

March 23, 2021

**VIA E-MAIL & FEDERAL EXPRESS**

Mr. Steven Kahl, Executive Secretary  
North Dakota Public Service Commission  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480

Re: Kesslers v. Minnesota Power, a division of ALLETE, Inc.  
Case No. PU-20-194

Dear Mr. Kahl:

Attached for filing on behalf of Minnesota Power, a division of ALLETE, Inc., is a Response in Opposition to Kesslers' Motions for Reconsideration of Order Dismissing Claims for Attorney Fees and Damages. A Certificate of Service is also attached.

The original and ten copies of this letter and these documents are being sent today to the Commission via Federal Express.

If you have any questions, please let me know.

Sincerely,



Mollie M. Smith  
*Attorney at Law*

**Direct Dial:** 612.492.7270

**Email:** msmith@fredlaw.com

MMS/72477667v1  
Enclosures

cc: ALJ Timothy J. Dawson (via e-mail, w/encls.)  
Brian Johnson (via e-mail, w/encls.)  
Lynn Boughey (via e-mail, w/encls.)  
David Moeller (via e-mail, w/encls.)

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Response in Opposition to Kesslers' Motions for Reconsideration  
Allete, Inc.  
Mollie Smith, Fredrikson&Byron, P.A.

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

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<p>Keith and Deanna Kessler,</p> <p style="text-align:center">Complainants/ Petitioners,</p> <p>v.</p> <p>Minnesota Power, a division of ALLETE, Inc.,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:right">Case No. PU-20-194 OAH File No. 20200211</p> <p style="text-align:center"><b>MINNESOTA POWER’S RESPONSE IN OPPOSITION TO KESSLERS’ MOTIONS FOR RECONSIDERATION OF ORDER DISMISSING CLAIMS FOR ATTORNEY FEES AND DAMAGES</b></p>
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**INTRODUCTION**

Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”), submits this Response in Opposition to the Motion for Reconsideration of Order Dismissing Attorney Fees filed by Keith and Deanna Kessler (“Kesslers”) on March 18, 2021 and the Second Motion for Reconsideration of Order Dismissing Claim for Damages filed by the Kesslers on March 22, 2021 (together, “Motions for Reconsideration”) in the captioned case.

About six months ago, the North Dakota Public Service Commission (“Commission”) dismissed, among other claims, the Kesslers’ claims for (1) reimbursement of all attorney fees incurred by the Kesslers relating to the prosecution of this action, and (2) reimbursement for damages incurred for damage to Section 15, devaluation of Section 15, as well as personal damages for inconvenience, nuisance, and emotional distress. September 23, 2020 Order on Motion for Partial Dismissal (“Order”). The case proceeded through extensive discovery, which closed months ago, but now, on the eve of the hearing, the Kesslers seek reconsideration of the Order.

The Kesslers’ Motions for Reconsideration are untimely and should be denied. Further, as the Commission determined in its Order, the Kesslers’ requests for attorney fees and damages are

beyond the scope of the Commission's authority. Because the Commission does not have the authority to grant the relief sought in these claims, the Commission should deny the Kesslers' Motions for Reconsideration.

### **RELEVANT BACKGROUND**

Minnesota Power received a Certificate of Site Compatibility from the Commission for the Bison 4 Wind Project ("Project") on September 25, 2013. *See* Case No. PU-13-127, Certificate of Site Compatibility for Energy Conversion Facility, Certificate Number 34 (September 25, 2013). The Kesslers are participating landowners in the Project.

The Kesslers filed a complaint on April 23, 2020, followed by a revised complaint on April 27, 2020. On May 20, 2020, the Commission received the response to the complaint by Minnesota Power. On May 27, 2020, the Commission filed a motion to find the Kesslers' complaint states a *prima facie* case and serve the complaint on Minnesota Power. On June 29, 2020, the Kesslers filed a Second Revised Complaint.

On July 20, 2020, Minnesota Power filed an Answer to the Second Revised Complaint, and a Motion for Partial Dismissal with supporting brief. On August 3, 2020, the Kesslers filed a Brief in Response to the Motion for Partial Dismissal of the Second Revised Complaint. On August 10, 2020, Minnesota Power filed a Reply Brief in support of its Motion for Partial Dismissal of Revised Complaint.

