

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Otter Tail Power Company/Montana-Dakota
Utilities Co. 345kV Transmission Line-Jamestown
to Ellendale Public Convenience & Necessity

Case No. PU-24-91

**PETITIONERS' RESPONSE TO APPLICANTS' OPPOSITION TO
AMENDED PETITION TO INTERVENE, RESCIND ORDER OF
NOVEMBER 20, 2024, AND REOPEN PROCEEDING**

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INTRODUCTION

Petitioners respectfully submit this Response to demonstrate that their requests are both timely and legally required. Contrary to the assertions of Applicants (Otter Tail Power Company and Montana-Dakota Utilities Co.), the Commission's November 20, 2024 Order never became a final, reviewable decision. It lacks the statutorily mandated findings of fact, separate conclusions of law, and the environmental and alternatives analyses required by N.D.C.C. §§ 28-32-39 and 49-22-09.

More fundamentally, the Commission and Applicants processed this 345kV transmission project under the wrong statute. By proceeding under Chapter 49-03, they bypassed the mandatory siting requirements of Chapter 49-22, including public notice, environmental review, and participation by affected landowners. That procedural error likely contributed to a second, independent failure: the Commission's November 20 Order contains none of the findings, conclusions, or reasoned analysis required by law. Either failure would justify reopening; together, they compel it.

Under N.D. Admin. Code § 69-02-06-01 and the Commission's continuing-jurisdiction authority under N.D.C.C. § 28-32-40(5), Petitioners properly sought reopening before any final order was issued. Applicants'

objections regarding timeliness, standing, and due process misapply the governing legal framework. They also disregard recent legislative developments, including House Bill 1258, and the public's interest in a complete and legally sufficient administrative record. For these reasons, and as detailed below, Petitioners' requests should be granted in full.

ARGUMENT

On May 21, 2025, Petitioners filed a petition to intervene, rescind the Commission's November 20, 2024 Order, and reopen the proceeding. On May 27, 2025, Petitioners filed an amended petition making no substantive changes to the original filing; the only revision was to the caption, clarifying the forward-looking nature of the relief requested. Applicants filed a response in opposition on June 6, 2025. This reply, timely filed on June 13, 2025, addresses the new factual and legal arguments raised in that opposition.

I. The Commission's November 20 Order is not a final agency action under North Dakota law.

The Commission's November 20 Order does not constitute a final agency action under North Dakota law. The Order lacks findings of fact, conclusions of law, and a reasoned explanation as required by N.D.C.C. §§ 28-32-39(1)–(2) and 28-32-46. *See also* N.D.C.C. §§ 49-22-08(6) and 49-22-08.1(5). Without a final order, statutory deadlines for reconsideration or judicial

review have not been triggered. The absence of finality preserves Petitioners' right to be heard.

Applicants respond to Petitioners' plain reading of the statutory requirements for a final order by asserting that no case law supports that interpretation. They further argue that the brief procedural summary in the Order's "Discussion" section satisfies the statutory obligation to provide findings of fact and conclusions of law sufficient to support a permit for a high-voltage transmission line in North Dakota.

As addressed in Petitioners' initial filing, the November 20 Order merely recites procedural background, including the roles of Otter Tail Power Company ("Otter Tail Power" or "Otter Tail") and Montana-Dakota Utilities Co. ("MDU"), their participation in MISO's Long-Range Transmission Planning process, and cost allocations. The Order then states—without explanation—that "the public convenience and necessity will be served" by the proposed 345kV line. It contains no findings of fact or legal reasoning to support that conclusion, as required by N.D.C.C. § 28-32-39 and basic principles of due process. *See* Order at 1–2.

Although the Commission appears to rely heavily on the project's inclusion in MISO's Long-Range Transmission Plan, deference to a regional

planning body does not relieve the Commission of its independent statutory duty to assess public necessity and apply North Dakota's siting requirements.

Critically, the Order fails to identify any specific public need within North Dakota, assess the adequacy of existing transmission infrastructure, evaluate reasonable alternatives, or address land use, environmental, or community impacts. It offers no rational connection between the asserted facts and the Commission's ultimate conclusion. This absence of reasoned decision-making renders the Order arbitrary and deprives Petitioners of a meaningful opportunity to respond.

II. The Commission retains continuing jurisdiction to reopen the proceeding.

Applicants do not acknowledge the Commission's continuing jurisdiction to reopen these proceedings. Yet even aside from the fact that the November 20 Order is not a final agency action under N.D.C.C. § 28-32-39(1)–(2), the Commission retains clear authority under N.D.C.C. § 28-32-40(5) to reconsider its order and reopen the record to ensure procedural due process, complete the evidentiary record, and fully evaluate new and material evidence bearing on the public interest.

