

August 10, 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.
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 Reply Brief in Support of Motion for Partial Dismissal of 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/70674120
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 REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL OF REVISED COMPLAINT
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INTRODUCTION

Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”), submits this Reply Brief in Support of its Motion for Partial Dismissal (“Motion”) of the revised Complaint filed by Keith and Deanna Kessler (“Kesslers”) on June 29, 2020 (“Complaint”) in the captioned case.

The Kesslers’ Response Brief (“Response”) asserts that the North Dakota Public Service Commission (“Commission”) has inherent, as well as statutory, authority to grant the relief sought in Paragraph 22, subparts 6, 7, 8, and 9 of the Complaint. However, as discussed further below, the remedies available to the Commission in siting matters were prescribed by the Legislature in the Energy Conversion and Transmission Facility Siting Act (“Siting Act”) (N.D.C.C. Ch. 49-22), and those remedies do not include the relief requested in Paragraph 22, subparts 6, 7, 8, and 9 of the Complaint. Therefore, the Commission should grant Minnesota Power’s motion to dismiss these claims pursuant to N.D. R. Civ. P. 12(b)(6).

ARGUMENT

I. The Commission’s Authority Over Siting of Electric Generation Facilities Was Established by the Legislature, Not by the North Dakota Constitution, and Is Limited By Statute.

A. The Commission’s authority in siting matters was established by the Legislature in the Siting Act.

It is true that the Commission originated as a constitutional body and, at the time, its authority was limited to the regulation of railroads.¹ However, the North Dakota Constitution is not the source of the Commission’s authority over siting matters. The current North Dakota Constitution states only that three public service commissioners are to be elected and that the Legislature must prescribe the Commission’s powers and duties. *See* N.D. Const. Art. 5, § 2 (“The qualified electors of the state . . . shall choose . . . three public service commissioners . . . The powers and duties of the . . . public service commissioners . . . ***must be prescribed by law.***”) (emphasis added). Thus, the Commission’s authority over the siting of electric generation facilities was conferred by the Legislature in the Siting Act, not in the North Dakota Constitution. Likewise, the relief the Commission may grant in siting cases was prescribed by the Legislature in N.D.C.C. §§ 49-22-20 and 49-22-21. *See City of Grafton v. Otter Tail Power Co.*, 86 N.W.2d 197, 202 (N.D. 1957) (“The . . . Commission is a constitutional body. . . . It was originally known as the Board of Railroad Commissioners. ***The powers and duties of its members are such as are prescribed by law.*** . . . The [Commission] has only such powers as have been conferred upon it by the

¹ As stated on the Commission’s website, the “Dakota Territory established a Board of Railroad Commissioners in 1885, with general jurisdiction over railroads, sleeping car companies, express companies, and telegraph companies. At statehood, the Constitution of ND provided for election of a Board of Railroad Commissioners with powers and duties prescribed by law. In 1940, its name was changed to Public Service Commission (PSC).” *See* <https://www.psc.nd.gov/commission/about/history.php>; *see also* ND PSC Informational Brochure, available at <https://www.psc.nd.gov/docs/psc-brochure-1989.pdf>; State Historical Society of North Dakota, Public Service Commission <https://www.history.nd.gov/archives/stateagencies/publicservicecommission.html>.

Legislature. It can initiate no public policies of its own. *It can act in no field which the Legislature has not authorized it to enter.*) (emphasis added); *Appl. of Neb. Pub. Power Dist.*, 330 N.W.2d 143, 148-49 (N.D. 1983) (the Commission’s “authority to regulate is limited to that given it by the Legislature”) (internal citations omitted); *City of Grafton*, 86 N.W.2d at 202 (“Our Constitution has authorized the Legislature to prescribe the powers and duties of the Public Service Commission and the Legislature has acted accordingly.”).

The Kesslers’ reliance on *State v. Hagerty*, 1998 N.D. 122, 580 N.W.2d 139, is misplaced. Although the *Hagerty* court noted that the Attorney General was a constitutional officer, the court’s analysis focused on whether the Attorney General’s actions (retaining special assistant attorneys general on a contingent fee basis) were authorized by statute. The court concluded that the statutes authorized the attorney general to appoint special assistant attorneys general, but that the “statutes relating to the Attorney General’s duties and powers did not then and do not now specify in detail the methods by which the Attorney General is to perform and exercise her duties and powers.” *Hagerty*, 1998 N.D. 122, ¶ 22, 580 N.W.2d at 146. As a result, the Court determined that the Attorney General had the inherent power to make the statutorily-authorized appointments on a contingent fee basis. Thus, the question of inherent authority only came into play because the authorizing statutes did not specify how to implement the authority given.

