STATE OF NORTH DAKOTA DISTRICT COURT

COUNTY OF BURLEIGH SOUTH CENTRAL JUDICIAL DISTRICT

Wano Township, Willowbank Township, Russell Township, Corwin Township, Valley Township, Mike Bartel, Patty Bartel, Richard Long, Susan R. Long, Steven Nelson, Julia Nelson, Phyllis P. Otterness, Patricia A. Vick, Brandon Schweigert, Tausha Schweigert, Shockman Farm Partnership, LLLP, Debra Sue Wald, Lucas Wald, Jill Wald, Tim Leppert, Orr Farms, Steve M. Rupp, Sandra J. Rupp, David A. Schweigert, Denette M. Schweigert, Allen D. Swiontek, Inna N. Swiontek, David Wald, Holly Wald, Weston Wald, and Willowbank Hutterian Brethren Association,

Appellants,

v.

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

Appellees.

Case No. 08-2025-CV-02068

Hon. Bobbi Weiler

APPELLANTS' REPLY BRIEF IN SUPPORT OF APPEAL AND REQUESTED RELIEF

157 PU-24-91 Filed 10/30/2025 Pages: 23
APPEAL - Appellants' Reply Brief in Support of Appeal and Requested Relief

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INTRODUCTION

Appellees defend a two-step path that North Dakota law does not allow.

Step one: Otter Tail and MDU asked the Public Service Commission to grant a certificate of "public convenience and necessity" (CPCN) for a brand-new 85-mile, 345-kV Jamestown–Ellendale transmission line in a Chapter 49-03 docket. That docket was noticed only by small-print publication. There was no mailed notice to the townships on the proposed route. There was no local hearing in the project area. The PSC issued a bare, two-sentence conclusion that "public convenience and necessity will be served," without explicit findings of fact or separate conclusions of law, and without identifying any present North Dakota reliability need. The PSC then refused to reopen when the affected townships, after learning of the decision, came forward and asked to intervene.

Step two: Having obtained that CPCN in a forum that excluded the directly affected communities, the Utilities filed a Chapter 49-22 siting application and now repeatedly cite the CPCN as having already established "need" for the 345-kV line. In that ongoing siting docket, the townships and landowners are told they may speak, but only about routing and mitigation, not whether the line is even necessary, because "need" was supposedly

decided already.

That is exactly backwards from what the Legislature requires.

For any new high-voltage transmission facility (115 kV and above), Chapter 49-22 is the exclusive, front-end siting and need framework. A utility "may not begin construction" without first obtaining a route permit "pursuant to this chapter," and the Commission's decision in that chapter must be based on: (1) an application that includes "a statement explaining the need for the facility"; (2) mailed notice and a meaningful opportunity to be heard by the affected landowners and townships with retained zoning authority; (3) a hearing in the project area; and (4) a written decision "in accordance with the evidence," supported by a "finding with reasons," addressing statutory criteria such as alternatives, efficient use of resources, system configuration, and the needs of North Dakota consumers. *See* N.D.C.C. §§ 49-22-05.1, 49-22-08(6), 49-22-08.1(5), 49-22-09.

That design is intentional. The Legislature did not want "public need" for a new 345-kV corridor decided in a quiet prelude with only newspaper publication. It required mailed notice, local hearing, and reasoned findings so that the very governments and landowners in the path of the line could participate before the Commission blessed the project as necessary.

Appellees' theory collapses those protections. They insist they could, first, secure a "public convenience and necessity" finding under Chapter 49-03, a chapter aimed at territorial integrity disputes between utilities and not corridor siting, without mailed notice to the affected townships; and then, second, carry that finding forward into Chapter 49-22 and treat "need" as already resolved against those same townships.

That approach is unlawful for two independent reasons.

First, Chapter 49-22 is not a second, clean-up step. It is the exclusive, integrated process for new 115-kV-and-above lines. The "need" showing must be made there, on that record, with those procedural guarantees. You cannot predetermine "need" somewhere else and then import it.

Second, the PSC's use of "informal disposition" in the Chapter 49-03 docket, followed by its June 18, 2025 refusal to reopen or allow intervention when the townships asked to be heard, produced real, ongoing prejudice. The record shows (and Appellees do not dispute) that the townships along the proposed line received no direct notice of the CPCN proceeding. They first learned, after the fact, that the PSC had already approved "public convenience and necessity." Now, in the pending 49-22 siting case, the Utilities repeatedly cite that CPCN to say "need" is settled. That forces the

townships to scramble immediately: call special meetings, coordinate affected landowners, and spend public money on counsel and assistance just to claw back the threshold "do we even need this line in North Dakota" question; the exact question 49-22 says must be decided with them in the room, after mailed notice, at a hearing near the route.