In addition, N.D.C.C. § 49-03 grants the Commission broad powers to regulate public utilities in the public interest, and N.D.C.C. ch. 49-22

authorizes further proceedings where necessary to comply with the statutory requirements governing facility siting.

III. Applicants evaded mandatory siting law; Petitioners have standing to intervene under both N.D.C.C. chs. 49-03 and 49-22.

This case involves more than a routine application for a transmission line. It raises a serious question about whether North Dakota's siting laws can be bypassed through selective statutory filing. Otter Tail Power and MDU applied under the wrong statute, N.D.C.C. ch. 49-03, and in doing so avoided the procedural safeguards required under ch. 49-22. Their approach deprived affected landowners, local governments, and the public of the notice, hearing, and evidentiary rights the law requires.

Petitioners have standing to intervene under both ch. 49-03 and ch. 49-22. But more importantly, they seek to correct a fundamental breakdown in the legal process. The Applicants' attempt to avoid the proper statutory framework undermines not only the validity of this project, but also the integrity of the Commission's regulatory role.

A. The cases cited by Applicants affirm Petitioners' right to intervene and support the legal standards at issue.

Applicants cite *Minn-Kota Ag Prods., Inc. v. N.D. Pub. Serv. Comm'n*, 938 N.W.2d 118, 130–31 (N.D. 2020), and *Bank of Rhame*, 231 N.W.2d 801,

808 (N.D. 1975), in an effort to suggest that Petitioners lack standing to intervene or seek rescission of the November 20 Order. But these decisions do not support that claim. On the contrary, both cases underscore North Dakota's liberal intervention standard and recognize the right of parties with legal or property interests to participate in administrative proceedings.

More importantly, the cases have no bearing on the specific legal deficiencies in this proceeding. Neither involved the approval of a high-voltage transmission line without the findings of fact, conclusions of law, or reasoned decision-making required by N.D.C.C. §§ 28-32-39(1)–(2), 28-32-46, 49-22-08(6), and 49-22-08.1(5). Nor did they involve an applicant deliberately proceeding under ch. 49-03 to avoid the procedural safeguards mandated by ch. 49-22 and the Administrative Agencies Practice Act. The Applicants' reliance on these cases ignores both their actual holdings and the procedural violations at the heart of this case.

B. Applicants invoked the wrong statutory framework.

This case is not merely about standing—it is about statutory compliance. Unlike in *Minn-Kota* or *Bank of Rhame*, Otter Tail Power and MDU filed under the wrong statute, ch. 49-03, while mischaracterizing their project as a matter of public necessity. Petitioners will present evidence

showing that the proposed 345kV transmission line does not serve a genuine public need, but rather operates as an infrastructure subsidy for private commercial wind developers seeking to export power out of state.

As noted in the October 16, 2024 memorandum by PSC Public Utility Analyst Christopher C. Hanson, in response to an October 14, 2024 letter from Jeremiah Doner, Director of Cost Allocation at MISA: “it creates *additional capacity for more wind to be transmitted from North Dakota eastward.*” (Emphasis added.) See Nill Decl., Ex. 8.

C. Applicants filed under ch. 49-03 to circumvent the procedural safeguards of ch. 49-22 and the Administrative Agencies Practice Act.

Neither *Minn-Kota* nor *Bank of Rhame* involved applicants who, like Otter Tail Power and MDU, deliberately evaded the statutory siting regime governing high-voltage transmission lines. Although the Commission is generally exempt from the Administrative Agencies Practice Act (AAPA), ch. 49-22 expressly subjects siting proceedings to the procedural requirements of N.D.C.C. ch. 28-32. See Amended Petition, Parts B and C(4) (Legal Basis for the Petition).

By filing under ch. 49-03, Applicants avoided critical procedural requirements—environmental analysis, evaluation of route alternatives,

conformity with local land use plans, and township input. *See* N.D.C.C. § 49-22-09. The Commission likewise bypassed the public hearing and notice provisions that safeguard transparency in the siting process.

The statute is unambiguous: ch. 49-22 governs new high-voltage transmission lines, including those at 345kV. Other utilities have complied. Basin Electric Power Cooperative, for example, filed a siting application under ch. 49-22 for a 345kV transmission line in docket PU-24-361. Yet Otter Tail Power and MDU were permitted to proceed under ch. 49-03 for a nearly identical project, thereby evading all of the procedural obligations that ch. 49-22 imposes.

