

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

<p><b>Keith and Deanna Kessler,</b></p> <p style="padding-left: 100px;"><b>Complainants/Petitioners,</b></p> <p style="padding-left: 100px;"><b>vs.</b></p> <p><b>Minnesota Power, a division of ALLETE, Inc.,</b></p> <p style="padding-left: 100px;"><b>Respondent.</b></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Case Nos. PU-20-194</b></p> <p><b>OAH File No. 20200211</b></p> <p><b>KESSLERS’ BRIEF IN RESPONSE TO MINNESOTA POWER’S MOTION FOR PARTIAL DISMISSAL OF REVISED COMPLAINT</b></p>
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¶1 Minnesota Power has made a motion for partial dismissal of the Kesslers’ Revised Complaint, asserting that four of the requests or remedies are beyond the scope of the North Dakota Public Service Commission’s (Commission) authority. Minnesota Power asserts that the requested relief is beyond the narrow limits of **Section 49-22-20** and **Section 49-22-21**, and further asserts that the Public Service Commission – despite its inherent constitutional powers and the numerous other statutes that give the Commission broad powers – is limited in this case to the options and penalties contained in those two statutes, and those two statutes alone. The Kesslers have requested the following relief:

6. Have the PSC conduct a survey of other landowners to determine if Minnesota Power has a pattern of misconduct relating to North Dakota landowners.
7. Prohibit Minnesota Power from any further operations in North Dakota.
8. Reimbursement for damages incurred for damage to Section 15, devaluation of Section 15, as well as personal damages for inconvenience, nuisance, and emotional distress.

9. Order Minnesota Power to reimburse all attorney fees incurred by the Kesslers relating to the prosecution of this action.

Minnesota Power claims that the Public Service commission does not have the authority to provide any of the requests. As will be shown below, each of these powers and remedies fall within the proper jurisdiction of the Commission.

¶2 The gravamen of the motion is Minnesota Power's argument that the only relief the Commission may grant in this case is that which has been given to it by the in Section 49-22-20 and Section 49-22-21. In other words, despite the Commissions inherent constitutional powers, despite the Commissions implied in incidental powers that are in addition to the powers expressly given by statute, and despite the numerous other statutory provisions which provide the Commission with the authority to provide each of the remedies requested, Minnesota Power serves that the Commission is limited only to Section 49-22-20 and Section 49-22-21. The Kessler's resist this motion and assert that the Commission's jurisdiction and powers are not so limited, as a matter of constitutional law as well as a matter of the other statutes that confer authority beyond the Siting Act found at Chapter 49-22.

### ¶3 DISCUSSION

**¶4 The cases cited by Minnesota Power are not dispositive of the issue of whether or not the Public Service Commission as matter of law cannot provide the remedies requested by the Kesslers. The Public Service Commission is a constitutionally created governmental entity that is imbued with implied and incidental powers and is not an administrative agency created by statute alone, and as such the traditional limits relating to administrative agencies do not apply to the Public Service Commission.**

¶5 The Public Service Commission is constitutionally created by Article V, Section 3, the North Dakota Constitution. As such, the Public Service Commission is imbued not only with statutory powers (as provided by the legislature) but also implied and incidental powers as well. A recent case interpreting the power of another constitutionally created office, that of Attorney General, provides a clear indication that the Commission has powers beyond those provided in title 49:

¶23 Furthermore, in addition to their statutory powers, this court long ago held that officers have implied powers as well. "The power of officers, implied and incidental, is ... 'that, in addition to the powers expressly given by statute to an officer or board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.'" State ex rel. Miller v. District Ct., 19 N.D. 819, 834, 124 N.W. 417, 423 (1910) (citation omitted).

...