Appellees call this harmless. It is not. It is the due-process problem. The November 20, 2024 CPCN was issued under the wrong statute, without the mandatory Chapter 49-22 procedures. It also lacked the explicit findings and separate conclusions of law North Dakota requires for a reviewable final order. The PSC then compounded that error in its June 18, 2025 order by denying intervention, refusing to reopen, and telling the directly affected townships they were too late. That June 18 order is what Appellants properly brought here. It is the mechanism by which the PSC locked in an unlawful "need" determination and froze out the communities that must now live with it.

This Court has authority to review that denial. First, the November 20, 2024 CPCN was not a final, reviewable order under Chapter 28-32 because it did not contain explicit findings of fact, separate conclusions of law, or proper service. As a result, the 30-day appeal period never began to run. The June

18, 2025 order, which denied reopening, denied intervention, and refused to correct those defects, is timely before the Court.

Second, the PSC exceeded its statutory authority by using Chapter 49-03, a publication-only process aimed at territorial disputes between utilities, to predetermine "public convenience and necessity" for a new 345-kV transmission line that Chapter 49-22 requires to be justified through mailed notice, a local hearing in the project area, and a reasoned "finding with reasons." When an agency proceeds without statutory authority, it acts ultra vires. A district court may review an ultra vires act at any time, and such an act is not insulated from review by a procedural clock the agency attempts to start.

The remedy follows: the Court should vacate the CPCN, reverse the PSC's refusal to reopen and allow intervention, and remand with instructions that (1) any determination of public convenience and necessity for this 345-kV line must proceed under Chapter 49-22, on a record built with mailed notice, a hearing in the project area, and explicit findings and conclusions; and (2) the PSC and the Utilities may not cite or rely on the vacated CPCN in the ongoing 49-22 siting docket as proof of "need" or as a substitute for the siting record the Legislature requires.

ARGUMENT

I. The November 20, 2024 CPCN order is not a final, reviewable decision under Chapter 28-32 because it lacks explicit findings, separate conclusions of law, and proper service.

Appellees' jurisdictional defense rests on a simple premise: the CPCN order issued November 20, 2024 was "final," Appellants supposedly missed the deadline to appeal that order, and the case is therefore over.

That premise fails for three independent reasons that go to the heart of North Dakota's administrative-review framework:

1. A "final order" must contain explicit findings of fact and separate conclusions of law sufficient to show the path of the agency's reasoning, and it must be served. That requirement is not stylistic; it is what makes judicial review possible. Here, the November 20 CPCN order does not identify specific factual findings (e.g., what present reliability problem exists in North Dakota today) tied to statutory criteria, and does not articulate separate legal conclusions. It simply declares that "public convenience and necessity will be served," with no analysis.

2. In its June 18, 2025 order denying Appellants' petition to reopen, the PSC effectively conceded that the November 20 CPCN order does not contain labeled findings of fact or labeled conclusions of law. The agency

asserted that the "discussion section" should be treated as supplying both, and that it could rely on "informal disposition" under N.D.C.C. § 28-32-22. But that is not how North Dakota law works. Section 28-32-39 requires explicit findings and separate conclusions of law so that a reviewing court can understand (i) what facts the agency actually found, and (ii) how those facts satisfy the governing statutory standards. A procedural narrative plus a bottom-line sentence ("public convenience and necessity will be served") is not a substitute. And § 28-32-22 does not authorize an agency to waive the findings/conclusions requirement where doing so would "substantially prejudice the rights of any party." Here, the PSC's approach did exactly that: it denied intervention to directly affected landowners and townships, issued an order with no findings, and then invoked that same unexplained order as if it were final and insulated from review.

3. Because the November 20 CPCN order did not satisfy the statutory prerequisites for a final, reviewable order, time did not begin to run. Appellants' challenge to the PSC's refusal, on June 18, 2025, to reopen the docket and allow participation is timely. It is that June 18 decision that squarely joined the issues now before this Court.

Appellees try to flip finality doctrine on its head: they argue that the

absence of findings and conclusions insulates the order from review. North Dakota law is the opposite. The absence of adequate findings prevents the agency from invoking finality to cut off review, because a party and a reviewing court cannot test an unexplained conclusion for lawfulness or evidentiary support. A non-final, non-served order does not start a jurisdictional clock.