This discrepancy demands explanation. Why was Basin Electric required to follow the proper statutory process while Otter Tail and MDU were allowed to proceed under an inapplicable chapter? No explanation has been offered. In the absence of one, the most reasonable inference is that Otter Tail and MDU deliberately chose a procedural path that would avoid the more rigorous requirements of ch. 49-22. The Commission's inconsistent application of statutory requirements invites precisely the type of procedural end-run that Petitioners now challenge and erodes confidence in fair and consistent regulatory enforcement.

D. Applicants strategically bypassed Commission review under ch. 49-22.

There may be practical incentives for a utility to file under ch. 49-03 instead of ch. 49-22, but none are legally justifiable. The siting statute imposes advance notice, environmental assessments, corridor analysis, and public hearings, none of which are required under ch. 49-03. Avoiding those requirements can expedite approvals, limit scrutiny, and mute local opposition.

That appears to have been the strategy here. The 345kV transmission line from Ellendale to Jamestown serves primarily to facilitate wind energy exports—not in-state reliability. Avoiding a public siting process would advance that goal. Applicants may also have attempted to recharacterize the line as a system upgrade to further evade siting oversight. But any new 345kV line more than one mile in length plainly falls within ch. 49-22's jurisdiction.

Applicants may have assumed the Commission would not scrutinize their filing basis, whether due to deference, administrative oversight, or resource constraints. That assumption shifted the burden to Petitioners and landowners to detect and challenge procedural violations.

The result is a breakdown of the statutory process. Under N.D.C.C.

§ 49-22-08, a utility must obtain a route permit, and the Commission must evaluate the proposed corridor before landowner contact or easement procurement. Otter Tail and MDU did none of this. The Commission accepted a ch. 49-03 application without first determining whether ch. 49-22 applied, thereby enabling a process that avoided mandatory siting procedures.

The Applicants state in their response that “the siting proceeding has yet to commence.” *Opposition* at 6. That admission confirms that the February 29, 2024 application was legally defective. The Commission lacked authority to approve the project under ch. 49-03, as exclusive jurisdiction for siting lies under ch. 49-22. Any current suggestion by the Applicants that they may now proceed under ch. 49-22—though they remain evasive, stating only that the siting process has not yet begun—constitutes a tacit admission that their original filing was improper. The Commission should vacate any actions taken under PU-24-91.

E. Applicants solicited easements for a high-voltage transmission line while avoiding ch. 49-22 oversight.

While pursuing a Certificate of Public Convenience and Necessity (“CPCN”) under ch. 49-03, Otter Tail and MDU actively solicited easements throughout 2024 and into 2025 for a 345kV transmission line, which qualifies as a high-voltage facility under N.D.C.C. § 49-22-03(6). Yet they never

initiated a siting application under ch. 49-22, the exclusive statutory process for approving such facilities.

This is not a procedural technicality. Chapter 49-22 is designed to ensure public participation and evidentiary review before landowner rights are affected. Soliciting easements under a ch. 49-03 application circumvents that process and deprives landowners and local governments of their legal protections.

The Commission has long recognized that utilities may not begin construction or site preparation for high-voltage transmission lines without first obtaining a certificate of site compatibility. *See* N.D.C.C. § 49-22-08. While utilities may begin negotiating easements before siting authority is granted, Otter Tail and MDU began soliciting easements in early 2024 without filing any application under ch. 49-22. In that context, the outreach caused uncertainty and misled landowners about the status of the project.

Declarations from affected landowners confirm that Otter Tail and MDU solicited easements before initiating any ch. 49-22 process. *See* Declarations of Richard Long, Debra Sue Wald, Brandon Schweigert, and Phyllis P. Otterness. Although public notice was published under ch. 49-03, the absence of a ch. 49-22 application meant landowners received none of the

notice, disclosures, or participation rights required by law. This led many to believe the project was already authorized and that further input was futile. The declarations underscore why the November 20 Order must be rescinded and why the project should not proceed without first demonstrating public necessity through lawful procedures.

IV. New legislative safeguards enacted through HB 1258 require the proceeding to be reopened.

Applicants are silent on the requirements imposed by House Bill 1258. As discussed in the Petition (pp. 38–40), recent legislative developments underscore the need to revisit and reopen this proceeding.

On January 29 and April 9, 2025, Wano and Willowbank Townships, which are Petitioners in this proceeding, denied Conditional Use Permits for the proposed Ellendale-to-Jamestown transmission line. On April 15, 2025, Governor Kelly Armstrong signed HB 1258 into law, amending key provisions of the North Dakota Century Code relating to the siting of electric transmission facilities. Among other reforms, HB 1258 imposes new procedural safeguards: the Commission must notify affected townships upon receiving a transmission line application and may not hold a public hearing fewer than 45 days after such notice.

