer appealed the Board's decision to the District Court. The District Court dismissed the appeal, holding that Energy Transfer lacked standing to appeal the Board's denial of the Petition because Energy Transfer was not directly interested in the Administrative Action, was not factually aggrieved by the Board's decision, and had not participated as a party in the Administrative Action. In the alternative, the District Court affirmed the Board's conclusion that (1) intervention would impair the prompt conduct of proceedings because Energy Transfer did not intervene until after the parties had reached a settlement and (2) the Board could not address or consider the relief sought in the Petition. Energy Transfer timely appealed from the Order. The Order should be reversed for the reasons set forth herein.

RELEVANT FACTUAL BACKGROUND

A. TigerSwan's Contractual Confidentiality Obligations

[¶9] On September 5, 2016, TigerSwan entered into a Professional Services Agreement, Agreement Number: PSA-480-201625559 (the "PSA"), with Dakota Access pursuant to which TigerSwan provided professional services to Dakota Access and affiliated companies and contractors working on DAPL. (*See* App. 40-43.)[1] The PSA provided several protections for materials and information generated in the course of

[1] "App. _" refers to pages of the Appendix of Appellants ("Appendix") filed herewith. "Order ¶ __" refers to paragraphs of the Order, which is included in the Appendix at App. 147 to 157. "Board Order ¶ __" refers to paragraphs of the Board Order, which is included in the Appendix at App. 56 to 58.

TigerSwan's engagement. (App. 42-43.)

[¶10] Section 11.1 of the PSA ("Confidential Information") provides that "all information . . . related to the Company [Dakota Access] whether received from or on behalf of the Company, whether marked or not, is proprietary and confidential to the Company":

> **11.1 Confidential Information**. Contractor [TigerSwan] acknowledges that all information, including but not limited to, data, drawings, recordings, tracings, specifications, calculations diaries, memoranda, manuals, correspondence, documentation, computer software, plans, programs, plants, processes, products, costs, equipment, routes, vendors, personnel, operations, customers, reports, studies, designs, know how, trade secrets, communications written or oral, of any form or media, related to the Company whether received from or on behalf of the Company, whether marked or not, is proprietary and confidential to the Company ("Confidential Information"). . . .

(App. 42.)

[¶11] Section 11.2 ("**Protection of Confidential Information**") provides that "[a]ll Company Confidential Information disclosed to or used or acquired by Contractor in connection with the Services ***shall be and remain Company's exclusive property***." (App. 43 (emphasis added).) Section 11.2 further provides that TigerSwan "shall protect," and "shall not use or disclose," Confidential Information and that Confidential Information may be disclosed "only on a confidential basis satisfactory to Company and ***with the prior written consent of Company***." (*Id.* (emphasis added).)

B. TigerSwan Produces Energy Transfer's Confidential Property Without Proper Notice to Energy Transfer As Required Under the PSA

[¶12] On October 30, 2018, the Board commenced the Administrative Action, alleging that TigerSwan provided private and investigative security services within North

Dakota without a license from the Board. (App. 49 at ¶ 1.) On or around June 1, 2020, TigerSwan produced nearly 16,000 electronically-stored documents to the Board. (App. 28.) The documents consist of materials generated or received by TigerSwan during the course of its engagement with Energy Transfer and information concerning the operations and security of critical infrastructure in North Dakota (*i.e.*, DAPL); attorney-client or otherwise privileged documents; documents containing commercial information regarding Energy Transfer's business affairs; and thousands of documents that simply have no bearing on any issue in the Administrative Action, including Appellants' operations in Iowa, South Dakota, and elsewhere. (App. 29.)

[¶13] TigerSwan did not provide any advance notice or written notification to Appellants, as specifically required by the PSA, that TigerSwan had received document requests from the Board that potentially called for the production of Energy Transfer's property nor obtain Energy Transfer's written approval to produce its documents. (*Id.*)

C. Energy Transfer Learns of the Mistaken Production of Documents to the Board and the Board Assures Energy Transfer that Documents Can Be Returned

[¶14] In late June 2020, TigerSwan's counsel first advised Energy Transfer's counsel of TigerSwan's production of the Energy Transfer Documents. (App. 29-31.) Upon learning of the production and the likelihood that it contained Appellants' confidential documents, Energy Transfer's counsel contacted the Board's counsel, Mr. Rogneby, in an effort to understand the situation and the content of the production. (*Id.*)

[¶15] The Board's counsel acknowledged from the outset, and repeatedly throughout negotiations, that the Energy Transfer Documents contained materials that were Appellants' property and that, based upon his own review, contained confidential, proprietary, and privileged documents, and documents subject to the critical infrastructure

and other exemptions, as well as documents that were simply not responsive to the document requests. (*Id.*; *see also* App. 85-86 at ¶ 6; App. 90-91 at ¶ 5; Dkt. No. 43 at ¶¶ 9-10.) Appellants consistently communicated to the Board that it was unlawfully in possession of Appellants' property, and that it was obligated to return certain privileged information under the North Dakota rules. (App. 29-31; *see also* App. 82-83 at ¶ 3; App. 85-86 at ¶ 6; App. 90-91 at ¶ 5; Dkt. No. 43 at ¶¶ 9-10.)

[¶16] Over the course of the summer of 2020 through the filing of the Petition, Energy Transfer and the Board engaged in prolonged negotiations concerning the Energy Transfer Documents, in an effort to reach an agreement that would provide Energy Transfer the protections to which it is entitled, while allowing the Board to obtain the documents it deemed necessary for the Administrative Action. (App. 29-31.) Among other things, Appellants proposed moving the ALJ to enter a jointly stipulated protective order that would strike this balance. (*Id.*) Appellants also proposed that the Board return the documents to Appellants and serve Appellants with a subpoena for the relevant, non-privileged documents. (*Id.*) While at times it appeared agreement was within reach, the Board vacillated in its commitments and positions with respect to the documents. (*Id.*; *see also* App. 85-86 at ¶ 6; App. 90-91 at ¶ 5.)

[¶17] The settlement agreement between the Board and TigerSwan was executed on September 15, 2020. (App. 51-55.) The Board's counsel represented before and after settlement that the Board would keep the Administrative Action open to address Appellants' concerns. (*See* App. 85-86 at ¶ 6.)