Bottom line: this Court has jurisdiction because there has not yet been a legally sufficient, properly served final order that resolves the core merits and that is reviewable in the way Chapter 28-32 requires. The PSC's June 18 order, which denied reopening, denied intervention, and refused to fix the defects, is properly before the Court.

II. Chapter 49-22 is the exclusive, front-end siting and "need" framework for new 115-kV-and-above transmission lines. Appellees' attempt to use Chapter 49-03 first, without direct notice to the affected townships and landowners, and then import that "need" finding into Chapter 49-22 is exactly what the Legislature forbids.

Appellees' responses defend a two-step process:

Step 1 — get a "public convenience and necessity" certificate under Chapter 49-03 in a proceeding noticed only by brief newspaper publication; no mailed notice to townships on the route, no local hearing, no opportunity for those townships and landowners to participate; and no explicit findings of

fact or separate conclusions of law.

Step 2 — open a Chapter 49-22 siting docket and repeatedly cite that prior CPCN as having already established "need" for the 345-kV Jamestown–Ellendale line.

That two-step structure fails for three reasons.

First, Chapter 49-22 is not a second step. It is the Legislature's exclusive first step for high-voltage lines.

For any "electric transmission facility" designed above 115 kV, "a utility may not begin construction … without first having obtained … a route permit from the commission pursuant to this chapter." Chapter 49-22 requires:

- an application that includes "a statement explaining the need for the facility";
- mailed notice and a meaningful hearing in the project area, with participation by affected landowners and by townships that have retained zoning authority; and
- a Commission decision "in accordance with the evidence," supported by a "finding with reasons," addressing statutory criteria like alternatives, efficient use of resources, system configuration, and the needs of North Dakota consumers.

In other words, the Legislature said: for new high-voltage corridors, you prove need inside a Chapter 49-22 siting proceeding, on a record built with direct notice to the people whose land, zoning, and rates are at stake. You do

not pre-clear "need" somewhere else and then tell those people after the fact.

Second, Chapter 49-03 is the wrong tool for what the Utilities did here.

Chapter 49-03 arose to police territorial integrity among utilities; to avoid wasteful duplication and turf fights over who gets to serve which load. It was not designed to bless, in advance, an 85-mile, 345-kV greenfield export corridor whose entire premise is to move privately developed future wind generation "from North Dakota eastward."

The record shows that is exactly what the Utilities asked the PSC to approve: they told the PSC the line would "accommodate new electric generation projects," "enable new commercial and industrial loads," and "reduce transmission constraints to export more North Dakota generation." The PSC analyst memo stated that the project "creates additional capacity for more wind to be transmitted from North Dakota eastward." The dissenting Commissioner noted that most of the supposed "constraints" are speculation about future wind build-out, not existing North Dakota reliability needs.

That is a Chapter 49-22 siting/need question; not a Chapter 49-03 territorial turf question.

Third, the Utilities' approach guts the core protections the Legislature wrote into Chapter 49-22.

Here is how the prejudice actually lands on the ground:

- Under Chapter 49-03, the Utilities proceeded on publication notice only. The townships along the proposed corridor, including the same townships that have since denied conditional use permits and formally voted to intervene, received no direct notice of the CPCN proceeding. They learned what had happened only after the PSC had already voted "public convenience and necessity will be served."

- Because they received no direct notice and were not allowed in, those townships and landowners were not in a position to marshal zoning ordinances, coordinate affected landowners, or retain assistance in real time. They are now being told, in the ongoing Chapter 49-22 siting docket, that "need" is already established by the CPCN.

- That creates immediate, front-loaded burden in the 49-22 siting docket: the townships must scramble to catch up, call special meetings, spend public money, and talk to landowners under time pressure, while the Utilities point to an earlier "need" determination the townships never had a fair chance to contest. The Utilities' repeated citation to the CPCN as proof of "need" effectively narrows the issues in 49-22 to routing tweaks and compensation, not whether the project is actually necessary for North Dakota in the first place.

That is not harmless. That is exactly the structural prejudice Chapter 49-22 was written to prevent. Chapter 49-22 hardwires two things: (1) you can't build a high-voltage line without first making a public-need showing in a proceeding that gives directly affected communities mailed notice, a local hearing, and a reasoned "finding with reasons," and (2) the Commission's

decision must actually articulate explicit findings and separate conclusions of law so a reviewing court can tell if "need" was proven.

Appellees' position turns that on its head. It says: we can get a barebones "public convenience and necessity" finding in a Chapter 49-03 docket that did not give those communities direct notice, then carry that finding forward into 49-22 and treat "need" as already decided.