On September 23, 2020, the Commission issued an Order on Motion for Partial Dismissal, dismissing the following four claims for relief as outside the scope of authority of the Commission:

1. Have the [Commission] conduct a survey of other landowners to determine if Minnesota Power has a pattern of misconduct relating to North Dakota landowners;
2. Prohibit Minnesota Power from any further operations in North Dakota;

3. Reimbursement for damages incurred for damage to Section 15, devaluation of Section 15, as well as personal damages for inconvenience, nuisance, and emotional distress; and
4. Order Minnesota Power to reimburse all attorney fees incurred by the Kesslers relating to the prosecution of this action.

The Order was served on the parties via certified mail on September 24, 2020.

Since service of the Order, the following relevant events have occurred:

- The parties concluded discovery, including nine depositions that took place in October 2020 (following an agreement to extend the discovery deadline set previously by Administrative Law Judge Dawson’s June 16, 2020 Scheduling Order).
- On January 25, 2021, Administrative Law Judge Dawson conducted a prehearing conference and established a prehearing schedule, including for submission of prefiled testimony, exhibit and witness lists, and other matters.
- On February 3, 2021, the Commission issued a notice of hearing for March 25-26, 2021, which listed the issues to be considered in the matter, which was served upon the parties by U.S. Mail on February 4, 2021.
- On March 8, 2021, Minnesota Power filed prefiled direct testimony and witness and exhibit lists. Also on March 8, 2021, the Kesslers filed their pretrial information, along with a number of subpoenas.
- On March 18 and 21<sup>1</sup>, 2021, the Kesslers filed the Motions for Reconsideration.
- The hearing is scheduled for March 25-26, 2021.

### **ARGUMENT**

#### **I. The Motions for Reconsideration are Untimely and Should be Denied.**

The Commission is an administrative agency subject to the Administrative Agencies Practice Act (“AAPA”). *See* N.D.C.C. § 28-32-21 (setting forth the procedures “[a]dministrative agencies shall comply with . . . in all adjudicative proceedings”); N.D.C.C. § 28-32-01(2) (defining

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<sup>1</sup> Although the second Motion for Reconsideration was emailed by the Kesslers on March 21, 2021, that date was a Sunday and so, under the rules, it was technically filed on the following business day, March 22, 2021.

“administrative agency” or “agency” as “each board, bureau, commission, department, or other administrative unit of the executive branch of state government” and not listing the Commission as an exempt agency).

The AAPA provides that “[a]ny party before an administrative agency who is aggrieved by the final order of the agency, . . . within fifteen days after notice has been given . . . may file a petition for reconsideration with the agency.” N.D.C.C. § 28-32-40(1). Additionally, the Commission’s general rules of practice impose a fifteen-day time limitation for motions for reconsideration. *See* N.D.A.C. 69-02-06-02 (providing that a petition for reconsideration must be filed within fifteen days after notice of the decision has been given).

The Kesslers had fifteen days to seek reconsideration after service of the Commission’s Order on Motion for Partial Dismissal in September 2020. The Kesslers did not do so. Rather, the Kesslers waited to file their Motions for Reconsideration for almost six months after issuance of the Order. No justification exists for sitting on these motions for six months and waiting to file them within a week of the evidentiary hearing, well after the close of discovery, the issuance of the hearing notice, and after the deadline to file prefiled testimony. Minnesota Power relied upon the Commission’s Order on Motion for Partial Dismissal to conduct discovery and prepare for the evidentiary hearing. If, on the eve of trial, the scope of the hearing were changed in the expansive manner requested by the Motions for Reconsideration, Minnesota Power would be deprived of the opportunity to adequately prepare and present its case. The timing rules on bringing motions for reconsideration exist to prevent situations like this. Accordingly, the Kessler’s Motions for Reconsideration are untimely and should be dismissed.

## II. **The Commission Properly Dismissed the Kesslers' Claims for Attorney Fees and Damages as Outside the Commission's Authority to Grant.**

- A. The Kesslers' Complaint is tied to the Commission's siting authority; thus, N.D.C.C. §§ 49-22-20 and 49-22-21 prescribe the applicable remedies.