[¶18] On September 28, 2020, the Board, over Appellants' objections, produced certain of the documents in response to a request made to it under the North Dakota open

records law. (App. 31; App. 82 at ¶¶ 2-3.) The Board's decision was made in a closed session after the Board refused to hear, on the record, the basis for Appellants' objection to that production and their claim to the documents. (*Id*.)

D. The Board Represented That It Would Keep the Administrative Action Open to Allow Resolution of Issues Concerning the Production

[¶19] On the afternoon of September 28, 2020, subsequent to the Board's decision to produce the Energy Transfer Documents to a member of the public, counsel for the Board, Mr. Rogneby, informed Appellants' counsel:

> The Board is interested in continuing its settlement discussions with [Appellants] concerning the documents which are not included in the pleadings. The Board did not take action today to close the administrative case to allow these discussions to continue … The Board would like the administrative case to be finally closed quickly. The Board is willing to allow [Energy Transfer] to be heard on these issues as much as possible.

(App. 97; *see also* App. 85-86 at ¶ 6.) The Board refused to add this email to the record on appeal to the District Court.

[¶20] On September 29, 2020, Appellants filed the Petition for the limited purpose of seeking a protective order from the ALJ requiring the Board to return to Appellants all documents in its possession that are Appellants' property and to destroy all copies, electronic or physical, of such documents within its possession. (App. 26-43.)

[¶21] On September 30, 2020, ALJ Hogan, who was designated by the Board to adjudicate the Administrative Action, wrote to the Board that "[g]enerally, when parties have reached a settlement, the [ALJ] takes no further action. Considering the status of this case, please advise if the Board would like me to address this motion or if the Board intends to take up the matter itself." (App. 45.)

E. The Board Schedules A Meeting to Rule on the Petition Without Adequate Notice

[¶22] On October 5, 2020, the Board held a meeting via Zoom to discuss, among other things, the Petition. (App. 85-87.) At the meeting, the Board decided to refer the Petition to the ALJ to allow her to be the "final decision maker on the petition to intervene." (App. 86-87 at ¶ 8.)

[¶23] On October 12, 2020, in the middle of the night at 3:32 a.m. CDT, the Board's counsel, Allyson Hicks, notified Appellants' counsel that the Board would hold a "special meeting" five-and-one-half hours later—at 9:00 a.m. CDT—concerning the Petition. (App. 98-100.) The agenda attached to Ms. Hicks's 3:32 a.m. email stated that the meeting was for (i) "[d]iscussion and consideration of [the Petition];" (ii) an executive session on the same issue; and (iii) "[d]iscussion and consideration of proposed final administrative order in Board v. TigerSwan." (App. 100.)

[¶24] Ms. Hicks's email provided no information as to why Appellants were being provided notice of a meeting in the middle of the night and only hours before it was to commence. (App. 98-100.) The Board refused to include this email in the record on appeal to the District Court. (*See* Dkt. No. 58.)

F. The Board Denies the Petition and Closes the Administrative Action But Refused to State Grounds for Its Decisions on the Record

[¶25] At 9:00 a.m. CDT on October 12, 2020, the Board held a virtual meeting via Zoom. At the meeting, over Appellants' objections, the Board voted on and issued oral orders (i) denying the Petition and (ii) closing and dismissing the Administrative Action. (App. 90-91.) The Board also arbitrarily reversed its position on referring the Petition to the ALJ, refusing to allow the ALJ to consider the Petition because "the Board did not believe the ALJ had the decision-making power to rule in this situation." (App. 90 at ¶ 3.)

With respect to the Board's denial of the Petition, the extent of the Board's reasoning for the denial was its counsel statements that the decision was "not substantive," but "jurisdictional" and "procedural." (App. 90-91.) At the time, the Board provided no further clarity or justification regarding the reasons for its decision. (*Id.*) At the same meeting, the Board voted to close and dismiss the Administrative Action. (*Id*.)

[¶26] At the October 12 meeting, Appellants' counsel informed the Board and its counsel—as it has done repeatedly since June 2020, and as Mr. Rogneby acknowledged—that the Board is in possession of inadvertently produced attorney-client privileged documents. (*Id*.) Appellants' counsel reiterated the Board's legal and ethical obligation to return inadvertently produced privileged materials in the Board's possession and requested the Board provide its basis for keeping the documents. (*Id.*) Both the Board and Ms. Hicks refused to commit to returning privileged documents in its possession and refused to state on the record any legal basis for maintaining Appellants' privileged documents. (*Id.*)

G. The Board Issues a Written Order Denying the Petition

[¶27] On October 30, 2020, the Board issued a written order denying the Petition. The Board did not serve its notice of entry of the Board Order on Appellants until November 12, 2020, the day after Appellants filed its original notice of appeal to the District Court. (App. 59-60.)

[¶28] The Board declined ALJ Hogan's offer to take up the Petition, asserting that having the ALJ consider the Petition "would impair the prompt conduct of the proceeding in that" the Board had reached a settlement with TigerSwan, "the case was effectively closed," and "continuation of the administrative case could detrimentally affect the parties' settlement and conclusion of the case." (Board Order ¶ 4.) According to the Board, intervention therefore was not proper pursuant to N.D.C.C. § 28-32-28. (*Id.*)

[¶29] The Board determined that "it was not the appropriate body to address this matter, which includes private contract disputes between two private parties as it falls outside of its statutory authority." (*Id.* at ¶ 5.) The Board further determined that "the records in its possession are subject to the open records law," the Board "is required by law to follow record retention requirements under N.D.C.C. § 54-06-07," and thus that "it could not address or consider the relief sought by [Energy Transfer], namely return of the discovery documents, without violating the law" and "did not have the authority to properly address, or agree to stipulate to any action concerning the documents without risking significant liability, and, therefore, would need a court order before it took any action with respect to the documents in its possession." (*Id.* at ¶ 6.)

