

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler,)	Case Nos. PU-20-194
)	OAH File No. 20200211
Complainants/Petitioners,)	
)	
vs.)	KESSLERS' BRIEF IN
)	RESPONSE TO
Minnesota Power, a division of ALLETE,)	MINNESOTA POWER'S
Inc.,)	MOTION IN LIMINE
)	
Respondent.)	

¶1 Minnesota Power has made a motion in limine attempting to restrict the evidence at the upcoming hearing. We assert that the evidence proposed is relevant and appropriately submitted to the Public Service Commission (PSC) as part of the hearing. In addition, in regards to any aspect of the case previously dismissed through the PSC's decision of September 23, 2020, the more recent decision of January 20, 2021, is controlling as to the evidence that the PSC has decided it will be allowed.¹ It is essential to note that the more recent decision by the PSC made it clear that the PSC intends to allow the Kesslers to present all evidence relating to the residence, and more specifically the PSC rejected the attempt by Minnesota Power to limit this evidence to their definition of "occupied residence" or their restrictive view that the only two dates relating to the use of the residence is the date of the application and the date of construction of the project.

¹ In regards to any claims which have been dismissed by the PSC, it is necessary for the Kesslers to offer that evidence or in the alternative make an offer of proof so as to preserve any record on appeal.

¶2 As clearly indicated in the PSC’s order dated January 20, 2021 [EXHIBIT 1], Minnesota Power was attempting to dismiss the claims relating to the structure of Section 15 and impose its definition of what an “occupied residence” is, as well as limiting the applicable date of such occupancy to the time that Minnesota Power obtained a certificate of site compatibility or constructed turbine 441 in 2014. Order at page 2. The PSC specifically denied Minnesota Power’s motion and yet Minnesota Power attempts to obtain from the ALJ what it could not obtain from the PSC itself, that is the ALJ limiting the evidence through Minnesota Power’s motion in limine – in direct contravention of the PSC’s Order dated January 20, 2021. Since the briefs as to Minnesota Power 2nd motion for partial summary judgment was presented to the PSC and not the ALJ, we attach the brief submitted by the Kesslers and assert that the arguments contained therein indicate the reasons why the motion was denied. **EXHIBIT 2.**

¶3 In addition, we provide the ALJ with the listing of the issues that the Kesslers suggested are the proper issues [EXHIBIT 3] due to the fact that the listing of the three issues in the notice for hearing are in our view contrary to the decision of the PSC in denying the 2nd motion for partial summary judgment. In addition, it is our view that unless properly dismissed in conjunction with a summary judgment motion, any issues raised in the Complaint remain as proper issues and the designation of the issues simply by a notice of hearing is not an appropriate way to dismiss the issues raised by the Kesslers. In other words, in

our view, the proper listing of the issues are those raised by the Kesslers in their Complaint, and those issues can be limited only by a proper motion for partial summary judgment and a clear decision made in conjunction with such a proper motion.

¶4 As noted above, the Kesslers, at the request of PSC staff, presented its proposed listing of the issues. **EXHIBIT 3.** Again, it is inappropriate to restrict the evidence or narrow the issues by the simple issuance of a notice of hearing. As such, the ALJ should consider the delineation of the issues listed in the notice of the hearing as an attempt to summarize the primary issues and not use the issues listed in the notice of hearing as a means to limit any of the issues or the evidence where the issues have been properly raised in the Kessler’s Complaint and have not been vitiated by any decision for partial summary judgment (other than the narrow decision made on September 23, 2020).

¶5 More problematic is the fact that Minnesota Power attempts to use the listing of issues as a method to disregard the PSC’s order of January 20, 2021. It is clear from the decision of the PSC on January 20, 2021, especially when reviewing the briefs submitted by the Kesslers, that the phrase “occupied residence” has not been defined by statute or by the PSC, and that phrase may very well apply to dates beyond that listed in the notice – and even if the notice date is determinative, all the facts and surrounding use of the property is relevant in determining whether the structure should be considered an “occupied residence” at the time the certification was granted.

