

July 20, 2020

VIA E-MAIL & FEDERAL EXPRESS

North Dakota Public Service Commission
c/o Steven Kahl, Executive Secretary
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

Re: Kesslers v. Minnesota Power, a division of ALLETE, Inc.
Complaint
Case No. PU-20-194

Dear Mr. Kahl:

Attached for filing on behalf of Minnesota Power, a division of ALLETE, Inc. ("Minnesota Power"), are electronic copies of the following documents:

- Minnesota Power's Motion for Partial Dismissal of Revised Complaint;
- Minnesota Power's Brief in Support of Motion for Partial Dismissal of Revised Complaint;
- Answer to Revised Complaint; and
- Certificate of Service.

The original and ten (10) copies of these documents are being sent today to the Commission via Federal Express. If you have any questions, please let me know.

Sincerely,



Mollie M. Smith

Attorney at Law

Direct Dial: 612.492.7270

Email: msmith@fredlaw.com

MMS/70518292
Enclosures

cc: ALJ Timothy J. Dawson (via e-mail w/encls.)
John Schuh (via e-mail w/encls.)
Brian Johnson (via e-mail w/encls.)
Lynn Boughey (via e-mail w/encls.)
David Moeller (via e-mail w/encls.)

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler, Complainants/ Petitioners, v. Minnesota Power, a division of ALLETE, Inc., Respondent.	Case No. PU-20-194 OAH File No. 20200211 MINNESOTA POWER’S MOTION FOR PARTIAL DISMISSAL OF REVISED COMPLAINT
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Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”), submits this Motion for Partial Dismissal of the revised Complaint (“Complaint”) filed by Keith and Deanna Kessler on June 29, 2020 in the above-captioned case. The Complaint contains the following claims for relief, which are outside the authority of the North Dakota Public Service Commission (“Commission”) to grant:

1. Have the [Commission] conduct a survey of other landowners to determine if Minnesota Power has a pattern of misconduct relating to North Dakota landowners (Complaint, ¶ 22, subpart 6);
2. Prohibit Minnesota Power from any further operations in North Dakota (Complaint, ¶ 22, subpart 7);¹
3. Reimbursement for damages incurred for damage to Section 15, devaluation of Section 15, as well as personal damages for inconvenience, nuisance, and emotional distress (Complaint, ¶ 22, subpart 8); and
4. Order Minnesota Power to reimburse all attorney fees incurred by the Kesslers relating to the prosecution of this action (Revised Complaint, ¶ 22, subpart 9).

¹ In Complaint ¶ 21, Issue 12, the Kesslers identify as an alleged issue whether Minnesota Power should “be prohibited from submitting any future applications to the Public Service Commission.” To the extent Complaint ¶ 21, Issue 12 is a request for relief, it is also included in Minnesota Power’s Motion.

Therefore, the Complaint fails to state a claim upon which relief can be granted and dismissal of these claims is appropriate under N.D. R. Civ. P. 12(b)(6). The grounds for this motion are more fully set forth in the accompanying brief.

Dated this 20th day of July, 2020.

FREDRIKSON & BYRON, P.A.

By 
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- Order Minnesota Power to reimburse all attorney fees incurred by the Kesslers relating to the prosecution of this action (Revised Complaint ¶ 22, subpart 9).

As set forth below, the Commission does not have the authority to grant the relief sought in these claims. Therefore, the Commission should grant the motion to dismiss these claims pursuant to N.D. R. Civ. P. 12(b)(6).

STATEMENT OF FACTS

Minnesota Power received a Certificate of Site Compatibility from the Commission for the Bison 4 Wind Project (“Project”) on September 25, 2013. *See* Case No. PU-13-127, Certificate of Site Compatibility for Energy Conversion Facility, Certificate Number 34 (September 25, 2013). The Kesslers are participating landowners in the Project.

The Kesslers filed a complaint on April 23, 2020, followed by a revised complaint on April 27, 2020. On May 27, 2020, the Commission filed a motion to find the Kesslers’ complaint states a *prima facie* case and serve the complaint on Minnesota Power.