H. Energy Transfer Files a Complaint Against the Board and TigerSwan

[¶30] On October 13, 2020, Energy Transfer filed a complaint against the Board and TigerSwan, alleging claim and delivery (replevin) pursuant to N.D.C.C. Ch. 32-07 and conversion against the Board, breach of contract against TigerSwan, and an application for a temporary restraining order and preliminary and permanent injunction against the Board and TigerSwan. Case No. 08-2020-cv-02788, Dkt. No. 2. The case remains pending before the Honorable Cynthia Feland in Burleigh County District Court (the "Feland Action"). The Energy Transfer Documents are subject to a restraining order entered by Judge Feland, which prohibits the Board and TigerSwan from disclosing the documents pending determination of that action. Feland Action, Dkt. No. 102. The parties recently completed briefing on motions for summary judgment, which remain pending.

[¶31] Notably, in summary judgment briefing, the Board did not dispute evidence submitted by Energy Transfer establishing that the Board's counsel repeatedly admitted that the Energy Transfer Documents contain materials that are, in the Board's own words,

"privileged," "outside the scope of written discovery," "unrelated to the Board's investigation," and "produced in error." Feland Action, Dkt. Nos. 268, 282, 284-288, 290, 337. Nor did the Board dispute evidence that its counsel repeatedly admitted that documents that were privileged, irrelevant, and mistakenly produced were, in the Board's own words, "not properly part of the Board's file," "not subject to an open records request," and "may be purged from the Board's records" and returned to Energy Transfer. *Id.*

[¶32] The Board also made a critical concession that privileged, confidential, and inadvertently produced documents are not "public records" and can be returned pursuant to the North Dakota rules:

> The Open Records Act and Document Retention Law do not conflict with N.D.R. Civ. P. 26 and N.D.R. Prof. C. 1.15(d). . . . These statutes are not in conflict and are easily read together. For example, ***if TigerSwan had disclosed an unrelated medical record of one of its employees to the Board in discovery, the Board would return that document because it is not related to the proceeding (the adjudication of TigerSwan's alleged unlicensed activity in North Dakota) and not a public record.*** . . .

Feland Action, Dkt. No. 337 at ¶ 28 (emphasis added).

I. Energy Transfer Appeals the Board Order

[¶33] On November 11, 2020, Energy Transfer filed a notice of appeal before the District Court, and on November 30, 2020, shortly after the Board served its written order, Energy Transfer filed an amended notice. (Dkt. Nos. 1, 7.) The Board certified an incomplete record on appeal that did not contain any correspondence between counsel for Energy Transfer and the Board, including (1) Mr. Rogneby's September 28, 2020 email agreeing to keep the Administrative Action open and (2) Ms. Hicks's email noticing the October 12, 2020 meeting before the Board. (*See* App. 46-96 (Board record); App. 97 (September 28 email); App. 98-100 (October 12 email).) Accordingly, with its principal

brief, Energy Transfer filed a motion to complete the record. (*See* Dkt. No. 42.)

[¶34] On June 23, 2020, District Court Judge Reich issued the Order dismissing the appeal, holding that Energy Transfer lacked standing to appeal because it was "not a party under the [Administrative Agencies Practice Act ('AAPA')]" and (1) was not "in any way, directly interested in the underlying administrative action," (2) was "not factually aggrieved by the decision of the Board," and (3) "did not intervene or participate in the administrative action." (Order ¶ 33.) In the alternative, the District Court affirmed the Board's decision that (1) Energy Transfer sought to intervene too late—after the parties had reached settlement—and thus that the Board's ruling that intervention would impair the prompt and orderly conduct of proceedings was "in accordance with the facts and the law in this matter" (Order ¶ 28) and (2) "the Board's determination that it could not properly and/or lawfully address the relief sought by the Petition . . . is in accordance with the law" and "is supported by the Board['s] findings of fact and . . . by the open records laws and record retention laws" (Order ¶¶ 30-32). The District Court also denied Energy Transfer's motion to complete the record. (Order ¶¶ 9-16.)

[¶35] The District Court did not reach the question of whether the North Dakota open records and document retention laws are applicable to the documents at issue, noting that these questions are pending in the Feland Action. (Order ¶¶ 30-32.)

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT ENERGY TRANSFER LACKED STANDING TO APPEAL THE BOARD'S DENIAL OF THE PETITION

[¶36] "Standing is a question of law, which is reviewed de novo on appeal." *Minn-Kota Ag Prod., Inc. v. N. Dakota Pub. Serv. Comm'n*, 2020 ND 12, ¶ 10, 938 N.W.2d 118, 123. The District Court made a fundamental error by applying the wrong legal

standard in evaluating Energy Transfer's right to appeal that order. The District Court held that Energy Transfer was "not a party under the AAPA and do[es] not have standing to appeal" the Board's order denying intervention because Energy Transfer (1) was not "in any way, directly interested in the underlying administrative action"; (2) was "not factually aggrieved by the decision of the Board"; and (3) "did not intervene or participate in the administrative action." (Order ¶ 33.)

[¶37] Simply, with respect to "standing," the District Court applied the wrong law by importing the legal test for standing to challenge the merits of a decision to an order on a petition to intervene under N.D.C.C. § 28-32-28.[2] While the three-factor test outlined by the District Court is appropriate to assess a movant's standing to appeal the ***merits*** of a substantive agency decision, it is not applicable to judicial review of an order denying a ***petition to intervene***. Neither intervention under N.D.C.C. § 28-32-28 nor an appeal of an administrative body's denial of a petition to intervene require a petitioner/movant to be a "party" under the AAPA or to satisfy the three-factor test outlined by the District Court. Rather, under North Dakota law, a non-party is automatically entitled to appeal from an order denying intervention because that order affects the "substantial right" of party to participate in an action. As this Court has explained:

> A person not a party who petitions to intervene is entitled to appeal from the order denying his application, because the application initiates a special proceeding which is terminated

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[2] N.D.C.C. § 28-32-28 is substantially similar to N.D. R. Civ. P. 24, which governs intervention in civil proceedings. *Compare* N.D.C.C. § 28-32-28 *with* N.D. R. Civ. P. 24. North Dakota courts look to state law interpreting Rule 24, as well as federal law interpreting the corresponding Fed. R. Civ. P. 24, when interpreting N.D.C.C. § 28-32-28. *See Minn-Kota Ag Prod., Inc.*, 2020 ND 12 at ¶¶ 35-40, 938 N.W.2d at 130 (looking to case law interpreting Rule 24 to interpret N.D.C.C. § 28-32-28); *Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co.*, 2011 ND 154, ¶¶ 32-36, 801 N.W.2d 677, 687.

