

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

<p>Keith and Deanna Kessler,</p> <p style="text-align:center">Complainants/ Petitioners,</p> <p>v.</p> <p>Minnesota Power, a division of ALLETE, Inc.,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:right">Case No. PU-20-194 OAH File No. 20200211</p> <p style="text-align:center">MINNESOTA POWER’S MOTION IN LIMINE</p>
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Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”), submits this Motion in Limine (“Motion”) to exclude from the March 25 and 26, 2021 evidentiary hearing certain document(s), testimony, and/or other evidence identified in Kesslers’ Pretrial Information, filed March 8, 2021. In accordance with NDAC § 69-02-05-01, the motion should be granted to appropriately limit the scope of testimony and evidence presented at hearing to that which is relevant to the issues identified by the North Dakota Public Service Commission in its February 3, 2021 Notice of Hearing. The grounds for this motion and the specific document(s), testimony, and/or other evidence Minnesota Power requests be excluded are more fully set forth in the accompanying brief.

Dated this 11th day of March, 2021.

FREDRIKSON & BYRON, P.A.

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INTRODUCTION

Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”), submits this Brief in Support of its Motion in Limine (“Motion”) to exclude certain document(s), testimony, and/or other evidence from the North Dakota Public Service Commission’s (the “Commission”) upcoming evidentiary hearing. Minnesota Power does this in furtherance of its continued attempt to promote an efficient, timely resolution to this action by focusing on the critical issues as identified by the Commission.

RELEVANT BACKGROUND

In the Notice of Hearing, issued February 3, 2021, the Commission identified three issues to be considered in this matter, as follows:

1. Whether the Section 15 structure was an occupied residence at the time the Commission issued its Order Granting a Certificate of Site Compatibility for the Project (Order).
2. If the Section 15 structure was an occupied residence at the time the Commission’s Order was issued, does placement of turbine number 441 violate the Commission’s Order; if so, what remedies are appropriate.

3. At the public hearing, did Minnesota Power withhold information relating to the Section 15 structure from the Commission that Minnesota Power should have communicated to the Commission; if so, what remedies are appropriate.

(the “Hearing Issues”). The hearing on these issues is scheduled to take place over two days, on March 25 and 26.

On March 8, 2021, Petitioners filed “Kesslers Pretrial Information.” The Petitioners did not file pre-filed testimony, but instead provided a list of points or topics that their witnesses may address. Petitioners’ filing also discloses that Petitioners intend to use 56 documents/categories of documents and call twelve witnesses. Many of the “testimony” topics and exhibits identified in Petitioners’ pre-hearing filing are outside the scope of the Hearing Issues.

ARGUMENT

As the Commission noted recently in its Order on Minnesota Power’s Motion for Partial Summary Judgment, proceedings before the Commission are not necessarily restricted by the technical and formal rules practiced before a court. However, even in instances where the Commission has waived the North Dakota Rules of Evidence, only relevant evidence may be admitted. NDAC § 69-02-05-01. In this case, an advance ruling regarding the scope of testimony and evidence is necessary to ensure the hearing remains focused on the Hearing Issues.

The issues outlined in the Commission’s Notice of Hearing dictate the testimony and documentary evidence that are relevant to this matter. That evidence includes whether the Section 15 structure was occupied when the Commission issued its Order and whether Minnesota Power withheld information about the Section 15 structure from the Commission at the September 13, 2013 public hearing. If the Section 15 structure was occupied, or if Minnesota Power withheld information about the Section 15 structure from the Commission, then evidence about the lawful, appropriate remedies is also relevant.

As outlined below, many of the documents and potential testimony points identified by the Petitioners are outside the scope of the Hearing Issues and should be excluded:

Petitioners' Exhibit Number(s)	Exhibit Description	Basis for Exclusion
17	Kessler Videos of flickering and noise from Turbine	Videos of post-construction conditions are not within the scope of or relevant to the Hearing Issues.
37-44	Documents regarding costs of construction, production values, costs of decommissioning	The costs to construct or decommission the overall wind facility, or monies earned by Minnesota Power in connection with the overall wind facility, are not relevant. Further, the Commission already determined that an award of damages is outside of the Commission's authority. (<i>See</i> Order on Motion for Partial Dismissal, p. 2 (Sept. 23, 2020).) As such, the only information potentially relevant is the cost to move Turbine 441, to the extent related to the issue of remedies. Therefore, proposed exhibits 38-41, 43-44 are not within the scope of or relevant to the Hearing Issues, and proposed exhibits 37 and 42 should be limited specifically to, at most, the cost to Minnesota Power to relocate Turbine 441. ¹
45	Attorney Boughey billings	The Commission has already determined that it cannot award attorney fees to the Petitioners. (<i>See</i> Order on Motion for Partial Dismissal, p. 2 (Sept. 23, 2020).) At Petitioners' counsel's request, he was given the opportunity to reargue this issue, but in a post-hearing filing separate from the merits. (<i>See</i> Prehearing Conference Summary and Scheduling Order, p. 2 (January 28, 2021).) Therefore, these documents are not within the scope of or relevant to the Hearing Issues.

