

Before The Public Service Commission of North Dakota

Case Nos. PU-20-194

In re Complaint of Keith and Deanna Kessler)	
)	
)	
Keith and Deanna Kessler,)	
)	
Petitioners,)	COMPLAINT
)	
vs.)	
)	
Minnesota Power, an operating division of)	
ALLETE, Inc.,)	
)	
Respondent.)	

COMES NOW Keith and Deanna Kessler for their Complaint in this matter:

I. FACTUAL ALLEGATIONS

¶1 The Application for a Certificate of Site Compatibility was filed on May 6, 2013, and included the following:

1. acknowledged the applicability of the siting criteria contained in NDAC section 69-06-08-01 relating to site selection criteria Part 3.0, 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.**
2. listed the rotor diameter as 383 feet and the tower height as 303 feet. **Parts 6.2.2. and 6.2.3.**

3. indicated that the on-site construction manager coordinates all aspects of the Project, including communications with landowners. **Part 6.4.1.**

4. listed in the demographics section the impact on landowners and particularly farmers as minimal and will include compensation to the landowners. **Part 7.2.2.**

5. In regards to placement of the project near residences, 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.

6. In regards to the impact of noise, 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.** “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.**

7. that “[t]here are 32 occupied residences, within the Project site boundary” and identified these homes in Exhibit 4. **Part 7.10.1.**

8. Even though many of the 32 homes were abandoned or clearly not residences, they were listed and identified in Exhibit 4

9. However, the Kessler home was not listed or identified.

10. In regards to the impact on agriculture and farming, 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.”

11. that “[n]o turbines will be placed within 1,400 feet of occupied residences.” **Part 7.10.2.**

12. As to mitigation measures relating to farming and ranching, that “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.**

The following tables or exhibits were provided with the application:

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
Exhibit 2/4	Exclusion and Avoidance Areas Map
Exhibit 10	Wind Turbine Design Features

The exclusion area or avoidance areas tables and map (Table 3-1, Table 3-2, and Exhibit 4) do 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.

¶2 A public hearing on the application was held on September 13, 2013, at the Oliver County Courthouse, Center, North Dakota. Patrick Ward served as the administrative law judge for the

hearing. Keith and Deanna Kessler attended, along with several other landowners. **Doc. No. 32.**

¶3 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.** The following requirements were listed:

Para. 1 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. 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. 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

¶4 The following occurred at the time of the public hearing of soon thereafter:

1. 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." 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.

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

3. 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 sign 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. 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.

¶5 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:

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. . . .

Doc. No. 40.

¶6 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.

. . .

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

Doc. No. 40.

¶7 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.

¶8 In conjunction with dealing with reclamations issues in 2017, the issue of the placement of Turbine 441 was addressed with

Minnesota 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 were 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.”¹

¹ The Kesslers had previously provided their notes of the meeting, which are as follows[with reclamation issues deleted]:

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

- 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 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.

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

¶9 In regards to the planning and approval of the wind project, the following occurred:

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.

¶10 The facts regarding the placement of Turbine 441 within 1400 feet of a residence 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. 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. 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 – 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. 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.² 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.

¶11 The following additional facts relate to the Kessler

Section 15 residence:

1. the residence existed in 1989 when the Kessler bought the land.
2. from 1989-1992 Keith and Deanna Kessler lived in the home.
3. from 1993-1997 Keith's brother Paul lived in the home.
4. from 2001-2003 Keith's mother-in-law lived in the home.
5. from 2003 to the Spring of 2015³, 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.

² 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.

³ Stephen was in college from 2011-2015, and Hayden was in college 2014-2015.

6. 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.

7. 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.

8. 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.

9. Minnesota Power – despite being repeatedly told otherwise by the Kesslers – ignored the Kessler’s statements about the residence and that it would be used by their son when he returned from college, and failed to include the residence in the avoidance and exclusion area tables and maps submitted to the PSC, and then attempted 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.

¶12 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.

- 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

The fact that Minnesota Power included all of these places – some occupied, and some not, for decades – and yet somehow missed 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 – demonstrates that 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.

¶13 Once this issue was brought to the attention of the PSC, 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**. Minnesota Power 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.”

¶14 The response of Minnesota Power dated May 29, 2018, issued by Todd Simmons, is patently and repeatedly false and demonstrates Minnesota Power’s intentional ignorance, doubling down, and an organized presentation of lies.⁴ **Doc. 147, Minnesota Power Letter 5-29-18.**

A. SENTENCE 1

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

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.

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:

⁴ The letter is part of the record, **Doc. 147, Minnesota Power Letter 5-29-18, Para. 5**

(a) 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.**

(b) 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.** 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.

(c) 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. 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.

(d) 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.** Did the company include the Kessler residence in its listing of the 32 residences? Apparently not. If not, this omission alone constitute fraud on the PSC.

(e) “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.**

(f) 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.** 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.

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.

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

B. SENTENCE 2

¶16 **“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.”**

1. This is simply false information. Whoever provided this information to Todd Simmons is lying. And Minnesota Power is covering its mistake by trying to falsely claim that the residence is not only unoccupied, but incapable of being used as a residence and essentially abandoned.