> by the order. The petitioner is not a party to the action, and his only opportunity for review is an appeal from the order, which is a final order affecting a substantial right . . . .

Wyatt v. R.D. Werner Co., Inc., 524 N.W.2d 579, 580 (N.D. 1994); *see also Quick v. Fischer*, 417 N.W.2d 843, 844-45 (N.D. 1988) (reviewing order denying motion to intervene). Energy Transfer is not aware of, and has not found, a single North Dakota case imposing the three-factor standing analysis in the context of a petition to intervene.

[¶38] Indeed, as this Court has explained, North Dakota's AAPA, based on an early draft of the Model State Procedure Act, "intended to confer upon would-be intervenors the right to seek judicial review if their petitions for intervention were denied." *Shark v. U.S. W. Commc'ns., Inc.*, 545 N.W.2d 194, 197 n.1 (N.D. 1996) (quoting Model State Administrative Procedure Act, 1981 Act § 1–102, 15 U.L.A. 1, 11, 13 (1990).).[3] *Minn-Kota Ag Products, Inc.*, cited by the Board in its brief on appeal to the District Court, is in accord. 2020 ND 12 at ¶¶ 5-28, 938 N.W.2d at 123-27. The threshold issue in that case was whether the appellant had standing to seek review of the ***merits*** of the agency's decision, *id.*, which the Court then reviewed, *id.* at 127-30. The Court imposed no such three-factor requirement in reviewing the agency's denial of the appellant's ***petition to intervene***. *Id*. at 131-37.

[¶39] This distinction evident in North Dakota law is in line with the well-established rule across the country that a would-be intervenor whose petition to intervene

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[3] As this Court noted, later revisions removed the clause "properly seeking and entitled" from the definition of "party" because "party" for purposes of that section of the statute was intended to address persons considered a "party to an administrative proceeding," not "the question [of] whether a person is entitled to judicial review" and thus that clause, intended to provide for judicial review of the denial of a petition to intervene, was misplaced. *Id.* The revisions thus do not affect the rule that a would-be intervenor is entitled to judicial review of a denial of a petition to intervene.

is denied has "standing to appeal that denial, independent of whether it would have standing to appeal on the merits." *Idaho Conservation League v. U.S. Forest Serv.*, No. 20-35033, 2021 WL 3758320, at *1 (9th Cir. Aug. 25, 2021); *see also City of Cleveland v. Ohio*, 508 F.3d 827, 837 (6th Cir. 2007) (rule is that a party unsuccessfully seeking to intervene may appeal only from the order denying intervention); *Scammon Bay Association, Inc. v. Ulak*, 126 P.3d 138 (Alaska 2005) (similar); *In re Associated Press*, 162 F.3d 503 (7th Cir. 1998) (similar).[4] Here, Energy Transfer is not appealing any ruling by the Board other than its denial of its petition to intervene and thus is entitled to judicial review of that decision.

II. THE DISTRICT COURT ERRED IN HOLDING THAT ENERGY TRANSFER WAS NOT DIRECTLY INTERESTED AND FACTUALLY AGGRIEVED IN THE ADMINISTRATIVE ACTION

[¶40] Even assuming, arguendo, that the District Court applied the correct standard (which it did not), the District Court erred in finding that Energy Transfer was not a "party" under the AAPA and that it was not directly interested, factually aggrieved, and did not participate in the Administrative Action. (Order ¶¶ 23, 27.) As an initial matter, this Court has rejected a "narrow or limited construction" of who should be a party for purposes of appeal:

> An administrative agency challenging the standing of those seeking a review of its decision . . . is a deliberate effort to prevent a judicial review of the agency's decision, which we do not look favorably upon. We have said a narrow or limited construction should not be placed on who may be a party for purposes of appeal or review: The question of who is a proper party should not be resolved on strict technical grounds which could result in the public being denied the

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[4] *See also* 15A Charles Alan Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure § 3902.1 (2d ed. April 2021 update) ("Persons denied intervention in the trial court clearly have standing to appeal the denial of intervention, but if intervention was properly denied have no greater right to appeal the judgment entered between others than other nonparties.") (collecting cases).

> opportunity to question the acts of the governing agency, body or board, as the situation may be. Any doubt on the question of standing involving a decision by an administrative body should be resolved in favor of permitting the exercise of the right to appeal by any person aggrieved in fact.

Minn-Kota Ag Products, 2020 ND 12 at ¶ 11, 938 N.W.2d at 124 (citations and quotation marks omitted).

[¶41] Further, Energy Transfer readily satisfies the three-factor test. First, Energy Transfer is directly interested in the Administrative Action because TigerSwan produced documents belonging to Energy Transfer to the Board in the Administrative Action. Second, Energy Transfer was factually aggrieved by a decision of the Board in that it was denied its right to seek a protective order—a right that is well-established under the case law, *see infra* Section III. The District Court found that Energy Transfer was not factually aggrieved by the Board's decision because its rights will be determined in the Feland Action. (Order ¶ 27.) But the fact that another case is pending does not mean that Energy Transfer was not factually aggrieved; it cannot be disputed that Energy Transfer had a right to intervene in the Administrative Action and was denied that right.[5] Third, Energy Transfer participated in the proceedings before the Board. Energy Transfer regularly asserted its position concerning the Energy Transfer Documents in correspondence with the Board's counsel and in meetings held by the Board and filed the Petition while the Administrative Action was pending. *See supra* §§ C-G. Contrary to the District Court's

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[5] In the case before Judge Feland, Energy Transfer seeks an order directing the Board to return the documents through claim and delivery and conversion, as well as an injunction prohibiting the Board from sharing the documents to the public. The Board is attempting to use the District Court's dismissal of this appeal to obtain dismissal of that case without adjudication of the merits.

conclusion, one "need not have been named as a party or have actively engaged in the proceedings to have participated." *Minn-Kota Ag Products*, 2020 ND 12 at ¶ 21, 938 N.W.2d at 126. Rather, "minimal participation is sufficient to have adequately participated." *Id.* (non-party's voluntary submission of a document in the record was sufficient although non-party did not formally intervene in the action).

