

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

**Otter Tail Power Company/Montana-Dakota Utilities Co.
345kV JETx Transmission Line
Siting Application**

Case No. PU-25-236

**OTTER TAIL POWER COMPANY AND MONTANA-DAKOTA UTILITIES CO.'S
RESPONSE IN OPPOSITION TO PETITION TO INTERVENE, MOTION TO SUBMIT
FILINGS, AND PETITION TO REOPEN**

I. INTRODUCTION

Otter Tail Power Company (“Otter Tail”) and Montana-Dakota Utilities Co. (“Montana-Dakota”) (collectively, “Applicants”) submit this Response in Opposition to Petitioners’¹ Petition to Intervene, Motion to Submit Filings, and alternatively, Petition to Reopen the Record (the “Petition”). The stated purpose of the Petition is “record preservation and to ensure the Townships’ formal filings are included in the formal evidentiary record considered by the Commission.” Petition at p. 1.

The Petition represents an untimely attempt to confuse the issues before the Commission in a siting proceeding under N.D.C.C. chapter 49-22 and should be denied in its entirety. First, the Petition is untimely and should be denied on those grounds alone. Second, the contents of the Filings² consist of objections and legal arguments that are not relevant to the siting proceeding and thus are not admissible as evidence of any fact relevant to the siting proceeding. Third, the Filings³ Petitioners wish to submit were already accepted into the record as public comments at the public hearings in this matter. As to Petitioners’ alternative request to reopen the record, Petitioners fail to identify any material changes of fact or law that have occurred since the conclusion of the

¹ The “Petitioners” referred to herein are Wano Township, Willowbank Township, Russell Township, Corwin Township, and Valley Township.

² The “Filings” referred to herein are those Limited Objections, Statements, and Questions for the Record filed by the Petitioners as Exhibits 1(A)–3(E) filed as Dkt. No. 86(3). Although it is not clear from the Petition, Applicants assume that Petitioners are not seeking to admit the emails and excerpt from the public hearing identified as Exhibit 4(A)–5. To the extent Petitioners also seek admission of Exhibits 4(A)–5, Applicants oppose their admission for the same reasons stated herein for Exhibits 1(A)–3(E).

³ With the exception of the Corwin Township filings. However, Corwin Township’s filings are identical to the filings submitted into the record as public comments by Wano, Willowbank, Russell, and Valley Townships. Dkt. Nos. 58 (Hearing Exhibit No. 21), 59 (Hearing Exhibit No. 22), and 85 (Hearing Exhibit No. 23).

hearing that would warrant reopening the record. For these reasons, the Petition should be denied in its entirety.

II. BACKGROUND

On August 8, 2025, Otter Tail and Montana-Dakota filed a Joint Consolidated Application for Certificate of Corridor Compatibility and Route Permit (the “Application”). Dkt. No. 1. The Application notes that the permitting requirements of political subdivisions are automatically superseded and preempted under N.D.C.C. § 49-22-16(2)(b) and requests that the Commission also find that certain local land use and zoning regulations and requirements are unreasonably restrictive in view of existing technology, factors of cost or economics, needs of consumers regardless of location, and/or conflict with state law. *Id.* § 7.5.

On September 16, 2025, the Commission issued a Notification of Application. Dkt. No. 7. From September to December 2025, numerous political subdivisions, including all Petitioners except Valley Township, filed their local zoning ordinances with the Commission. Dkt. Nos. 16–17; 20–23; 34.

On November 19, 2025, the Commission issued a Notice of Filing and Notice of Public Hearings and a Notice of Technical Hearings. Dkt. Nos. 25, 27. Notices of the Public and Technical Hearings were published in local newspapers. *See* Dkt. Nos. 40, 45. The Notice of Public Hearing identified the following issues to be considered in the proceeding:

1. Will construction, operation, and maintenance of the facility at the proposed location produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?
2. Is the proposed facility compatible with environmental preservation and the efficient use of resources?
3. Will construction, operations, and maintenance of the facility at the proposed location minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion?

Dkt. No. 25.