Here, unlike in *Hagerty*, the Siting Act specifies the powers and duties of the Commission, including the actions the Commission may take when the Siting Act or the Commission’s associated orders or rules are violated. Therefore, the cases cited in the Kesslers’ Response regarding the inherent authority of constitutional officers are not relevant.

- B. The Kesslers' Complaint is tied to the Commission's siting authority; thus, N.D.C.C. §§ 49-22-20 and 49-22-21 prescribe the applicable remedies.

The Kesslers' Response acknowledges that N.D.C.C. §§ 49-22-20 and 49-22-21 provide “remedies and punishments available to the Public Service commission [sic],” but argue that those provisions should not be “adopted” by the Commission here because the Kesslers have alleged more than just siting issues. This argument fails for several reasons. First, the Kesslers' Complaint is tied directly 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 Siting Act. Thus, contrary to the Kesslers' assertions, the Siting Act applies. Second, the Legislature specified the available remedies in the Siting Act, and the Commission is not at liberty to “adopt” remedies other than what the Legislature has authorized, particularly the extraordinary and unprecedented relief the Kesslers have requested in the Complaint. Third, even if allegations in the Complaint extend beyond siting, the Kesslers cannot unilaterally expand the Commission's authority beyond what has been granted by the Legislature. In other words, the Kesslers cannot confer authority to the Commission over matters it does not otherwise have authority over simply by including those matters as allegations in a complaint. Rather, since the Kesslers' claims for relief are outside of the Commission's authority, those claims should be dismissed for failure to state a claim upon which relief can be granted.

II. Since the Penalties Authorized in Siting Cases are Specified in N.D.C.C. §§ 49-22-20 and 49-22-21, Penalties in Other Provisions of N.D.C.C. Title 49 Are Not Applicable.

- A. Since N.D.C.C. §§ 49-22-20 and 49-22-21 prescribe the penalties for violations of the Siting Act, N.D.C.C. §§ 49-01-07 and 49-07-01 are, by their own terms, inapplicable.

The penalties provisions in N.D.C.C. §§ 49-01-07 and 49-07-01 are, by their own terms, inapplicable because the penalties authorized in siting cases are prescribed in N.D.C.C. §§ 49-22-20 and 49-22-21.

N.D.C.C. § 49-01-07 provides in relevant part: “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.) The Kesslers argue that the emphasized phrase renders this statute applicable because N.D.C.C. §§ 49-22-20 and 49-22-21 do not prohibit the relief the Kesslers are requesting. (See Kessler Response at ¶ 20.) However, in reality, the emphasized portion is applicable because N.D.C.C. §§ 49-22-20 and 49-22-21 “prescribe” the manner in which violations of the Siting Act may be redressed by the Commission.²

N.D.C.C. § 49-07-01³ provides: “Any person who violates or fails to comply with any provision of this title, or who fails, omits, or neglects to obey, observe, or comply with any order, decision, decree, rule, direction, demand, or requirement of the commission, or any part or provision thereof, *in a case in which no other penalty has been provided*, shall be guilty of a class A misdemeanor.” (Emphasis added.) As discussed above, N.D.C.C. §§ 49-22-20 and 49-22-21 specifically provide for penalties for violations of the Siting Act.

B. N.D.C.C. Chs. 49-02, 49-04, and 49-05 apply to “public utilities” and Minnesota Power is not a public utility in North Dakota.

N.D.C.C. Chs. 49-02, 49-04, and 49-05 all apply to “public utilities” and therefore are not applicable here, as Minnesota Power is not a public utility under the laws of North Dakota. An

² Merriam-Webster defines “prescribe” as “to lay down a rule,” “to lay down as a guide, direction, or rule of action,” “to specify with authority,” and “to designate or order the use of as a remedy.” *Prescribe*, Merriam-Webster’s Online Dictionary (last visited August 7, 2020), <https://www.merriam-webster.com/dictionary/prescribe>; see also PRESCRIBE, Black’s Law Dictionary (11th ed. 2019) (defining “prescribe” as “[t]o dictate, ordain, or direct; to establish authoritatively (as a rule or guideline).”).