The Petitioners' decision to not file testimony makes the full scope of their planned testimony uncertain. However, as noted in the chart below, it is clear from Petitioners' pre-hearing

¹ These proposed exhibits appear to be the same set of documents that are the subject of the Kesslers' pending request for a subpoena *duces tecum*. Minnesota Power reserves all objections to that request.

filing that they intend to solicit testimony about matters outside the scope of the Hearing Issues, or is unnecessarily duplicative, and should also be excluded:

Witness	Point/Scope of Testimony (p. # of Petitioners' pre-hearing filing)	Basis for Exclusion
Keith Kessler	Testimony about the “problems created” by the placement of Turbine 441 (p. 5)	Outside the scope of and irrelevant to the Hearing Issues.
	Testimony that “Minnesota Power in its response to the Kessler complaint lied repeatedly to the PSC in regards to the actual facts, most directly in their letter response to the PSC” (p. 6)	Outside the scope of and irrelevant to the Hearing Issues.
	“[R]equest that Minnesota Power be prohibited from doing any further business in North Dakota” (p. 6)	This relief is unavailable in this action. (Order on Motion for Partial Dismissal, p. 2 (Sept. 23, 2020).) Therefore, testimony about this is outside the scope of and irrelevant to the Hearing Issues.
	“[R]equest that the Kessler attorney fees be paid in full for all aspects of this matter, including the fees relating to the earlier issues resolved by mediation.” (p. 6)	Attorney fees are not available in this action. (Order on Motion for Partial Dismissal, p. 2 (Sept. 23, 2020).) Further, Petitioners have no claim for the Commission to order attorney fees paid relating to matters settled in mediation. Therefore, testimony about this is outside the scope of and irrelevant to the Hearing Issues.
Deanna Kessler	“[C]onfirmation of the information provided by Keith. . . .” (p. 7)	To the extent Mrs. Kessler would offer “confirmation” of Mr. Kessler’s testimony that should be excluded as set out above, it should likewise be excluded as to Mrs. Kessler.
Stephen Kessler	“[T]he historic use of the structure, when he was in school, and the intended use of the structure once he returned from college.” (p. 7)	Petitioners are the owners of the Section 15 structure and will offer testimony as to whether it was an “occupied residence” when the Commission issued its Order. Further testimony about these issues will be unnecessarily duplicative. Additionally, Stephen Kessler was not alleged to be present for any communications with Minnesota Power during the relevant period. Therefore, he has no admissible information as to what

		information Minnesota Power had in its possession as of the time of the hearing or when the Commission issued its Order.
Hayden Kessler	“[T]he historic use of the structure, when he was in school, and the intended use of the structure once he completed high school.” (p. 7)	Petitioners are the owners of the Section 15 structure and will offer testimony as to whether it was an “occupied residence” when the Commission issued its Order. Further testimony about these issues will be unnecessarily duplicative. Additionally, Hayden Kessler was not alleged to be present for any communications with Minnesota Power during the relevant period. Therefore, he has no admissible information as to what information Minnesota Power had in its possession as of the time of the hearing or when the Commission issued its Order.
John Kessler	Testimony about John Kessler’s alleged conversation with a Minnesota Power representative(s) regarding a crane walk over Petitioners’ property (p. 8)	Testimony from John Kessler about his alleged conversations with a person(s) from Minnesota Power about whether a crane walk during construction damaged Keith Kessler’s property is outside the scope of and irrelevant to the Hearing Issues.
Cross-examination (witness(es) not identified by Petitioners)	Testimony to be elicited from Minnesota Power about income generated by Turbine 441 (p. 8)	The costs to or monies earned by Minnesota Power in connection with the overall wind facility or any part thereof is not relevant. Further, the Commission has already determined it cannot award damages to the Petitioners. (Order on Motion for Partial Dismissal, p. 2 (Sept. 23, 2020).) Therefore, this information is not within the scope of or relevant to the Hearing Issues.
Cross-examination (witness(es) not identified by Petitioners)	Testimony to be elicited from Minnesota Power as “a review of all the incorrect information provided to the PSC in furtherance of its application for this project. . . .”	To the extent that information sought to be elicited from Minnesota Power about its efforts to permit the Bison IV wind project is not related to the Petitioners or the Section 15 structure, it is not within the scope of or relevant to the Hearing Issues.

CONCLUSION

The upcoming hearing should focus on the Hearing Issues, as those are the issues that the Commission has indicated it is going to consider in its determination of this action. Therefore, Minnesota Power respectfully requests that evidence and testimony not relevant to the Hearing Issues and/or unnecessarily duplicative be excluded consistent with this Motion.

Further, Minnesota Power reserves its right to object at hearing, pending the proffer of the Petitioners' actual testimony.

Dated this 11th day of March, 2021.

FREDRIKSON & BYRON, P.A.

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