¶26 Not every aspect of the powers of a constitutional officer like the Attorney General may be conveniently spelled out by statute, and the Legislature has not attempted to do so. Public officers have implied and incidental powers in addition to their explicit statutory powers. State ex rel. Miller v. District Ct., 19 N.D. at 834, 124 N.W. at 423. See also Brink v. Curless, 209 N.W.2d 758, 767 (N.D.1973), overruled on other grounds by City of Bismarck v. Muhlhauser, 234 N.W.2d 1 (N.D.1975) ("[W]here the powers and duties of an officer are prescribed by the Constitution and statutes, such powers and duties are measured by the terms and necessary implication of such grants and must be exercised in accordance therewith.") As we recently said in Kasprowicz v. Finck, 1998 ND 4, p 14, 574 N.W.2d 564, "leaving the manner and means of exercising an administrative agency's powers to the discretion of the agency implies a range of reasonableness within which the agency's exercise of discretion will not be interfered with by the judiciary."

¶27 Absent express constitutional or statutory limitations, we see no reason for this court to accord a constitutional officer like the Attorney

General a narrower measure of discretion than the range of reasonableness accorded to other Public officials, such as school boards (Reed v. Hillsboro Pub. Sch. Dist. No. 9, 477 N.W.2d 237 (N.D.1991)), or other municipal authorities (Haugland v. City of Bismarck, 429 N.W.2d 449 (N.D.1988)).

*State v. Hagerty*, 1998 ND 122, ¶¶23-27, 580 N.W.2d 139, 147 (1998)(emphasis added).

¶6 In furtherance of its argument that the Commission is limited to the remedies provided in Sections 49-22-20 and 49-22-21, Minnesota Power cites two cases, one of which is inapposite, and the other which has been impliedly overruled by the *Hagerty* case.

¶7 In the *Williams Electric Co-Op* case, the North Dakota Supreme Court was not dealing with limiting the powers of the Public Service Commission, but instead dealing with an argument that the Public Service Commission has the right to supplant the role the courts and consider, or adjudicate, contractual rights and obligations between parties. The Court concluded that the Public Service Commission's function is to regulate Public utilities and not to compel enforcement of contractual obligations. This case is inapposite because the case dealt with expanding the Public Service Commission's authority beyond regulating Public utilities. Although the Court stated that the Commission's "jurisdiction is dependent upon the statutes," it did not hold that the jurisdiction the Public Service Commission is founded only on statute.

¶8 Unfortunately, in the *Nebraska Public Power* case, the North Dakota Supreme Court in 1983 used the inapposite language in the *Williams Electric Co-Op* case as the basis for the following sentence to which Minnesota Power relies: “The PSC’s authority to regulate is limited to that given it by the legislature.” And yet, as will be shown below, even this inaccurate generic sentence does not preclude the Commission from providing the remedies requested by the Kesslers.

¶9 The *Nebraska Public Power* case, as well, is inapposite for several reasons. First of all, the issue before the Court was whether the Court should add an additional factor to be employed by the Public Service Commission when it evaluates corridor applications: the factor of need. The North Dakota Supreme Court refused to add this additional factor of need into the 11 factors found in Section 49-22-09 which the PSC is to be guided when it evaluates corridor applications. Significantly, in the *Nebraska Public Power* case, Court limited its review to the Siting Act and its legislative history, and found no authority in Section 29-22-09 for adding this additional factor relating to need. The *Nebraska Public Power* Court did not consider any inherent constitutional powers, any implied and incidental powers, or any other statutes found in Title 49. For that reason alone, the *Nebraska Public Power* case is not dispositive to this case. (Moreover, as stated above, it appears that the *Nebraska Public Power* case has been impliedly overruled by the *Hagerty* case.)

¶10 As shown by a close reading of the cases cited by Minnesota Power, in conjunction with the more recent case in *Hagerty*, it is clear that the Public Service Commission should not accept the argument Minnesota Power that the remedies allowed in the siting act are the only remedies that can be employed in this matter.

¶11 Minnesota Power mentions a few more decisions that need to be discussed very briefly. On page 4, Minnesota Power asserts the following: “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.” As noted above, this statement of fact is incorrect. The Public Service Commission is created by our Constitution, and unlike an administrative agency, is a creature of the Constitution. Although perhaps administrative agencies are only provided the power granted to it or necessarily implied from the grant, this is not the case in regards to the Public Service Commission. As such, the three cases cited following that statement do not apply to the Public Service Commission.