³ This provision is erroneously cited as N.D.C.C. § 49-07-02 in the Kesslers’ Response (see Kessler Response at ¶¶ 30, 32, 39). However, N.D.C.C. § 49-07-02 was repealed and the Kesslers appear to instead be referencing N.D.C.C. § 49-07-01.

“electric public utility” is defined in N.D.C.C. § 49-03-01.5(2) as “a privately owned supplier of electricity offering to supply or supplying electricity to the general public.” Additionally, to the extent these chapters apply to an “electric provider,” N.D.C.C. § 49-04-01.5(1) defines this term as “an electric public utility or a rural electric cooperative.” While Minnesota Power, a division of ALLETE, Inc., has service territory and is a regulated utility in Minnesota, it is not in North Dakota.⁴ Thus, these provisions are not applicable.⁵

- C. When quoted in its entirety, it is evident that N.D.C.C. § 49-07-01.1 does not apply to matters subject to the Siting Act.

N.D.C.C. § 49-07-01.1, by its own terms, does not apply to matters subject to the Siting

Act:

Any person who violates any statute, commission order, or commission rule which applies to matters within the authority of the commission under chapters 8-08, 8-09, 8-10, 24-09, 32-25, and 51-05.1, titles 60 and 64, **and title 49 except for chapters 49-22, 49-22.1, and 49-23**, in addition to any other penalty provided, is subject to a civil penalty of not to exceed five thousand dollars. A violation occurring under chapter 49-23, in addition to any other penalty, is subject to a civil penalty not to exceed twenty-five thousand dollars. The commission shall develop policies for the assessment of penalties under chapter 49-23 which will take into consideration the severity of damages and the conduct of the offender. The civil penalty may be compromised by the commission. The amount of the penalty when finally determined or agreed upon in compromise, if not paid, may be recovered in a civil action in the courts of this state.

⁴ See, e.g., *Square Butte Elec. Co-op. v. Hilken*, 244 N.W.2d 519, 512 (N.D. 1976) (noting that Minnesota Power & Light (which is now known as ALLETE, Inc.) is a Minnesota regulated utility serving Minnesota customers).

⁵ Although the referenced sections of N.D.C.C. Chs. 49-02, 49-04, and 49-05 are not applicable, it should also be noted that the interpretation of NDCC § 49-05-10 in the Kesslers’ Response does not align with the provision’s plain language, which states that any action to recover under the provision be “brought in any court of competent jurisdiction.”

(Emphases added.) By excepting N.D.C.C. Ch. 49-22, this provision does not apply to the situation at hand.⁶

CONCLUSION

For the reasons stated in this Reply Brief, as well as the brief provided with the Motion, 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 10th day of August, 2020.

FREDRIKSON & BYRON, P.A.

By 
MOLLIE M. SMITH, ND Bar #06714
PATRICK D.J. MAHLBERG, ND Bar #06659
*Attorneys for Minnesota Power, a division of
ALLETE, Inc.*
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7270
msmith@fredlaw.com
pmahlberg@fredlaw.com

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⁶ Not only does the Kesslers' Response ignore the emphasized portion of N.D.C.C. § 49-07-01.1, the emphasized portion appears to have been purposefully omitted from the quote provided in the Response. (*See* Kessler Response at ¶ 31.)

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 August 10, 2020, this Certificate of Service and a true and correct copy of the following document:

- Minnesota Power’s Reply Brief in Support of Motion for Partial Dismissal of Revised Complaint

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

Steven Kahl
Executive Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov
(Via E-Mail and original and 10 copies via FedEx)

ALJ Timothy J. Dawson
Administrative Law Judge
Office of Administrative Hearings
2911 N. 14th Street, Suite 303
Bismarck, ND 58503
tjdawson@nd.gov
(Via E-Mail)

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

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

Lynn Boughey
Boughey Law Firm
PO Box 1202
Mandan, ND 58554-1202
lynnboughey@midconetwork.com
(Via E-Mail)

/s/ Roxanne Gangl _____
Roxanne Gangl

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