[¶42] The District Court's ruling that Energy Transfer lacked standing to appeal was thus contrary to law and should be reversed.

III. THE DISTRICT COURT ERRED IN AFFIRMING THE BOARD'S RULING THAT INTERVENTION WOULD IMPAIR THE ORDERLY AND PROMPT CONDUCT OF PROCEEDINGS

[¶43] "Intervention has historically been liberally granted in North Dakota." *Brigham Oil & Gas, L.P.*, 2011 ND 154 at ¶ 40, 801 N.W.2d at 689 (*quoting Eichhorn v. Waldo Twp. Bd. of Sup'rs, Cty. of Richland*, 2006 ND 214, ¶ 13, 723 N.W.2d 112, 116).[6] N.D.C.C. § 28-32-28, the statute governing administrative intervention, provides:

> 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. . . .

Accordingly, a movant must establish: (1) its legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding and (2) intervention will not impair the orderly and prompt conduct of the proceeding.

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[6] North Dakota courts look to state and federal law interpreting Rule 24, when interpreting N.D.C.C. § 28-32-28. *See supra* Note 2.

[¶44] There can be no question "persons affected by the disclosure of allegedly privileged materials" have sufficient legal interests such that they "may intervene in pending . . . proceedings and seek protective orders." *United States v. RMI Co.*, 599 F.2d 1183, 1186 (3d Cir. 1979) ("owner of exhibits could intervene in . . . proceeding to object to their disclosure on a ground of privilege, even when the exhibits were in the possession of a third party") (citing *Perlman v. United States*, 247 U.S. 7 (1918)); *see also Fed. Trade Comm'n v. Peabody Energy Corp.*, No. 4:20-CV-00317-SEP, 2020 WL 1332095, at *1 (E.D. Mo. Mar. 23, 2020) (prospective intervenor established standing where it asserted that permitting disclosure of its competitively sensitive information in the action in which it was seeking to intervene would cause it injury). Indeed, the Board has never disputed that the first requirement for intervention was satisfied.

[¶45] Rather, the Board denied intervention on grounds that it would "impair the prompt conduct of the proceeding in that a settlement had already been reached and the case was effectively closed." (Board Order ¶ 4.) According to the Board, "holding the administrative action open when it had already been settled by the parties, to allow additional litigation concerning whether certain documents are confidential pursuant to a private contract between private parties, had no bearing on the merits of the administrative action." (*Id*.) The District Court affirmed the Board's decision, concluding that Energy Transfer sought to intervene too late—after the parties had reached settlement—and thus that the Board's ruling was "in accordance with the facts and the law in this matter." (Order ¶ 28.) This Court reviews an agency's decision on the question of whether a party has a right to intervene under a *de novo* standard, and factual findings for abuse of discretion. *See Minn-Kota Ag Products, Inc.*, 2020 ND 12 at ¶¶ 35-40, 938 N.W.2d at 130. The

District Court's ruling is contrary to law, and should be reversed, for a number of reasons.

[¶46] First, the District Court erred as a matter of law in ruling that intervention was properly denied, and would impair the orderly and prompt conduct of proceedings, because Energy Transfer sought to intervene after the Board and TigerSwan reached settlement. **It is undisputed that the Administrative Action was open when Energy Transfer filed the Petition**. (*See supra* §§ C-D.) No rule exists, as the District Court concluded, that a motion to intervene is untimely where a settlement has been reached. In fact, the law is the opposite: North Dakota courts recognize that ***even "a post-judgment motion to intervene is not too late."*** *Brigham Oil & Gas, L.P.*, 2011 ND 154 at ¶ 40, 801 N.W.2d at 689 (emphasis added). It is reversible error to deny intervention based on the mere fact that a ***judgment*** has been entered—let alone as here, where it is undisputed that the action remained open. *Quick*, 417 N.W.2d at 845 ("[T]he trial court erred in denying intervention on the ground that a motion after judgment is too late . . . ."). Here, the District Court's ruling turned primarily on the fact that the Board and TigerSwan had reached a settlement. (Board Order ¶ 4.) It should be reversed on this basis alone.

[¶47] Second, the District Court erred by failing to consider the limited purpose of Energy Transfer's proposed intervention. The proposed intervention was narrowly tailored for the limited purpose of seeking a protective order. Intervention to address such ancillary, administrative issues relating to discovery could not possibly impair the orderly and prompt conduct of proceedings or affect the settlement agreement, which was final and executed before the Petition was filed. (*See* App. 51-55.) Indeed, a non-party may intervene to address such issues even after a case is closed, and where that non-party could have intervened earlier, because there is little prejudice to existing parties and no

impairment to the conduct of proceedings from the intervenor's "delay in intervening" where intervention "pertains to a particularly discrete and ancillary issue" such as the "issue of the protective order, and not to reopen the merits." *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 785-86 (1st Cir. 1988). This is because "the merits of the case have been already concluded and are no longer subject to review." *Id.*

[¶48] Precisely for this reason, courts in the Eighth Circuit and across the country have determined that post-settlement or post-judgment intervention for the purpose of managing documents does not impair settlement and have allowed such intervention as a matter of course. *See, e.g.*, *Dorsett v. Cty. of Nassau*, 283 F.R.D. 85, 93 (E.D.N.Y. 2012) ("intervention by the [movant] for the limited purpose of enforcing the Confidentiality and Protective Orders will not impede the progress of the litigation, as this case has already been settled and closed"); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.,* 998 F.2d 157, 161 n.5 (3d Cir. 1993) (intervention "for the limited purpose of modifying a protective order" is proper "even after the underlying dispute between the parties has long been settled"); *Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, No. CIV 04-4048-(DWF/FLN), 2006 WL 3079410, at *2–3 (D. Minn. Oct. 24, 2006) (intervention permitted for "limited purpose" of modifying a protective order; intervention would not jeopardize settlement).[7] The District Court's affirmance of the Board's ruling that "continuation of the administrative case could detrimentally affect the parties' settlement and the conclusion of the case" (Order ¶ 28; Board Order ¶ 4) is thus contrary to law.