Prior to the Hearings, on January 6, 2026, Petitioners’ attorney Douglas J. Nill moved the Commission for admission *pro hac vice*. Dkt. No. 38. Attorney Nill’s Motion for Admission included the limited basis for his request for *pro hac vice* admission in this proceeding:

7. Mr. Nill’s participation is expected to be limited to advising the Clients and assisting designated North Dakota associate counsel with written submissions and other record-preservation steps in this docket in connection with the related pending appeal. Mr. Nill does not presently anticipate appearing in person at hearings or examining witnesses.

Dkt. No. 38(2). In response to attorney Nill’s electronic correspondence filing the Motion for Admission, Mr. Brian Johnson, Executive Director for the Commission, informed attorney Nill that an additional filing would need to be submitted to seek party status in the proceeding under North Dakota Administrative Code Section 69-02-02-05. Exhibit 1 to *Declaration of Casey Furey*. In response, attorney Nill affirmed he did not seek party status on behalf of the Petitioners.

As set forth in Paragraph 7 of the motion, my participation is expected to be limited to advising the Interested Persons and assisting designated North Dakota associate counsel with written submissions and other record-preservation steps in this docket in connection with the related pending appeal. I do not presently anticipate appearing in person at hearings or examining witnesses. The Interested Persons may also personally participate in the Commission’s public process, including submitting written comments and providing statements at public hearings. To my understanding, that type of public participation does not require a petition to intervene. *Nothing in this [filing] email is intended as a request for intervenor or party status.*

Id. (emphasis added).

On January 7, 2026, Administrative Law Judge Hogan (“ALJ Hogan”) granted Nill’s admission *pro hac vice*, but noted, “As part of his request, Mr. Nil [sic] asserts that the [Townships] do not intend to intervene in this proceeding.” Dkt. No. 41 at fn. 1. Attorney Nill (and Associate Attorney Steven Leibel) did not appear at or participate at the Hearings.

Formal Hearings were held in this matter on January 8, 9, 12, 14, and 16, 2026, in Bismarck, Ellendale, Edgeley, and Jamestown, North Dakota (the “Hearings”). At the Hearings, several representatives of Petitioners provided public testimony and submitted written materials. Dkt. Nos. 51–64; 85. Specifically, Township officials or representatives provided comments and submitted the Filings into the record as public comments.

III. LAW AND ARGUMENT

A. The Petition is untimely and no good cause exists to justify late intervention.

The Petitioners have failed to timely petition to intervene under the Commission’s intervention rules and their Petition should be denied. North Dakota Administrative Code § 69-02-02-05 requires that “[a] petition to intervene in any proceeding must be filed at least ten days prior to the hearing, but not after except for good cause shown.” N.D. Admin. Code § 69-02-02-05(2).

Here, the timeliness of the Petition and whether good cause exists to justify late intervention should not be viewed in a vacuum. The Townships, through their counsel attorneys Nill and Leibel, have actively opposed the Project since May of 2025 when Petitioners (and other

parties) attempted to intervene in the Project’s Certificate of Public Convenience and Necessity proceeding long after the deadline to petition to intervene has passed. N.D.P.S.C. Case No. PU-24-091 (the “CPCN Proceeding”) at Dkt. Nos. 28–29. Despite their prior petition to intervene in the CPCN proceeding being denied as untimely, Petitioners again seek late intervention after the Hearings have concluded, without any showing of good cause. Attempts to intervene after a hearing has occurred should be viewed with heightened scrutiny.

Petitioners argue that good cause exists to allow late intervention for numerous reasons that do not relate to the untimeliness of the Petition.⁴ The North Dakota Supreme Court has said, “good cause should be interpreted to mean a showing of good cause as to why a petitioning intervenor should be allowed to intervene late under the circumstances.” *Minn-Kota Ag Prods., Inc. v. N. Dakota Pub. Serv. Comm’n*, 2020 ND 12, ¶ 42, 938 N.W.2d 118. Here, Petitioners fail to show good cause exists to justify late intervention. In *Minn-Kota Ag.*, the court held that the fact that a party has interests that are “substantially effected by the [Commission’s] decision” is not enough to establish good cause. *Id.* at ¶ 46. In that case, Minn-Kota sought to intervene to “offer additional information to address concerns expressed by the [Commission] during [its] work session.” *Id.* In affirming the ALJ’s denial of the request for intervention, the *Minn-Kota* court noted that Minn-Kota had not provided any compelling argument on how its interests weren’t adequately represented at hearing or throughout the proceedings and noted that others made the same arguments sought to be advanced by *Minn-Kota Ag.* *Id.*