The statute also clarifies that local zoning ordinances are not

automatically preempted. They remain in effect unless the Commission affirmatively finds, by a preponderance of the evidence, that the local requirements are “unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of location,” or that they conflict with state or federal law. Critically, HB 1258 applies retroactively to January 1, 2025.

Although enacted after the Commission’s November 20 Order, the law’s retroactive effect governs the relevant time period in which Wano and Willowbank exercised their zoning authority. Wano’s denial on January 29 and Willowbank’s on April 9 fall squarely within HB 1258’s scope. Yet the record shows no notice to these townships, no opportunity for them to submit local regulations, and no compliance with the 45-day notice requirement prior to hearing. These statutory omissions compel the Commission to re-evaluate the permit under the procedural framework and local participation mandates now codified in law.

Reopening the proceeding under these circumstances is not merely permissible; it is necessary to preserve the integrity of the process. Allowing the permit to stand despite the absence of legally required notice, timelines, and township participation would frustrate legislative intent and violate

basic principles of due process.

V. The public interest was not adequately evaluated under the governing statutes.

Applicants argue that public interest considerations under N.D.C.C. ch. 49-22 are irrelevant because the CPCN proceeding under ch. 49-03 has concluded. This position fails to confront a central fact: the proposed 345kV transmission line is a jurisdictional transmission facility subject to the Siting Act. By proceeding under ch. 49-03 alone, Applicants effectively bypassed the Commission's full statutory obligations.

Applicants assert that the Commission need only determine whether they are "technically, financially, and managerially fit" and whether "public convenience and necessity" will be served under N.D.C.C. § 49-03-01. But that argument misconstrues the law by reading ch. 49-03 in isolation. The Siting Act (ch. 49-22) governs all transmission facilities at or above 115kV. *See* N.D.C.C. § 49-22-03(6). It requires a separate siting application, public hearing, and formal findings based on public interest, environmental impact, and land use compatibility. *See* N.D.C.C. §§ 49-22-05.1, -08, -08.1, -09. A CPCN under ch. 49-03 cannot substitute for a siting permit under ch. 49-22, nor can a limited "public convenience" analysis satisfy the comprehensive public interest review required by the Siting Act.

The township permit denials—which Applicants disregard—are both legally significant and procedurally relevant. Townships have independent zoning authority under North Dakota law. The formal denials issued by Wano and Willowbank Townships, following public hearings and deliberation, constitute new and material evidence. These actions demonstrate that the proposed project lacks local support and may conflict with existing land use plans. Such evidence goes directly to public interest and land use compatibility, which are key criteria the Commission is required to evaluate under ch. 49-22 but were never addressed in the November 20 Order.

While Applicants claim the Commission made all necessary findings for a CPCN, this argument presumes the wrong statute applies and ignores the procedural shortcomings in the Commission’s decision. The November 20 Order contains no evaluation of local land use impacts, no acknowledgment of township input, and no engagement with the broader public interest considerations required for transmission projects under ch. 49-22. Reopening the proceeding is not only justified, but necessary to ensure the Commission complies with its statutory obligations and does not allow jurisdictional evasion through selective reliance on ch. 49-03.

The problem is compounded by the Commission's finding in the November 20 Order that "public convenience and necessity will be served by the construction and operation of the facilities." Although framed as a ch. 49-03 determination, this language closely mirrors the public interest factors that are reserved for analysis under ch. 49-22, including environmental effects, alternative locations, and land use compatibility. Yet the Order contains no findings addressing those issues. The result is a finding of public convenience made without the evidentiary record or procedural safeguards required by law. This creates concrete prejudice: the Commission's summary conclusion gives the appearance that the project has already passed a full public interest test, potentially predisposing future proceedings and undermining the integrity of the siting process.

The township denials, together with the enactment of HB 1258, occurred after the Commission issued its November 20 Order and were not part of the record in the original proceeding. They therefore constitute new and material evidence bearing directly on the public interest and trigger the Commission's continuing jurisdiction under N.D.C.C. §§ 28-32-39 and 28-32-40(5). The Commission cannot disregard this post-order evidence merely because the Applicants structured their filing to avoid the statutory

framework that would have required its consideration.

VI. Applicants' remaining arguments misstate the law and misapply the Commission's rules.

Applicants raise a series of procedural and substantive defenses that either misstate the applicable legal framework or fail to address the actual basis of Petitioners' claims. None of these arguments provide a valid reason to deny the relief requested.

