

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Keith and Deanna Kessler,)
)
 Plaintiffs,)
)
 vs.)
)
 Minnesota Power, a Division of)
 ALLETE, Inc.)
)
 Defendant.)

**ORDER GRANTING DEFENDANT’S
PARTIAL MOTION TO DISMISS
ATTORNEY’S FEES CLAIM**

Case No. 1:22-cv-029

Before the Court is a motion to dismiss Count 5 of the complaint, as it applies to attorney’s fees incurred before the North Dakota Public Service Commission, filed by Defendant Minnesota Power, a Division of ALLETE, Inc. (“Minnesota Power”) on February 15, 2022. See Doc. No. 7. Defendant Minnesota Power concurrently filed a Memorandum in Support of its Partial Motion to Dismiss on February 15, 2022. See Doc. No. 8. Plaintiffs Keith and Deanna Kessler (“Kesslers”) filed a response in opposition to the motion on March 8, 2022. See Doc. No. 17. Defendant Minnesota Power filed a reply brief on March 22, 2022. See Doc. No. 21. For the reasons set forth below, the Defendant’s motion is granted, as it applies to the attorney’s fees incurred during proceedings before the North Dakota Public Service Commission hearings.¹

I. BACKGROUND

The Kesslers own property in Oliver County, North Dakota, namely: the Northwest Quarter of Section 15, Township 141 North, Range 87 West and a portion of the Southeast Quarter

¹ If successful, reasonable attorney’s fees may still be recoverable by Plaintiffs in conjunction with the current action.

of Section 15, Township 141 North, Range 87 West, Oliver County, North Dakota. The Kesslers own numerous structures on the above-mentioned Northwest Quarter, including a structure that is allegedly used as a residence.

On May 3, 2013, Minnesota Power filed an Application with the North Dakota Public Service Commission (“PSC”) for a Certificate of Site Compatibility seeking authorization for construction of the Bison 4 Wind Project (“Bison 4”), consisting of up to 70 wind turbine generators and associated facilities in Oliver County, North Dakota. See Doc. No. 22-2, p. 1. On September 13, 2013, a jurisdictional and siting hearing was held regarding the Certificate of Site Compatibility Application before the PSC. Id. On September 25, 2013, the PSC issued Minnesota Power a Certificate of Site Compatibility (“Certificate”) for Bison 4. Id. at p. 9. Following the issuance of the Certificate, Minnesota Power moved forward with their wind project, including erecting Turbine 441 adjacent to the Kesslers’ property. See 1-1, p. 1. However, the Certificate issued by the PSC required that “no turbines will be placed within 1,400 feet of an occupied residence.” See Doc. No. 22-2, p. 7.

On July 25, 2019, following the completion of Turbine 441, the Kesslers filed an administrative complaint with the PSC alleging that the turbine was built too close to an occupied residence on the Kesslers’ property in violation of the Order Provisions incorporated in the Certificate. See 1-1, p. 2. Minnesota Power asserted that the structure on the Kesslers’ property was not an occupied residence, but never contacted the property owner to confirm its assertion. Id. On March 25, 2021, the PSC held a hearing concerning the Kesslers’ complaint and found: (1) Minnesota Power constructed Turbine 441 approximately 1,100 feet from the Kesslers’ structure, and (2) that the structure was occupied at the time of siting and, as such, violated the 1,400-foot

setback required by the Certificate issued by the PSC. Id. The PSC ordered Minnesota Power to remove Turbine 441 within six months. Id. at p. 3.

Having exhausted their administrative remedies with the PSC, on January 19, 2022, the Kesslers filed a civil action in Oliver County, North Dakota asserting claims for inverse condemnation, negligence, nuisance, loss of enjoyment of use of property, and attorney's fees. Minnesota Power removed the action to federal court on February 15, 2022. See Doc. 1. The Kesslers' claim for attorney's fees in their complaint seeks to recover attorney's fees incurred through the administrative action before the PSC as well as attorney's fees incurred in the current action. Id. at p. 7. In the present motion, Minnesota Power seeks to dismiss the claim for attorney's fees incurred in connection with the PSC proceedings. See Doc. 7. The motion has been fully briefed and is ready for disposition.