On June 29, 2020, the Kesslers filed the current revised Complaint. Minnesota Power is filing an Answer and this Motion is in response to the current Complaint.²

STANDARD OF REVIEW

To survive a motion to dismiss, a complaint must not only state a claim, but it must also include factual allegations of a violation for which relief can be granted. *See* N.D.C.C. § 28-32-21(1)(a); *see also* N.D. R. Civ. P. 12(b)(6); *Ziegelmann v. DaimlerChrysler Corp.*, 2002 ND 134, ¶ 5, 649 N.W.2d 556, 559 (dismissal is appropriate under N.D. R. Civ. P. 12(b)(6) “if [in the complaint] it is disclosed with certainty the impossibility of proving a claim for which relief can

² With respect to any allegations or requests for relief not included in its Motion, Minnesota Power responds to the allegations and requests for relief in its Answer. For the reasons set forth in the Answer, Minnesota Power asserts that the Complaint should be dismissed.

be granted.”); *see also Brandvold v. Lewis & Clark Pub. Sch. Dist.*, 2011 ND 185, ¶ 6, 803 N.W.2d 827 (citing *Vandall v. Trinity Hosps.*, 2004 ND 47, ¶ 5, 676 N.W.2d 88).

ARGUMENT

I. The Commission Has the Authority and Obligation to Dismiss Claims for Which Relief Cannot be Granted.

A. This proceeding is subject to the Administrative Agencies Practice Act and the Rules of Civil Procedure.

The Commission is an administrative agency subject to the Administrative Agencies Practice Act (“AAPA”). *See* N.D.C.C. § 28-32-21 (setting forth the procedures “[a]dministrative agencies shall comply with . . . in all adjudicative proceedings”); N.D.C.C. § 28-32-01(2) (defining “administrative agency” or “agency” as “each board, bureau, commission, department, or other administrative unit of the executive branch of state government” and not listing the Commission as an exempt agency). Administrative proceedings involving the Commission must also comply with the North Dakota Rules of Civil Procedure, including Rule 12(b)(6). *See* N.D. Att’y Gen. Op. No. 85-24 (June 12, 1985) (“The North Dakota Rules of Civil Procedure, although specifically designed to govern proceedings in courts of law, are applicable to administrative agencies with respect to their administrative proceedings.”).

B. Under the AAPA and the North Dakota Rules of Civil Procedure, dismissal is required where a complaint includes claims for which relief cannot be granted.

As in other administrative proceedings and in proceedings before North Dakota district courts, a complaint before the Commission should be dismissed if the relief sought cannot be granted.³ *See* N.D. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted is

³ The Commission has previously granted a motion to dismiss in a complaint case. *See* Case No. PU-18-223, Order on Recommended Decision Granting Motion to Dismiss Complainants/Petitioners’ Complaint (October 10, 2018), affirmed by *Environmental Law & Policy Center and Dakota Resource Council v. North Dakota Public Service Commission and Meridian Energy Group, Inc.*, No. 08-2018-CV-02937 (S. Central Jud. Dist., May 14, 2019).

a valid defense to a claim for relief, and a complaint can be dismissed on these grounds); *Hauer v. Zerr*, 2020 ND 16, ¶¶ 15-16, 937 N.W.2d 508, 512-13 (holding that a complaint that alleges fraud in the inducement and seeks reformation, rather than the proper remedy of rescission, is not a claim upon which relief can be granted and must be dismissed as a matter of law). In other words, if the relief requested could not be granted even if all facts alleged in the complaint are true, then dismissal is appropriate.