As the Commission recognized in its September 23, 2020 Order, the relief the Commission may grant in siting cases is not unlimited, but is instead prescribed by the Legislature. *See* Order on Motion for Partial Dismissal at 2 (“[C]ertain remedies requested by the Kesslers are beyond a reasonable application of authority, expressed or implied. The law expressly provides under which sections the commission may assess damages and attorney fees.”).<sup>2</sup>

The Legislature has articulated the actions the Commission may take in response to a violation of the Siting Act or the Commission's associated rules and orders. *See* N.D.C.C. §§ 49-22-20 and 49-22-21; Order on Motion for Partial Dismissal at 2 (“The law expressly provides under which sections the commission may assess damages and attorney fees.”). No matter what facts may be proven in this action, the Commission's authority does not include granting damages or attorneys' fees to private parties. The Commission properly dismissed these claims as outside its authority to grant.

- B. The Kesslers' argument that the Commission has authority to award damages or attorney fees is wrong.

The Kesslers' reliance upon N.D.C.C. § 49-05-10 is misplaced. First, N.D.C.C. Ch. 49-05 applies to “public utilities” and therefore is not applicable here, as Minnesota Power is not a public utility under the laws of North Dakota. An “electric public utility” is defined in N.D.C.C. § 49-03-01.5(2) as “a privately owned supplier of electricity offering to supply or supplying electricity to the general public.” Additionally, to the extent N.D.C.C. Ch. 49-05 applies to an “electric

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<sup>2</sup> Minnesota Power does not repeat its arguments on this point, but instead incorporates the arguments set forth in its August 3, 2020, and August 10, 2020 briefs in support of its Motion for Partial Dismissal of the Revised Complaint.

provider,” N.D.C.C. § 49-04-01.5(1) defines this term as “an electric public utility or a rural electric cooperative.” While Minnesota Power, a division of ALLETE, Inc., has service territory and is a regulated electric utility in Minnesota, it is not in North Dakota.<sup>3</sup> Thus, N.D.C.C. § 49-05-10 is not applicable.

Second, the Kesslers omit critical language from their quotation of N.D.C.C. § 49-05-10. Specifically, the Kesslers omit the language that provides that it is a “court,” not the Commission, that would address a claim by the Kesslers for damages. The Kesslers’ attempt to simply ignore the language of N.D.C.C. § 49-05-10 and greatly expand the Commission’s authority has no basis in law and must be denied.

Accordingly, since the Kesslers’ claims for attorney fees and damages are outside of the Commission’s authority, the Commission properly dismissed those claims for failure to state a claim upon which relief can be granted.

### **CONCLUSION**

The Kesslers’ Motions for Reconsideration are untimely and should be dismissed. Further, notwithstanding the Kesslers’ desire to greatly expand the scope of this proceeding, the Kesslers’ requests for attorney fees and damages are not within the Commission’s authority to grant under N.D.C.C. Ch. 49-22. Accordingly, the Commission should deny the Kesslers’ Motions for Reconsideration with prejudice.

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<sup>3</sup> See, e.g., *Square Butte Elec. Co-op. v. Hilken*, 244 N.W.2d 519, 512 (N.D. 1976) (noting that Minnesota Power & Light (which is now known as ALLETE, Inc.) is a Minnesota regulated utility serving Minnesota customers).

Dated this 23rd day of March, 2021.

FREDRIKSON & BYRON, P.A.

By 

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**STATE OF NORTH DAKOTA**  
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Keith and Deanna Kessler,

Complainants/  
Petitioners,

v.

Minnesota Power, a division of ALLETE,  
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Respondent.

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Case No. PU-20-194  
OAH File No. 20200211

**CERTIFICATE OF SERVICE**

Roxanne Gangl, being first duly sworn, does depose and state that on March 23, 2021, this Certificate of Service and a true and correct copy Minnesota Power's Response in Opposition to Kesslers' Motions for Reconsideration of Order Dismissing Claims for Attorney Fees and Damages were sent by electronic mail and/or mailed via Federal Express (as indicated below) to:

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*/s/ Roxanne Gangl*

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Roxanne Gangl