

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. (“Minnesota Power”), are the following documents:

- Application for Protection of Information;
- March 11, 2021 Boughey E-mail; and
- Certificate of Service.

The original and seven copies of the Application and the Boughey E-mail are being sent today to the Commission via Federal Express. Also enclosed is a sealed envelope marked PROTECTED INFORMATION – PRIVATE containing the lost revenue information that is the subject of the application.

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/72482760v1

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.)

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

<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">CERTIFICATE OF SERVICE</p>
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Roxanne Gangl, being first duly sworn, does depose and state that on March 23, 2021, this Certificate of Service and true and correct copies of:

- Filing letter;
- Minnesota Power's Application for Protection of Information; and
- March 11, 2021 Boughey E-mail

were sent by electronic mail and/or mailed via Federal Express (as indicated below) to:

Steven Kahl
Executive Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov
(Via E-Mail and via FedEx)

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

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

Lynn Boughey
Boughey Law Firm
PO Box 1202
Mandan, ND 58554-1202
lynnboughey@midconetwork.com
bougheyfirm@midconetwork.com
(Via E-Mail)

/s/ Roxanne Gangl

Roxanne Gangl

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler, Complainants/ Petitioners, v. Minnesota Power, a division of ALLETE, Inc., Respondent.	Case No. PU-20-194 OAH File No. 20200211 MINNESOTA POWER’S APPLICATION FOR PROTECTION OF INFORMATION
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Pursuant to North Dakota Administrative Code (“N.D.A.C.”) § 69-02-09-01, Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”), submits this application to protect from disclosure certain confidential information being filed with the North Dakota Public Service Commission (“Commission”) in the above-captioned matter. The purpose of this application for protection of information is to protect against public disclosure of trade secret information as defined by North Dakota Century Code (“N.D.C.C.”) § 47-25.1-01(4). Specifically, Minnesota Power requests that trade secret protection be given to information pertaining to lost revenue (the “Lost Revenue Information”) to be provided in accordance with the Administrative Law Judge’s March 17, 2021 Order on Subpoena *Duces Tercum* and Subpoena of Witnesses (“Order”) requiring Minnesota Power to produce information regarding “the cost, including lost income, of moving, removing, or decommissioning Turbine 441.” Order at 4.

The Lost Revenue Information is not available to the general public, and Minnesota Power treats the Lost Revenue Information as trade secret, confidential business information. The Lost Revenue Information includes detailed financial information, including revenue and market-sensitive price information, specific to Minnesota Power. The information has independent

economic value to competitors and commercial parties, and public disclosure may create a competitive disadvantage for Minnesota Power compared to competitors and other commercial parties in future business transactions. In addition, Minnesota Power has maintained the confidentiality of the Lost Revenue Information. The Lost Revenue Information is provided only to Minnesota Power's employees or authorized agents who need to know the information to fulfill their responsibilities in connection with the Project.

For these reasons, Minnesota Power respectfully requests the Commission grant its application to protect the above-referenced Lost Revenue Information and enter an appropriate protective order limiting disclosure of the protected information. Specifically, Minnesota Power requests that the information be available only to the counsel for Keith and Deanna Kessler ("Kesslers"), the Administrative Law Judge, the Commission, and the Commission's counsel. As shown in the enclosed email correspondence, Mr. Boughey suggested such an approach to confidentiality of the information and indicated he would abide by such an order (see highlighted paragraph).

In accordance with N.D.A.C. § 69-02-09-02, one copy of the trade secret material is provided in the enclosed sealed envelope which is labeled: "**PROTECTED INFORMATION - PRIVATE**".

Minnesota Power also requests the Commission waive the requirement in submit a redacted public version of the Lost Revenue Information. Given that the entirety of the Lost Revenue Information is trade secret, the entire document would be redacted.

Dated this 23rd day of March, 2021.

FREDRIKSON & BYRON, P.A.

By 
MOLLIE M. SMITH, ND Bar #06714
PATRICK D.J. MAHLBERG, ND Bar #06659
*Attorneys for Minnesota Power, a division of
ALLETE, Inc.*
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7270
msmith@fredlaw.com
pmahlberg@fredlaw.com

72475315 v2

From: lynnboughey@midconetwork.com
Sent: Thursday, March 11, 2021 6:04 AM
To: 'Dawson, Timothy J.'
Cc: Mahlberg, Patrick; Smith, Mollie; 'Johnson, Brian L.'; boughelawfirm@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 providers 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 3rd 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

From: Dawson, Timothy J. <tjdawson@nd.gov>
Sent: Wednesday, March 10, 2021 3:36 PM
To: lynnboughey@midconetwork.com; 'Mahlberg, Patrick' <PMahlberg@fredlaw.com>; Smith, Mollie <msmith@fredlaw.com>; Johnson, Brian L. <brljohnson@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 14th Street, Suite 303
Bismarck, ND 58503
tjdawson@nd.gov
(701)328-3200

From: bougheylawfirm@midconetwork.com <bougheylawfirm@midconetwork.com>
Sent: Wednesday, March 10, 2021 11:15 AM
To: 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>
Sent: Tuesday, March 9, 2021 12:21 PM
To: bougheylawfirm@midconetwork.com
Cc: 'Dawson, Timothy J.' <tjdawson@nd.gov>; Smith, Mollie <msmith@fredlaw.com>; 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
Minneapolis, MN 55402-1425
Direct Dial: 612.492.7419
Mobile Phone: 763.267.8689

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Please consider the environment before printing this email.

From: Mahlberg, Patrick
Sent: Tuesday, March 9, 2021 12:17 PM
To: 'Dawson, Timothy J.' <tjdawson@nd.gov>
Cc: Smith, Mollie <msmith@fredlaw.com>; brljohanson@nd.gov; 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
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Direct Dial: 612.492.7419
Mobile Phone: 763.267.8689

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