II. The Claims Seeking Relief Outside the Authority of the Commission Cannot be Granted and Must be Dismissed.

A. The Commission’s relief-granting authority is limited to that granted by the Legislature.

The Complaint’s allegations are tied to whether Minnesota Power’s development of a wind energy conversion facility was in accordance with a Certificate of Site Compatibility issued by the Commission pursuant to the Energy Conversion and Transmission Facility Siting Act (“Siting Act”) (N.D.C.C. Ch. 49-22). The Commission, as an administrative agency, is a creature of legislative action and only has the power that has been granted to it or necessarily implied from the grant. *Heier v. N.D. Dept. of Corr. & Rehab.*, 2012 ND 171, ¶ 18, 820 N.W.2d 394; *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584-85 (N.D. 1984); *Schwind v. Dir., Dakota Dep’t of Transp.*, 462 N.W.2d 147, 150 (N.D. 1990) (“[T]he jurisdiction of an administrative agency is dependent upon the terms of a statute”); *see also Vogel v. Marathon Oil Co.*, 2016 ND 104, ¶ 17, 879 N.W.2d 471, 478 (“A statute expressly including a comprehensive regulatory scheme is a strong indication the legislature did not intend to provide other remedies.”). The North Dakota Supreme Court has specifically stated that the Commission’s “authority to regulate is limited to that given it by the Legislature.” *Appl. of Neb. Pub. Power Dist.*, 330 N.W.2d 143, 148-49 (N.D. 1983) (internal citations omitted). As a result, the relief the Commission may grant is also limited to that given it by the Legislature.

- B. The Commission should dismiss those claims for relief in the Complaint that the Commission does not have the authority to grant.

The Legislature has articulated the actions the Commission may take in response to a violation of the Siting Act or the Commission's associated rules and orders. N.D.C.C. §§ 49-22-20 and 49-22-21. No matter what facts may be proven in this action, the Commission's authority does not include conducting broad surveys of landowners unrelated to the dispute at hand, prohibiting Minnesota Power from conducting business in North Dakota or submitting applications to the Commission, or granting damages or attorneys' fees to private parties. Accordingly, the claims in Paragraph 22, subparts 6, 7, 8, and 9 of the Complaint should be dismissed for failure to state a claim upon which relief can be granted.

CONCLUSION

The relief requested in Paragraph 22, subparts 6, 7, 8, and 9 of the Complaint is not within with Commission's authority to grant under N.D.C.C. Ch. 49-22. Therefore, as to those claims, the Complaint fails to state a claim for relief that the Commission can grant. Accordingly, the Commission should grant Minnesota Power's Motion for Partial Dismissal.

Dated this 20th day of July, 2020.

FREDRIKSON & BYRON, P.A.

By 
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to subpart 9, Minnesota Power admits that the building located in Section 15, Township 141 North, Range 87 West, Oliver County, North Dakota (“Section 15 building”) was not identified on Application Exhibit 4 but denies that the Section 15 building was the Kesslers’ home or that it should have been identified on Application Exhibit 4.

2. With respect to paragraph 2, Minnesota Power admits the allegations.

3. With respect to paragraph 3, Minnesota Power states that public hearing Exhibit 3 speaks for itself and no response is required.

4. With respect to paragraph 4, subparts 1 and 2, Minnesota Power admits that Commission public hearings are an opportunity for the public to state concerns regarding a proposed project, and that the public hearing held on September 13, 2013, was the appropriate time for the Kesslers to have raised a concern regarding the placement of Turbine 441. Minnesota Power denies all other allegations in subparts 1 and 2, express or implied. With respect to subpart 3, Minnesota Power admits only that its representatives, Wade Isaacson and Scott Monroe, met with the Kesslers after the Commission public hearing and, during that meeting, clarified that turbines will be at least 1,400 feet from occupied residences, that Minnesota Power tries to put fences back to their original locations, and that Minnesota Power would work with the Kesslers to determine the final fence location on their land. Minnesota Power denies that the Kesslers stated a concern regarding the proximity of Turbine 441 to the Section 15 building, denies that the Kesslers refused to sign an easement for the Bison 4 Wind Project (“Project”), and denies all other allegations, express or implied.

5. With respect to paragraph 5, Minnesota Power admits that the Commission issued its Findings of Fact, Conclusions of Law, and Order (“Order”) on September 25, 2013, and states that said document speaks for itself and no response is required.