¶6 The basics that should apply to the hearing. It is appropriate at this point to say a few words about the basics that should apply to the hearing that will soon take place. We assert that the following statements are correct and should be considered in regards to any decision made by the ALJ, or subsequently made by the PSC itself.

1. Normally a hearing is for the purpose of determining the facts alleged in the Complaint, and then afterwards applying the law.
2. Normally the person filing the Complaint is allowed to present any evidence that could arguably be relevant to the matter raised by the Complaint.
3. Normally the person filing the Complaint is allowed to raise any *issues* that could arguably be relevant to the matters raised in the Complaint.
4. It is inappropriate – and a violation of due process – to limit the facts or issues where the facts and issues apply to any possible legal contention.
5. The person filing the Complaint should not be unduly restricted in presenting facts, raising issues, or presenting his or her case.
6. The plaintiff or complainant should be allowed to present his or her own case as he or she sees fit.
7. The rules of evidence or procedure should be interpreted to allow evidence to be received and the facts to be fully presented.
8. The plaintiff or complainant should never be required to prove relevance or be prevented from raising an issue unless there is an unquestionable determination that under no set of facts and under no possible interpretation of the law will this fact or issue have merit.

¶7 Effect of the PSC's order denying Minnesota Power 2nd motion for partial summary judgment. Four important points to be considered in regards to the proper effect of the PSC's order denying Minnesota Powers 2nd motion for partial summary judgment:

1. By its motion Minnesota Power attempted to create its own definition of “occupied residence.”
2. By its motion Minnesota Power attempted to select to specific dates when its definition of “occupied residence” would be applicable.
3. The PSC rightly denied Minnesota Power 2nd motion for partial summary judgment, no doubt in part due to the reasons presented by the Kesslers and their responsive brief.
4. As such, the Kessler should be allowed to present any and all facts relating to the residence at issue, and not be limited by time; the intent of the Kessler’s, the history of the use of the house, the planned use of the house, all of these facts are relevant to whether or not the resident should have been listed as an “occupied residence” and disclosed to the PSC – even if it was not considered an “occupied residence” by Minnesota Power.

¶18 Notice of hearing issued by the PSC The notice of hearing should not be used to limit the issues that have been raised in the Complaint. As stated above, the limiting of issues must be done properly – by motion and brief for partial summary judgment. It is not appropriate for the issues raised in the Complaint to in any way be limited or restricted by the mere notice of hearing or the delineation of issues in the notice of hearing; it is the Complaint filed by the Kesslers that provides the alleged facts and the issues to be addressed. If the PSC or the ALJ allow the listing of the issues in the notice of hearing to vitiate or destroy any issue raised in the Complaint, then the PSC and the ALJ have not followed the applicable law that relates to narrowing the issues by proper motion and briefing. In regards to this issue, we raise three additional points:

1. Although for structural reasons the PSC may want to arrange all the Kesslers issues structurally, it has no right to limit the issues raised in the Kesslers’ Complaint by any means other than proper summary judgment motion practice.

2. All the issues raised by the Kessler's – except for those previously resolved through a proper summary judgment motion – should be allowed to be presented to the PSC.

3. Other than those issues already resolved by the first order granting partial summary judgment, the Kessler should be allowed to raise and address all their issues.

¶9 Notice of hearing issue number 1 In regards to issue 1 as

described by the PSC, we assert (as mentioned above) that the term “occupied residence” is a term that is not yet been defined by statute, by rule or regulation, or by the PSC. As such, any and all facts relating to the structure should be allowed into evidence so that the PSC can develop a fair and appropriate definition of “occupied residence.” In addition, as discussed above, although the notice of issue refers to at the time the certificate of site compatibility was issued, that particular and precise moment in time unduly restricts the facts necessary to show whether the residence was indeed “occupied” – by any definition. As such, it is inappropriate to include within issue 1 any specified time, or if there is a specified time, the facts surrounding the structure should nonetheless be admissible because they all relate to whether or not the structure was an occupied residence at that time.

