

I. Introduction

This matter involves the complaint of landowner Keith Kessler¹ relating to reclamation required to be conducted by Minnesota Power/Allete following the construction of Minnesota Power Bison 4 Wind Project by ALLETE, Inc. (hereinafter Minnesota Power²). It also concerns the improper placement of Turbine 441 within 1400 feet of a residence that should have been listed an inhabited due to Minnesota Power being informed that the residence was only temporary vacant and was intended to be used by the Kesslers as soon as their son returned from college; even a cursory review of the home would make it clear to anyone that the residence was, at the time, fully furnished, had a full kitchen and running water and toilet, and was fully capable

¹ Interestingly, the actual complaint submitted by Keith Kessler via email on December 1, 2015, is not contained in either the PSC main file or in the informal file. Instead, there is reference to the Kessler *verbal* complaint of June 11, 2015, by message to Commissioner Kalk, and then reference to another *verbal* complaint made on November 30, 2015, to Jerry Lein. See **Informal File I-15-0195 Item 2** (Jerry Lein Memo 3-1-17). At the suggestion of Jerry Lein, Mr. Kessler provided a written complaint via email on December 1, 2015, which Mr. Lein forwarded to the company. *Id.* Minnesota Power Response to landowner complaint 12-8-15 is part of the formal file, **PU-13-127, Doc. No. 103**, as is the company's Proposed Mitigation Agreement 12-21-15, **PU-13-127, Doc. No. 106**, which was rejected by the Kesslers as insufficient to resolve all issues.

Because counsel for Mr. Kessler cannot find the complaint that was submitted by Mr. Kessler anywhere in the PSC files it is attached to this memorandum for filing in the main file, the informal file, or both.

² For convenience sake, "Minnesota Power" is usually used in this document, even though in some instances the developer RendField Land Co. or more regularly ALLETE applies.

of being used as a residence immediately. Moreover, the Kesslers specifically advised Minnesota Power – repeatedly before, during, and after the public hearing – that the residence would be occupied and was only temporary vacant. Despite these realities and disclosures, Minnesota Power failed to list the residence on any of the materials provided to the PSC and failed to disclose these facts as the application progressed towards approval. Indeed, Minnesota Power took active steps to prevent the Kesslers from raising this issue at the public hearing, thus misleading the PSC in regards to whether the company was actually in full compliance with the siting requirements.

In regards to the placement of Turbine 441 we will through this memorandum proposing a solution that, if at all possible, will not require the moving of the turbine away from the residence. As to the reclamation issue, we are proposing that the company pay the Kesslers an amount sufficient for the Kesslers to have the work done themselves; the Kesslers understandably would prefer not to have to have any further dealings or contact with Minnesota Power (except as required under the existing agreements that remain in force) given the problems they have had with Minnesota Power and the deterioration of their relationship based especially on the company's most recent

submission of blatantly false information to the PSC regarding as an attempt to defend its improper placement of Turbine 441.

Finally, as discussed with PSC staff, we will also include within this proposal certain suggestions at the end of this document as to several requirements that I believe the Public Service Commission should include as part of its Order Provisions in regards to any approval of any wind farm application in the future, thus attempting to prevent what has occurred here from happening to the Kesslers and provide protection to all North Dakota landowners.

II. Contents of Application

The letter of intent was filed by ALLETE on March 18, 2013, as to the construction of an additional wind energy conversion facility in Mercer, Oliver, and Morton counties. **Doc. No. 1.**³ The Application for a Certificate of Site Compatibility was filed on May 6, 2013, and acknowledged the applicability of the siting criteria contained in NDAC section 69-06-08-01 relating to exclusion and avoidance areas (Parts 3.1 and 3.2), land rights (Part 4.3), and the impact of the project of land use and noise, with specific acknowledgment of the duty of mitigation (Part 7.3 and 7.6). **Doc. No. 5.**

³ The letter of intent requested the Commission to shorten the one-year waiting period between notification and when the application of for a Certificate of Site Compatibility can be submitted to one month.

The application listed the rotor diameter as 383 feet and the tower height as 303 feet. Parts 6.2.2. and 6.2.3.

The application also indicated that the on-site construction manager coordinates all aspects of the Project, including communications with landowners. **Part 6.4.1.** The impact on landowners and particularly farmers is listed in the demographics section as minimal and will include compensation to the landowners. **Part 7.2.2.**⁴

In regards to placement of the project near residences, the application specifically stated that “[t]he development of the Project will not displace any residences or existing or planned industrial facilities. Wind turbines will be sited a minimum of 1,400 feet from existing or planned industrial facilities. Wind turbines will be sited a minimum of 1,400 feet from occupied residences.” **Part 7.3.1.** *See also* Parts 7.3.2, 7.5.1, 7.5.3.

In regards to the impact of noise, the application acknowledges that “[t]here are approximately 32 residences and one cemetery located either within the Project boundary or within one mile of the boundary.”

⁴ “Landowner compensation will be established by individual lease agreements. In general, areas surrounding each turbine can still be farmed or used for grazing. In addition, in an environment of uncertain agricultural prices and yields, the supplemental income provided to farmers from wind energy leases will provide stability to farm incomes and thus support the continued viability of farming on the Project site.” **Docket 5, Part. 7.2.2.**

Part 7.6.1. “Minnesota Power has chosen a benchmark noise level of 50 dBA as the criterion for the noise evaluation.” **Part 7.6.2.** “The minimum single turbine setback distance calculated where an exceedance of the 45 dBA benchmark would no longer occur is approximately 402 meters (1,320 feet) for the worst case turbine.” **Part 7.6.2.** Impacts to nearby residents and other potentially affected parties in terms of noise will be taken into consideration as part of the actual siting of the turbines. **Part 7.6.3.**

As to effects on land-based economies, the application specifically acknowledges that “[t]emporarily disturbed areas will be reseeded in consultation with land owners and the Natural Resource Conservation Service (NRCS) to blend in with existing vegetation.”

Part 7.7.3. the application also acknowledged the type of land involved: “The majority of the Project site is native grassland, cultivated farmland, and pasture Crops are a large percentage of the counties’ market value so prime farmland is important in production. Cropland accounts for approximately 42 percent of the total land cover within the Project site.” **Part 7.10.1.** Once again the application noted that “[t]here are 32 occupied residences, within the Project site boundary” and identified these homes in Exhibit 4. **Part 7.10.1.**

In regards to the impact on agriculture and farming, the application stated that “[n]o impacts are anticipated to animal health and safety due to the construction or operation of the wind farm and associated facilities. Except for the physical locations of the turbines and access roads, all the land surrounding the facility will be available for grazing.” **Part 7.10.2.** “The resulting overall impact on production for the top five crops in Oliver and Mercer Counties would be expected to be minor to negligible. As noted earlier, wind lease payments will provide farmers with a supplemental source of income, thus helping to support the continuation of farming in Oliver and Mercer Counties.” The application once again repeated that “[n]o turbines will be placed within 1,400 feet of occupied residences.” **Part 7.10.2.**

As to mitigation measures relating to farming and ranching, the application stated “Minnesota Power will work with landowners to minimize impacts to their land. Once the wind turbines are constructed, all land surrounding the turbines can still be farmed or grazed.” **Part 7.10.3.**

As to erosion, the application acknowledged that “[t]he potential for wind and water erosion exists in the soil types found on the site. Construction practices will minimize soil erosion during and after turbine construction, and impacts are not expected to be measurable.”

Part 7.11.2. as to mitigation relating to wind and water erosion, the application stated that the following mitigation measures will be taken:

Wind and water erosion are potential hazards for the soils found on the site. To minimize erosion during and after construction, BMPs for erosion and sediment control will be utilized. Since turbines will not be located on significant slopes, only non-structural practices should be required. These practices include: temporary seeding, permanent seeding, mulching, filter strips, erosion blankets, grassed waterways, and sod stabilization. Topsoil will be segregated if cuts are made during construction and reapplied after final contours have been graded.

Part 7.11.3.

Finally, the application reviewed the impact on vegetation. “The Project is located in the Northwestern Great Plains Ecoregion (EPA, 2009), which encompasses the Missouri Plateau portion of the Great Plains. This ecoregion is semiarid with rolling plains and occasional buttes. Native grasslands are largely replaced by spring wheat, alfalfa, and rangeland areas.” **Part 7.15.1.** In order to mitigate the impact to vegetation, the application provided the following:

Minnesota Power will work closely with the USFWS during micro-siting to minimize impacts to vegetation within the Project site. Minnesota Power will conduct a pre-construction inventory of existing wetlands, native prairie, and woodlands . . .

Minnesota Power will use BMPs during construction and operation of the Project to protect topsoil and adjacent resources and to minimize soil erosion. Practices may include containing excavated material, protecting exposed soil, stabilizing restored material, and revegetating rangelands with native species.

Part 7.15.3.