II. STANDARD OF REVIEW

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates the dismissal of a claim if there has been a failure to state a claim upon which relief can be granted. In order to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A plaintiff must show that success on the merits is more than a "sheer possibility." Id. A complaint is sufficient if its "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The court must accept all factual allegations as true, except for legal conclusions or "formulaic recitation of the elements of a cause of action." Id. at 681. Detailed factual allegations are not necessary under the

Rule 8 pleading standard, rather a plaintiff must set forth grounds of its entitlement to relief which “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint does not “suffice if it tenders a naked assertion devoid of further factual enhancement.” Ashcroft, 556 U.S. at 678 (2009). The determination of whether a complaint states a claim upon which relief can be granted is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id. at 679. Dismissal will not be granted unless it appears beyond doubt the plaintiff can prove no set of facts entitling plaintiff to relief. Ulrich v. Pop Cnty, 715 F.3d 1054, 1058 (8th Cir. 2013).

III. LEGAL DISCUSSION

Count 5 of the complaint asserts a single claim for attorney’s fees, but the attorney’s fees sought in the complaint can be separated into two categories from which they originate: those in conjunction with the present inverse condemnation action and those incurred through administrative hearings before the PSC. The issue presented to the Court is whether the Kesslers’ claim for attorney’s fees incurred in conjunction with the PSC hearings fail to state a claim upon which relief can be granted. Minnesota Power contends that under North Dakota law, the Kesslers are not allowed to recover any attorney’s fees incurred in the PSC proceedings and the portion of Count five (5) of the complaint must be dismissed as a matter of law. The Kesslers oppose the motion and contend that they should be allowed to recover all attorney’s fees incurred in relation to the administrative complaint filed by the Kesslers in 2019. The Court agrees with Minnesota Power.

The well-settled “American rule” on the payment of attorneys’ fees in federal litigation is that, in the absence of a statute or an enforceable contract, each party is responsible for his or her own fees. Actors’ Equity Ass’n. v. Am. Dinner Theatre Inst., 802 F.2d 1038 (8th Cir. 1986) (internal quotations omitted). No contract exists here, so the court then turns to consider whether any statute permits the Kesslers to recover fees incurred during the PSC proceedings.

Section 32-15-32 of North Dakota Century Code provides in part: “The court may in its discretion award . . . reasonable actual or statutory costs or both . . . and reasonable attorney’s fees for all judicial proceedings.” United Power Ass’n v. Moxness, 267 N.W.2d 814, 817 (N.D. 1978). More specifically, the North Dakota Supreme Court has said that Section 32-15-32 authorizes the district court to award reasonable attorney’s fees for all judicial proceedings in an eminent domain action. Mont.-Dakota Utils. Co. v. Behm, 2020 ND 234, 951 N.W.2d 208. However, the North Dakota Supreme Court has limited recovery of attorney’s fees to litigation of claims asserting condemnation or inverse condemnation. Moxness, 267 N.W.2d at 817. The Kessler’s action before the Court includes an inverse condemnation claim. Therefore, in order to determine whether the recovery of attorney’s fees is permitted for the Kesslers, the Court must classify the administrative hearings before the PSC, determine the authority that governs those proceedings, and clarify the scope of “judicial proceedings,” as written in Section 32-15-32 of North Dakota Century Code.

The North Dakota Supreme Court in Moxness clearly stated that attorney’s fees will not be awarded for siting and jurisdiction hearings before the PSC:

No language in §§ 32-15-32 or 32-15-35, NDCC, in any way indicates any intent on the part of the Legislature to extend the application of those provisions to proceedings provided for outside of Chapter 32-15. The Legislature, not this court, should make the decision of whether costs and attorney fees should be allowed to landowners who participate in PSC jurisdictional or siting hearings.

Id.