A. Timeliness and standing.

Applicants argue that Petitioners lack standing and that the Petition is untimely under N.D. Admin. Code § 69-02-02-05, which governs intervention in pending proceedings. But that rule does not apply here. Petitioners are not seeking to intervene prospectively in an open docket. Rather, they are seeking to reopen a proceeding in which the Commission failed to issue a lawful final order containing the findings and conclusions required by statute. That request is governed by N.D.C.C. §§ 28-32-39 and 28-32-40(5), not by § 69-02-02-05. Moreover, pro hac vice admission has been granted, and Petitioners are entitled to be treated as parties in any properly reopened proceeding.

B. Reopening authority.

Applicants also contend that reopening is barred by N.D. Admin. Code

§ 69-02-06-01, which permits reopening before a final order is issued. But no final order has been issued in this matter. The November 20 Order lacks the findings of fact and conclusions of law required under N.D.C.C. § 28-32-39. Because the Commission has not issued a lawful final decision, the time for reopening has not expired. The Commission retains jurisdiction under N.D.C.C. § 28-32-40(5) to reopen the matter and correct the procedural deficiency.

C. Collateral attack and finality.

Applicants suggest that Petitioners are launching an impermissible collateral attack and that agency findings need only be “adequate” to support judicial review. But that standard is not satisfied here. The November 20 Order fails to analyze key elements of the project, including compliance with applicable law, land use compatibility, and public interest factors. A bare assertion of “public convenience and necessity” is not a substitute for actual findings supported by the record. Petitioners are not collaterally attacking a final order; they are invoking the Commission’s continuing jurisdiction to address an incomplete and procedurally deficient decision.

D. Due process.

Applicants assert that Petitioners received due process because public

notice was published and open houses were held. This argument misses the point. The core issue is not whether technical notice occurred. It is that the Commission evaluated the need for a jurisdictional transmission facility under the wrong statutory framework, failed to require a formal siting application, and excluded affected communities from meaningful participation in the proceeding that determined the project's approval. Petitioners' due process argument addresses the structure and substance of the proceeding, not just whether minimal procedural boxes were checked.

E. Alleged “unsupported” claims.

Applicants dismiss Petitioners' arguments as a “laundry list” of unsubstantiated assertions. That characterization is inaccurate. Each point raised by Petitioners corresponds to a specific legal requirement under ch. 49-03, ch. 49-22, or the Administrative Agencies Practice Act. These are not speculative claims. They are grounded in statutory text, factual record, and procedural history. The proper remedy is to reopen the proceeding and ensure that the project is evaluated under the correct legal standards.

F. Mischaracterization of public interest and conflation of benefits.

Applicants' analogy comparing the JETx Project to a fire station serving private homes misrepresents Petitioners' position and oversimplifies

the Commission's legal obligations. Petitioners do not argue that infrastructure benefitting private entities is inherently disqualified from serving the public interest. Rather, they assert that the Commission failed to determine whether this particular transmission project, designed to support anticipated but undisclosed private generation, meets the public interest criteria defined in the governing statutes, including ch. 49-22. Public interest cannot be presumed. It must be established through evidence and expressed in specific findings. Unlike a properly vetted public facility, this project was approved without the findings required by law, without consideration of local opposition, and without application of the correct statutory framework.

CONCLUSION

Petitioners do not seek a "do-over" of a properly concluded process. They seek the lawful completion of a proceeding that failed to produce a final order containing the findings and conclusions required by statute. The Commission's November 20 Order lacks the evidentiary foundation, legal analysis, and procedural safeguards mandated by North Dakota law for high-voltage transmission projects.

New and material evidence, including township permit denials and post-order legislative changes, further supports reopening. The Commission

retains continuing jurisdiction to address these deficiencies and to ensure full compliance with chs. 28-32 and 49-22 of the North Dakota Century Code. Anything less would endorse a process that violated both the law and the public trust.

Because the Applicants were required to proceed under ch. 49-22 at the time they filed under ch. 49-03, the defects in the current proceeding cannot be cured by waiting for a future filing.

The Commission must act now to vacate the November 20 Order, reopen the permit proceeding, and require full compliance with the siting process mandated by law.

Accordingly, Petitioners respectfully request that the Commission exercise its continuing jurisdiction under N.D.C.C. §§ 28-32-39, 28-32-40(5), 28-32-46, and 49-22 to vacate the November 20 Order and reopen the permit proceeding under the correct statutory framework. Petitioners further request that the Commission suspend any construction activity, land acquisition, or condemnation efforts related to the proposed transmission line pending resolution of this matter. A revised decision should be issued only after the Commission develops a complete evidentiary record, applies the correct statutory requirements, and fully considers input from affected local

governments and communities.

Dated: June 13, 2025

Respectfully submitted,

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