¶12 However, one of the cases has language that is applicable to the powers of the Public Service Commission and whether or not the legislature intended to provide other remedies. Minnesota Power cites to *Vogel v. Marathon Oil Company*, 2016 ND104, ¶17, 879 N.W.2d 471, 478, and quotes the following sentence: “A statute expressly including a comprehensive regulatory scheme is a strong indication the legislature did not intend to provide other remedies.”

¶13 While this language may apply to some administrative agencies, it cannot be applied to the Public Service Commission because unlike the *Vogel* case where there was no indication of legislative intent, in this situation the legislature – when describing the general jurisdiction of the Public Service Commission at section 49-02-01– specifically states that “[t]he general jurisdiction of the Commission shall extend to and include” eight following areas, including “electric utilities engaged in the generation and distribution of light, heat, or power.” This jurisdictional statute indicates a broad jurisdiction, that “shall extend to and include” the areas mentioned. Thus, there is an indication by legislature that the general jurisdiction and powers of the Public Service Commission should be broadly construed. In addition, under applicable North Dakota law, the Public Service Commission should refuse to narrow its measure of discretion where there is no express constitutional or statutory limitations requiring it to do so. *State v. Hagerty*, 1998 ND 122, ¶27, 580 N.W.2d 139, 147 (1998)(“Such powers are to be found unless there is an ‘express constitutional or statutory limitations.’”)

**¶14 B. In addition to any implied and incidental powers that the Public Service Commission has as a matter of course, Title 49 contains numerous other statutes which not only provide the Public Service Commission with the power to provide the remedies requested, but explicitly declined to limit the Public Service Commission’s powers.**

**¶15 1) *the inherent, implied, and incidental powers of the Public Service Commission have not been expressly limited by statute, and as such the Public Service Commission in determining remedies is not limited by Section 49-22-20 or Section 49-22-21.***

¶16 As noted above in the *Hagerty* case, in addition to their statutory powers, officers and Commissions “have implied powers as well” and such powers include those that are “implied and incidental” to those “powers expressly given by statute and includes “such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.”” *State v. Hagerty*, 1998 ND 122, ¶23, 580 N.W.2d 139, 147 (1998). Such powers are to be found unless there is an “express constitutional or statutory limitations.” *Ibid.* at ¶27.

¶17 Significantly, neither Section 49-22-20 nor Section 49-22-21 expressly limit the Public Service Commission to the rationale or penalties listed in those two statutes. And without such an explicit limit, the Public Service Commission is not limited to the four reasons listed in Section 49-22-24 for revoking or suspending a certificate or permit, or limited to the various penalties listed in Section 49-22-21. *Ibid.* at ¶27. As such, the argument made by Minnesota Power that the Public Service Commission is limited in this case to those remedies listed in Section 49-22-20 and Section 49-22-21 should be rejected.

**¶18 2) *In addition to its inherent constitutional powers, numerous other statutes contained in Title 49 provide the Public Service Commission with the jurisdiction and authority to provide the remedies requested by the Kesslers.***

¶19 Before we review the numerous statutes which provide additional powers and authority of the Public Service Commission, is important to note that the Public Service Commission is created under our Constitution, and as

discussed above, all constitutional officers or board of officers are allowed the inherent powers necessary to exercise their powers, fulfill their responsibilities, and enforce their orders and enforce the rules, regulations, or statutes that relate to their purpose and function.

¶20 We will now review the numerous statutes in Title 49 which provide the basis for the Public Service Commission to provide not only the remedies listed in Chapter 29-22, but to go beyond those specific listed items.

**Section 49-01-07 – Proceedings of the Public Service Commission**

“The Commission in all cases may conduct its proceedings, when not otherwise particularly prescribed by law, in a manner most conducive to the proper dispatch of business and to the ends of justice.” Emphasis added.