III. Public Hearing Held

A public hearing on the application was held on September 13, 2013, at the Oliver County Courthouse, Center, North Dakota. The issues by the Commission in the notice of the public hearing were as follows:

1. Will the location, construction, and operation of the proposed facilities produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?
2. Are the proposed facilities compatible with the environmental preservation and the efficient use of resources?
3. Will the proposed facility locations minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion?

Doc. No. 24. Patrick Ward served as the administrative law judge for the hearing. **Doc. No. 31 (audio recording).** Keith and Deanna Kessler attended, along with several other landowners. **Doc. No. 32.**

Minnesota Power submitted three exhibits to the hearing officer. Exhibit 1 is the Application previously filed with the Public Service Commission. **Doc. No. 34, Public Hearing, Exhibit 1.** Exhibit 2 is the supplemental materials submitted at the public hearing. In regards to coordination with the landowners, the hearing officer was advised through Exhibit 2 of the following:

4.0 Landowner Coordination

Keeping the public informed on the status of the Project is key component to its success. Principal stakeholders in the Project are landowners that have entered into agreements with Minnesota Power to provide wind rights for the Project. Minnesota Power has finalized options to install turbines with the landowners that would be impacted by the Project, and revised its Project boundary to reflect only those landowners who would be directly impacted by the Project. In addition, Minnesota Power will send out the letter in Appendix C to all landowners potentially impacted by the project on August 9, 2013. The letter outlines the PSC public hearing for the Project, the Project design and additional information sources.

Doc. No. 35, Public Hearing, Exhibit 2 at page 5 (emphasis added).

Finally, as required by the Public Service Commission, Minnesota Power provided a detailed listing of the requirements to be set forth by the Commission in its Order and certifying its obligation to comply with each of these forty items which will be contained in the certificate or permit issued by the Public Service Commission . **Doc.**

No. 36, Public Hearing, Exhibit 3.

A work session in regards to the application was held on September 17, 2013. **Doc. No. 38 (audio recording).** On September 25, 2013, the Public Service Commission issued its Findings of Fact, Conclusions of Law, and Order. this document included the following relevant findings of fact:

19. With the exception of prime farmland and possible cultural resource sites, no exclusion areas have been identified within the project area. . . .

20. Up to 133 acres of agricultural production will be impacted due to turbine placement, access roads, the operations and maintenance facility and project substation, which constitutes less than 0.5 percent of the Project area. Wind turbine configuration will not result in significant impacts to agricultural production. No impacts on the agricultural quality of the crop land are anticipated. If compaction of soils occurs during construction, Minnesota Power will work with landowners to alleviate the compaction.

...

22. Minnesota Power submitted evidence to demonstrate its commitment to maximize the benefits of the proposed energy conversion facility as far as is possible so as to meet the Policy Criteria set forth in North Dakota Administrative Code Section 69-06-08-01(4).

...

24. The only Avoidance Areas identified within the project area are cultural resource sites, woodlands and wetlands. No turbines will be placed within these areas.

...

35. No turbines will be placed within 1,400 feet of an occupied residence. The closest turbine to a participating occupied residence is approximately 1402 feet. The closest turbine to a non-participating residence is approximately 5972 feet.

36. Minnesota Power conducted noise and shadow flicker analyses, using both "worst case" and "realistic" scenarios. These studies indicated that the Project will not cause adverse effects due to either noise or shadow flicker. As shown in Hearing Exhibit 2, the highest expected cumulative noise level at any participating residence is about 46 decibels (dBa). The highest expected level at any non-participating residence is 37 dBa. . . .

...

39. Minnesota Power made other representations and agreements as contained in the Certification Relating to Order Provisions - Wind Energy Conversion Facility Siting executed by Minnesota Power and filed with the Commission on August 13,

2013 (Hearing Exhibit 3), which is incorporated in these Findings of Fact. . . .

Doc. No. 40.

The Public Service Commission went on to make the following applicable Conclusions of Law:

3. The Application submitted by Minnesota Power meets the site evaluation criteria required by North Dakota Century Code chapter 49-22.

4. The location, construction, and operation of the proposed energy conversion facility will produce only minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota.

. . .

6. The proposed energy conversion facility will minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion.

. . .

8. The proposed project is of such design, location and purpose that it will produce minimal adverse effects.

Doc. No. 40.

The Commission then issued an Order providing in part the following:

1. Certificate of Site Compatibility for an Energy Conversion Facility No. 34 is issued to Minnesota Power for the construction, operation, and maintenance of a wind energy facility known as Bison 4 Wind Project in accordance with this Order.

. . .

4. The August 13, 2013, Certification Relating to Order Provisions - Wind Energy Conversion Facility Siting (Exhibit 3), except as modified in accordance with Findings of Fact paragraph 39 above, is incorporated by reference and attached to this Order.

Doc. No. 40.

IV. Review of Applicable Documents and Salient Facts

- 6-2-09 5 -Year Wind Project Option Agreement signed by the Kesslers, allowing Minnesota Power to enter upon their property, conduct tests and install when measuring equipment, and restore the owner's property to the condition as a previously existed. A 20-page Wind Project Easement Agreement (unsigned) was attached.
- 6-19-09 letter from Minnesota Power with copy of executed Wind Project Option Agreement and payment of \$2520
- 1-4-12 letter from ALLETE to Kesslers providing an update "as part of our commitment to keep you informed" stating that ALLETE Clean Energy has been formed for the purpose of construction of wind generation "in your area" and that "some of your properties are in the process of being assigned for construction." The letter goes on to state that "initial contacts for some landowners have already taken place . . . and others may be contacted in the future." The letter specifically provides the following assurance to all the landowners: "You can be assured that although the companies are different, the people representing all that, Minnesota power and all that clean energy, share a commitment to integrity, honesty and responsible, their business practices."
- Undated Kessler's receive Bison I Wind Energy Center indicating 33 turbines with rotor diameter 332 feet, blade length 161 feet, hub height 262 feet, total height with blade extended straight up 428 feet NOTE: Bison IV will be rotor diameter 383 feet, blade length 206 feet, hub height 303 feet, total

height with blade extended straight up 292 feet, [see Application Ex. 10, DOC. 5 at page 316]

5-3-13 Application by Minnesota power to Public Service Commission to construct the Bison 4 Wind Project [DOC. 5], which includes

3.0	Site Selection Criteria
3.1	Exclusion Areas
3.2	Avoidance Areas
4.3	Land Rights
6.5.1	Project Control, Management, And Service
7.2.2	Impacts
7.2.3	Mitigated Measures
7.3	Land Use
7.3.3	Mitigated Measures
7.4.2	Impacts
7.6	Noise
7.10	Effects On Land Based Economy
9.0	Identification Of Potential Permits/Approvals
Table 3-1	Exclusion Areas
Table 3-2	Avoidance Areas
Table 4-1	Performance Standards, Including Setbacks, For Wind Turbines
Table 7.18-1	Summary Of Impacts And Mitigation
Table 9-1	Potential Permits and Approvals Required For Construction And Operation Of The Proposed Facility
Exhibit 2/4	Exclusion and Avoidance Areas Map
Exhibit 10	Wind Turbine Design Features

Note: The exclusion area or avoidance areas tables and map (Table 3-1, Table 3-2, and Exhibit 4) does not seem to include any reference to the residence located on the NW1/4 of Section 15, and even if it is marked, the red circle indicates that the residence is outside the 1400 distance – which did not end up being the case.

9-13-13 sign in sheet for PSC hearing listing Keith and Deanna Kessler [Doc. 32]

9-13-13 Bison IV Sound Map [Doc. 35, Exhibit 2, page 109] received at Hearing

9-13-13 Bison IV Exclusion and Avoidance Areas [Doc. 35, Exhibit 2, page 109] received at Hearing

9-13-13 Minnesota Power Certificate Relating to Order Provisions- Energy Conversion Facility Siting [Doc. 36, Exhibit 3 at Hearing], which has provisions relating to the following requirements to which the company agreed:

Para. 1 the company agrees to comply with the certificate of site compatibility, chapter 49-22 of the North Pacific. Oh, chapter 69-06-08 of the North Dakota administrative code, and is responsible for compliance with the order and conditions and criteria set forth in the applicable laws and rules

Para. 6 the company agrees that the certificate is subject to suspension or revocation for failure to comply with commission's order, or the conditions and criteria for the certificate

Para. 7 the company agrees to maintain records that will demonstrate that is complied with the requirements of the commission's order and the certificate

Para. 9 the company agrees to construct and operate the facility in the manner described in the company's application and the certification relating to orders provisions, which control if there is any conflict between the application and the order provisions

Para. 16 requirements as to topsoil

Para. 18 requirements as to reclamation, fertilization, and reseeding

Para. 19 requirements as to continuation of reclamation and maintenance

Para. 21 requirements as to tree and shrub mitigation

Para. 22 requirements as to repair and replacement of all fences and gates removed or damaged during construction and operation of facility

Para. 25 requirement that staging area and equipment shall not be located on landowners property unless negotiated with landowners

Para. 26 requirement for company to remove all waste that is a product of construction and operation, restoration, and maintenance of the site

Para. 27 upon completion of construction of each wind turbine, restore the area affected as near as practicable to the condition as it existed prior to the beginning of construction

Para. 32 requirement to implement the procedure for all complaints will be handled by the company

Para. 34 requirement to inform the commission in writing of any plans to modify the facility or the site plan, and obligation to obtain written approval before any modifications to the site plan or the facility

Para. 37 company understands that the authorizations are subject to modifications by order of the commission if deemed necessary to protect further the public or the environment

Para. 40 the certificate of site compatibility is subject to suspension or revocation for failure to comply with the commission's order and the conditions and criteria of the certificate

9-25-13 Findings of Fact, Conclusions of Law and Order, in which the Public Service Commission, approved the application of Minnesota Power [Doc. 40].