Here, Petitioners seek intervention to submit several exhibits into the record. However, no good cause exists because the Petitioners’ interests were adequately represented at hearing. At the Hearings, numerous representatives of Petitioners (and others) made public comment advancing similar arguments to those stated in the Filings. In fact, several Township representatives spoke at length on multiple occasions. *See* Dkt. Nos. 52, 57, 64. Moreover, with the exception of the Corwin Township’s Filings, all of these documents were accepted into the record as public comments by the ALJ. As such, sufficient information was submitted during the five days of hearings in this matter to allow the Commission to make an intelligent and informed decision. *See Minn-Kota Ag.*, ¶ 46. Petitioners fail to show good cause exists to permit late intervention under the circumstances.

B. Petitioners’ Filings are not relevant to this proceeding.

The Filings are irrelevant for two separate reasons. First, because public need is outside the scope of a siting case, the Filings do not relate to the noticed issues or the criteria to be considered in a siting proceeding under N.D.C.C. ch. 49-22. The Filings are argument, not evidence. Rather than presenting factual evidence for the Commission to consider, these Filings consist of only Petitioners’ (1) questions to the Applicants and Commission staff; (2) demands that

⁴ For example, Petitioners reference the Applicants’ preemption request as a basis for finding good cause for late intervention; however, the preemption request was included in the Application. As such, Petitioners were on notice that Applicants were seeking preemption as early as August 8, 2025, five months prior to the first hearing. Dkt. No. 1.

the Commission make certain findings and conclusions in this matter; and (3) legal arguments related to the Applicants' preemption request. If the Petitioners wished to make objections at hearing or submit briefing on legal issues, they were required to timely petition to intervene prior to the Hearings.

1. Need is not a factor to be considered under the Siting Act.

Need is not a criterion for determination in a siting proceeding. Despite this, the Filings captioned as "Limited Objections" and "Questions for the Record" relate to the need for the Project. The issue of need was addressed and resolved by the Commission in the Project's CPCN Proceeding.

It is well-settled that need is not a factor to be considered in a siting proceeding under N.D.C.C. chapter 49-22. The North Dakota Supreme Court has held that an evaluation of need is not within the Commission's authority in siting proceedings. *Matter of Nebraska Pub. Power Dist.*, 330 N.W.2d 143, 148–49 (N.D. 1983) (Finding, "the PSC does not have the authority or duty to determine need" under the Siting Act.). The Commission itself has previously recognized this limitation on its authority under Chapter 49-22 in an order finding evidence of need is irrelevant in a siting proceeding because need is not a factor for the Commission's consideration under N.D.C.C. § 49-22-09. *See Brady Wind, LLC 150 MW Wind Energy Ctr. - Stark Cnty. Siting Application Brady Wind, LLC 230 kV Transmission Line - Stark Cnty. Siting Application*, N.D. P.S.C. Case No. PU-15-690, 2016 WL 1638879, at **4–5 (Apr. 20, 2016) ("[N]eed is not a criterion for determination by this Commission in deciding whether to approve or deny" an application under the Siting Act.). Moreover, the North Dakota Legislature recently considered and rejected an amendment that would add "need" to the siting factors under Section 49-22-09. Senate Bill No. 2314 (2017) (version 17.0884.06004).⁵ As such, Petitioners' request that the Filings be "admitted into the evidentiary record" and "be treated as record evidence considered by the Commission in its final finding" should be denied. At its core, the Petition requests that the Commission disregard North Dakota law and exceed its authority conferred by the Legislature. The Commission should deny this request to launch a collateral attack on the Commission's decision in another case.