“[W]hen not otherwise particularly prescribed by law” clearly indicates that any narrow reading of Section 49-22-20 and 49-22-21 is not allowed. Because those Sections do not particularly prescribed any other rationale or penalties, by legislative enactment, the authority and power of the Public Service Commission may include any inherent, implied, incidental powers. To put this another way, the legislature intentionally refused to prescribe the powers of the Public Service Commission only to those powers explicitly listed in certain statutes.

¶21 Moreover, the statute specifically provides that the Public Service Commission is charged with promoting “the ends of justice.” One could argue that this alone allows the Public Service Commission the power to frame and implement whatever procedures and remedies it deems necessary to the proper

exercise of its power to protect the Public and ensure that any utilities under its jurisdiction comply with statutes, rules, regulations, and orders of the Public Service Commission.

**Section 49-02-01 – Proceedings of the Public Service Commission**

“The Commission in all cases may conduct its proceedings, when not otherwise particularly prescribed by law, in a manner most conducive to the proper dispatch of business and to the ends of justice.” Emphasis added.

¶22 Section 49-02-01 provides the general jurisdiction of the Public Service Commission over Public utilities, including electric utilities engaged in the generation and distribution of light, heat, or power. *Ibid.* at ¶4.

¶23 Section 49-02-02 of the code list the powers of the Public Service Commission with reference to Public utilities, and significantly, these powers are not explicitly or expressly limited to only those powers. These four subdivisions specifically relate to this matter:

1. Investigate all methods and practices of Public utilities or other persons, subject to the provisions of this title.
2. Require Public utilities or other persons to conform to the laws of this state and to all rules, regulations, and orders of the Commission not contrary to law.
- ...
4. Compel obedience to its lawful orders by proceedings of mandamus or injunction or other proper proceedings, in the name of the state, in any court having jurisdiction of the parties or of the subject matter.
- ...
- 6... The expense of any hearings or investigations and the actual expenses of any employees of the Commission while engaged by any hearing or investigation must be deducted from the application fee paid by the utility involved. The Commission shall ascertain the costs and expenditures.

These subdivisions make it clear that the Public Service Commission has the right to investigate the practices of Public utilities, require Public utilities to conform to the laws of this state and to all rules, regulations and orders of the Commission, enforce those orders through court process if necessary, and assess expenses of any hearings or investigations and ascertain the costs and expenditures.

¶24 Section 49-02-04 describes the power of the Commission to regulate Services, and provides that “whenever the Commission, after hearing, finds that the rules, regulations, practices, . . . or Service of any Public utility . . . are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the Commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, . . . Or methods to be observed, furnished, constructed, enforced, or employed, and, after hearing, shall fix the same by its order, rule, or regulation.” In other words, is the Public Service Commission determines that a Public utility’s practices or Service is unreasonable, unsafe, improper, and adequate, or insufficient, the Commission may fashion an appropriate remedy and “fix the same by its order, rule, or regulation.” The Public Service Commission’s ability to fashion a remedy and correct practices or Services that are unreasonable or inadequate is as broad as possible, and is in no way limited by the legislature.

¶25 Section 49-02-14 allows the Commission to “have the right, at any time, to inspect the accounts, books, papers, and documents of any Public utility.”

As such, the Public Service Commission has every right to demand that Minnesota Power provide them all documents relating not only to the Castle property, but all the landowners subject to this particular application.

¶26 **Section 49-02-17** allows the Commission to review “any unjust or unreasonable rates, rules, or practices of such utility,” and “call such facts to the attention of the officials of such Public utility and urged upon them the propriety of changing such rates, rules, or practices.” In regards to this case, the counselors assert that the practices of Minnesota Power were unjust and unreasonable.

¶27 Under **Section 49-02-18**, if after providing notice under Section 29-02-17 the utility fails to change or just a remedy “the discrimination, unreasonableness, or on justness, within a reasonable time, the Commission shall take the action necessary and appropriate proceeding to obtain relief from such rates, rules, or practices.” By the terms of the statute alone, the Public Commission has full authority to implement each of the remedies requested by the Kesslers.