6. With respect to paragraph 6, Minnesota Power states that the Commission's Order speaks for itself and no response is required.

7. With respect to paragraph 7, Minnesota Power admits only that Turbine 441 is approximately 1,125 feet from the Section 15 building but denies that said building was a "residence" or "the Kessler home" and denies that the 1,400 foot voluntary setback applied to the Section 15 building. Minnesota Power denies all other allegations, express or implied.

8. With respect to paragraph 8 (including footnote 1), Minnesota Power admits that its representatives met with Commission Staff members, John Schuh and Jerry Lein, and with the Kesslers on April 14, 2017. Minnesota Power also admits that Kesslers raised concerns regarding reclamation and the placement of Turbine 441 in relation to the Section 15 building at that meeting. Minnesota Power states that referenced Document 109 speaks for itself and no response is required. Minnesota Power denies any implication that the Section 15 building was an occupied residence at the time of the public hearing on the Project's Application or at the time Turbine 441 was constructed, or that the Kesslers had informed Minnesota Power of a concern regarding the proximity of Turbine 441 to the Section 15 building prior to its construction. Minnesota Power also denies that Scott Monroe agreed that Kesslers had previously informed Minnesota Power of concerns regarding the proximity of Turbine 441 to the Section 15 building and denies all other allegations, express or implied.

9. With respect to paragraph 9, including all subparts, Minnesota Power admits that it did not identify the Section 15 building as an occupied residence in its Application or at the public hearing but denies that the Section 15 building was an occupied residence or that it should have

been identified as such to the Commission. Minnesota Power denies all other allegations in paragraph 9, express or implied.

10. With respect to paragraph 10, unless otherwise stated herein, Minnesota Power denies all allegations, express or implied. With respect to paragraph 10, subpart 1, Minnesota Power admits only that its representatives informed Project landowners that turbines would not be placed within 1,400 feet of an occupied residence and the Project would comply with applicable laws, and Minnesota Power denies all other allegations, express or implied. With respect to paragraph 10 subparts 2 and 3, Minnesota Power states that it filed a map of the Project turbine layout with the Commission on August 7, 2013, which was available to the public. Further, Minnesota Power states that it met with each landowner hosting a turbine, including the Kesslers, to review the proposed turbine locations at the time they signed an easement for the Project. Therefore, Minnesota Power denies the allegations. With respect to paragraph 10, subpart 4, Minnesota Power denies all allegations. With respect to paragraph 10, subpart 5, Minnesota Power admits that public hearing Exhibit 4 showed the location of Turbine 441 and that said exhibit was available to the Kesslers prior to and at the public hearing. Minnesota Power denies all other allegations. With respect to paragraph 10, subparts 6 and 7 (including footnote 2), Minnesota Power admits that the Section 15 building was not identified on Project maps or in the Application for the Project but denies that the Section 15 building was an occupied residence or should have been identified on Project maps or in the Application. Minnesota Power also denies that a Project turbine layout map was not available to the Kesslers prior to the public hearing, and denies all other allegations.

11. With respect to paragraph 11, subparts 1-5 and 7, Minnesota Power states that it is without information sufficient to admit or deny the allegations, except that Minnesota Power

admits that the Section 15 building was uninhabited at the time the Project was permitted and constructed. Minnesota Power states that it is without information sufficient to admit or deny the alleged interior status and improvements of the Section 15 building in subpart 6, but notes that, with the exception of exterior painting, all improvements are alleged to have occurred after the permitting and construction of Turbine 441. Further, Minnesota Power states (as acknowledged in subsections 5 and 6) that the Section 15 building was uninhabited and in disrepair at the time the Project was permitted and constructed. With respect to subpart 8, Minnesota Power admits that it asserts the Section 15 building was unoccupied and in disrepair during the permitting and construction of Turbine 441, and denies all other allegations. With respect to subpart 9, Minnesota Power admits only that when the Kesslers signed an easement for the Project on October 23, 2013 (after the Certificate of Site Compatibility was issued for the Project), the Kesslers mentioned that their son may move into the old farmhouse near Turbine 441 at some point in the future; however, Minnesota Power denies that the Kesslers informed Minnesota Power of a concern regarding the location of Turbine 441, and denies all other allegations, express or implied.

