STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler, Complainants/Petitioners, vs. Minnesota Power, a division of ALLETE, Inc., Respondent.	)	Case Nos. PU-20-194 OAH File No. 20200211 **KESSLERS' BRIEF IN RESPONSE TO MINNESOTA POWER'S SECOND MOTION FOR PARTIAL DISMISSAL OF REVISED COMPLAINT**

¶1 Introduction of Motion Before the PSC Minnesota Power has made a second motion for partial dismissal of the Kesslers' Revised Complaint, asserting that Minnesota Power is as a matter of law in full compliance with the statutory and regulatory and contractual (by its application) obligations as to the placement of Tower 441 within 1500 feet of the Kessler's second residence based on its argument *first* that the structure owned by the Kessler on Section 15 was not an "occupied residence"[1] and *second* that Minnesota Power should not have to

[1] **Legal Question Presented by Minnesota Power is Misleading, Improper, and Assumes Incorrect Facts** We note that the motion itself improperly includes within its framework an improper legal argument and an assumption of a fact that is in dispute; that is, the motion itself asserts the legal argument that the determination of whether the residence was 'occupied' "at the time the Minnesota Power obtained the certificate of Site Compatibility [in 2013] or constructed Turbine 441 in 2014." Minnesota Power's Motion for Partial Summary Judgment at Para. 1 (11-13-20)(emphasis added).

The Kesslers object to the question as presented and specifically assert that nothing in the law sets the specific date that applies in determining 'occupation' of a residence and the PSC has every right to adopt a definition of "occupied residence" that is NOT limited to either of the dates suggested by Minnesota Power. Moreover, Minnesota Power's proposed dates run counter to the purpose of the law and the purpose of the PSC itself in regards to protecting the rights and property of North Dakota landowners.

23 PU-20-194 Filed 01/04/2021 Pages: 193
Brief in Response to Second Motion for Partial Dismissal of Revised Complaint
Keith and Deanna Kessler
Lynn Boughey, Attorney

conduct a sound study as to the Kessler residence, arguing that it has already done so (despite the fact that they have NOT done so, it has only done a modeling).

¶2 Motion Must be Denied if Any Material Facts in Dispute

Because the motion made by Minnesota Power is a motion to dismiss, the motion cannot be granted if there are any genuine issues of material facts; in addition, all facts alleged by the Kesslers contained in there Amended Complaint, any submissions made in this matter, and in their depositions must be taken as being true for purposes of the pending motion, and any reasonable inferences derived from those alleged facts must be construed in favor of the Kesslers and against Minnesota Power, who as the movant "bears the burden to demonstrate clearly that there is no genuine issue of material fact." Minnesota Power Brief at page 5 (11-13-20).

¶3 Kesslers Object to Minnesota Power's Motion and Arguments

The Kessler object to both aspects of the pending motion and state the motion should be denied in its entirety due to the existence of material facts in dispute and the misinterpretation of the law and the Power of the PSC to require

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In our view, the PSC is allowed to consider ALL of the facts surrounding the property at issue, including its prior use, use at the time of the applications, use at the time of the construction of the project, and the present and future intended use of the property by the landowner. No decision should be made until the facts have been determined – as to the law, the definition to be adopted, or as to the application of the law to the facts.

In addition, it is essential to note that the evidence shows that Minnesota Power had notice and knowledge that the Kesslers had previously used the structure as a residence and that it was not only capable of being used presently as a residence, it was intended to be used as a residence by their son when he returned from college. As such, Minnesota Power was obligated to list the residence on its exhibit and inform the PSC of any and all information relating to the Kessler's use of the residence and allow the PSC to decide whether the set back applies.

corrective actions where a utility violates the law, rules, regulations or Order of the PSC, to the detriment of a landowner.

DISCUSSION – AS TO ADOPTION OF PROPER DEFINITION

¶4 Adoption of Definition Should Occur After Facts Determined

In order to resolve this case, it is necessary for the PSC at some point to adopt a proper definition of "occupied residence." We assert that such an adoption should occur following a hearing in this matter so that the Commission can reach such a legal conclusion based on the facts relating to this case. We nonetheless address the proper definition at this time in case the PSC decides to adopt a proper definition now instead of following a proper determination of the facts relating to the Kessler property.