V. Discussion

The Present Chasm between Minnesota Power and the Kesslers

As to the two primary issues, that of reclamation and siting of Turbine 441, a review of the entire record makes it clear that Minnesota Power

and its representatives believe that they have not done anything wrong and that the Kessler's are inappropriately being obstinate and unreasonable. By the same token, it is clear that the Kessler's believe that Minnesota Power has treated them improperly and unfairly, resulting in their level of trust relating to Minnesota Power basically nonexistent.

This Proposal is an Attempt to Find Resolution The purpose of this proposal is to attempt to resolve the issues of concern and bridge the gap of misunderstanding as to all issues, find a middle ground in which both parties will be in a position to resolve the issue to the satisfaction of all, and suggest how we can all go about preventing such a situation from occurring again.

Attorney Boughey's Review of the Kessler Situation I have carefully studied Minnesota Power's application, the process for obtaining approval by the public service commission, and the problems the customers have encountered in regards to the construction of the wind project at issue. In regards to the planning and approval of the wind project, I have concluded that despite the best intentions of senior Minnesota Power executives (particularly David Moeller) it appears to me that

1) mid-level Minnesota power representatives failed to provide proper information to the Kesslers as to the exact location of the turbines,

2) provided misinformation to the Kesslers in regards to the location of one particular turbine,

3) took positive steps to dissuade or prevent the Kesslers from raising this concern at the public hearing on September 13, 2013,

4) failed to acknowledge or inform the Public Service Commission – in its application and communications to the public service commission) – even the possibility that the structure near turbine 441 was inhabited or would be inhabited in the near future,

5) failed to acknowledge or inform the Public Service Commission – when the issue was raised by the Kesslers – about being told that the residence on the Kessler’s property was only temporarily uninhabited due to the Kessler’s child being in college, and placed turbine 441 within 1400 feet of the residence at issue.

6) provided false information about being informed previously that the Kesslers did not consider the residence abandoned and indeed considered the residence inhabited for purposes of the avoidance and exclusion provision of the North Dakota Century Code and the North Dakota Administrative Code

Review of Actual Facts Unfortunately, the PSC has never been fully advised of the actual facts relating to the siting of Turbine 441. As to the reclamation issues, the PSC has been kept apprised of the basic problems but has not been provided a clear overview that frankly justifies adoption of the Kesslers’ proposal contained herein.

VI. Location of Turbine 441 Issue

The facts regarding the placement of Turbine 441 within 1400 feet of a residence are at best troubling; at worst they constitute fraud upon the Kesslers and the PSC and require PSC action to resolve the issue and to make sure nothing like this happens to any other North Dakota landowner.

1) When Minnesota Power first proposed Bison 4 Wind Project to the Kesslers (and presumably all others) the company guaranteed that it would comply with the law and that the turbines would not be within 1400 of any residence.

2) Amazingly, Minnesota Power did not at any time prior to the public hearing provide a map to the landowners indicating where it intended to place the turbines.

3) Prior to the public hearing the Kesslers were told that a preliminary siting map had been drafted and they asked for a copy; however, Minnesota Power never provided that copy to them. It is essential to note that Minnesota Power did not take any steps to disclose the exact siting of Turbine 441 to the Kesslers, and indeed – since the map submitted to the PSC at the public hearing made it appear to the Kesslers that the turbine was less than 1400 feet from the house at issue – it seems clear that Minnesota Power intentionally failed to relay this information to the Kesslers.

4) Prior to the public meeting the Kesslers have repeatedly relayed their concerns about the placement of any turbines too close to BOTH their home residence AND the Section 15 residence. The Kesslers repeatedly told Minnesota Power that the Section 15 residence was going to be occupied in a very short time by their son who would be returning from college soon; they were repeatedly put off and told it would not be a problem, that the company is required to follow the law, and there were several opportunities to move the siting if it was too close to the residence. The Kesslers specifically discussed this issue with Scott Monrow prior to the public meeting. Each time the Kesslers were told that all turbines would be at least

1400 feet from any residence and that there would be “a window” of time in which to move it away from the residence if it was too close

5) The first indication that the Kesslers had that Turbine 441 had been sited within 1400 feet of the Kessler home occurred at the public meeting when the Kesslers finally had an opportunity to see the “final” siting map.

Note: The map provided at the public hearing did not make it absolutely clear that Turbine 441 was less than 1400 feet from the Section 15 residence. However, the map provided sufficient indication to the Kesslers to provide them great concern about the location of Turbine 441 and to raise the issue with Minnesota Power during the public hearing.

6) The exclusion and avoidance tables and most importantly the map entitled “Exhibit 2 Exclusion and Avoidance Areas” which showed the placement of each of the towers and the route of the underground power lines presented at the public hearing totally failed to include the Kessler Section 15 residence.⁵

Note: Given the fact that the Kesslers repeatedly raised their concern about the Section 15 residence to Minnesota Power before the hearing, the fact that no map was provided to the Kesslers before the hearing (despite their request) implies that Minnesota Power not only knew about the Section 15 residence but intentionally failed to list the residence or place it on the Exclusion and Avoidance map.

7) The Kessler Section 15 residence should have been listed and disclosed to the PSC through the application and hearing process, particularly given the other residences that were disclosed. Minnesota Power disclosed all the other residences – even those which had been sitting empty or not used for several years.

8) Here are the facts relating to the Kessler Section 15 residence:

a) the residence existed in 1989 when the Kessler bought the land.

⁵ It should be noted that the application for a Certificate of Site Compatibility filed on May 6, 2013, also failed to include the Section 15 Kessler residence. See **Doc. No. 5, page 310**. Exhibit 4 Exclusion and Avoidance Areas” which showed the placement of each of the towers and the route of the underground power lines.

b) from 1989-1992 Keith and Deanna Kessler lived in the home.

c) from 1993-1997 Keith's brother Paul lived in the home.

d) from 2001-2003 Keith's mother-in-law lived in the home.

e) from 2003 to the Spring of 2015⁶, the home was used regularly for i) lunches for the working crew when the Kesslers were working cattle, ii) for a hunting cabin, iii) an additional residence for out-of-town family members to stay during family get-togethers, including Keith's brother, his brother-in-law, and his sister, and iv) hosting super bowl Sunday parties.

f) Throughout 2003 through 2016 the Section 15 residence was in no way abandoned or left in disrepair. The house throughout the development of the entire project was capable of being used as a residence; it had furniture, running water, working toilet, full kitchen, carpet, and full heating. Yes, general maintenance and upkeep occurred; in 2012 a new coat of paint was administered on the outside; in May – June 2016 the Kesslers put in new flooring and painted the interior; in 2016 the shingles were replaced and some new windows were installed; in 2018 another new coat of paint was administered as well as a few more windows were installed.

g) the residence was used by Hayden when he returned from college in the late spring and Summer of 2015, and soon thereafter Hayden and his girlfriend (soon to be wife) lived there full-time. The couple was married in 2017 and their first home was the Kessler Section 15 residence.

h) Minnesota Power asserts that the home was abandoned, incapable of being lived in, and was AFTER the construction was completed remodeled and made capable of being a residence. This is simply not true, as clearly shown in the immediate preceding paragraphs. Worse yet, all anybody had to do was walk up to the residence and look at it to realize that it was indeed a fully functional residence.

⁶ Stephen was in college from 2011-2015, and Hayden was in college 2014-2015.

i) the simple fact of the matter is the Minnesota Power – despite being repeatedly told otherwise by the Kesslers – decided to ignore the Kessler’s statements about the residence and that it would be used by their son when he returned from college, decided NOT to include the residence in the avoidance and exclusion area tables and maps submitted to the PSC, and worse yet, decided to cover their mistake by failing to disclose the residence to the PSC, failing to disclose the information submitted by the Kesslers as to the property being a residence, and subsequently lying to the PSC about the history of the residence and the statements made by the Kesslers to Minnesota Power.