¶10 Notice of hearing number 2. By the same token, issue number 2 – whether the placement of turbine number 441 violates the commission's order – is contrary to North Dakota law in that it fails to include what must be decided. Issue 2 on its face as only if the placement of turbine 441 violates the PSC's order. However, the order at issue specifically requires that Minnesota Power

comply with all statutes, regulations, rules, and orders issued by the PSC. Part of the Kesslers Complaint is that the placement of turbine number 441 violated North Dakota statutes, regulations, setbacks, and the previous order requiring Minnesota Power to comply with all statutes, regulations, that apply to the placement of the term. As such, the only way issue number 2 can be read appropriately is if any violation of the Commission's order *includes* within it any violation of any statute or regulation or setback provision or requirement.

¶11 Notice of hearing issue number 3. This issue relates to whether Minnesota Power withheld any information that should have been communicated to the Commission. By definition, it is necessary to review all the facts relating to the structure at issue, and then once those facts are known, determine not only if Minnesota Power withheld information, but should have taken the steps necessary to determine the actual and planned use of the residence. The issue is not only whether Minnesota Power withheld information, but whether it failed to investigate the facts and determine what information should be provided to the PSC in regards to the information supplied to the PSC. In other words, Kesslers assert not only that Minnesota Power failed to provide the information new, but inappropriately failed to gather the information needed, such as specifically asking the landowner if the structure was being used as a residence or was intended to be used as a residence. Because the Kesslers repeatedly told Minnesota Power that it was a residence and they intended to use it as a residence, this information should have been relayed to the PSC at the public hearing. But

beyond that, Minnesota Power should have investigated any structures that appeared that it could be used as a residence, and simply asked the landowner basic questions as to the use of the structure. We therefore assert that issue number 3, as with the previous 2 issues, is too narrowly drawn and improperly limits the issues raised by the Kesslers without going through a proper summary judgment process.

Remaining items raised by Minnesota Powers motion in limine

¶12 1. Exhibit 17, videos of flickering and noise from turbine. This evidence goes to whatever remedy the PSA may choose, and this evidence is important particularly in determining whether or not turbine 441 has to be moved. As such, that evidence is relevant.

¶13 2. Exhibit 37-44, documents regarding cost of construction, production values, and costs of decommissioning. All of this evidence is relevant to any argument that might be made by Minnesota Power that is too expensive to move the turbine. The production values come into play because it is relevant to determine if the cost of moving the turbine is substantially less than the value of the continued production at another location. If so, any arguments made by Minnesota Power that it is unable to move the turbine is relevant. Significantly, both issue 2 and issue 3 listed by the PSC includes reference to remedies, and as such all this information is relevant as to the remedy selected by the PSC.

¶14 Exhibit number 45, Attorney Boughey Billings. The Kesslers have made a motion asking that the PSC reconsider its decision granting partial

summary judgment as to attorney fees. **EXHIBIT 4.** In the event the PSC allows the Kessler's claim for attorney fees, the attorney fee billings is relevant. This issue has to be resolved by the PSC, and if it decides attorney fees can be received, then this evidence will be relevant.

¶15 Reference to filing detailed testimony of witnesses. Counsel for the Kessler's is unaware of any rule of civil procedure that requires a Kessler's to present to the court (PSC) ahead of time the testimony of their witnesses. The Kessler's have answered all discovery, and subjected themselves to substantial and lengthy depositions. Minnesota Power clearly is aware of what the testimony of the Kesslers will be. Nonetheless, the Kesslers have provided an overview of the testimony that will be received at the hearing.

¶16 Testimony of Keith Kessler, problems created by turbine 441. The problems created by turbine 441 is the essence of this case, and this testimony goes not only to the essential facts relating to how this occurred, but also relates to any remedies that may be fashioned by the PSC. One cannot remedy a problem without discussing what the problem is. Obviously this testimony is relevant.

¶17 Keith Kessler testimony about Minnesota Power lying to the PSC. Issue number 3 listed by the PSC clearly indicates that any information of Minnesota Power lying is relevant to its failure to provide information to the PSC at the hearing, and also is relevant as a pattern of misconduct. As discussed above, the PSC has improperly limited the evidence by its cursory delineation of issues, and all of the facts and evidence should be admissible in reference to any of the

misconduct of Minnesota Power. This evidence is relevant in regard to a pattern of misconduct, and shows motive which goes to the issue credibility of the representatives of Minnesota Power.