¶5 Examples of Absurdity if Minnesota Power's Definitions are Accepted by the PSC Minnesota Power is proposing that "unoccupied" applies when the resident is not physically present. Under such a definition, each of the following scenarios would be considered that the residence is "unoccupied":

a. a residence is "unoccupied" while the resident is in the barn or combining;
b. a residence is "unoccupied" while the resident is at work.
c. A residence is "unoccupied" while the resident is gone for the weekend.
d. A residence is "unoccupied" while the resident is on vacation.
e. A residence is "unoccupied" while the resident is spending the winter in Arizona.
f. A residence is "unoccupied" while the resident is visiting family out of state for an extended period.
g. A residence that is "unoccupied" while the resident is attending college.

By the review of these scenarios alone, it is obvious that the term "unoccupied" and the phrase "occupied residence" must be capable of some other appropriate

and valid definition. The above scenarios clearly demonstrate that the adoption of Minnesota Powers requirement physical presence in the residence results in an unfair definition and indeed in many situations creates a patently absurd result.

¶6 Applicable Rules of Statutory Interpretation The term "occupied residence" is not defined anywhere in the entire Century Code. In regards to exclusion and avoidance areas, there are reference to "inhabited rural residence" in Section 49-22-05.1 and "inhabited residence" throughout Section 69-06-08-01 of the administrative code relating to "Energy conversion facility siting criteria." Significantly, the phrase "inhabited structure" is defined under North Dakota law:

> 1. "Inhabited structure" means a structure or vehicle:
> a. Where any person lives or carries on business or other calling;
> b. Where people assemble for purposes of business, government, education, religion, entertainment, or public transportation; or
> c. Which is used for overnight accommodation of persons.

Occupancy is not required; the structure is considered inhabited if a person lives there (no duration or continuity required) or the structure is "used for overnight accommodation of persons (again, no duration or continuity required).[2]

But for whatever reason, the Exhibit presented to the PSC refers to "occupied residences" – a term that is not defined in the code ore the administrative regulations relating to wind energy. , it is left to the PSC to adopt a definition Under North Dakota law – through its rules of statutory interpretation – the PSC

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[2] "Inhabited dwelling" is also used in the North Dakota Century Code. See Section 20.1-04-14 and Section 23-11-03(1). As discussed below, the term "dwelling" is also used in the criminal code at Section 12.1-22-06(1) which refers back to section 12.1-05-12(2).

(as well as every court in the state) is obligated to interpretate the words or provisions of any statute

> a) with a view to effecting its objects and to promoting justice,
> b) without impairing any vested right existing when it takes effect (such as the right to property, the use of one's own property, and the prohibition of taking without just compensation),
> c) towards a just and reasonable result;
> d) favoring the public interest over any private interest;
> e) taking into consideration the object meant to be obtained; and
> d) in a way that does not result in an absurdity.

N.D.C.C. Sections 1-02-01, 1-02-30, 1-02-38(30), 1-20-38(5), 1-20-39(1).

¶7 **Right of PSC to Choose a Proper Definition** The PSC has every right to create a fair and reasonable definition for an "occupied residence" that properly balances the interests of both utility companies and North Dakota landowners. At the very least, that definition should require that the utility, in its application process and construction phases, take all steps necessary to protect existing residences, whether physically occupied at that moment or residences which are intended to be used as residences in the near future.

¶8 **"Simple" Definition of "Occupied Residence"** We respectfully suggest that the following "simple" definition of "occupied residence" should be adopted by the PSC:

> For purposes of the placement of structures by a utility, an "occupied residence" includes any of the following:
> a) a structure presently being used as residence;
> b) a structure that is capable of being used as a residence which has overnight accommodations of any type;
> c) a structure that has in the last six years been used at any time for overnight accommodations, regardless if it is presently being used as such; or

d) a structure that is capable of being used as a residence or for overnight accommodations and the landowner intends in the future to use it as such.

The adoption of this definition will resolve the issue before the PSC and require Minnesota Power to come to terms with the Kesslers or move the offending turbine away from the Kessler's residence by a distance required under North Dakota law.