9) The failure of Minnesota Power to list the Kessler Section 15 residence as a residence in the avoidance and exclusion tables and maps makes no sense at all when one looks that the other residences that Minnesota Power actually listed. “Exhibit 2 Exclusion and Avoidance Areas” showed the placement of each of the towers and the route of the underground power lines. This map (presented at the public hearing) totally failed to include the Kessler Section 15 residence. And yet the following other residences were shown. [We will review each of the ten residences actually shown on the west side of N141-W87 Road District 21 Township, beginning with the Kessler main residence and then moving from north to south as to the residences on the west side of Oliver county.]

- A. Mercer County, Keith and Deanna Kessler main home, occupied
- B. Section 6, Wayne Cline residence, occupied
- C. Section 4, Skalsky property, residence occupied by Metz
- D. Section 18, Pulver residence, unoccupied 2004 to the present
- E. Section 19, Clinton Redmann residence, occupied
- F. Section 20, Aasmundstad residence, occupied
- G. Section 20, Maize residence, occupied
- H. Section 22, Mary Winkler residence, no one there 2009-2014, son lives there now
- I. Section 27, Voegele residence, parents’ place, unoccupied 2010 to the present
- J. Section 26, Greg Voegele residence, occupied

Note: It is unfathomable that Minnesota Power would include all of these places – some occupied, and some not, for decades – and yet somehow miss the one residence to which they had been informed repeatedly was a viable residence and would be used by the Kessler son once he returned from college – unless of course Minnesota Power knew it was within the distance of 1400 feet and intentionally chose not to place the Kessler Section 15 residence on the map. What is even more incredulous is the statement made by Minnesota Power to the PSC once this issue was brought to the attention of the PSC, where Minnesota Power repeatedly provided false information to the PSC by the letter submitted to the PSC on May 29, 2018. **Doc. 147, Minnesota Power Letter 5-29-18.**

10) During the public meeting (probably during a break) the Kesslers raised the issue of the placement of Turbine 441 with Scott and Matt. In the presence of other Minnesota Power representatives (some wearing suits) Matt blew up and basically yelled at the Kesslers, telling them “we don’t have time to move things around due to the tax credits, we have to get started, this isn’t the place for it, we can meet latter and discuss it.”

Note: The whole purpose of the public hearing is to determine if any member of the public has a personal or general concern about the project and it is indeed “the place for it” – that is for the public to relay any concerns they may have. Matt’s statement to the Kesslers was a blatant misstatement of the law, a misrepresentation of the ability to later fix the problem, and an intentional act to prevent the PSC from hearing the concerns of a potentially aggrieved landowner.

11) The Kesslers during the public hearing once again told Minnesota Power’s representatives that they will be using the house at issue, that their son will be living there as soon as he gets back from college.

Note: It is at this point that despite any further failings to do so, Minnesota Power was obligated to advise the PSC and the hearing officer that the application failed to include what may be properly considered an “occupied residence” and that the residence at issue, although perhaps presently “unoccupied” is fully capable of being

immediately occupied and is intended to be occupied in the very near future. Had Minnesota Power been forthright to the PSC and the hearing officer, the siting of Turbine 441 could have been modified slightly further to the east, thus preventing this entire debacle. Instead, Minnesota Power choose to placate the Kesslers by falsely claiming the problem would be fixed at a later time, knowing full-well that once the application was approved the making of changes to siting locations would be difficult if not impossible. The time to resolve this issue, and the time to disclose the potential problem to the PSC, was precisely at this hearing. Minnesota Power had knowledge of the potential problem and failed to disclose that to the PSC or the hearing officer.

12) Following the public hearing the Kesslers met with Scott and Wade at the New Salem office, where once again the Kesslers stated that Turbine 441 was too close to the Section 15 residence. Scott reassured the Kesslers that “we have to stay back 1400 feet because we have to.” At this meeting Scott and Wade attempted to get Kesslers to sign the easement and the Kesslers at that time raised several concerns, including issues relating to fencing and overhang issues. The Kesslers stated that the placement of Turbine 451 and Turbine 441 “are going to interrupt with our fence.” Both Scott and Wade reassured the Kesslers that neither turbine will be a bother and the fence will go right back where it was. At the end of that meeting the Kesslers didn’t sign the easement and Keith asked them, “what happens now if we don’t sing the easement” and Wade replied, with a big smile on his face, “if you don’t sign it we will just get a judge to sign it” and asserted that he would be able to make that happen quickly, within 30-60 days.

Note: At this meeting The Kesslers were advised by Minnesota Power – indeed, guaranteed – that Turbine 441 would not be within 1400 feet of the Kessler residence at Section 15. This did not happen.

13) Despite the Kesslers repeatedly raising the siting location issue with Minnesota Power and despite Minnesota Power’s statements and guarantees that Turbine 441 would not be within 1400 feet of the residence, Turbine 441 was placed 1125 feet from the Kessler home.

14) In conjunction with dealing with reclamations issues in 2017, the issue of the placement of Turbine 441 was addressed with Minnestoa Power on April 14, 2017 (Good Friday) in the presence of PSC staff members John Schuh and Jerry Leins. The Kesslers have summarized this meeting as follows:

We meet with Scott, Wade, John Schuh and Jerry Leins . We meet on section 21 looked at underground line, and we pointed out the ruts that were made by either the fencing crew or who ever put silt fence in. We went to look at section 16 where the crane walk took place and discussed holes from temp fence that were never filled in on section 16, 15 and 21. Then we went to section 15 and looked at 441 tower and discussed it being close to property line and the house. Deanna said we told you that it looked too close to the property line and that one of our sons was going to live in the house. At that time Scott Monroe agreed that we did tell him and Wade that. Then Wade said do you get it in writing? Keith then said, “[Damn] it I thought I could trust you, I thought we were in a partnership together.”⁷

⁷ The Kesslers had previously provided their notes of the meeting, which are as follows:

April 14th 2017 Good Friday
Meeting 2:00 with PSC and Minnesota Power

- Met at tower 448 on SW 1/4 21
 - Talked about fencing, spraying and rocks to be removed
- E1/2 of 21
 - Looked at Leingangs tower that borders our land to see the washouts into our hayfield
- Corral
 - Looked at wash out in hayfield (we ended up moving our fence because washout was so bad. Did not want to drive hay machine or baler across)
- Tower N of corral
 - Pointed out holes from temp fence. Pointed out underground and crane walk (you can see where the land is different)
- Tower on 15 [and cattle guard and fencing issues]
 - Pointed out wash out by fence from east to west.
 - Talked about cattle guard and putting in double fence. Talked about how we were [told] that the tower was not going to bother our land. Scott agreed that we did talk about it. Wade ask if we had

15) Adding insult to injury, once this issue finally came to the attention of the PSC, Minnesota Power provided a response to the PSC that is blatantly false in regards to the underlying facts and attempts to justify its position by narrowly and improperly using the term “uninhabited residence” in a manner that is contrary to the facts of the case, the statutory intent of the avoidance and exclusion areas, and any reasonable interpretation of what constitutes an uninhabited residence. The temporary absence of the Kesslers son from the home he would – without a doubt – come back to should not serve as a basis for considering the Kessler residence as “uninhabited.”

Questions that Come to Mind:

If Minnesota Power is aware that someone is gone for a day at work, is the residence (that is fully functional and capable of being lived in) at that time “uninhabited” for purposes of providing protection to North Dakota landowners through the statutory requirement of avoidance and exclusion areas?

If Minnesota Power is aware that someone is gone for a week on business, is the residence (that is fully functional and capable of being lived in at that time “uninhabited” for purposes of providing protection to North Dakota landowners through the statutory requirement of avoidance and exclusion areas?

If Minnesota Power is aware that someone is on vacation for four weeks, is the residence (that is fully functional and capable of being lived in at that time “uninhabited” for purposes of providing protection to

it in writing? Keith said GD we had an agreement and I should not had to have it in writing.

- Went to yard on 15
 - Talked about the noise and how close the tower was to the house. Talked about how we told the one of our sons where going to live there. Scott also agreed that we did tell him and Wade. And Jerry and John both said they would not want to live there.
- PSC agreed to give Minnesota Power a punch list and it was going to be done in a timely manner. We never heard from them until February 2018. 10 months later

Doc. 109 includes the PSC staffs listing of many the same issues, with PSC staff confirming the problems listed.

North Dakota landowners through the statutory requirement of avoidance and exclusion areas?

If Minnesota Power is aware that someone is in Phoenix Arizona during the winter months but planning on residing in the house when he or she gets back, is the residence (that is fully functional and capable of being lived in at that time “uninhabited” for purposes of providing protection to North Dakota landowners through the statutory requirement of avoidance and exclusion areas?

If Minnesota Power is aware that someone is in the Peace Corp for one year and out of country but planning on residing in the house when he or she gets back is the residence (that is fully functional and capable of being lived in at that time “uninhabited” for purposes of providing protection to North Dakota landowners through the statutory requirement of avoidance and exclusion areas?