12. With respect to paragraph 12, Minnesota Power admits that the Section 15 building was not identified as an occupied residence in avoidance and exclusion tables or on Project maps but denies that the Section 15 building was an occupied residence or should have been identified on said tables and maps. Minnesota Power further states that, based on field observations and plat book review, it believed the residences identified in public hearing Exhibit 2 were occupied residences. Minnesota Power denies all other allegations, express or implied.

13. With respect to paragraph 13, Minnesota Power admits only that it submitted a letter to the Commission dated May 29, 2018, but denies all other allegations, express or implied.

14. With respect to paragraph 14, Minnesota Power admits only that Todd Simmons submitted a letter to the Commission on behalf of Minnesota Power that was dated May 29, 2018. Minnesota Power denies all other allegations, express or implied.

15. With respect to paragraphs 15, 16, 17, 18, and 19, Minnesota Power states that the May 29, 2018 letter speaks for itself and no response is required.

16. With respect to paragraph 15, subpart 1, Minnesota Power admits only that the Section 15 building was not inhabited at the time of the public hearing on the Project's Application or at the time Turbine 441 was constructed. Minnesota Power states that NDCC § 49-22-05.1 establishes a 500 foot avoidance area from inhabited rural residences, and denies the implication that the exclusion and avoidance "statutory provisions" established the 1,400 foot setback from occupied residences voluntarily applied by Minnesota Power. Minnesota Power also denies that its voluntary 1,400 foot setback from occupied residences should have been applied to the Section 15 building. Minnesota Power denies all other allegations, express or implied.

17. With respect to paragraph 15, subpart 2, Minnesota Power states that the Commission's Order speaks for itself and no response is required. Minnesota Power admits that the Section 15 building was not identified as a residence in the Project's Application, but denies that said building was a "residence," an "occupied residence," or "the Kessler home" and denies that the 1,400 foot voluntary setback should have been applied to the Section 15 building. Minnesota Power further denies that: the Kesslers informed Minnesota Power of a concern regarding the proximity of Turbine 441 to the Section 15 building prior to construction of Turbine 441; the Section 15 building or the Kessler residence were displaced; and Minnesota Power promised the Kesslers that Turbine 441 would not be within 1,400 or 1,320 feet of the Section 15 building. Minnesota Power denies all other allegations, express or implied.

18. With respect to paragraph 15, subpart 3, Minnesota Power states that the paragraph contains a legal conclusion to which no response is required and, to the extent a response is required, denies the same. Minnesota Power admits that the Section 15 building was not identified as an occupied residence in the Project's Application, but denies that: said building was a "residence" or an "occupied residence"; the 1,400 foot voluntary setback applied to the Section 15 building; and the Kesslers informed Minnesota Power of any plans to use the Section 15 building in any particular manner prior to issuance of the Certificate of Site Compatibility.

19. With respect to paragraph 15, subpart 4, Minnesota Power states that NDCC § 49-22-05.1 (currently and as of September 25, 2013) and NDAC § 69-08-06-01 (currently and as of September 25, 2013) speak for themselves, and do not state as alleged by the Kesslers. Further, Minnesota Power states that the Section 15 building was uninhabited and denies that there was a doubt regarding said building's use that should have been disclosed at the public hearing. Minnesota Power also states that the January 4, 2012 letter speaks for itself and denies the implication that Minnesota Power did not act with integrity, honesty and responsibility, and fair business practices with respect to the Commission, the hearing officer, or the Kesslers.