¶9 Motion to Dismiss Should be Denied Now as a Matter of Course We are pleased to inform the reader that you need not read any further beyond this paragraph because the motion should be denied as a matter of course due to the fact that

1) there are material facts in dispute;
2) the arguments presented by the Kesslers demonstrate that the law is in question and it is necessary for the PSC to hold a hearing and first determine the facts, and then determine a proper definition of the terms, and then apply the law based on both the facts and the definition adopted by the PSC.

By making this motion now Minnesota Power is attempting to prevent the PSC from first determining the applicable facts and forcing it to reach the merits 9and create a definition of "unoccupied" and "occupied residence" without a hearing and without the benefit of an opportunity to determine these important aspects issues within the realm of fully deciding the case before it. Minnesota Power is, in every sense of the words, "putting the cart before the horse."

¶10 List of the Salient Facts that Show Motion Should be Denied Now as a Matter of Course In the event that the reader has decided to continue beyond the last determinative paragraph, we are pleased to inform you that you

again have the choice of going no further than this particular paragraph – a paragraph that lists the most salient factual points which, under the law, must be taken as true for purposes of the pending motion. If Minnesota Power disagrees with ANY of these facts, the motion cannot be granted (because the facts are in dispute). To this end, a quick summary of the facts (which we already know Minnesota Power disputes) along with a review of the applicable law (which Minnesota Power also disputes) is provided right now:

> 1) the Kessler residence at all times at issue was a residence capable of being used as such and intended to be used as such by the owner;
>
> 2) there is no requirement in the statute, the rules and regulations that apply to wind farms, the PSC application process, or the Order of the PSC as to this wind farm that the residence be occupied at any certain time or for any certain time-period;
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> 3) the PSC as the right to interpret the term "occupied" and the phrase "occupied residence" as it deems appropriate and in light of the purpose of the PSC and its obligation to protect the public;
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> 4) the Kessler residence was previously used as a residence by the Kesslers, had been used intermittently as a residence for many years, was properly considered a "residence" and an "occupied residence" throughout the times at issue, and was intended to be used as a residence in the future;
>
> 5) that fact that a person was not physically in the Kessler residence at the times proposed by Minnesota Power does not alter the fact that the residence – for purposes of this case and the wind farm project – was indeed "occupied" under any fair reading of the term or phrase;
>
> 6) the interpretation proposed by Minnesota Power – that occupancy is determined only by physical presence of a person at all times applicable to the project – creates an absurd and unjust result, which is not allowed under ND law or in light of the obligation of the PSC to protect the rights and property of North Dakota landowners;
>
> 7) Minnesota Power listed not only occupied residences in its exhibit to the PSC and hearing officer, but also depicted on the map residences that had not been occupied for decades, abandoned homes also not used in decades, and structures that in no way could be considered a residence –

and yet the ONLY structure not listed by Minnesota Power in its exhibit failed to show the Kessler residence, a building that is indeed a residence, is indeed a residence that has been occupied repeatedly over the years, a residence that was occupied for numerous reasons as a guest house and hunting lodge over the years, and a residence that was – with Minnesota Power's knowledge – intended to be used as a residence upon the return of the Kessler's son from college.

8) Minnesota Power was obligated to provide ALL relevant facts as to the Kessler residence known to Minnesota Power to the PSC as part of its application and at the public hearing;

9) Minnesota Power knew at the time it made it application, at the time when the siting was approved, and throughout the construction of the wind farm that the Kessler residence was considered by the Kesslers as a residence, an occupied residence, and a residence that was to be used by their son as soon as he returned from college.