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[7] While North Dakota state courts have not reached this issue, there is a "growing consensus" among the federal courts of appeals that intervention for limited ancillary issues such as enforcing and challenging confidentiality order "may take place long after a case has been terminated." *Cardiac Pacemakers, Inc.*, 2006 WL 3079410, at *2–3.

[¶49] Third, the District Court erred by disregarding the repeated assurances by the Board's counsel that it would return privileged, irrelevant, and inadvertently produced documents and keep the Administrative Action open to resolve document concerns. (*See supra* §§ C-D.) The District Court determined that "[r]egardless of any representations made by counsel . . . Appellants were required to act to protect their legal interests," and Energy Transfer "appear[s] to have created the current situation by not formally addressing the matter until after the administrative action settled." (Order ¶¶ 24-25.)

[¶50] The District Court erred. Any untimeliness in filing (which Appellants dispute) was a direct result of Energy Transfer counsel's good faith reliance on the repeated assurances of the Board's counsel that the Board would keep the Administrative Action open to resolve Appellants' concerns regarding the documents and the parties' attempts to resolve the dispute without formal intervention. Courts routinely excuse untimeliness under these circumstances. *See, e.g.*, *Allianz Ins. Co. v. Surface Specialties, Inc.*, No. CIV.A.03-2470-CM-DJW, 2005 WL 44534, at *1 (D. Kan. Jan. 7, 2005) (delay excused where movant relied in good faith upon the "conduct and statements of [opposing] counsel" and delay was a result of "exhaustive efforts . . . to resolve the dispute" before filing a motion); *Hartford Fire Ins. Co. v. P & H Cattle Co.*, No. CIV A 05-2001-DJW, 2008 WL 5046345, at *2 (D. Kan. Nov. 24, 2008) (delay excused where it resulted from parties' attempts to resolve the dispute without motion and where non-movant received notice that movant intended to file motion to compel and thus was not prejudiced); *Flathead-Michigan I, LLC v. Penninsula Dev., L.L.C.*, No. 09-14043, 2011 WL 891191, at *3 (E.D. Mich. Feb. 18, 2011) (vacating entry of default judgment where counsel delayed filing claim in reliance on "opposing counsel's assurances that he would be provided" with certain

information concerning the claim). Moreover, as argued before the District Court, the Board should be equitably estopped from arbitrarily reversing its position. The Board knew its representations were being relied upon by Appellants, and it cannot now be permitted to back away from its promises. *Cf. Blocker Drilling Canada, Ltd. v. Conrad*, 354 N.W.2d 912, 920-21 (N.D. 1984) (agency equitably estopped from changing its position with respect to a tax issue where it conveyed the impression that a certain method of valuation was acceptable, knowing that the representation would be relied upon).

[¶51] Moreover, the District Court's holding that Energy Transfer "should have" intervened as soon as it became aware of TigerSwan's production of the documents fails to consider the repercussions to Energy Transfer of such intervention and the Catch-22 intervention posed for Energy Transfer. (Order ¶ 24.) Specifically, by filing its Petition, Energy Transfer was forced to disclose publicly that the Board was in possession of the Energy Transfer Documents. This public disclosure led virtually immediately to requests for those documents under the North Dakota open records laws, and additional lawsuits are now pending regarding the application of that statute to these documents. By holding that Energy Transfer should have intervened earlier—which is not a requirement of the statute or any case law—the Court ignores the sensitive position that TigerSwan's inappropriate production put Energy Transfer in by requiring it to alert the world to the issue, when the very act of alerting (moving to intervene) harmed Energy Transfer. Moreover, the District Court entirely excuses the Board's reneging on its agreement with respect to the documents. (*Id*.) The District Court's holding essentially means that litigants dealing with state agencies cannot rely on in any way the representations of counsel for state agencies. For these reasons, the District Court erred by finding that the Petition was too late and that

intervention would impair the orderly and prompt conduct of proceedings.

IV. THE CASE SHOULD BE REMANDED TO THE ALJ WITH INSTRUCTIONS TO GRANT THE PETITION

[¶52] Energy Transfer requests that the case be remanded to the ALJ with instructions to grant the Petition. The Court need not reach the other issues presented in this case if it determines that (1) Energy Transfer has standing to appeal and (2) intervention would not impair the prompt and orderly conduct of proceedings. While the District Court did not reach the issue of whether the ALJ has authority to grant the relief sought by the Petition, the ALJ plainly has authority. The ALJ "may exercise any authority granted by law or rule," and "may be designated to preside over the entire administrative proceeding." N.D.C.C. § 28-32-27(7).

[¶53] As discussed above, intervention is routinely permitted to seek or enforce confidentiality protections in a protective order. Such discrete and ancillary purposes cannot impair the orderly conduct of proceedings. Moreover, the AAPA and the North Dakota Rules of Civil Procedure plainly provide the ALJ with statutory authority to enter protective orders and order the return of documents. N.D.C.C. § 28-32-33(2) (hearing officer "may issue . . . discovery orders, and protective orders in accordance with the North Dakota Rules of Civil Procedure"); N.D. R. Civ. P. 26(c) (providing for protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including to protect confidential information); N.D. R. Civ. P. 26(b)(5)(B) (requiring the prompt return or destruction of "information . . . produced in discovery that is subject to a claim of privileged or of protection as trial-preparation material").

[¶54] The Board's refusal to allow the ALJ to consider the Petition—particularly after the Board's counsel assured Energy Transfer that it was keeping the Administrative

Action open to permit the ALJ to do so—is contrary to law. Thus, the case should be remanded to the ALJ so that Energy Transfer may file a motion for a protective order.