And finally, if Minnesota Power is aware that someone is finishing up his or her college years but planning on residing in the house when he or she gets back is the residence (that is fully functional and capable of being lived in at that time “uninhabited” for purposes of providing protection to North Dakota landowners through the statutory requirement of avoidance and exclusion areas?

**VII. Minnesota Power Letter to PSC Dated 5-29-18:
Intentional Ignorance, Doubling Down, or an Organized
Presentation of Bald-Faced Lies to Cover for Others Lying**

The Public Service Commission’s primary purpose is to assist in the development of the state’s natural resources while protecting its citizens, its landowners, and the public at large. To fulfill this mandate it is essential that the PSC insure that any company doing business in the state is worthy of doing business in this State and that it treats the citizens of North Dakota fairly and honestly.

Now let’s look precisely at the response of Minnesota Power dated May 29, 2018, issued by Todd Simmons – particularly in light

of the facts listed above. The letter is part of the record, **Doc. 147, Minnesota Power Letter 5-29-18, Para. 5**

A. SENTENCE 1

Doc. 147, Minnesota Power Letter 5-29-18, Para. 5

“The Bison 4 Wind Project was appropriately permitted to locate Tower 441 where it is.”

Point 1: This is true only if one ignores the exclusion and avoidance area statutory provisions and at the same time interprets the residence has been uninhabited despite the fact that it was a viable resident that was intended to be inhabited in the very near future.

Point 2: Tower 441 was not “appropriately permitted” as clearly shown by the application requirements submitted by the company. As discussed above, the application asserts that the following precautions have been taken as to the impact on landowners and the placement of the project near residences:

(1) The impact on landowners and particularly farmers is listed in the demographics section as minimal and will include compensation to the landowners. **Part 7.2.2.**

(2) In regards to placement of the project near residences, the application specifically stated that “[t]he development of the Project will not displace any residences or existing or planned industrial facilities. **Part 7.3.1.**

Note: Part 7.3.1 does not differentiate between occupied and unoccupied residences and asserts that “the Project will not displace any residences” – and yet it has displaced the Kessler residence.

(3) Wind turbines will be sited a minimum of 1,400 feet from existing or planned industrial facilities. Wind turbines will be sited a minimum of 1,400 feet from occupied residences.” **Part 7.3.1. See also** Parts 7.3.2, 7.5.1, 7.5.3.

Note: This part of Part 7.3.1 does differentiate between occupied and unoccupied residences, but the statement ignores the Kessler property by adopting the view that the

residence doesn't apply because it is – at the moment – unoccupied. This is disingenuous at best, and a misstatement of fact to the PSC at worst.

(4) In regards to the impact of noise, the application acknowledges that “[t]here are approximately 32 residences and one cemetery located either within the Project boundary or within one mile of the boundary.” **Part 7.6.1.**

Question: Did the company include the Kessler residence in its listing of the 32 residences? Apparently not. If not, does this omission alone constitute fraud on the PSC?

(5) “Minnesota Power has chosen a benchmark noise level of 50 dBA as the criterion for the noise evaluation.” **Part 7.6.2.** “The minimum single turbine setback distance calculated where an exceedance of the 45 dBA benchmark would no longer occur is approximately 402 meters (1,320 feet) for the worst case turbine.” **Part 7.6.2.**

(6) Impacts to nearby residents and other potentially affected parties in terms of noise will be taken into consideration as part of the actual siting of the turbines. **Part 7.6.3.**

Note: Again, note that the commitment presented to the PSC to take into account the impact on “nearby residences” does not differentiate between occupied and unoccupied residences, and of course the company did not apply this guarantee to the Kessler residence. Indeed, the facts show that the representatives of the company promised the Kesslers that the turbine would not be within the 1400 OR 1320 feet, and yet that promise was not kept.

Point 3: The fact that Minnesota Power failed to list the residence at issue as a potentially inhabited residence is at best misleading, and at worst fraud on the PSC. At the very least the residence should have been shown on the maps provided to the PSC through its application process, with a clear indication that the residence is capable of being used as a residence and that the landowners have indicated to the company that they intend to use the residence in the near future and most certainly within the life of the turbine.

Point 4: The statutory intent of the exclusion and avoidance areas is clear, and if any doubt existed as to the use of a residence – that is, if there was any possibility that the residence would be inhabited as it relates to the effects of the wind tower – then any such doubt should have been in favor of the landowner. Moreover, at the very least this issue should have been disclosed in the application and to the hearing officer at the public hearing in light of the assertions made to the public and to the public service commission relating to the company’s stated “commitment to integrity, honesty and responsible, fair business practices.”⁸

B. SENTENCE 2

Doc. 147, Minnesota Power Letter 5-29-18, Para. 5

“At the time of siting turbines for the Bison 4 development, the building that has since been remodeled was not occupied and was in disrepair.”

This is simply false information. Whoever provided this information to Todd Simmons is lying.⁹ And Minnesota Power is covering its

⁸ Letter sent by ALLETE Clean Energy to all landowners, including Keith and Deanna Kessler) (Jan. 4, 2012):

Initial contacts with some landowners have already taken place as we move forward with this new potential project. Others may be contacted in the future by ALLETE Clean Energy or Minnesota Power representatives regarding future potential wind generation development. ALLETE and its key energy subsidiary companies continue to plan for development of additional wind generation in western North Dakota. The timing and scope of this development is dependent on many considerations, but we will be sure to provide additional information as it becomes available. You can be assured that although the companies are different, the people representing ALLETE, Minnesota Power and ALLETE Clean Energy share a commitment to integrity, honesty and responsible, their business practices. Emphasis added.

⁹ It should also be noted that prior to the submission of the Minnesota Power letter of May 29, 2018 (which clearly provides incorrect information to the PSC), in February of 2017 Keith Kessler raised the issue of Turbine 441 being placed too close to his Section 15 residence with Commissioner Attorney John Schuh. When this issue was raised by PSC staff with the company, Minnesota Power advised

PSC staff “that this residence was unoccupied at the time Bison 4 was permitted and constructed.” Minnesota Power also asserted to PSC staff that “[b]ased on photographs and electric usage at the residence MN Power concludes that it became occupied during the last year.” Internal File Doc. No. 2, page 2. It appears that PSC staff took Minnesota Power at its word and did not check with the Kesslers to determine what the facts were in regards to the use of this property or whether the Kesslers had at any time before, during, or after the hearing advised Minnesota Power that the residence was previously used as a residence and that the residence was fully capable of being occupied and would be occupied in the near future due to the Kessler’s son returning to live in that residence. **PSC Informal File I-15-0195, Doc. 2, page 2, 3-1-17 Staff Memo.** PSC staff also opined in its internal memorandum that the rules relating to the siting application process would not apply to “unoccupied or abandoned residences” – but again, it appears that PSC staff took Minnesota Power at its word and did not make any inquiry of the Kesslers as to whether this home was indeed an unoccupied or abandoned residence. **PSC Informal File I-15-0195, Doc. 2, page 2, 3-1-17 Staff Memo.**

Lastly, the PSC staff reviewed the hearing recording to determine what issues were raised by Mr. Kessler at the hearing and concluded that the Kesslers did not “bring up the residence” at the hearing. However, there does not appear to be any inquiry of the Kesslers as to whether the issue of the residence being too close to Turbine 441 was indeed raised by the Kesslers as a concern to Minnesota Power on the day of hearing; Keith did not raise this issue on the record because the maps provided at the hearing did not make it clear what the actual distance would be to the residence, and because Minnesota Power informed the Kesslers before Keith spoke at the hearing that the company would insure that the tower was not within 1400 feet because Minnesota Power is obligated to follow the law and not place the turbine within 1400 feet of a residence. **PSC Informal File I-15-0195, Doc. 2, page 2, 3-1-17 Memo.**

The acceptance by PSC staff of the Minnesota Power’s after-the fact rationale for ignoring the Kessler Section 15 residence is especially baffling given the meeting held with the Kesslers on Good Friday [April 14, 2017] where both Commissioner Attorney John Schuh and Commission Staff Member Jerry Lein were present when the Kesslers clearly indicated that “Deanna said we told you that it looked too close to the property line and that one of our sons was going to live in the house. At that time Scott Monroe agreed that we did tell him and Wade that. Then Wade said do you get it in writing? Keith then said, “[Damn] it I thought I could trust you, I thought we were in a partnership together.” See above footnote 7 and text to which the footnote applies.

mistake by trying to falsely claim that the residence is not only unoccupied, but incapable of being used as a residence and essentially abandoned.