10) the maps provided to the PSC and shown at the public hearing were not conducive to a correct determination of the placement of the towers in relation to the avoidance and set back requirements;

11) Minnesota Power convinced the Kessler during the public hearing not to object or raise the issue by promising the Kesslers that the tower would not be placed within the avoidance area or within the applicable set back required by law – and the Kesslers detrimentally relied on those promises made by Minnesota Power at the public hearing;

12) following the hearing when the issue was to the improper placements of Tower 441 Minnesota Power lied to in filings to the PSC about the facts surrounding the Kessler residence and its knowledge of those facts;

13) the Kesslers have provided by their Revised Formal Complaint, affidavits, answers to interrogatories, deposition testimony, and exhibits relating to all of these submissions that the home was used as a residence for many years, was capable of overnight accommodations throughout the time the project was first presented to the PSC, during the application process, and during the construction phase; in addition the Kesslers repeatedly informed Minnesota Power that the home was considered a residence and was going to be used by their son as his residence once he returned from college; and

14) once the issue was raised by the Kesslers to the PSC Minnesota Power has provide incorrect and false information relating to the occupancy of the home, the history of the home, and the information received about the residence from the Kesslers.

¶11 Reference to Factual Allegations Contained in Revised Formal Complaint All of the allegations contained in the **Revised Formal Complaint [KESSLER BRIEF EXHIBIT 1]** are taken as being true for purposes of the pending motion to dismiss. The factual allegations relating to the public hearing and the fact that the Kessler's attempted to raise their concerns at the public hearing are found at **paragraph 4 of the Revised Formal Complaint**. The allegations that the Kessler's repeatedly relayed to the representatives of Minnesota Power the fact that the residence was being used and was intended to be used by their son when he returned from college is found at **paragraphs 7 and 10 of the Revised Formal Complaint**. The history of the use of the structure as a residence is found at **paragraph 11 of the Revised Formal Complaint**. The concerns about the inaccuracies of the map or exhibit that allegedly showed the occupied residences that was submitted by Minnesota Power to the PSC is found **at paragraph 12 of the Revised Formal Complaint**. The factual information relating to Minnesota Power lying after this issue was raised by the Kesslers to the PSC is found at **paragraph 13 of the Revised Formal Complaint**.

¶12 References to Factual Information Provided in Depositions The confirmation by the PSC General Counsel and PSC staff that there is no statutory definition of "occupied residence" and the fact that the rules and regulations of the PSC do not include such definition is found that **pages 84-85 of Jerry Lein's deposition**, and **pages 62-63 of John Schuh's deposition**. In addition, the PSC staff member who interprets the PSC rules and regulations

agreed at his deposition that a residence is still occupied despite the fact that the person may be physically somewhere else, such as when the person is gone for a weekend, or even is gone as a snowbird for an extended time. **Jerry Lein's deposition at 85-86**. As to the information supplied by Minnesota Power in its depositions, Matthew Freudenrich confirmed that Barry Gardner had the responsibility to determine if the house was occupied and should be put on the exhibit provided to the PSC. **Freudenrich deposition at pages 30-31.** Barry Gartner testified that although they used three different sources to determine if the structure was occupied, Minnesota Power did not and do not check with the landowners to see what the structures are, if there ever used, and if the landowner considers the structure of residence; nor does the company check to see if the structure is being used as a residence or will be used in the future as a residence. **Gartner deposition at pages 15-17.** Finally, Scott Monroe, who is the person who was supposed to provide any important information to those creating the exhibits as to occupied residences, stated that the right-of-way agent did not relay any information to him regarding the Kessler residence and whether it was previously had been used or was going to be used as a residence. **Monroe deposition at pages 74-75.** The attached exhibits are as follows:

Jerry Lein's deposition KESSLER BRIEF EXHIBIT 2
John Schuh's deposition KESSLER BRIEF EXHIBIT 3
Freudenrich deposition KESSLER BRIEF EXHIBIT 4
Gartner deposition KESSLER BRIEF EXHIBIT 5
Monroe deposition KESSLER BRIEF EXHIBIT 6

¶13 Reference to Factual Information Contained in Exhibits Also submitted with this brief are several exhibits – in addition to the Revised Formal Complaint – including the two maps provided to the PSC and shown to the public at the public hearing [**KESSLER BRIEF EXHIBITS 7-8],** and the map of the occupied residences which letter designations of the structures shown, many of which were not even residences – yet failing to shown the Kessler structure [**KESSLER BRIEF EXHIBITS 9]**. We also provide the Kessler's Answers to Interrogatory No. 2 win which the Kessler describe the use of the residence over the years. [**KESSLER BRIEF EXHIBITS 10.]** Lastly, as discussed above, as to credibility of Minnesota Power and its agents, we note that Jerry Lein has provided confirmation that it is the Kesslers who are telling the truth and not the representatives of Minnesota Power.