V. THE DISTRICT COURT ERRED IN AFFIRMING THE BOARD'S RULING THAT THE BOARD COULD NOT LAWFULLY ADDRESS THE RELIEF SOUGHT BY THE PETITION

[¶55] In its order, the District Court held that "the Board's determination that it could not properly and/or lawfully address the relief sought by the Petition . . . is in accordance with the law" and "is supported by the Board['s] findings of fact and . . . by the open records laws and record retention laws." (Order ¶¶ 30-32.)[8] The District Court's holding was devoid of any reasoning, explanation, or analysis of how these determinations are in accordance with the law or supported by the Board's factual findings. (*Id*. at ¶ 31.) Remand is proper because this Court cannot perform its appellate function where the District Court does not set forth its reasoning. *Beckstrand v. Beckstrand*, 2017 ND 20, ¶¶ 14-15, 890 N.W.2d 213, 218 (remanding to district court for explanation of its ruling). Moreover, the Court need not reach the issue of whether the ***Board*** had authority to address the relief sought by the Petition if it concludes, as it should, that the ***ALJ*** has authority to grant the relief sought by the Petition.

[¶56] But should the Court reach this issue, the District Court's conclusion that the Board lacked authority to address the relief sought by the Petition is legally and factually incorrect. The Board erroneously concluded, and the District Court erroneously affirmed, that the Board "was not the appropriate body to address this matter, which includes private contract disputes between two private parties." (Board Order ¶ 5; Order

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[8] The District Court did not decide whether the documents were "records" within the scope of the open records and document retention laws, noting that this question will be decided in the Feland Action. (Order ¶ 32.)

¶ 31.) The dispute is not a mere contract dispute between private parties outside of its statutory authority; the Petition sought a protective order for documents disclosed by TigerSwan to the Board in the Administrative Action—which the Board is authorized to enter pursuant to the discovery rules described above.[9]

[¶57] The Board's further conclusion that it "could not address or consider the relief sought by [Energy Transfer], namely return of the discovery documents, without violating the [open records] law" (Board Order ¶ 6) is also belied by the Board's admissions that documents that were privileged, irrelevant, or inadvertently produced could be returned to Energy Transfer. (*See supra* §§ C-D.) Further, N.D. R. Civ. P. 26(b)(5)(b) and N.D. R. Prof. C. 1.15(d) ***require*** the Board's counsel to return privileged documents and documents belonging to Energy Transfer without regard to whether a protective order is in place.

[¶58] The Board's conclusion is also contradicted by statute and the regular practice of the State in litigation. The State of North Dakota regularly agrees to confidentiality orders in connection with discovery obtained from private parties, and courts regularly enter such orders. (*See, e.g.*, App. 101-46.) Protective orders entered by the State routinely allow parties to designate materials produced in discovery as "Confidential"; routinely bar parties (including the State) from disseminating materials obtained in discovery beyond a strictly limited set of interested parties, *e.g.,* experts, attorneys, and court reporters; and routinely require parties (including the State) to destroy documents designated Confidential by a producing party at the close of litigation. (*See*

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[9] "Hearing officer" refers to both the administrative law judge or a person or persons presiding for the agency, depending on context. *See* N.D.C.C. § 28-32-27.

App. 102-03 at ¶ 3 ("Confidential Information . . . may only be used by the other parties and their attorneys for purposes of this litigation and no other purposes, and shall be treated by the parties as confidential . . . ."); App. 109 at ¶ 22 ("Within sixty (60) days after receiving notice of the entry of a final non-appealable order, judgment, or settlement with respect to all claims in this Action, all parties and non-parties having Confidential documents or information shall, absent a court order or written agreement to the contrary, (a) return such documents, information and all copies thereof to counsel for the designating or producing party or (b) destroy such information and materials . . . ."); App. 113 at ¶ 3, 117-18 at ¶ 8 (similar); App. 123 at ¶ 5, 124 at ¶ 10 (similar); App. 131 at ¶ 5, 137-38 at ¶ 18 (similar); App. 145 at ¶ 5, 146 at ¶ 10 (similar).)

[¶59] The Board's recent admissions in the Feland Action further demonstrate that the Board's ruling is without basis in law. In that case, the Board's counsel admitted that documents that are privileged, confidential, and unrelated to its investigation of TigerSwan can be returned and are "not [] public record[s]" pursuant to North Dakota rules:

> The Open Records Act and Document Retention Law do not conflict with N.D.R. Civ. P. 26 and N.D.R. Prof. C. 1.15(d). . . . These statutes are not in conflict and are easily read together. For example, ***if TigerSwan had disclosed an unrelated medical record of one of its employees to the Board in discovery, the Board would return that document because it is not related to the proceeding (the adjudication of TigerSwan's alleged unlicensed activity in North Dakota) and not a public record.*** . . .

Feland Action, Dkt. No. 337 at ¶ 28 (emphasis added). The Board's determination that it lacked authority to enter the relief sought by the Petition is erroneous and the District Court's conclusory affirmance of the Board's determination should be reversed.

VI. THE DISTRICT COURT DID NOT REACH ENERGY TRANSFER'S DUE PROCESS CLAIM

[¶60] The District Court did not reach Energy Transfer's due process claim. Thus, if the Court reverses the District Court's ruling that Energy Transfer lacks standing to appeal the Board's decision, the case should be remanded for consideration of Energy Transfer's due process claim, as this is an independent ground for reversal. Energy Transfer argued, in proceedings below, that the Board failed to accord Appellants a fair hearing, in violation of Appellants' constitutional due process rights and the provisions of N.D.C.C. Ch. 28-32. The AAPA expressly provides that, with respect to hearings not involving a complaint against a specifically named individual:

> [t]he administrative agency shall designate a time and place for the hearing and shall serve a copy of the notice of hearing upon all the parties in the manner allowed for service under the North Dakota Rules of Civil Procedure ***at least twenty days*** before the hearing.

N.D.C.C. § 28-32-21(3)(b) (emphasis added).

[¶61] The AAPA further provides:

> to the extent necessary for full disclosure of all relevant facts and issues, the person presiding at the hearing shall afford to all parties . . . the opportunity to respond, present evidence and argument, conduct cross-examination and submit rebuttal evidence.

N.D.C.C. § 28-32-35.