Here are the facts. As stated above, the company was repeatedly told by the Kesslers that the residence was merely *temporarily* unoccupied and their son was going to live in the residence when he got back from college. Moreover, the residence was not “since” remodeled and at the time of the project development incapable of being used as a residence. As shown above, the residence was used as a residence and second home from 1989 to the present. The fact that the Kessler boys were in college for a short time does not change the fact that the house throughout the development of the entire project was capable of being used as a residence; it had furniture, running water, working toilet, full kitchen, carpet, and full heating. Yes, general maintenance and upkeep occurred; in 2012 a new coat of paint was administered on the outside; in 2016 new flooring was installed and the interior was painted; in 2016 the shingles were replaced and some new windows were installed; in 2018 another new coat of paint was administered as well as a few more windows were installed. But none of this supports the false statement by the company that the building has “since been remodeled” and “was in disrepair.” People were living in it before, during and after the project development. The residence was used before the throughout the construction phase and Minnesota Power was specifically told by the Kesslers repeatedly during the planning and construction phase (2009 – 2015) that it was a residence and was going to continue to be used as a residence the moment their son returned from college in the Spring of 2015.

C. SENTENCE 3

Doc. 147, Minnesota Power Letter 5-29-18, Para. 5

The staff memorandum dated May 15, 2017, regarding the April 14 Good Friday meeting with Minnesota Power, the Kesslers, John Schuh, and Jerry Lein, is entirely consistent with the Kesslers position that they had informed Minnesota Power that the residence would be occupied by their son “before the turbine was sited.” **Doc. 109, page 3**, which is also filed at **Doc. 137, page 4**; also filed as **PSC Informal File I-15-0195, Doc. 22, page 4, 3-1-17 Staff Memo**.

“Because that structure wasn't being lived in, the setback requirement of 1400' did not apply to that building.”

This is simply an attempt to find an excuse for justifying its failure to determine the facts, ignoring the Kesslers repeated statements, and presenting a false narrative to the PSC.

The structure was capable of being used as as residence, had recently been used as a residence, and – most importantly – was *intended* to be used as a residence in the very near future.

If the PSC accepts this charade, then all of the protections afforded to landowners are a sham and all a company has to do is redefine any of the conditions to suit its needs and discard the rights and interest of North Dakota landowners.

D. SENTENCE 4

Doc. 147, Minnesota Power Letter 5-29-18, Para. 5

“Additionally, at no time, including at the PSC's public hearing on the Bison 4 wind project development, were issues raised regarding either the location of Tower 441 or plans to remodel and inhabit the abandoned building.”

If there is any statement made by the company that should give the PSC pause about the legitimacy of this company doing business in North Dakota, it should be this sentence. It is patently false and the company knew or should have known that it is false.

Essential Fact 1: The Kesslers prior to the public hearing told both Scott and Wade about their concerns that Turbine 441 would be too close to the residence.

Essential Fact 2: The Kesslers prior to the public hearing told both Scott and Wade that the residence was not “an abandoned building” but was a residence that had recently been used by other family members and was intended to be used by their son when he returned from college.

Essential Fact 3: Because of their concern the Kesslers before the public hearing requested from the company the map that showed the planned location of Turbine 441; interestingly, despite this

request the company did not provide a map to the Kesslers prior to the hearing and they discovered at the public hearing that Turbine 441 was indeed going to be too close to their residence.

Essential Fact 4: The Kesslers at the public hearing, after reviewing the map, did indeed raise the issue of the location of Turbine/Tower 441 – which the company certainly knows. As noted above, when the Kesslers raised the issue at the hearing Matt basically yelled at the Kesslers, telling them “we don’t have time to move things around due to the tax credits, we have to get started, this isn’t the place for it, we can meet latter and discuss it.” This occurred in the presence of several Minnesota Power representatives.

E. SENTENCE 5

Doc. 147, Minnesota Power Letter 5-29-18, Para. 5

“Minnesota Power is not responsible for the choice made to move to the turbine by renovating and living in that building.”

As noted above, the home was capable of being used as a residence and the attempt to assert that it could be lived in only after being “renovated” is patently false. The Kesslers did not “move” to the turbine; the house was there, used before and during the project, and occupied on either side of the actual construction of the Turbine 441. Moreover, the Kesslers repeatedly told the company that they planned on using it as soon as their son returned from college.

VIII. Kessler Proposal as to Improper Placement of Turbine 441

In regards to resolving the improper placement of Turbine 441, the Kesslers’ propose the following:

Kessler Proposal 1: Kessler Proposal 1 is that the PSC require Minnesota Power to provide to the PSC staff and Attorney Boughey its complete internal file on the Kesslers which was pulled together on May 24, 2019 and sent by Wade Isaacson to David Moeller via email of Thu 5/23/2019 4:56 PM referring to internal share folder listed as \\userw\~wisaacson\$\share\Kessler Files.

Discussion: As is clear from the review of Minnesota Power's letter of May 29, 2018 (section immediately above) the person who sent the letter is either lying, or was not informed of the correct facts – which means that someone within the framework of Minnesota Power lied to him. In our view, the PSC should terminate all present and further activities of Minnesota Power until the PSC determines who is lying and whether Minnesota Power should be allowed to do business in the State of North Dakota. The only way to do this is to require Minnesota Power to provide its complete internal file relating to the Kesslers. As luck would have it, the existence of this internal file was disclosed to Mr. Boughey through a “reply all” email originating from an employee of Minnesota Power to its senior representative. **See Attachment 1, Review of Emails Relating to Minnesota Power Kessler File.**

Kessler Proposal 2: Kessler Proposal 2 is that the PSC require Minnesota Power to conduct a sound study of the Kessler's residence (similar to the one conducted in regards to John Aasmundstad, Doc. 96) specifically for the purpose of ensuring compliance with North Dakota Administrative Code 69-06-08-01(4) and determining if at any time in a three-week period the sound levels exceed 50 dBA within 100 feet of the residence and the placement of the recording or measuring devices are placed at least four locations 100 feet from the residence towards the direction of Turbine 441 and not shielded by any other building, structure, or physical attribute. By the same token, the company will not modify the parameters of Turbine 441 during the duration of the study and will provide documentation to the PSC that during the study the turbine was being used in its normal operating parameters.

Note: Any sound study would need to be conducted by a third party selected by the PSC, and the placement of the devices should not have the same “weaknesses” inherent in the Aasmundstad study, such as placing the devices along the road resulting in false or exaggerated high sound readings, and no improper placement where sound is shielded by a building or other physical structure.

Kessler Proposal 3: In the event that the sound study shows any instances during the time of the study of the residence being

subjected to 50 dBA within 100 feet of the residence, that the the company will be required to resolve the violation of excess sound have one of two options:

a) take whatever steps are necessary to reduce the noise from Turbine 441, including but not limited to reducing the speed or parameters of the turbine, and then after doing so conduct another identical sound study to determine if the turbine is now in compliance and not subjecting the residence to 50 dBA within 100 feet of the residence; or

b) move Turbine 441 to at least 1400 feet away from the Kessler residence.

Kessler Proposal 4: In regards to determining if flickering is occurring and affecting the Kessler Section 15 residence, the Kesslers' propose that the PSC order Minnesota Power to pay for a third party selected by the PSC and hired by the PSC to interview the Kesslers and the persons living at the residence and to then conduct a flickering test and that that report be filed with the PSC.

Kessler Proposal 5: If flickering is occurring, then the PSC should supervise steps taken to alleviate the flickering, including but not limited to moving Turbine 441 farther away from the Kessler Section 15 residence.

Kessler Proposal 6: Distribution of Survey to All Bison Wind Farms Landowners (Including the 1 Under Construction) In regards to the landowners affected by the Bison Wind Farms, that the PSC require the company to prepare, under the direction of the staff of the PSC, a mailing issued on PSC letterhead to all affected landowners (as determined by the PSC) a survey which will be returned to the PSC with self-addressed stamped envelope provided asking if the landowner had throughout the development, construction, and operation of the Bison 4 Wind Farm any concerns relating to

- 1) receiving incomplete or inaccurate information from any of the companies involved,
- 2) failing to receive early and clear indication as to the proposed location of any of the turbines or the routes relating to the project,

- 3) having any difficulties in reference to any aspects of the construction phase which was not handled to the satisfaction of the landowner;
- 4) having any difficulties in reference to any aspects of the reclamation or placing the property back in the manner in which it existed prior to the construction of the wind farm; and
- 5) having experienced any attempt by any of the companies to hinder relaying any of these concerns to the PSC in any way, including at the public hearing.

Kessler Proposal 7: In regards to any present project of a wind farm or in regards to any future wind farm project, that the PSC require the following in its **Certificate Relating to Order Provisions** as to this company and all others:

1) Clear Designation of Siting Decisions Provided to All Landowners The company shall be required to provide at least 60 days before any public hearing to all affected landowners (defined as any landowner within one mile of any aspect of the project) the siting maps showing the planned position of any wind turbines with specific reference to any residences (or buildings capable of being used as residences) and a circle around the planned turbine of 1400 feet radius from the proposed turbine. This document shall include notification of the date, time, location, and hearing officer assigned to the public hearing, as well as the point of contact of the PSC staff member available to answer questions of the public and receive any complaints or concerns.

