

## Hamre, John G.

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**From:** Johnson, Brian L.  
**Sent:** Friday, March 19, 2021 8:10 AM  
**To:** Hamre, John G.  
**Subject:** FW: KESSLER - MINNESOTA POWER Subpoena Duces Tecum - PU-20-194 and OAH File No. 20200211

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**From:** Mahlberg, Patrick <PMahlberg@fredlaw.com>  
**Sent:** Monday, March 15, 2021 4:55 PM  
**To:** Dawson, Timothy J. <tjdawson@nd.gov>  
**Cc:** Smith, Mollie <msmith@fredlaw.com>; Johnson, Brian L. <brljohanson@nd.gov>; bougheyfirm@midconetwork.com; lynnbughey@midconetwork.com  
**Subject:** RE: KESSLER - MINNESOTA POWER Subpoena Duces Tecum - PU-20-194 and OAH File No. 20200211

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Dear Judge Dawson:

Please consider this as Minnesota Power's response regarding the proposed subpoena *duces tecum* that would require Minnesota Power to collect and produce the following documents:

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

(proposed Subpoena Duces Tecum (the "Proposed Subpoena").) Pursuant to the Prehearing Conference Summary and Scheduling Order, Minnesota Power responded to the Proposed Subpoena on 3/9/21. The Kesslers responded on 3/11/21, and Your Honor set today as the deadline for Minnesota Power to provide any further response.

Minnesota Power stands by its prior objections and further states that the Proposed Subpoena is untimely too. The Kesslers did not seek this information in discovery and discovery closed months ago. The Kesslers' untimely attempt to cause Minnesota Power to respond to discovery at this point is untimely and could be rejected on that ground.

Despite Minnesota Power's objections, it has further examined the Kesslers' Proposed Subpoena, in light of the three issues identified by the Commission in its Notice of Hearing. The Proposed Subpoena seeks documents relating to (1) costs of putting up and taking down/decommissioning Turbine 441, as well as costs of constructing all of the project turbines, and (2) Minnesota Power's income/value of production from Turbine 441 and all of the project turbines.

*Information About the Costs of Constructing/Decommissioning Turbine 441 and All Project Turbines*

In his 3/11/21 email, Mr. Boughey clarified that his request regarding construction/decommissioning costs was a “request[] that Minnesota Power provide[] these numbers [the cost of taking down and putting up the turbine].” Without waiving its objections, Minnesota Power will be prepared to offer such numbers into evidence through testimony as to Turbine 441, but Minnesota Power should not be required to further produce documents. In additional, information about the “cost of putting up all” the turbines, however, is not relevant or probative of the issues to be determined by the Commission in this matter, which is focused only on Turbine 441.

*Information About Annual Production/Income*

In his 3/11/21 email, Mr. Boughey did not assert that this information was relevant or probative except as to Turbine 441. Consequently, it seems clear that this request is overbroad as to all turbines other than Turbine 441. As to Turbine 441, Mr. Boughey suggests that this information is relevant to determining “whether moving the turbine can be both cost-effective and appropriate in the long run.” The income derived by Minnesota Power from the operation of Turbine 441 is not relevant or probative of the issues, however, because damages are not a remedy available in this matter. (See Order on Motion for Partial Dismissal, p. 2 (Sept. 23, 2020).)

In light of the foregoing, Minnesota Power respectfully requests that the Proposed Subpoena Duces Tecum be rejected. That way, information about the cost of moving Turbine 441, which is the only information potentially probative or relevant in the remedies determination by the Commission, will be available to the Commission through Minnesota Power’s testimony.

Thank you for your consideration.

Pat

**Patrick D.J. Mahlberg**  
**Fredrikson & Byron, P.A.**  
**200 South Sixth Street, Suite 4000**  
**Minneapolis, MN 55402-1425**  
**Direct Dial: 612.492.7419**  
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**From:** [lynnboughey@midconetwork.com](mailto:lynnboughey@midconetwork.com) <[lynnboughey@midconetwork.com](mailto:lynnboughey@midconetwork.com)>  
**Sent:** Thursday, March 11, 2021 6:04 AM  
**To:** 'Dawson, Timothy J.' <[tjdawson@nd.gov](mailto:tjdawson@nd.gov)>  
**Cc:** Mahlberg, Patrick <[PMahlberg@fredlaw.com](mailto:PMahlberg@fredlaw.com)>; Smith, Mollie <[msmith@fredlaw.com](mailto:msmith@fredlaw.com)>; 'Johnson, Brian L.' <[brljohanson@nd.gov](mailto:brljohanson@nd.gov)>; [bougheyfirm@midconetwork.com](mailto:bougheyfirm@midconetwork.com)  
**Subject:** RE: KESSLER - MINNESOTA POWER Subpoena Duces Tecum - PU-20-194 and OAH File No. 20200211

