

**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
)	SUPPORT OF MOTION
Minnesota Power, a division of ALLETE,)	FOR RECONSIDERATION
Inc.,)	OF ORDER DISMISSING
)	CLAIM FOR ATTORNEY
Respondent.)	FEES

¶1 In preparation for the upcoming hearing the Kesslers have determined that it is necessary to ask the Public Service Commission (PSC) to reconsider its prior ruling relating to attorney fees. The Kesslers respectfully request that the PSC reconsider its decision made in granting Minnesota Power’s motion for partial summary judgment as to the issue of attorney fees. This motion is made directly to the PSC since the PSC itself made this determination in its order dated September 23, 2020.

Discussion

¶2 I think we can all agree that the primary purpose of the Public Service Commission is to protect the interests of the public while fostering reasonable development and use of our natural rights. I think we can also agree that the remedies available to the PSC are broad and extend as far as is necessary to protect the public, create fairness, and do justice. To this end, we assert the following legal points:

1. That the Public Service Commission has the authority to award attorney fees to a prevailing complainant, regardless of any separate statutory provision.

2. That if a statutory provision is indeed necessary, Section 49-05-10 provides sufficient basis for allowing attorney fees wherein it states “such public utility shall be liable to the persons, corporations, or limited liability companies affected thereby for all loss, damages, or injury caused thereby or resulting therefrom.”

In our view, all loss, damages, or injury caused by a public utility that fails to comply with state law, the rules and regulations applicable to that entity, or an application process or order of the PSC necessarily can include, at the PSC’s discretion, attorney fees. Any other interpretation would severely limit and lessen the ability of landowners to present a complaint due to any pre-existing reality that attorney fees will not be allowed.

¶3 We respectfully suggest that it would be a huge mistake for the PSC to conclude as a matter of law that attorney fees cannot be provided in this particular case. If the PSC continues to persist in this interpretation, then only the rich – as a practical matter – will be able to file any complaint before the PSC because the little guy – the normal rancher and citizen – could never afford to bring a complaint if attorney fees is not an option.

¶4 In making the decision to grant Minnesota Power’s motion for partial summary judgment, the PSC provided the following rationale:

[1] The Commission agrees with the Kesslers in that its powers and authority are not as limited as described by ALLETE. [2] However, certain remedies requested by the Kesslers are beyond a reasonable application of authority, expressed or implied. [3] The law expressly provides under which sections the Commission may assess damages and attorney fees. [4] To the extent that it was intended for the Commission to have authority to prohibit any future operations of Minnesota Power within the state, such authority would have been expressly granted.

Order on Motion for Partial Dismissal 9-23-20. We note that when it comes to a motion for dismissal, all the facts alleged by the Kesslers are taken to be true, and the decision rendered is one of law, regardless of any facts that may be borne out at the upcoming hearing. As will be shown below, we believe it is a mistake for the PSC to limit itself as a matter of law in regards to not only the issue of attorney fees, but in regards to all of its powers allowed – not only statutorily-based powers, but also implied powers derived from a reasonable interpretation of those statutes in light of the authority and purpose of the PSC to protect the public and to allow full and complete remedies where statutory violations have occurred or were the rules, regulations, and orders of the PSC have not been followed.

¶5 In the first sentence of the PSC’s rationale, the PSC agrees that the PSC’s powers and authority are not as limited as described by Minnesota Power. And yet despite this concession, the PSC proceeds to rule against the Kesslers.

¶6 The second sentence provides that certain remedies requested by the Kesslers are beyond a reasonable application of authority, and yet as indicated above is both reasonable and in our view necessary to apply Section 49-05-10 as allowing attorney fees in conjunction with the statutory authority to require “such public utility shall be liable to the persons, corporations, or limited liability companies affected thereby for all loss, damages, or injury caused thereby or resulting therefrom.” Section 49-05-10 (emphasis added).

¶7 In the second portion of the second sentence, the Commission refers to its authority and its powers to fashion remedies as being both expressed

and implied. We will deal with express grant of authority immediately below, and note at this point that by recognizing that the Commission has implied powers, that it is appropriate to apply those implied powers to fashion appropriate remedies, including attorney fees. Once again, deciding attorney fees are not allowable as a matter of law is in our opinion a huge mistake. It would be much better for the Commission to state that it has the authority, express where expressly made and implied where appropriate, to award attorney fees. In our view, the Public Service Commission should keep this option open and not automatically foreclose it; and although the Commission may decide attorney fees (in its discretion) are not going to be granted here, the opportunity to request such fees should be allowed to proceed and should be based on the facts garnered from the upcoming hearing. Why give up your authority from the get go? Why not assert that you have the authority to award attorney fees, and you would decide when to do so based on the facts and your own discretion?

¶8 In the next sentence, you state that the law expressly provides under which sections the Commission may assess damages and attorney fees. This may be true, but as stated in our discussion of the second sentence, statutory authorization for fees in particular situations does not necessarily deny an award of fees in all other situations. Yes, where fees are specifically provided, such authority is express. But it is important to note that the grant of *express* authority to award attorney fees in some sections does not necessarily – and should not necessarily – be used to limit or prevent the PSC’s *implied* powers to award

attorney fees in all other matters or in other situations warranting such an award. In the previous sentence, the PSC indicated that it had both express and implied powers. And yet in this sentence, the PSC seems to imply that there are no implied powers. The previous sentence was correct, and the PSC does indeed have both express and implied powers, and any other interpretation would improperly limit the PSC to only those powers explicitly provided under statute. The PSC should not reject the concept of implied powers, because to do so would necessarily restrict its ability in the present and in the future to only the powers listed by statute. The whole idea of implied powers is that such powers are not expressly provided but are found within the context of what is necessary to fulfill the role and purpose of the PSC.

¶9 Finally, in the fourth sentence the Commission determines as a matter of law that without express statutory authority it does not have the authority to prohibit any future operations of Minnesota Power within the state, and if such power were intended such authority would have been expressly granted. As to this point, we again assert that the Commission has both express and implied powers, and by reaching this result is unnecessarily limiting itself to express (statutory) powers only, and is also unnecessarily limiting its powers that can be properly implied from the express powers statutorily given. We respectfully suggest that the Commission should – as much is allowed under a reasonable interpretation of its express authority – recognize its implied powers and not voluntarily and unnecessarily limit its powers.

¶10 Based on the above, the Kesslers request that the PSC reconsider the striking of claim No. 9 in the Kesslers' formal revised complaint and, upon receipt of the evidence in this case, decide whether or not attorney fees should be reimbursed to the Kesslers that relate to the prosecution of this action.

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



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