20. With Respect to paragraph 16, subpart 1, Minnesota Power denies the allegations, express or implied.

21. With respect to paragraph 16, subpart 2, Minnesota Power admits only that when the Kesslers signed an easement for the Project on October 23, 2013 (after the Certificate of Site Compatibility was issued for the Project), the Kesslers mentioned that their son may move into the old farmhouse near Turbine 441 at some point in the future; however, Minnesota Power denies that the Kesslers informed Minnesota Power of a concern regarding the location of Turbine 441. Minnesota Power states that it is without information sufficient to admit or deny the alleged interior

improvements to the Section 15 building but notes that, with the exception of exterior painting, all improvements are alleged to have occurred after the permitting and construction of Turbine 441. Further, Minnesota Power states that the Section 15 building was uninhabited and in disrepair at the time the Project was permitted and constructed. Minnesota Power denies that it has made any false statements regarding the Section 15 building, and denies all other allegations, express or implied.

22. With respect to paragraph 16, subparts 3 and 4, Minnesota Power states that the referenced Commission Staff memorandum speaks for itself. Minnesota Power lacks sufficient knowledge to admit or deny the allegations regarding Commission Staff's thoughts, beliefs, opinions, or actions, other than to the extent identified in the referenced document. Minnesota Power admits it informed Commission Staff the Section 15 building was unoccupied at the time the Project was permitted and constructed and that photographs and electric usage indicated the Section 15 building was not occupied until sometime in 2016. Minnesota Power denies all other allegations, express or implied.

23. With respect to paragraph 16, subpart 5, Minnesota Power lacks sufficient knowledge to admit or deny the allegations regarding Commission Staff's thoughts, beliefs, opinions, or actions, other than to the extent identified in the referenced documents. Minnesota Power admits that a meeting took place on April 14, 2017, between Commission Staff members John Schuh and Jerry Lien, the Kesslers, and Minnesota Power representatives, and admits that the Kesslers raised concerns regarding the placement of Turbine 441, but denies all other allegations, express or implied.

24. With respect to paragraph 16, subpart 6, Minnesota Power states that the referenced document speaks for itself. Minnesota Power denies all other allegations, express or implied.

25. With respect to paragraph 17, subpart 1, Minnesota Power denies the allegations, express or implied.

26. With respect to paragraph 17, subpart 2, Minnesota Power states that it is unclear what timeframe is specifically being referenced, but denies any allegation that the Section 15 building was an occupied residence at the time the Project was permitted and constructed.

27. With respect to paragraph 17, subpart 3, Minnesota Power states that it contains legal conclusions to which no response is required and incorporates by reference all responses provided herein.

28. With respect to paragraphs 18, subparts 1-3, Minnesota Power denies the allegations, express or implied. Minnesota Power states that when the Kesslers signed an easement for the Project on October 23, 2013 (after the Certificate of Site Compatibility was issued for the Project), the Kesslers mentioned that their son may move into the old farmhouse near Turbine 441 at some point in the future; however, the Kesslers did not raise a concern regarding the location of Turbine 441.

29. With respect to paragraph 18, subpart 4, Minnesota Power states that it filed a map of the Project turbine layout with the Commission on August 7, 2013, which was available to the public. Further, Minnesota Power states that it met with each landowner hosting a turbine, including the Kesslers, to review the proposed turbine locations at the time they signed an easement for the Project. Therefore, Minnesota Power denies the allegations.

30. With respect to paragraph 18, subpart 5, Minnesota Power denies the allegations, express or implied.

31. With respect to paragraph 19, subpart 1, Minnesota Power admits that the Section 15 building existed and was not occupied at the time the Project was permitted and constructed.

Minnesota Power also admits that when the Kesslers signed an easement for the Project on October 23, 2013 (after the Certificate of Site Compatibility was issued for the Project), the Kesslers mentioned that their son may move into the old farmhouse near Turbine 441 at some point in the future; however, Minnesota Power denies that the Kesslers informed Minnesota Power of a concern regarding the location of Turbine 441, and denies all other allegations, express or implied.

