

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler  
v. Minnesota Power, a division of ALLETE, Inc.  
Complaint

Case No. PU-20-194

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

Geralyn R. Schmaltz deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **21st day of January 2021**, she deposited in the United States Mail, at Bismarck, North Dakota, **two** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and containing a photocopy of:

- **Order on Motion to Dismiss**

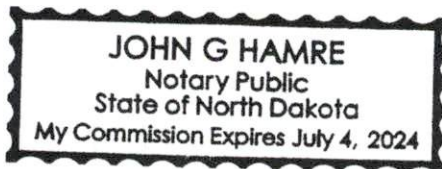
The envelopes were addressed as follows:

Mollie Smith  
Attorney for Minnesota Power,  
a division of Allete, Inc.  
Fredrikson & Byron, P. A.  
200 South Sixth Street Suite 4000  
Minneapolis, MN 55402-1425  
**Cert. No. 7020 1290 0001 6150 6138**


Lynn Boughey  
Attorney for Keith & Deanna Kessler  
PO Box 1202  
Mandan, ND 58554-1202  
**Cert. No. 7020 1290 0001 6150 6145**

The addresses shown are the respective addressee's last reasonably ascertainable post office addresses.

Subscribed and sworn to before me  
this **21st day of January 2021**.



SEAL

  
Notary Public

28 PU-20-194 Filed: 1/21/2021 Pages: 4  
Affidavit of Service by Certified Mail - Order on  
Motion to Dismiss

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

**Keith and Deanna Kessler  
v. Minnesota Power, a division of ALLETE, Inc.  
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**Case No. PU-20-194**

**ORDER ON MOTION TO DISMISS**

**January 20, 2021**

**Preliminary Statement**

On April 23, 2020, the Public Service Commission (Commission) received a complaint from the Keith and Deanna Kessler (Kesslers). A revised complaint was filed on April 27, 2020. The complaint was regarding the placement of a wind turbine on Kessler's property.

On May 20, 2020, the Commission received a Minnesota Power, a division of ALLETE (ALLETE) response to the complaint.

On May 27, 2020, the Commission found the Kessler's complaint states a prima facie case.

On June 2, 2020, Administrative Law Judge (ALJ) Timothy Dawson was assigned as the ALJ.

On June 11, 2020, a prehearing conference was held. Filings and discovery were discussed during the prehearing conference. As a result of the prehearing discussion, Kesslers agreed to file an amended and simplified complaint. ALLETE agreed to a deadline for its answers and any motions.

On June 29, 2020, Kesslers filed a Second Revised Complaint.

On July 20, 2020, ALLETE filed an Answer to the Revised Complaint, Brief in Support, and a Motion for Partial Dismissal.

On August 3, 2020, Kesslers filed a reply Brief in response to ALLETE's July 20, 2020, Motion for Partial Dismissal

On August 10, 2020, ALLETE filed a reply brief in support of their Motion for Partial Dismissal of Revised Complaint.

On September 23, 2020, the Commission issued an Order on Motion for Partial Dismissal dismissing four claims for relief requested by Kesslers as outside the scope of authority of the Commission.

On November 13, 2020, ALLETE filed a Notice of Motion and Motion for Partial Summary Judgment, Brief in Support of Motion, and supporting documents.

On January 4, 2021, Kesslers filed Kesslers' Brief in Response to Minnesota Power's Second Motion for Partial Dismissal of Revised Complaint, and also filed exhibits.

On January 14, 2021, ALLETE filed Minnesota Power's Reply Brief in Support of Motion for Partial Summary Judgment.

### **Discussion**

ALLETE's Motion for Partial Summary Judgment was filed pursuant to N.D. R. Civ. P. 56 and identified the following claims for dismissal:

1. Kesslers' claims to the extent that they are based on the assertion that a structure they own in Section 15, Township 141 North, Range 87 West, Oliver County, North Dakota ("Section 15 Structure") was an "occupied residence" at the time that Minnesota Power obtained a Certificate of Site Compatibility from the North Dakota Public Service Commission for the Bison IV Project in 2013 or constructed Turbine 441 in 2014; and
2. Kesslers' claims for a sound study and any related relief.

ALLETE asserts there are no genuine issues of material fact relating to the structure being unoccupied and that, even if there were, the sound modeling conducted by EAPC demonstrates compliance with the sound level requirements of NDAC § 69-06-08-01(4).

Kesslers responded that ALLETE's motion to dismiss must be denied due to the existence of a dispute of material facts regarding a determination of whether the residence was an "occupied residence." Kesslers also argue that the sound study modeling was insufficient for making a determination regarding the sound at the occupied residence.

ALLETE's reply brief stated that Kesslers misrepresented the Motion and applicable standard as a partial motion to dismiss rather than a motion for partial summary judgment, that Kesslers offer no good reason to determine the applicable legal standard based upon facts presented at the hearing, misrepresent testimony, and offer no evidence of sound levels or deficient modeling.

ALLETE moves to support this Motion for Partial Dismissal under N.D.R. Civ. P. 56 rather than a specific procedural administrative rule promulgated by the Commission. Generally, proceedings before an administrative agency are not restricted by the technical and formal rules practiced before a court. The Commission previously considered ALLETE's September 23, 2020 Motion for Partial Dismissal for the purpose of narrowing the issues within the Commission's scope of authority.


The matters relating to the turbine, residence, and the impacts are matters of dispute within the Commission's jurisdiction and subjects of consideration by the Commission. Kessler should be afforded the opportunity to present their position and evidence. To the extent that ALLETE would like the Commission to consider its arguments regarding whether the residence of dispute was unoccupied and whether the sound study was adequate, it may do so during the hearing.

### Order

The Commission Orders:

ALLETE's Motion for Partial Summary Judgement is DENIED.

### PUBLIC SERVICE COMMISSION



**Randy Christmann**  
Commissioner



**Julie Fedorchak**  
Chair



**Brian Kroshus**  
Commissioner