North Dakota law does not allow that. The Legislature made Chapter 49-22 the exclusive, integrated process for siting new 115-kV and above transmission lines precisely so that "public convenience and necessity" would be tested in public, with the affected local governments in the room, before any utility can advance construction. The PSC cannot lawfully use Chapter 49-03 to sidestep those mandatory Chapter 49-22 safeguards.

Separately, the Court has authority to review this dispute because the PSC exceeded its statutory authority. Chapter 49-22 is the exclusive front-end siting and need framework for new high-voltage transmission lines. The PSC nonetheless used Chapter 49-03, which provides only publication notice and is aimed at territorial and service-area questions, to make an advance "public convenience and necessity" determination for a new 345-kV transmission line. It then carried that determination forward into the

Chapter 49-22 siting docket and treated "need" as settled. When an agency proceeds in a manner the Legislature did not authorize, that is an ultra vires act. A court may review an ultra vires act at any time, and it is not insulated from review by a timing objection.

III. Appellees' standing argument fails because the June 18, 2025 order directly adjudicated Appellants' request to participate and directly affects their property, zoning authority, and rates.

Appellees argue Appellants lack standing because they supposedly were not "parties" in the CPCN docket. That argument ignores what is actually on appeal.

After the November 20 CPCN issued (with no mailed notice to the townships and landowners now in front of this Court), the townships along the proposed route denied CUPs, held public meetings, and voted to intervene. Affected landowners and ratepayers also sought to intervene. On May 21, 2025, they jointly petitioned the PSC to reopen, to rescind, and to intervene.

On June 18, 2025, the PSC told them no. It rejected intervention. It refused to reopen. It refused to rescind. It declared they were too late. That denial is the order Appellants appealed.

So, we are not in the posture of strangers trying to collaterally attack

someone else's case. We are in the posture of directly affected landowners, townships with retained zoning authority, and captive ratepayers challenging (1) the PSC's refusal to even let them in and (2) the PSC's insistence on using an ultra vires, unreasoned CPCN order as the foundation for everything that comes next.

That is classic, textbook standing. If a state agency makes a final decision that you cannot participate in the very proceeding where it is approving a high-voltage line across your land (or across land you regulate by zoning), you have suffered an injury personal to you, traceable to that denial, and redressable by judicial relief. Nothing in North Dakota law requires affected landowners and local governments to silently absorb that denial.

Appellees' fallback position, that Appellants "will have an opportunity to raise these concerns" in the Chapter 49-22 siting docket, underscores rather than defeats standing. It concedes that Appellants are directly affected by the siting of this 345-kV line. Having acknowledged that direct impact in the siting docket, the PSC and the Utilities cannot at the same time contend that these same townships and landowners lacked any legally protectable interest in the earlier CPCN proceeding that purported to establish "need" for the line.

IV. The PSC's reliance on "informal disposition," publication-only notice, and its refusal to reopen after affected townships came forward violated due process and caused concrete prejudice.

Appellees' due-process answer is basically: (1) the PSC published notice in newspapers in spring 2024, (2) nobody "requested a hearing" then, so (3) the PSC was free to decide "public convenience and necessity" by informal disposition in November 2024 without ever holding a local evidentiary hearing, issuing explicit findings of fact and separate conclusions of law, or serving a final order that met Chapter 28-32 standards. Then, they say, (4) the landowners and townships can still participate later in the Chapter 49-22 siting docket, so no harm, no foul.

That chain breaks down at every step.

First, "informal disposition" cannot be used in a way that "substantially prejudices the rights of any party."

Here, "informal disposition" was used to do exactly what Chapter 49-22 forbids: decide the core "need / public convenience and necessity" question for a brand-new 345-kV corridor without giving the people in the corridor mailed notice, a hearing in the project area, or a reasoned written decision with explicit findings and conclusions that explains why North Dakota actually needs this project now.

Once the PSC had that result in hand, it rejected those same parties'

May 2025 petition to intervene and reopen as untimely. By that point, multiple townships had already denied conditional use permits, convened special meetings, and voted to participate.

That is textbook "substantial prejudice." The PSC used informality to (i) skip statutory process, then (ii) invoke the skipped process as the reason to shut the door.

Second, publication-only notice is not a substitute for the direct, mailed notice and in-area hearing the Legislature hardwired into Chapter 49-22.

Appellees do not dispute that the townships and landowners along the route did not receive direct notice of the CPCN proceeding. They learned of the CPCN after it was issued. By the time they mobilized to seek intervention, the PSC characterized them as late, denied entry, and refused to reopen.