[¶62] Due process requires a participant in an administrative proceeding to be given notice of the general nature of the questions to be heard, and an opportunity to prepare and be heard on those questions. *Morrell v. N.D. Dep't of Transp.,* 1999 ND 140, ¶ 9, 598 N.W.2d 111, 114; *see also* N.D.C.C. § 28-32-21. Basic notions of fundamental fairness also require such person to be adequately informed in advance of the questions to

be addressed at the hearing so the person can be prepared to present evidence and arguments on those questions. *Morrell,* 1999 ND 140 at ¶ 9, 598 N.W.2d at 114.

[¶63] As set forth above, the Board failed to provide twenty days' notice of the hearing and did not serve the notice by an appropriate, permitted process. Rather, the Board provided notice of the October 12 hearing via an email sent at 3:32 a.m. on October 12, just hours before the 9:00 a.m. CDT start time. (App. 98-100.) This was not proper or sufficient notice under the law. *See* N.D.C.C. § 28-32-21(3)(b). As a result, Appellants were deprived of a meaningful opportunity to prepare and present evidence and arguments related to the issues, as the AAPA and case law require. *See* N.D.C.C. § 28-32-35; *Morrell,* 1999 ND 140 at ¶¶ 9-14, 598 N.W.2d at 114–15 (due process violated where agency did not provide sufficient notice of the issues to be addressed at a hearing).

[¶64] The District Court determined, in the context of Appellants' motion to complete the record, that the October 12 hearing was not a hearing, but a special meeting of the Board. (Order ¶ 13.) This cannot be correct. It cannot be correct that a meeting of the Board, where the Petition was argued and decided, is not a hearing. Even if this determination were correct (which it is not), this only means that the Board did not provide a hearing at all—violating Appellants' due process rights. Accordingly, the District Court's decision should be reversed and the case remanded for proceedings consistent with the requirements of the AAPA.

VII. THE DISTRICT COURT ERRED BY DENYING ENERGY TRANSFER'S MOTION TO COMPLETE THE RECORD

[¶65] The Board certified an incomplete record. The District Court denied Energy Transfer's motion to require the Board to complete the record with (1) Mr. Rogneby's September 28, 2020 email to Energy Transfer (App. 97) and (2) Ms. Hicks's email noticing

the October 12, 2020 meeting before the Board (App. 98-100) (together, the "Excluded Documents"). These Excluded Documents were critical to appreciate and understand what occurred in the Administrative Action, which was carried on both before the ALJ and independently before the Board after Appellants filed the Petition.

[¶66] Pursuant to N.D.C.C. § 28-32-44(4), the agency's record of proceedings should include, among other things: (i) "[n]otices of all proceedings"; (ii) "[a]ny prehearing notices, transcripts, documents or orders"; and (iii) "[a]ny motions, pleadings, briefs, petitions, requests and intermediate rulings." Where the Board submits an abstract of the record, it is "to be supplemented by those portions of the record requested to be submitted by the appellant . . . ." N.D.C.C. § 28-32-44(7). This Court "may permit amendments or additions to the record filed by the administrative agency in order to complete the record." N.D.C.C. § 28-32-44(8).

[¶67] The Board's counsel refused to add the Excluded Documents to the record, stating that they fall outside of what is considered the agency record of proceedings and were not considered by the Board. Appellants disagree. First, Ms. Hicks's October 12 email clearly constitutes a pre-hearing notice or notice of proceeding that should be included in the record. But the District Court determined that the email was not a pre-hearing notice because "the Board did not hold a hearing" but rather "a special meeting." (Order ¶ 13.) This is incorrect. The Board met to consider the Petition, argument was heard, and the Petition was decided. The fact that the Board called the hearing a "special meeting" should not excuse it from including the 3:32 a.m. middle of the night notice in the record. Indeed, the Board included the minutes of meetings relating to the Petition, and Energy Transfer's concerns regarding the documents, in the record precisely because they

are hearings. *See* App. 46-47; App. 61-96; N.D.C.C. § 28-32-44(4).

[¶68] Second, the District Court's conclusion that the September 28 email "does not fall under the definition of a record" because "[c]orrespondence between counsel concerning negotiations is not an intermediate ruling" and the email was "not relevant or material to the subject matter in this case" is erroneous. (Order ¶¶ 14-15.) The Board's counsel's email to Appellants agreeing to keep the Administrative Action open relates to a critical issue in this appeal. The Board cannot legitimately claim that it did not consider its prior statements regarding the issue at the heart of this appeal or that the communication was irrelevant to its decision. In fact, the minutes of the October 5, 2020 hearing evidence that the specific representation—that the Board promised to keep the Administrative Action open so Energy Transfer could be heard—was discussed at the hearing. (App. 85-86 at ¶ 6.) Further, the statement constitutes at the very least an "intermediate ruling" by the Board. N.D.C.C. § 28-32-44(4)(d). The email also falls into the broad category of pre-hearing "document[s]." N.D.C.C. § 28-32-44(4)(c).

[¶69] The District Court erred by construing "records" too narrowly. (Order ¶¶ 14-15.) The definition of "agency record of proceedings" is broader than those documents that are presented as a result of a "formal hearing":

> The 'record of proceedings before the agency' consists of a wide range of documents, and . . . is not limited to documents presented as a result of a formal hearing. Rather, the 'agency record of proceedings' may include information not presented at a formal hearing.

Sprunk v. N. Dakota Workers Comp. Bureau, 1998 ND 93, ¶ 9, 576 N.W.2d 861, 865 (citations omitted). It also may include documents such as correspondence that were not considered by the Board nor presented to the ALJ. *Id.* Appellants submit that the definition of "agency record of proceedings" requires the Board to include the Excluded Documents

in the certified record, and request that the District Court's decision be reversed.

CONCLUSION

[¶70] Based on the foregoing, Energy Transfer respectfully requests that this Court reverse the Order and Judgment.

ORAL ARGUMENT REQUESTED

[¶71] Energy Transfer requests oral argument. Oral argument is appropriate because of the complexity of the issues presented for review and the importance of the legal issues being addressed, including whether an agency's denial of a non-party's petition to intervene in an administrative action is appealable.

Dated: November 19, 2021

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Certificate of Compliance

The undersigned, as attorneys for the Appellant in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with a plain, roman type style in size 12-point font and that the brief totals 38 pages.

Dated: November 19, 2021

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