[EXTERNAL E-MAIL]

Dear Judge Dawson –

Please accept this as my response to your email of yesterday at 3:36 PM. I would respectfully request that Minnesota Powers objection in my response be turned into an exhibit filed in conjunction with whatever written decision the ALJ may render in regards to this issue.

## DISCUSSION

I have issued a subpoena to Minnesota Power requesting the following information:

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

I have this morning I reviewed the following objection submitted by Minnesota Power:

Minnesota Power hereby objects to issuance of this subpoena. These documents are outside the scope of the hearing, not probative of the issues to be considered, unduly burdensome, would contain confidential information, and the request is disproportionate to the needs of this matter. Minnesota Power will present more fulsome objections if requested.

I respond as follows:

The information requested is relevant in regards to the public service commission's decision and final resolution of the case before it. We allege that Minnesota Power improperly placed Turbine 441 approximately 1000 feet away from the Kessler residence, which is a violation of the setback provisions, the authorization of the PSC provided to Minnesota Power, and North Dakota law.

The ability and the cost in deconstructing Turbine 441 as well as moving it to another location is most certainly relevant to the issue at hand.

In the event that the PSC determines that the proper remedy is to have the turbine removed or moved, is quite likely that Minnesota Power will assert that the cost of doing so is substantial and exorbitant. We are requesting that Minnesota Power provides these numbers and not be allowed to simply state it is expensive or exorbitant.

By the same token, the amount of income derived from Turbine 441 is relevant whether moving the turbine can be both cost-effective and appropriate in the long run.

We assert that the information requested is both relevant and probative the issues to be considered, most particularly the final resolution of what to do with Turbine 441, and whether to require that it be decommissioned and perhaps move to another location.

It seems to me that this information should be produced so such information can be made available to the PSC at the upcoming hearing.

This information should be provided. It is relevant, and as the ALJ is aware, the standard for such a disclosure under Rule 26 is simply whether the discovery “appears reasonably calculated to lead to the discovery of admissible evidence.”

As to the other objections made by Minnesota Power, providing this basic information should not be unduly burdensome; certainly Minnesota Power knows full well the cost of the entire project, and can delineate the cost of putting up Turbine 441, the cost of decommissioning it, and the cost of correcting it at some other location.

As to the assertion of confidentiality, the information can be provided to counsel with appropriate restrictions as to any proprietary information, indeed the PSC determines that the amount of income from the specific turbine, the cost of decommissioning, or the cost of moving it to another location is indeed proprietary.

We have no objection to the information and documents requested being provided under seal to the ALJ, and available to review at the upcoming pretrial conference and also at the upcoming hearing by counsel for the Kesslers, and that the issue of whether the documents and the information contained therein be reserved for the hearing itself and within the broad discretion of the PSC.

One possible resolution as to confidentiality would be that the ALJ, the PSC, the staff of the PSC, and counsel for the Kesslers will have access to the documents and the information contained therein, but the information will be otherwise unavailable to any other 3<sup>rd</sup> persons. If so instructed, I will of course also abide by any decision by the ALJ or PSC prohibiting me from disclosing this information to my clients.

I would respectfully suggest that Minnesota Power be required by the ALJ to pull together the materials and have the answers at the ready, and that the information be provided to the ALJ under seal and available for my review at the upcoming pretrial conference or in the alternative available at the hearing itself until such time as the final decision is made by the PSC as to the relevance and admissibility of these documents and this information.

If requested, I too would be more than happy to “present more fulsome [arguments] if requested.”

Thank you for your consideration in regards to this matter.