That's not just unfair in some abstract sense. It has a concrete, ongoing effect now: in the Chapter 49-22 siting docket, the Utilities repeatedly cite the CPCN as already having established "need." That shifts the frame of that docket. The townships are told to argue routing and mitigation, not whether the line is even necessary for North Dakota consumers. And because they were frozen out of the CPCN, they are now forced to spend public time and

money on emergency meetings and counsel to undo a "need" determination made without them.

That is irreparable procedural harm. The PSC and the Utilities cannot resolve the "need" question in a proceeding that provided no direct notice to the townships and landowners in the path of the 345-kV line, exclude those parties from that proceeding, and then tell those same parties that they may participate only later, in a different docket, after "need" is already being treated as settled.

Third, the PSC's June 18, 2025 order locked in that prejudice and is properly before this Court.

The June 18 order is the agency action that said, in substance: (a) we already decided "public convenience and necessity"; (b) you did not ask to participate soon enough; (c) we will not reopen; and (d) we will not let you in.

That order is exactly what Appellants appealed.

So, when Appellees now argue lack of standing and lack of prejudice, they are asking the Court to ignore what actually happened. The agency denied intervention to the very communities in the path of the 345-kV line after deciding "need" without them, and it is now using that "need" determination to shape the current siting docket. That is both due-process harm and practical, ongoing prejudice. It cannot be brushed off as harmless.

Result: the Court should vacate the CPCN, reverse the denial of intervention/reopening, and remand with instructions that any further "need" or siting determination proceed under Chapter 49-22 with (i) mailed notice to the affected townships and landowners, (ii) a hearing in the project area, and (iii) a final order that contains explicit findings of fact and separate conclusions of law sufficient for judicial review.

V. Remedy: Vacatur and remand with instructions.

Appellees suggest there is nothing meaningful this Court can do. That is wrong.

The Court should:

1. Vacate the November 20, 2024 CPCN because the PSC acted outside its lawful authority by using Chapter 49-03 to issue a "public convenience and necessity" finding for a new 345-kV transmission line that must instead proceed under Chapter 49-22.

2. Reverse the PSC's June 18, 2025 denial of intervention and refusal to reopen, because excluding directly affected townships, landowners, and ratepayers, and then invoking that exclusion as both a timeliness bar and a standing bar, was unlawful and substantially prejudicial.

3. Remand with instructions that any further consideration of "need," "public convenience and necessity," routing, or corridor approval for this 345-kV line must proceed under Chapter 49-22, with:

- mailed notice to affected landowners and to the townships that have retained zoning authority and denied local permits;
- a hearing in the project area;
- participation rights for Appellants; and
- an eventual written decision that (i) is grounded in the evidentiary record, (ii) addresses statutory criteria (including "need," alternatives, efficient use of resources, and consumer impacts), and (iii) includes explicit findings of fact and separate conclusions of law sufficient for judicial review.

4. Direct that the vacated CPCN may not be cited in that Chapter 49-22 proceeding (or in any related right-of-entry or condemnation effort) as evidence of "need," "public convenience and necessity," or "public benefit." The siting record must stand on its own.

That relief does not prejudge the engineering merits of the line. It simply restores the statutory scheme the Legislature wrote, and it restores to affected North Dakotans the notice, voice, and reviewability that scheme guarantees.

CONCLUSION

Appellees' responses rest on two themes: first, that Appellants supposedly missed a 30-day appeal window, and second, that any exclusion can be cured because the affected townships and landowners can participate later in the Chapter 49-22 siting docket. Neither position is compatible with North Dakota law.

The PSC's November 20, 2024 CPCN order was not final or reviewable under Chapter 28-32 because it did not contain explicit findings of fact, separate conclusions of law, or proper service. Chapter 49-22, not Chapter 49-03, is the exclusive front-end siting and "need" framework for new high-voltage lines. Denying intervention to the townships and landowners directly in the path of the proposed 345-kV line was unlawful and prejudicial. The suggestion that those same communities can instead participate later in the routing phase does not cure the denial of their statutory right to be heard on need at the outset.

Separately, the PSC exceeded its statutory authority by using Chapter 49-03's publication-only process to predetermine "public convenience and necessity" for a new 345-kV transmission line that must be justified under Chapter 49-22. An ultra vires act is subject to review and cannot be insulated

from judicial scrutiny by invoking a procedural clock.

The Court should vacate the CPCN, reverse the denial of intervention, and remand with instructions consistent with Chapters 49-22 and 28-32.

Dated: October 28, 2025

Respectfully submitted,

By: /s/ Douglas J. Nill

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