2) Detailed and Understandable Siting Maps Displayed at Public Hearing At the public hearing, the siting maps will be displayed, along with aerial photographs of each section and all contiguous sections

3) Weekly Reports to the PSC Regarding the Effects of Construction on All Landowners and Status of Reclamation In addition to providing weekly reports to the PSC on the progress of the construction phase and significant incidents, the company shall also

- a) provide weekly reports during the construction phase (submitted as to each landowner) that provide an overview of any work done on the landowner's property, all steps taken to alleviate the effect of the construction phase on the landowner, and any probable need for reclamation or repair; and

b) at the completion of the project weekly reports providing the status of all reclamation issues and all other steps being taken to place the property back to the condition that existed prior to the project. Such reports will continue until as to each landowner until the PSC has received a filed certificate of satisfaction signed by the landowner stating that the company has fulfilled all requirements relating to the landowner and return of the property to the condition that existed prior to the project.

c) in the event that the PSC determines following notice and hearing before the PSC that the company is not fulfilling its obligations to the landowners regarding reclamation issues, upon such finding by PSC will to suspend and revoke the certificate of site compatibility and the company will be precluded from submitting any further applications to the PSC. No further application will be approved and

IX. Problems during Construction and Reclamation Issues

Nothing occurs in a vacuum, and most certainly that is the case here. During the construction of this project numerous problems and concerns existed relating to the Kessler's property and Minnesota Power's actions towards the Kesslers. The problems that occurred during construction are already summarized in Doc. Nos. 109 and 137, and discussed above at footnotes 7 & 9.

Problems and Concerns of the Kesslers Regarding Reclamation

According to the 5-Year Easement, Minnesota Power had access to the Kessler property until June 2014 to complete any reclamation.¹⁰

¹⁰ 5 -Year Wind Project Option Agreement 6-2-09 The first relevant document is the 5 -Year Wind Project Option Agreement relating to right to access the Kessler

In regards to the reclamation issues themselves, it appears that the following problems occurred during and following the completion of the project in relation to the Kesslers:

- instance of a fence being removed on Section 15 without notification, which resulted in the cattle getting out
- instances of cattle getting out during a graduation reception at the Kessler home
- four more instances in the summer of 2014 of cattle getting out
- instance on the week of November 24, 2014, in which the Kesslers informed Monroe that they would be out of town the next week and not to do any fencing work, and Monroe the next week removed a half-mile of fence and rebuilt it while the cattle were adjacent
- fencing issues, including not being asked where the Kesslers wanted the fence to go, type of wire to be used, splicing issues, fencing to be laced on their property, fence posts on wrong side of wire, holes for temporary fencing never filled
- improper and untimely grass seeding
- rocks in ditches, around culverts, around tower or grass seeding not removed
- crane walk ruts, no compaction testing, wood left from pads, went beyond easement boundary, ruts need to be filled in and rocks removed
- 2 towers adjacent to their property,
- being fenced out of their property
- instances of Minnesota power leaving the gate open and cattle getting out

property. This agreement allows Minnesota Power to enter upon their property to, among other things, restore the owner's property to the condition as a previously existed. The document was signed on or about June 2, 2009, which means its applicable duration goes to around June 2, 2014. As such, Minnesota Power is required to get permission from the Kessler to enter their land to conduct reclamation from June 2, 2014, onward. A separate long-term easement allows Minnesota Power to enter the land to service or repair the turbines or related accessories as to the completed project.

See Kessler Complaint sent to Jerry Lein 12-1-15 (Attachment 1).

The PSC record is replete with documentation relating to the reclamation issues and the failure of Minnesota Power to resolve these reclamation issues to the satisfaction of the landowner. See especially **Doc. 109, Doc. 137**, and Keiths' notes of the Good Friday meeting, **footnotes 7 & 9 above**. Simply put, Minnesota Power had years to resolve the reclamation issues relating to the Kessler property. After allowing Minnesota Power to conduct the reclamation process properly and completely, the Kesslers finally submitted a complaint to the PSC listing each of their concerns.

Minnesota Power had through its construction easement five years to complete the reclamation process, that is until June of 2014. It failed to complete the necessary reclamation by that time. the Kesslers, Minnesota Power, and PSC staff attempted to resolve all the remaining issues, but the reclamation still remains uncompleted. See Jerry Lein Memorandum and the various weekly reports.

It is instructive to see how Minnesota Power decided to employ a third party to justify its supposed reasonable attempts to resolve the reclamation issues. Minnesota Power has attempted to whitewash all of the reclamation issues by hiring a company (Wenck) to provide a "report" to the company (with the clear intention of the company to

provide the report to the PSC). **Doc. No. 117.** If indeed Minnesota Power wanted to provide a neutral third-party report to the PSC, it certainly could have taken the proper steps to make that happen. But that isn't what Minnesota Power did. Instead, it hired a company (Wenck) to provide a "report" directly to the company (that would be provided to the PSC) without requiring the investigating company to discuss with the Kesslers their concerns, without requiring the investigating company to obtain or objectively review the concerns that had been raised by the Kesslers. Moreover, instead of sending the report to the Kesslers at the same time it was completed or at the time of filing the report with the PSC, the company apparently submitted the report only to the PSC. By not providing the report directly to the Kesslers, one must wonder if the report is really only the result of Minnesota Power hiring a "hired gun" for the clear purpose of providing the PSC with a report that is merely a "whitewash." By not getting the Kesslers input and not sending the report to the Kesslers for their comment or review, one must seriously wonder about the credibility of such a report, not to mention the motives of Minnesota Power in how it proceeded in regards to obtaining and submitting this report to the PSC.

In an attempt to determine if Minnesota Power had provided the Wenck report to the Kesslers at any time, counsel for the Kesslers specifically inquired via email for any information that the company had in regards to sending the completed report to the Kesslers, either at the time it was completed or at the time it was filed with the PSC. Minnesota Power advised Mr. Boughey on May 29, 2019, that “We do not have any records that a copy of the Wenck report was mailed to Mr. Kessler.” Minnesota Power instead asserted that “there was a discussion with Mr. Kessler on June 15, 2018 that included a discussion of the findings in the Wenck report and based on that discussion it was Minnesota Power’s understanding that Mr. Kessler had reviewed the Wenck report.” Email of David Moeller to Lynn Boughey Wednesday, May 29, 2019 8:21 AM.¹¹ Minnesota Power had not provided any documentation or notes that supposedly show this to be the case.

¹¹ The content of the email of David Moeller to Lynn Boughey Wednesday, May 29, 2019 8:21 AM is as follows:

In the interest of resolving this, our records indicate that there was a discussion with Mr. Kessler on June 15, 2018 that included a discussion of the findings in the Wenck report and based on that discussion it was Minnesota Power’s understanding that Mr. Kessler had reviewed the Wenck report. We do not have any records that a copy of the Wenck report was mailed to Mr. Kessler nor of course do we have access to what Mr. Kessler has in his own files or downloaded from the Minnesota Power’s weekly reports filed with the NDPSC in compliance with the April 19, 2018 request.

In any event, the Kesslers are pretty much done with trying to get Minnesota Power to fulfill its reclamation obligations and suggest that it would be easier for all concerned for Minnesota Power to simply provide the funds to the Kesslers necessary to have the reclamation done, and done right. As such, the Kesslers propose the following payments by Minnesota Power so that they can hire out the tasks to be performed:

ITEM 1 – Fencing

- 1) numerous places where splicing was done \$10,000
- 2) re south of Turbine 441, fencing needs to be along property line, cattle guard needs to be removed (now owned by Kessler) \$7500
- 3) fill in all holes created by prior construction of temporary fencing \$3000

ITEM 1 – Amount requested: \$20,500

ITEM 2 – Rocks

- 1) up to 5 locations where rocks still have not been removed that are in close proximity of the fence line or moved under the fence itself
- 2) reimbursement for damage to mower which was damaged due to rocks not being removed when mowing tallgrass

ITEM 2 – Amount requested: \$5,000

ITEM 3 -- Ruts and Washouts

- 1) approximately 6 inch ruts from Crane movement and washouts along the electrical collection line, some due to improper dirt work, also some due to not enough straw socks to prevent washout
- 2) damage beyond Crane-walk 50 foot easement where company went way outside the easement and created a path extending to 100 feet
- 3) washout around turbine pads

ITEM 3 – Amount requested: \$90,000

ITEM 4 – Compaction

1) need to run a compaction test, and if unreasonable amount of compaction still exists. It needs to be fixed by arriation or other means

ITEM 4 – Amount requested: \$15,000

ITEM 5 – Reseeding

1) the seeding done by the company was ineffective, and much of the re-seeding needs to be redone

2) also need to reimburse for killing hayfield, grass, and alfalfa – which all needs to be reseeded

ITEM 5 – Amount requested: \$7,000

ITEM 6 – Noxious Weeds

1) weeds are a continuing problem, and only be resolved by regular and proper spraying along road and ditch, underground collection line, and around turbine pads

ITEM 6 – Amount requested: \$10,000

ITEM 7 – Lost Time, Labor, and Lost Production

1) the Kesslers have had to spend hundreds of hours trying to deal with all of these issues [Note: This item does not include the potential claim for inconvenience, which will be waived if we reach a full agreement on the reclamation issues.]