32. With respect to paragraph 20, Minnesota Power incorporates by reference all responses set forth in this Answer.

33. With respect to paragraph 21, the Complaint speaks for itself and no response is required, except that Issues 10, 11, and 12 are addressed separately in Minnesota Power's Motion for Partial Dismissal, provided herewith. Further, Minnesota Power denies that the Statement of Issues appropriately frames issues necessary for determination of this matter.

34. With respect to paragraph 22, the Complaint speaks for itself and no response is required, except that subparts 6, 7, 8, and 9 are addressed separately in Minnesota Power's Motion for Partial Dismissal, provided herewith. Further, with respect to subpart 1, the requested file has been provided to the Kesslers' counsel.

35. With respect to paragraph 23, the Complaint speaks for itself and no response is required.

DEFENSES

FIRST DEFENSE

The Complaint fails to state a claim for which relief may be granted.

SECOND DEFENSE

The Section 15 building was not an occupied residence at the time the Project was permitted and constructed; therefore, the voluntary 1,400 foot setback from occupied residences

and the sound and shadow flicker commitments made by Minnesota Power with respect to occupied residences do not apply to the Section 15 building.

THIRD DEFENSE

A map depicting the location of Turbine 441 was available to the Kesslers prior to and at the public hearing on the Project's Application, but the Kesslers did not raise a concern with Minnesota Power or the Commission regarding the proximity of Turbine 441 to the Section 15 building prior to the public hearing, during the public hearing, or prior to the construction of Turbine 441. Therefore, the Kesslers are estopped from now asserting concerns regarding the proximity of Turbine 441 to the Section 15 building.

FOURTH DEFENSE

A map depicting the location of Turbine 441 was available to the Kesslers prior to and at the public hearing on the Project's Application, but the Kesslers did not raise a concern with Minnesota Power or the Commission regarding the proximity of Turbine 441 to the Section 15 building prior to or at the public hearing, or prior to issuance of a Certificate of Site Compatibility for the Project. The Order issuing the Certificate of Site Compatibility is a final, non-appealable Order, and the Kesslers are prohibited from collaterally attacking the Order.

FIFTH DEFENSE

Minnesota Power has already provided the Kesslers with the complete internal file requested in paragraph 22, subpart 1 of the Complaint; therefore, the request for relief is moot.

SIXTH DEFENSE

The Kesslers' Complaint is barred, in whole or in part, by applicable statutes of limitation.

SEVENTH DEFENSE

The Kesslers' Complaint is barred, in whole or in part, by equitable doctrines including but not limited to waiver, laches, estoppel, and unclean hands.

EIGHTH DEFENSE

The Kesslers' Complaint is barred, in whole or in part, by express agreement.

NINTH DEFENSE

The Kesslers' Complaint may be barred for additional reasons pending discovery of additional facts regarding this matter and, therefore, Minnesota Power asserts and expressly does not waive all other defenses available to it under applicable law not specifically stated herein.

PRAYER FOR RELIEF

WHEREFORE, having stated its answer and affirmative defenses, Minnesota Power requests relief as follows:

1. That the Complaint be dismissed with prejudice;
2. For such other and further relief as the Commission deems just and proper.

Dated this 20th day of July, 2020.

FREDRIKSON & BYRON, P.A.

By 
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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler, Complainants/ Petitioners, v. Minnesota Power, a division of ALLETE, Inc., Respondent.	Case No. PU-20-194 OAH File No. 20200211 CERTIFICATE OF SERVICE
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Roxanne Gangl, being first duly sworn, does depose and state that on July 20, 2020, this Certificate of Service and a true and correct copy of the following documents:

- Minnesota Power’s Motion for Partial Dismissal of Revised Complaint;
- Minnesota Power’s Brief in Support of Motion for Partial Dismissal of Revised Complaint;
- Answer to Revised Complaint

were sent by electronic mail and/or mailed via Federal Express (as indicated below) to:

Steven Kahl
Executive Director
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/s/ Roxanne Gangl _____
Roxanne Gangl

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