2. 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.

3. 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.**

4. 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.**

5. 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.

6. 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.**

C. SENTENCE 3

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

1. 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.
2. 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.
3. 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

¶18 **“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.”**

1. 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.
2. 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.
3. 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.

4. 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.

5. 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

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

1. 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.

¶20 The Kesslers specifically allege the following misconduct relating to Minnesota Power:

1. Providing incorrect information to the PSC or a landowner.
2. Lying to a landowner.
3. 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.
4. Failing to properly protect the land and interests of the landowner during construction of the project.

5. the map presented to the PSC failed to include a residence owned by the Kesslers;
6. the existence of this residence was relayed repeatedly to the company before the public hearing;
7. the company did not update the map or inform the hearing officer of this issue;
8. 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;
9. 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;
10. the company nonetheless placed the turbine within 1125 feet of the residence;
11. 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;
12. 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.

II. STATEMENT OF ISSUES

¶21 At the PSC’s request, we provide a listing of the issues which we believe need to be determined in this matter:

ISSUE 1: Is Turbine 441 improperly placed and in violation of Minnesota Power's application, in violation of the requirements placed upon Minnesota Power by the PSC's order accepting approving that application, or in violation of any North Dakota statute or regulation?

ISSUE 2: Did Minnesota Power provide incorrect or false information in its application, particularly in regards to the placement of turbine 441 and the failure to show the Kessler's residence on the listing and exhibits of avoidance or exclusion areas?

ISSUE 3: Did Minnesota Power provide any misinformation or false information to the Kessler's?

ISSUE 4: During the hearing September 13, 2013, did Minnesota Power divide any incorrect information to the Kessler's or take any steps to dissuade prevent the Kessler's from raising the issue about the location of turbine 441 at the hearing?

ISSUE 5: Following the hearing of September 13, 2013, did Minnesota Power make any promises to the Kessler's in regards to the placement of turbine 441?

ISSUE 6: At the Good Friday meeting that occurred on April 14, 2017, with the Kessler's, Minnesota Power, and representatives of the public service commission, did Minnesota Power provide any incorrect or false information relating to the placement of turbine 441?

ISSUE 7: Following the filing of the complaint by the Kessler's, did Minnesota Power provide any incorrect or false information in regards to what previously occurred, with the Kesslers had told them, or the history of the residence at issue?

ISSUE 8: Should Minnesota Power be required to move turbine 441 away from the Kessler residence?

ISSUE 9: In the event the Public Service Commission determines that Minnesota Power acted in any way improperly in regards to dealing with the Kessler's, the placement of Turbine 441, or responding to the complaint of the Kessler's, what sanction should the PSC apply to Minnesota Power?

ISSUE 10: but the applicable sanctions that the public service commission can employ limited by citing provisions, or instead does the public service commission have the inherent authority and Power to administer sanctions beyond that listed in the citing statute?

ISSUE 11: In the event the Public Service Commission determines that Minnesota Power acted in any way improperly in regards to dealing with the Kessler's, the placement of Turbine 441, or responding to the complaint of the Kessler's, should Minnesota Power be prohibited from conducting any additional utility business in the state of North Dakota?

ISSUE 12: In the event the Public Service Commission determines that Minnesota Power acted in any way improperly in regards to dealing with the Kessler's, the placement of Turbine 441, or responding to the complaint of the Kessler's, should Minnesota Power be prohibited from submitting any future applications to the Public Service Commission?

We acknowledge that the PSC and the opposing party may have additional issues. In addition, we hereby reserve the right to submit further issues based on discovery, any request by the PSC, and in response to any issues raised by Minnesota Power.

III. REQUESTED RELIEF

¶22 In regards to resolving the improper placement of Turbine 441, the Kesslers' propose the following relief:

1. Require Minnesota Power to provide complete internal file.
2. Require Sound Study by Independent Entity.
3. If sound study indicates a violation of the application, the PSC's Order, or any North Dakota law or regulation, require Minnesota Power to fix problem or move turbine.

4. Require Flickering Study by Independent Entity.
5. If flickering study indicates a violation of the application, the PSC's Order, or any North Dakota law or regulation, require Minnesota Power to fix problem or move turbine.
6. Have the PSC conduct a survey of other landowners to determine if Minnesota Power has a pattern of misconduct relating to North Dakota landowners.
7. Prohibit Minnesota Power from any further operations in North Dakota.
8. Reimbursement for damages incurred for damage to Section 15, devaluation of Section 15, as well as personal damages for inconvenience, nuisance, and emotional distress.
9. Order Minnesota Power to reimburse all attorney fees incurred by the Kesslers relating to the prosecution of this action.

¶23 Dated this 29th day of June, 2020.



Lynn Boughey (#04046)
Attorney for Keith and Deanna
Kessler
lynnboughey@midconetwork.com
P.O. Box 1202
Mandan, ND 58554-1202
(701) 751-1485