ITEM 7 – Amount requested: \$75,000

TOTAL: \$222,500

In the event we do not come to terms with the company in the next twenty-one (21) days as to full payment for the above reclamation damages, we request that the matter be forwarded to the PSC commissioners for a hearing a decision on the matter.

X. Present Concerns about Current Improper Actions of Minnesota Power Relating to Other Bison Wind Projects

One would hope that the situation with the Kesslers was an isolated event, but in addition to the pattern of misconduct delineated above relating to the Kessler property alone, It appears that the same

characters working for Minnesota Power are participating in yet another program of deception and lies as to the present project being constructed by Minnesota Power. Keith Kessler's brother, John Kessler, has provided the following information about the most recent Minnesota Power Bison Wind Farm Project:

In a conversation with Scott Monroe in mid-November, I told Scott that I was told that there are still ruts in the ground a foot deep that are from the big crane when they walked it across the land. Scott replied saying that he did not know of any complaints of such damage caused by the crane. I also told Scott that the tower on Beierlein's looked like it was going to overhang onto our property and he said they learned [their] lesson and don't do that anymore because they had to many complaints when overhanging.

John Kessler

Emphasis added.

XI. The Need for the PSC to Determine Whether Minnesota Power Should be Allowed to Continue Operations in North Dakota

In addition to the proposals listed above that resolve “piecemeal” items of concerns, the Kesslers believe that the facts and concerns contained in this document demonstrate the need for the PSC to determine whether Minnesota Power should be allowed to continue to conduct business in the State of North Dakota.

The privilege provided to private companies through the PSC to withdraw or develop our natural resources is a privilege steeped in

trust and obligation. Only the most trustworthy and honest may apply and be granted this privilege to subject our landowners and our citizens to the vagaries and inconveniences of a massive construction project and the final remnant left upon the completion of the project. Any such company allowed on our land to develop our natural resources must not only acknowledge the rights of our landowners and citizens, but must also protect those rights. A company that is found failing to do so — by either misuse of our resources or abuse in any way of our landowners or citizens — cannot be allowed to do business in this State.

The Kesslers specifically allege the following relating to Minnesota Power:

- Providing incorrect information to the PSC or a landowner.
- Lying to a landowner.
- Preventing or dissuading a landowner to present concerns to the PSC at its public hearing conducted under the authority of the PSC for that very purpose.
- Failing to properly protect the land and interests of the landowner during construction of the project.
- Failing to properly reclaim the land and put the landowner's property back to nearly the same condition it had been before the project was initiated by the private company.

Each and every one of these misdeeds or improper action is sufficient to terminate a company's privilege to conduct business in the State.

Unfortunately, every one of these misdeeds were facilitated and

conducted by Minnesota Power in regards to the Bison 4 Wind Power project.

It is worthwhile to mention at this point the most egregious aspects of what has occurred:

- the map presented to the PSC failed to include a residence owned by the Kesslers;
- the existence of this residence was relayed repeatedly to the company before the public hearing;
- the company did not update the map or inform the hearing officer of this issue;
- when this issue was raised at the public hearing by the Kesslers the company took active steps to dissuade the Kesslers from raising the issue at the hearing;
- the company subsequently met with the Kesslers and guaranteed that the company would follow the law and that the turbine would not be within 1400 feet of the residence;
- the company nonetheless placed the turbine within 1125 feet of the residence;
- following a meeting with the Kesslers on May 11, 2018 (where the Kesslers raised the issue of the placement of Turbine 441), Todd Simmons of Minnesota Power issued a letter dated May 29, 2018, addressed to the Kessler (that was filed with the PSC) that contained patently false information, most particularly the false assertion that the residence had been “abandoned,” which was nothing more than a convenient argument made up after-the-fact by Minnesota Power to provide a false justification for all of its mistakes and failures to provide the PSC with proper information as to the Kessler section 15 residence;
- the purpose of this Simmons letter dated May 29, 2018, was to present to the Kesslers – and more importantly to the PSC – facts and conclusion that would provide an excuse for Minnesota Power to have improperly placed Turbine 441 within 1400 feet of a residence and to convince the PSC that Minnesota Power had not done anything wrong in regards to the placement of Turbine 441; and
- in regards to its attempt to demonstrate that the reclamation issues raised by the Kesslers were either resolved or

exaggerated, Minnesota Power has attempted to whitewash all of the reclamation issues by the following acts:

- hiring a company (Wenck) to provide a “report” to the company (with the clear intention of the company to provide the report to the PSC),
- failing to require the company to discuss with the Kesslers their concerns, obtain or objectively review the concerns that had been raised by the Kesslers,
- failing to provide the report to the Kesslers at the time it was completed or filed with the PSC,
- taking no steps to demonstrate that the report was indeed sent to the Kesslers for their review, instead merely telling counsel for the Kesslers in an email that regardless of whether the Kesslers received a copy of the Wenck report, it was available as a public record when it was filed and the Kesslers had access to the report through the public records.

If any one of the allegations listed above is true, then something must be done by the PSC.

In our view, any honest company would not have issued a false and improper letter intended to justify its misconduct and would have instead done the following:

- 1) admitted that the company, through its employees, did indeed have prior knowledge of the existence of the residence and the fact that it was a functional residence that was going to be used as a residence;
- 2) admitted that the map showing the residences surrounding the project that was filed with the PSC failed to include the Kessler Section 15 residence;
- 3) admitted that the Kesslers had indeed raised the issue of the placement of Turbine 441 with representatives of Minnesota Power before, during, and after the public hearing; and

4) admitted that the placement of Turbine 441 within 1400 feet of the Kessler Section 15 residence was a mistake.

In the event that the PSC determines that any one of the items listed above is true, the only issue remaining – other than resolving the Kessler complaint – is what should the PSC do in regards to Minnesota Power?

XII. Request for an Evidentiary Hearing before the PSC Regarding Whether to Allow Minnesota Power to Continue Operations in the North Dakota Kessler's Final Proposal Relating to Minnesota Power

Keith and Deanna Kessler respectfully request that the PSC itself (or Mr. Patrick Ward through PSC appointment as an ALJ) hold an evidentiary hearing before the PSC itself (and conducted by PSC staff, or in the alternative through Mr. Boughey as counsel on behalf of the Petitioners Keith and Deanna Kessler) at which evidence is received relating to Minnesota Power's actions and conduct directed towards the Kesslers and any other North Dakota landowners in regards to any of the Bison Wind project, for the purpose of determine is the certificate of authority granted to Minnesota Power to conduct operations in the State of North Dakota should be withdrawn or modified in any way. Following receipt of such evidence, Minnesota

Power would have an opportunity to respond to the factual information provided and the issues raised.¹²

XIII. Conclusion

The privilege provided to private companies through the PSC to withdraw or develop our natural resources is a privilege steeped in trust and obligation. Only the most trustworthy and honest entity should be granted this privilege that provides the power and right to subject our landowners and our citizens to the vagaries and inconveniences of a massive construction project and the final remnants remaining after completion of the project. Any such company allowed on our land to develop our natural resources must not only acknowledge the rights of our landowners and citizens, but must also genuinely acknowledge and protect those rights. A company which is found failing to do so — by either misuse of our resources or abuse in any way of our landowners — cannot be allowed to do business in this State. What would justify such a draconian result?

- Providing incorrect information to the PSC or a landowner.
- Lying to a landowner.

¹² Counsel for the Kesslers specifically suggests that issuance of a show cause order would improperly allow Minnesota Power to simply respond to the concerns, without the PSC first receiving evidence that would delineate those concerns and proved a proper record that would serve as the basis for any PSC action that may be taken.

- Preventing or dissuading a landowner to present concerns to the PSC at its public hearing conducted under the authority of the PSC for that very purpose.
- Failing to properly protect the land and interests of the landowner during construction of the project.
- Failing to properly reclaim the land and put the landowner's property back to nearly the same condition it had been before the project was initiated by the private company.

Each and every one of these misdeeds or improper action is sufficient to terminate a company's privilege to conduct business in the State.

Unfortunately, every one of these misdeeds were facilitated and conducted by Minnesota Power in regards to the Bison 4 Wind Power project and its conduct towards the Kesslers.

We respectfully suggest that the proposals listed in this memorandum be implemented by the Public Service Commission, for the benefit not only of the Kessler but also all of the citizens and landowners in North Dakota who may be subjected to the effects of a massive utility project such as any of the Bison Wind Power projects.

Dated this 25th day of July, 2019.



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