

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

**ORDER ON SUBPOENA DUCAS TECUM AND
SUBPOENA OF WITNESSES**

OAH File No. 20200211

The ALJ issued a Prehearing Conference Summary and Scheduling Order on January 28, 2021. In the Order requests to ALJ for subpoenas as to documents must be made by March 4, 2021. The deadline was moved to March 8, 2021, to accommodate Keith and Deanna Kessler (“the Kesslers”).

On February 3, 2021, the Commission issued a Notice of Hearing and identified three issues. These issues are:

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.

On March 8, 2021, the Kesslers subpoenaed several witnesses with the language to appear at the PSC Hearing Room, 12th Floor, State Capitol. Bismarck, ND 58505. On March 11, 2021, Minnesota Power, a division of ALLETE, Inc., (“Minnesota Power”) sent an email stating it was “our understanding that Mr. Boughey acknowledges that virtual appearance is authorized per your January 28, 2021 Scheduling Order, and we note that one or more of Minnesota Power’s witnesses plans to comply with the subpoenas via virtual appearance.”

IT IS ORDERED that any subpoena requiring appearance at the PSC Hearing Room is satisfied by virtual appearance at the PSC Hearing Room.

On March 8, 2021, a Subpoena Duces Tecum to Minnesota Power was provided to the ALJ for approval or denial. The subpoenaed documents were:

1. Minn Power documents evidencing amount of cost for putting up Turbine 441.
2. Minn Power documents evidencing amount of cost for putting up all project Turbines.
3. Minn Power documents evidencing annual production from Turbine 441 (MG and re-sale valuation).
4. Minn Power documents evidencing annual production from all project Turbines (MG and re-sale valuation).
5. Minn Power documents evidencing cost of decommissioning single Turbine such as 441.

Because of the expedited manner for a decision on the Subpoena Duces Tecum, on March 9, 2021, Minnesota Power immediately objected by email. Minnesota Power initially objected to the Subpoena Duces Tecum on the grounds it was outside the scope, not probative of the issues,

unduly burdensome, would contain confidential information, and is disproportionate to the needs of this matter.

Under N.D.A.C. § 69-02-05-03, the Kesslers “must show the general relevance and reasonable scope of the evidence sought before a subpoena will be issue for the production of documentary evidence.” By email on March 11, 2021, the Kesslers provided the following arguments in favor.

1. The ability and cost of deconstructing Turbine 441 is relevant.
2. The cost of moving the Turbine is relevant to address whether the remedy of moving the turbine is appropriate.
3. The income derived from Turbine 441 is relevant to address cost-effectiveness and appropriateness of the remedy of moving Turbine 441 in the long run.
4. The information requested is relevant as to the remedy of moving or decommissioning Turbine 441.
5. Providing the information is not unduly burdensome.
6. If confidentiality is required for proprietary information, it may be provided for by the ALJ.

On March 15, 2021, Minnesota Power more fully responded through another email. Minnesota Power provided the following arguments.

1. The Subpoena Duces Tecum is untimely because the information was not sought during discovery and the discovery time period had closed.
2. The information requested about costs of constructing and decommissioning all project turbines is not relevant as to all project turbines. The issues relate to Turbine 441.

3. The information requested about costs of constructing and decommissioning Turbine 441 should not be required to be provided in document form because witnesses will be able to testify to this information.
4. The information about annual production and income is not relevant and overbroad as to turbines other than Turbine 441 and as to Turbine 441 is not relevant because damages are not a remedy available in this matter.


Any information that relates to a remedy must relate to the issues delineated by the Commission and the remedies allowed to be provided by the Commission. This ALJ is unaware of any remedy of monetary damages that may be provided by the Commission and any information demanded as to wind turbines outside of Turbine 441 is outside the scope of this hearing. Any information demanded as to solely the remedy of monetary damages is outside the scope of this hearing. However, the cost, including lost income, of moving, removing, or decommissioning Turbine 441 is relevant to the remedies that may be provided by the Commission.

IT IS ORDERED that the documents demanded in numbers 1, 3, and 5 as listed in the Subpoena Duces Tecum as listed above be provided, especially as to the basis of any testimony on the cost of moving, removing, or decommissioning Turbine 441. The demand for documents in number 2 and 4 of the Subpoena Duces Tecum as listed above do not need to be provided.

Dated at Bismarck, North Dakota, this 17th day of March 2021.

State of North Dakota
Public Service Commission

By: _____


Timothy J. Dawson
Administrative Law Judge
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, North Dakota 58503
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CERTIFICATE OF SERVICE

OAH File No. 20200211

The undersigned certifies that the original of the **ORDER ON SUBPOENA DUCAS TECUM AND SUBPOENA OF WITNESSES** were mailed, inside mail, at the State Capitol, on the 17 day of March 2021, to:

John Hamre
Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0480

and March true and correct copies of the above document were sent by electronic mail and mailed, regular mail, on the 17 day of March 2021, to:

Lynn Boughey
Boughey Law Firm
PO Box 1202
Mandan, ND 58554-1202

Mollie Smith
Fredrikson & Byron, PA
200 South 6th Street - Suite 4000
Minneapolis, MN 55402-1425

and that a true correct copy of the above document were sent by electronic mail and mailed, inside mail, at the State Capitol on the 17 day of March 2021, to:

John Schuh
Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0480

Brian Johnson
Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0480

OFFICE OF ADMINISTRATIVE HEARINGS
Timothy J. Dawson, Administrative Law Judge


Louise Wetzel