¶28 **Section 49-04-16** requires the utilities to comply with any rules and regulations or orders from the Commission:

**Section 49-04-16 – Orders from Commission – observation by Public utility.**

Every Public utility shall obey and comply with each requirement of every order, decision, direction, rule, or regulation made or prescribed by the Commission in any matter in any way relating to or affecting its business as a Public utility, and shall do everything necessary or proper in order to

secure compliance with and observation of every such order, decision, direction, rule, or regulation by all of its officers, agents, and employees.

Implied within this obligation is the inherent authority to enforce the failure of any utility to follow the rules, regulations, orders of the Commission.

¶29 **Section 49-05-10** specifically provides in the first sentence the right of any person, corporation, or limited liability company affected by the utility's improper actions or omissions to obtain recovery "for all loss, damages, or injury caused thereby resulting therefrom." Significantly, although the next sentence allows such a claim to be presented to a court, this first sentence is not so limited. In our view, the first sentence of Section 49-05-10 allows the Kesslers to request damages directly from the utility as part of a remedy the Public Service Commission may choose to fashion, including attorney fees.

¶30 **Sections 49-07-02** relates to penal provisions in a case in which no other penalty has been provided and that can be imposed on "[a]ny person who violates or fails to comply with any provision of this title, or who fails, miss, or an neglect to obey, observe, comply with any order, decision, decree, rule, direction, demand, or requirement of the Commission, or any part or provision thereof."

¶31 The next Section, **Section 49-07-01.1**, provides that "any person who violates any statute, Commission order, Commission rule which applies to matters within the authority of the Commission ... shall, in addition to any other

penalty provided, be subject to a civil penalty not to exceed five thousand dollars.  
(Emphasis added.)

¶32 Thus, **Section 49-07-02** provides a penalty if no other penalty has been provided, in **Section 49-07-01.1** provides a penalty in addition to any other penalties that may be provided. In other words, the legislature has not limited to Public Service Commission to narrow penalties, and allows the Public Service Commission to fashion whatever remedy it deems appropriate, and use whatever statutes and enforcement mechanisms it deems appropriate to the situation.

¶33 We've already discussed above how Minnesota Power is attempting to limit Public Service Commission's authority and fashion a remedy to Section 49-22-20 in Section 49-22-21. The Commission should not exceed to such a request, or any such limiting of its broad and inherent power to use all of its statutes and rules and regulations to do justice and apply appropriate remedy. The fact that the application involve the siting of its windfarm does not mean that all the other statutes, rules, and regulations relating to Minnesota Power should go by the wayside. The allegations contained in the revised complaint deal with numerous issue separate from the siting, including the allegation that Minnesota Power lied to the Kesslers, prevented them from testifying at the hearing or raising a concern at the hearing, provided inaccurate and false information to the Public Service Commission to its application, provided inaccurate and false information as to the residence at issue being abandoned, and acted

inappropriately and unjustly in reference to the Kessler's and the other landowners who were subject to Minnesota Power's development of its windfarm.

¶34 Minnesota Power concedes that **Section 49-22-20** and **Section 49-22-21** applies to the Kessler matter, and as such they concede that the certificate of site compatibility or permit for the construction of an electric transmission facility may be revoked or suspended due to any material false statement in the application or any accompanying statements or studies required of the applicant, failure to comply with the certificate or permit or any terms, conditions, or modifications contained therein, or violation of the provisions of this chapter rules or regulations issued pursuant to this chapter by the Commission. However, in reference of the application of **Section 49-22-20**, it is difficult to understand how revocation of site compatibility or revocation of the permit for the construction would be applicable now that the site has already been constructed and is operational. (It is possible that a revocation or suspension of the certificate would result in this windfarm being shut down, that is certainly not clear.)

¶35 As to **Section 49-22-21**, the penalty sections relating to the siting chapter, provides that anyone guilty of willful acts in violation of the chapter, any regulation issued or approved pursuant to the chapter, is guilty of a class a misdemeanor and subject to various fines. Again, as noted above, the Kessler revised complaint involves much more than just the siting issue, and as such Minnesota Power's attempt to limit the remedies and penalties to Section 49-22-

20 and **Section 49-22-21** should not be adopted by the Public Service Commission.