2. The Filings are devoid of any evidence relevant to the proceeding.

The Filings do not contain any evidence, only demands and legal arguments prepared by Petitioners' counsel. *See* Filings, fn. 1. Under North Dakota's Administrative Agencies Practice Act (the "APA"), "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the administrative action more probable or less probable than it would be without the evidence." N.D.C.C. § 28-32-01(11); *see also* N.D.R. Evid. 401. Under N.D.C.C. § 28-32-24, "admissibility of evidence in any adjudicative proceeding

⁵ <https://ndlegis.gov/assembly/65-2017/regular/documents/17-0884-06004a.pdf>; *see also* https://ndlegis.gov/assembly/65-2017/regular/bill-actions/ba2314.html?bill_year=2017&bill_number=2314

before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence.” N.D.C.C. § 28-32-24.

Legal arguments, demands to the Commission, and questions do not have a tendency to make the existence of any fact more probable or less probable. Moreover, the subject matter of the Filings is of no consequence to the determination of the administrative action at hand and does not relate to the siting factors. As such, the Filings do not constitute “relevant evidence” under the APA or the North Dakota Rules of Evidence and Petitioners’ request that the Filings be admitted into the record and treated as record evidence considered by the Commission should be denied.⁶ Because the admission of irrelevant information into the evidentiary record is the stated basis for the Petition, it follows that the Petition should also be denied.

Finally, to the extent that the Petition merely seeks to ensure that the Filings are included in the administrative record, it is moot. As discussed above, the substance of the Filings has already been included in the record as public comment.

C. Petitioners fail to state any appropriate grounds for reopening the record.

Petitioners cannot simply reopen the record to admit additional evidence as they suggest. Under N.D. Admin. Code § 69-02-06-01(1), grounds requiring reopening include, “any material changes of fact or law alleged to have occurred since the conclusion of the hearing.” No material changes of fact or law have occurred since the conclusion of the hearing. Petitioners state they “seek reopening solely to cure the record-status problem for the Township Exhibits.” Petition at p. 12, § III(18). The “record-status problem” Petitioners refer to is the result of their own actions in this proceeding. The fact that their Filings, submitted as public comments, were only accepted into the record as public comments is not a material change in fact or law that warrants reopening the record.

Furthermore, as shown above, the Filings fail to meet the most basic requirement to be considered evidence under N.D.C.C. § 28-32-24 and N.D.R.Evid. 401. The Filings do not assist the Commission in making any finding of fact because they consist of legal arguments or objections that are of no consequence to the determination of the issues to be considered by the Commission in a siting proceeding. *See* Dkt. No. 25.

Finally, the issues discussed in the Filings were already raised at the Hearings by representatives of the Townships themselves and/or other members of the public. Crucially, with the exception of the Corwin Filings (which are identical to the Filings of the other Townships) these Filings are already in the record. Dkt. Nos. 58, 59, 85 (Hearing Exhibit Nos. 21, 22, and 23, respectively). In fact, representatives of the Petitioners testified about the substance of the Filings

⁶ For the avoidance of doubt, this filing constitutes the Applicants’ formal objection to the admission of the Filings into the evidentiary record under N.D.C.C. § 28-32-01(11) and N.D.R. Evid. 401.

at the hearing, and the Commission and parties had an opportunity to cross-examine them on their testimony. Dkt. Nos. 52, 57, 64.

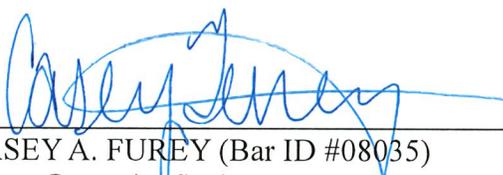
The Filings are not evidence, and they are not relevant to the proceeding, but they are in the record. Allowing Petitioners to intervene at this late stage will not change these realities. The Petition should be denied.

IV. CONCLUSION

For the reasons stated herein, the Applicants respectfully request that the Commission:

- a. Deny the Petition to Intervene;
- b. Deny the Motion to Accept the Township Filings as Late-Filed Exhibits; and
- c. Deny the Petition to Reopen the Record.

Dated this 20th day of February, 2026.

By: 
CASEY A. FUREY (Bar ID #08035)
cfurey@crowleyfleck.com
ERIK J. EDISON (Bar ID #08790)
ejedison@crowleyfleck.com
CROWLEY FLECK PLLP
*Attorneys for Otter Tail Power Company and
Montana-Dakota Utilities Co.*
100 West Broadway, Suite 250
P.O. Box 2798
Bismarck, ND 58502-2798
(701) 223-6585