¶18 Keith Kessler testimony requesting that Minnesota Power be prohibited from doing further business in North Dakota. We believe that this evidence is relevant as to the remedy to be determined by the PSC, in his view they should be allowed to conduct any further business in North Dakota should be allowed.

¶19 Keith Kessler's testimony regarding attorney fees. As stated above, the Kesslers have made a motion asking the PSC to reconsider its prior decision as to attorney fees. This evidence should be allowed if the PSC changes its determination in this regard.

¶20 Deanna Kessler's testimony confirming the information provided by Keith. Minnesota Power has on several occasions asserted that the information provided by Keith Kessler is not correct. As such, since Deanna Kessler was present and observed what was actually said throughout their contact with Minnesota Power, is appropriate for the co-owner Deanna Kessler to also be able to testify as to what was said. Although cumulative, is only one other person, not 20 other people, and is clearly relevant to the credibility of Keith. By the same token, Keith's testimony is relevant to Deanna's testimony, which also shows the credibility of Keith. In addition, any statement made by Minnesota Power to the Kesslers is by definition a party admission and therefore admissible for that

reason alone. This evidence is relevant in regard to a pattern of misconduct, and shows motive then goes to the issue credibility of the representatives of Minnesota Power.

¶21 Testimony of Steven Kessler relating to the use of the structure. As stated above, the primary issue relates to whether the residence was occupied, and all the facts surrounding the use of that property are relevant. Again, limiting the evidence to just the day the PSC issued its order would fail to allow the Kesslers to present the facts necessary for determining whether the residence should be considered an “occupied residence.”

¶22 Testimony of Hayden Kessler regarding the history of the structure. Same as previous paragraph.

¶23 Testimony of John Kessler regarding discussion with Minnesota Power regarding crane walk. This evidence is relevant in regard to a pattern of misconduct, and shows motive and also goes to the issue credibility of the representatives of Minnesota Power.

¶24 Testimony as to income generated by turbine 441. As stated above relating to Exhibit 37-44, this testimony is relevant in regards to selecting the remedy. Please see the discussion above as to Exhibit 37-44 for full articulation of why this testimony is relevant.

¶25 Review of all incorrect information provided to the PSC. As stated above, issue number 3 specifically goes into whether or not Minnesota Power provided incorrect information to the PSC. Any incorrect information provided to

the Kesslers, as well as testimony showing that the information provided to the PSC in his letter response to the Kesslers' Complaint, is relevant to issue number 3 as well as to the credibility of Minnesota Power and its representatives.

¶26 Dated this 18th day of March, 2021.



Lynn Boughey (#04046)
Attorney for Keith and Deanna Kessler
lynnboughey@midconetwork.com
P.O. Box 1202
Mandan, ND 58554-1202
(701) 751-1485

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler,)	Case Nos. PU-20-194
)	OAH File No. 20200211
Complainants/Petitioners,)	
)	
vs.)	CERTIFICATE OF SERVICE
)	
Minnesota Power, a division of ALLETE,)	
Inc.,)	
)	
Respondent.)	

¶1 I hereby certify that the following document (s):

1. Kesslers' Response to Minnesota Power's Motion in Limine.

were served upon the above-named Respondent by serving true and correct copies of the above-listed document on the 18th day of March, 2021, via email to:

Steven Kahl
Executive Director
ND Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov
(email & original and 10 copies
Via USPS)

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

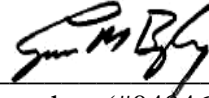
John Schuh
ND Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
jschuh@nd.gov
(Via email)

Brian Johnson
ND Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
brljohanson@nd.gov
(Via email)

Mollie M. Smith
Patrick D.J. Mahlberg
200 S 6th St., Suite 4000
Minneapolis, MN 55402-1425
msmith@fredlaw.com
pmahlberg@fredlaw.com

(Via email)

¶2 Dated this 18th day of March, 2021.



Lynn Boughey (#04046)
Attorney for Keith & Deanna Kessler
lynnboughey@midconetwork.com
P.O. Box 1202
Mandan, ND 58554-1202
(701) 751-1485