¶36 Lastly, it is important to note that **Section 49-22-16** provides that subdivision to the certificate of site compatibility for an electric energy conversion facility may not supersede or preempt any local land use, zoning, or building rules, regulations, or ordinances in the site may not be designated which violates local land use, zoning, or building rules, regulations, or ordinances. The county regulation at the time this windfarm was approved and constructed required 1320 feet distance for many residents and the wind turbine. And of course, the state statute (and the application approved by the Public Service Commission) specifically provides that the distance from any occupied residence must be sited a minimum of 1,400 feet from occupied residences.

**¶37 3) *brief review and summary of the statutes listed above that provide the Public Service Commission with the jurisdiction and authority to provide the remedies requested by the Kesslers.***

¶38 We have asserted in this brief, with reference to specific constitutional provisions and statutes, that the following relief requested by the Kesslers find support within North Dakota law and specifically within title 49 of the North Dakota Century code:

¶39 In closing, we provide with specificity references to the statutes listed above which provide the Public Service commission with the power to do any of the following:

**Article 5, section 3**, North Dakota Constitution – inherent constitutional and general authority in regards to the regulation of Public utilities

**Section 49-01-07** – commission authorized to conduct its proceedings, when not otherwise particularly prescribed by law, in a manner most conducive to the proper dispatch of business and to the ends of justice.

**Section 49-02-01** – general jurisdiction that extends to and includes electric utilities engaged in the generation and distribution of light, heat, or power.

**Section 49-02-02, subdivision 1, 2, 4, and 6** – power to 1) investigate all methods and practices of Public utilities, 2) require Public utilities to conform to the laws of the state and to all rules, regulations and orders, 4) compel obedience to its lawful orders, 6) power to ascertain costs and expenses relating to applications filed by gas or electric Public utilities

**Section 49-02-04** – power to remedy the practices of any Public utility that are unjust, unreasonable, unsafe, improper, inadequate, or insufficient in force or fix the same by order, rules, or regulation

**Section 49-02-14** – the right at any time to inspect the accounts, books, papers, documents of any Public utility

**Section 49-02-17** – the power to advise a utility that its practices are unjust or unreasonable and urge upon them the propriety of changing such practices

**Section 49-02-18** – the power to take the action necessary and appropriate proceeding to obtain relief from any discriminatory, unreasonable, or unjust practices

**Section 49-04-16** – the requirement that every Public utility shall obey and comply with each requirement of every order, decision, direction, rule, or regulation made or prescribed by the commission and should do everything necessary or proper in order to secure compliance

**Section 49-05-10** – utility liable to any person affected by any act, matter, or thing prohibited, forbidden, or declared to be unlawful for all loss, damages, or injury caused thereby resulting therefrom.

**Sections 49-07-02, 49-07-01.1, 49-22-20, 49-22-21** – various additional remedies and punishments available to the Public Service commission.

¶40 We further provide in summary fashion an indication of which statutes most closely apply to each claim for relief – nonetheless noting that the other statutes continue to apply to these remedies. Indeed, taken as a whole, all of the statutes listed above create a panoply of rights and remedies that allow the Public Service Commission to fashion an appropriate remedy in this matter; all within the proper jurisdiction, mission, and purpose of the Public Service Commission.

¶41 **Claim for Relief No. 6.** Have the PSC conduct a survey of other landowners to determine if Minnesota Power has a pattern of misconduct relating to North Dakota landowners.

**See esp. 49-01-07, 49-02-02, 49-02-04, 49-02-17, 49-02-18.**

**Rationale:** The PSC certainly has the authority as part of its investigative function to conduct a survey of the landowners to determine if there is a pattern of misconduct by Minnesota Power. This would certainly fall under its mission to protect the citizens of North Dakota from any improper conduct of any utility, particularly as it relates to the issue of whether the regulated company has provided inaccurate or false information to landowners.

¶42 **Claim for Relief No. 7.** Prohibit Minnesota Power from any further operations in North Dakota.