The Kesslers argue they should be permitted to recover attorney's fees incurred in conjunction with exhausting administrative remedies before the PSC because those were not siting and jurisdictional proceedings. The Kesslers self-labeled the subsequent proceedings following the filing of their administrative complaint in July of 2019 as "enforcement proceedings." The Kesslers claim the attorney's fees incurred in conjunction with the proceedings brought against Minnesota Power in 2019 should be awarded to them. To support their claim, the Kesslers argue that the later "enforcement proceedings" were necessary exhaustive remedies to obtain a ruling that Minnesota Power violated the original PSC order as a "precondition to this inverse condemnation action." See Doc. 17, p. 4-5. Further, the Kesslers attempt to distinguish established case law and highlight public policy considerations.

The Kessler's arguments made to distinguish the later PSC hearings from the siting and jurisdictional proceedings are noted, but the Court is not convinced. Rather, the self-labeled "enforcement proceedings" were additional, subsequent siting and jurisdictional proceedings. Regardless of how the Kesslers want to characterize these proceedings, they ultimately were before the PSC to enforce a 1,400-foot setback violation for the placement of Turbine 441. This is a siting and jurisdictional issue. On August 4, 2021, the PSC's preliminary statement even references the matter as "a complaint concerning the siting of ALLETE, Inc.'s (ALLETE's) Bison 4 Wind Project (the Project) Turbine 441." See Doc. No. 22-1. Accordingly, the subsequent proceedings the Kesslers participated in before the PSC are classified as an extension of the earlier siting and jurisdictional proceedings. Thus, Moxness controls and the attorney's fees incurred by the Kesslers before the PSC are unrecoverable.

Alternatively, if the subsequent proceedings before the PSC are not to be considered siting and jurisdictional proceedings, the Court must determine how the PSC proceedings should be

classified. This is a vital determination because, in the event that Moxness would not control, Section 32-15-32 authorizes the district court to award reasonable attorney's fees for all judicial proceedings in an eminent domain action. A definition for "judicial proceeding" is absent from any North Dakota statute. However, the Court finds that the hearings before the PSC are more akin to an "adjudicative proceeding." Section 28-32-01(1) provides in part:

"Adjudicative proceeding" means an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required. An adjudicative proceeding includes administrative matters involving a hearing on a complaint against a specific-named respondent; a hearing on an application seeking a right, privilege, or an authorization from an agency, such as a ratemaking or licensing hearing; or a hearing on an appeal to an agency. An adjudicative proceeding includes reconsideration, rehearing, or reopening.

N.D.C.C § 28-32-01(1)

"Administrative agency" or "agency" means each board, bureau, commission, department, or other administrative unit of the executive branch of state government. N.D.C.C § 28-32-01(2). The administrative hearings before the PSC fit squarely into North Dakota's definition of an adjudicative proceeding. Consequently, the hearings before the PSC cannot be considered "judicial proceedings" and the Kesslers are not entitled to attorney's fees that were incurred in conjunction with those administrative hearings.

While the Court may even agree with some of the public policy considerations raised by the Kesslers, the case law in North Dakota does not permit recovery. It is well-understood that the Plaintiffs seek to differentiate the "enforcement proceedings" from the siting and jurisdictional proceedings. However, the self-labeled "enforcement proceedings" were merely an extension of the jurisdictional and siting proceedings. This Court cannot expand the scope of Section 32-15-32 so far as to include the PSC proceedings under the umbrella of "judicial proceedings," as written in Section 32-15-32 because the hearings were, instead, "adjudicative proceedings."

In their claim for attorney's fees, the Kessler's seek fees in conjunction with this action and those incurred before the PSC. If the Kesslers are successful in demonstrating an inverse condemnation claim, they may still be able to recover attorney's fees incurred in this action. However, North Dakota law does not entitle the Kesslers to recover attorney's fees arising from the PSC proceedings.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' briefs, and relevant case law. For the reasons set forth above, Minnesota Power's motion to dismiss the attorney's fees claim (Doc. No. 7) is **GRANTED**, as it relates to the fees incurred in conjunction with the PSC hearings.

IT IS SO ORDERED

Dated this 11th day of July, 2022.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge
United States District Court