All the best,

Lynn

Lynn M. Boughey  
Boughey Law Firm  
P O Box 1202  
Mandan ND 58554  
701-751-1485  
[lynnboughey@midconetwork.com](mailto:lynnboughey@midconetwork.com)

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**From:** Dawson, Timothy J. <[tjdawson@nd.gov](mailto:tjdawson@nd.gov)>  
**Sent:** Wednesday, March 10, 2021 3:36 PM  
**To:** [lynnboughey@midconetwork.com](mailto:lynnboughey@midconetwork.com); 'Mahlberg, Patrick' <[PMahlberg@fredlaw.com](mailto:PMahlberg@fredlaw.com)>; Smith, Mollie <[msmith@fredlaw.com](mailto:msmith@fredlaw.com)>; Johnson, Brian L. <[brljohanson@nd.gov](mailto:brljohanson@nd.gov)>  
**Subject:** Subpoena Duces Tecum - PU-20-194 and OAH File No. 20200211

Mr. Boughey must show the general relevance and reasonable scope of the evidence sought for the issuance of the Subpoena Duces Tecum to Minnesota Power. Please provide this information to me as soon as possible and no later than March 12, 2021, at noon. Minnesota Power may stand on its previous objection or add to it by 5:00 p.m. on March 15, 2021. I plan to make a decision by noon on March 17, 2021, at the latest.

ALJ Dawson

Timothy J. Dawson  
Director/ALJ  
North Dakota Office of Administrative Hearings  
2911 N 14<sup>th</sup> Street, Suite 303  
Bismarck, ND 58503  
[tjdawson@nd.gov](mailto:tjdawson@nd.gov)  
(701)328-3200

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**From:** [bougheyfirm@midconetwork.com](mailto:bougheyfirm@midconetwork.com) <[bougheyfirm@midconetwork.com](mailto:bougheyfirm@midconetwork.com)>  
**Sent:** Wednesday, March 10, 2021 11:15 AM  
**To:** [lynnboughey@midconetwork.com](mailto:lynnboughey@midconetwork.com)  
**Subject:** KESSLER v Minnesota Power MP's preliminary response to subpoena duces tecum - LYNN

Lynn, FYI – they are objecting to the subpoena we are trying to get the judge to sign. Also an issue with emailing you - See below emails. Terrie

**From:** Mahlberg, Patrick <[PMahlberg@fredlaw.com](mailto:PMahlberg@fredlaw.com)>  
**Sent:** Tuesday, March 9, 2021 12:21 PM  
**To:** [bougheyfirm@midconetwork.com](mailto:bougheyfirm@midconetwork.com)  
**Cc:** 'Dawson, Timothy J.' <[tjdawson@nd.gov](mailto:tjdawson@nd.gov)>; Smith, Mollie <[msmith@fredlaw.com](mailto:msmith@fredlaw.com)>; [brljohnson@nd.gov](mailto:brljohnson@nd.gov)  
**Subject:** FW: Kesslers v Minnesota Power - Case No PU-20-194 - OAH File No. 20200211 - Minnesota Power preliminary response to subpoena duces tecum

Mr. Boughey—

You were cc'd on the response regarding the subpoena duces tecum to Minnesota Power below, but I received an undeliverable message bounce-back. So, I am trying this email address instead. Please confirm receipt.

Pat

**Patrick D.J. Mahlberg**  
**Fredrikson & Byron, P.A.**  
**200 South Sixth Street, Suite 4000**  
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**From:** Mahlberg, Patrick  
**Sent:** Tuesday, March 9, 2021 12:17 PM  
**To:** 'Dawson, Timothy J.' <[tjdawson@nd.gov](mailto:tjdawson@nd.gov)>  
**Cc:** Smith, Mollie <[msmith@fredlaw.com](mailto:msmith@fredlaw.com)>; [brljohanson@nd.gov](mailto:brljohanson@nd.gov); [lynnboughey@midconetwork.com](mailto:lynnboughey@midconetwork.com)  
**Subject:** Kesslers v Minnesota Power - Case No PU-20-194 - OAH File No. 20200211 - Minnesota Power preliminary response to subpoena duces tecum

Dear Judge Dawson—

We write regarding Mr. Boughey's proposed subpoena duces tecum to Minnesota Power (a copy is attached for reference), which seeks to compel Minnesota Power to produce the following documents:

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

Under the Prehearing Conference Summary and Notice of Third Prehearing Conference, it is indicated that an expedited response to such requests will be required. Although there has not yet been a request for an expedited response, Minnesota Power hereby objects to issuance of this subpoena. These documents are outside the scope of the hearing, not probative of the issues to be considered, unduly burdensome, would contain confidential information, and the request is disproportionate to the needs of this matter. Minnesota Power will present more fulsome objections if requested.

Sincerely,

Pat

**Patrick D.J. Mahlberg**  
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