

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

|   |   |                              |
|---|---|------------------------------|
| <b>Keith and Deanna Kessler,</b>              | ) | Case Nos. <b>PU-20-194</b>   |
|   | ) | OAH File No. <b>20200211</b> |
| <b>Complainants/Petitioners,</b>              | ) |                              |
|   | ) |                              |
| vs.   | ) | <b>KESSLERS' MOTION</b>      |
|   | ) | <b>FOR RECONSIDERATION</b>   |
| <b>Minnesota Power, a division of ALLETE,</b> | ) | <b>OF ORDER DISMISSING</b>   |
| <b>Inc.,</b>                                  | ) | <b>CLAIM DAMAGES</b>         |
|   | ) | <b>(Caption corrected)</b>   |
| <b>Respondent.</b>                            | ) |                              |

¶1 The Kesslers herby respectfully request and move that the PSC reconsider its decision in it Order on Motion for Partial Dismissal 9-23-20 which resulted in the striking of the claim in the Kesslers' formal revised complaint as to awarding damages and once determining that the claim shall be allowed, decide based on the evidence in this case whether or not damages should be awarded to the Kesslers.

¶2 Dated this 21<sup>st</sup> day of March, 2021.



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| <b>Keith and Deanna Kessler,</b>              | ) | <b>Case Nos. PU-20-194</b>   |
|   | ) | <b>OAH File No. 20200211</b> |
| <b>Complainants/Petitioners,</b>              | ) |                              |
|   | ) |                              |
| <b>vs.</b>                                    | ) | <b>KESSLERS' BRIEF IN</b>    |
|   | ) | <b>SUPPORT OF MOTION</b>     |
| <b>Minnesota Power, a division of ALLETE,</b> | ) | <b>FOR RECONSIDERATION</b>   |
| <b>Inc.,</b>                                  | ) | <b>OF ORDER DISMISSING</b>   |
|   | ) | <b>CLAIM FOR DAMAGES</b>     |
| <b>Respondent.</b>                            | ) | <b>(corrected caption)</b>   |

¶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 allowing damages. 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 allowing damages. 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 resources. 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 damages 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 damages 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, damages awarded to the landowner. Any other interpretation would severely limit and lessen the ability of landowners to present a complaint due to any pre-existing ruling that damages 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 damages 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 an award of damages is not an option. Such a conclusion would also be contrary to the statute itself. Lastly, as a matter of policy, the PSC is in the best position to determine what needs to be done to correct any violation of its orders, applicable statutes, or the rules and regulations that apply to the corporation or entity in regards to the action of the public utility.

¶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.** As stated above, it is our view that the power to award damages is indeed expressly granted in Section 49-05-10.

¶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 damages 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 damages. Once again, deciding damages 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 damages. In our view, the Public Service Commission should keep this option open and not automatically foreclose it; and although the Commission may decide damages (in its discretion) are not going to be granted here, the opportunity to request such damages 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. As noted, Section 49-05-10 specifically provides the authority of the PSC to award damages.

¶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 to create an appropriate remedy. We respectfully suggest that the Commission should – as much is allowed under a reasonable interpretation of its express authority – recognize its power to assess damages and not voluntarily and unnecessarily limit its powers.

¶10 Based on the above, the Kesslers request that the PSC reconsider the striking the Kesslers' claim for damages found within their formal revised complaint and, upon receipt of the evidence in this case, decide whether or not damages should be allowed.

¶11 Dated this 21<sup>st</sup> day of March, 2021.



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