**See esp. 49-01-07, 49-02-17, 49-02-18, 49-04-16.**

**Rationale:** The PSC, in addition to its power to suspend or revoke a permit, should most certainly have the power to decide if a company should be prohibited, based on his prior conduct, and doing business in North Dakota. This too is part of the primary

mission of the PSC, which is to protect the citizens of North Dakota for many improper conduct of any utility.

¶43 **Claim for Relief No. 8.** Reimbursement for damages incurred for damage to Section 15, devaluation of Section 15, as well as personal damages for inconvenience, nuisance, and emotional distress.  
See esp. 49-01-07, 49-02-02(6), 49-02-04, 49-02-17, 49-02-18, 49-05-10.

**Rationale:** The PSC, particularly under Section 49-05-10 and Section 49-02-02(6), has the power to require Minnesota Power to pay the Kesslers damages as part of a remedy the Public Service Commission may choose to fashion. Otherwise, the landowner would not be made whole.

¶44 **Claim for Relief No. 9.** Order Minnesota Power to reimburse all attorney fees incurred by the Kesslers relating to the prosecution of this action.  
See esp. 49-01-07, 49-02-02(6), 49-02-04, 49-02-17, 49-02-18, 49-05-10.

**Rationale:** Also particularly under Section 49-05-10 and Section 49-02-02(6) the PSC has the power to require Minnesota Power to pay the Kesslers' attorney fees. The PSC, in determining costs and expenses that will be assessed against the utility company should also include attorney fees on behalf of the landowner since bringing this action was a consequence of the company's failure to follow the PSC's order or comply with North Dakota statutes, rules, and regulations. In addition, the devaluation of the Kessler property due to the improper placement of the turbine constitutes the equivalent of inverse condemnation, and as such it is appropriate for the PSC to award attorney fees to the landowner, just as it occurs under normal North Dakota combination law.

¶45 Dated this 2<sup>nd</sup> day of August, 2020.



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Lynn Boughey (#04046)  
Attorney for Keith and Deanna Kessler  
lynnboughey@midconetwork.com  
P.O. Box 1202  
Mandan, ND 58554-1202  
(701) 751-1485

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

Keith and Deanna Kessler,	)	Case Nos. PU-20-194
	)	OAH File No. 20200211
Complainants/Petitioners,	)	
	)	
vs.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
Minnesota Power, a division of ALLETE,	)	
Inc.,	)	
	)	
Respondent.	)	

¶1 I hereby certify that the following document (s):

1. Kesslers’ Brief in Response to Minnesota Power’s Motion for Partial Dismissal of Revised Complaint.

was served upon the above-named Respondent by serving true and correct copies of the above-listed document on the 3<sup>rd</sup> day of August, 2020, via email to:

Steven Kahl  
Executive Director  
ND Public Service Commission  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480  
ndpsc@nd.gov  
(email & original and 10 copies  
Via USPS)

ALJ Timothy J. Dawson  
Administrative Law Judge  
Office of Administrative Hearings  
2911 N. 14<sup>th</sup> Street, Suite 303  
Bismarck, ND 58503  
tjdawson@nd.gov  
(Via email & USPS)

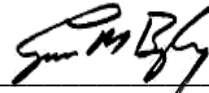
John Schuh  
ND Public Service Commission  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480  
jschuh@nd.gov  
(Via email)

Brian Johnson  
ND Public Service Commission  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480  
brljohanson@nd.gov  
(Via email)

Mollie M. Smith  
Patrick D.J. Mahlberg  
200 S 6<sup>th</sup> St., Suite 4000  
Minneapolis, MN 55402-1425

msmith@fredlaw.com  
pmahlberg@fredlaw.com  
(Via email)

¶2 Dated this 3<sup>rd</sup> day of August,, 2020.



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Lynn Boughey (#04046)  
Attorney for Keith & Deanna Kessler  
lynnboughey@midconetwork.com  
P.O. Box 1202  
Mandan, ND 58554-1202  
(701) 751-1485