¶14 MINNESOTA POWER HAS LOST ALL CREDIBILTY. Throughout this case the Kesslers have repeatedly asserted – for years – that they had told the representative of Minnesota Power that the structure at issue is a residence and will continue to be used as a residence when their son came back from college. Every single person from Minnesota Power who has provided answers to discovery and depositions has claimed 1) that the Kesslers never mentioned these concerns to any representative of Minnesota Power, and 2) that not one person from Minnesota Power discussed these concerns with the Kesslers at the public hearing – and went on to deny in any way asking the Kesslers to not raise their concerns at the public hearing. However, <u>THE TESTIMONY OF</u>

JERRY LEIN – of the PSC – SPECIFICALLY AND DIRECTLY CONTRADICTS THE PREVIOUS SWORN TESTIMONY OF THE REPRESENTATIVES OF MINNESOTA POWER. The portions of the transcript of Jerry Lien that directly contradicts the previous testimony of Minnesota Power's representatives is provided as **KESSLER BRIEF EXHIBIT 11**.

I. ARGUMENT AS TO MEANING OF "OCCUPIED RESIDENCE"

1. underlying mission and role of PSC

¶15 It is important to note at the outset that any definition of occupied employed or applied by the PSC should take into account the underlying mission of the PSC, and the purpose of the rules and regulations created and adopted by the PSC, and the role of the PSC and protecting the rights and the interests of the landowners in conjunction with appropriate development of the state's natural resources.

2. lack of statutory definition

¶16 Section BLANK, which relates to avoidance areas and setbacks, does not include a definition of the word "occupied" in regards to "occupied residence." In addition, the North Dakota Century Code does not have a definition of "occupied" as it relates to residence anywhere else in the Code. The North Dakota Century Code does include a definition of dwelling as it relates to burglary of the structure, which would include a residence, which the PSC may want to consider when it chooses its own definitions of "unoccupied residence."

3. lack of definition under PSC rules and regulations

¶17 The General Counsel and PSC staff have indicated in the depositions that the term occupied and the phrase occupied residence has not been defined by the PSC, and that the PSC has the authority to create and apply such a definition.

4. PSC has the authority to define "occupied residence" and obligation to apply the facts as alleged by the Kessler's.

¶18 In regards to the issues before the PSC we assert the following in regards to resolving the pending issue:

> 1. The PSC has the right and obligation to define occupied residence
> 2. The PSC is required in conjunction with the pending motion to take the facts as alleged by the Kessler's in their second amended complaint, the information and arguments presented to the PSC thus far, and any testimony provided by deposition.

5. role and function of the PSC in choosing definition

¶19 As discussed above, the PSC should take into account – in choosing a proper definition – its important role in protecting the property and livelihood of the farmers and ranchers who own the land upon which certain utilities are allowed to develop projects. We will not repeat the rules of statutory construction listed above, all of which should be employed by the PSC in determining a proper definition of "unoccupied residence."

6. several possible definitions that could be adopted by the PSC

¶20 **DEFINITION OPTION 1** In order to prevent reaching any type of absurdity, we assert that any proper definition of an occupied residence, or in the converse and unoccupied residence, should focus on the potential use or function of the structure, and not on the duration of the absence of the person who

is using that structure. As such, is our view that one definition of an "occupied residence" could be as follows:

> A structure is considered a "residence" if it is capable at any time and being use as a residence, meaning that it is capable of overnight accommodations by the owner, regardless of whether it is presently being used for overnight accommodations. If the structure has at any time been used for overnight accommodations, is presently being used for overnight accommodations, or is intended in the future to be used for overnight accommodations, then the structure is considered to be an occupied residence, regardless of its present use or the duration of any such occupation.

¶21 **DEFINITION OPTION 2** As noted above, we respectfully suggest that the following "simple" definition of "occupied residence" should be adopted by the PSC:

> For purposes of the placement of structures by a utility, an "occupied residence" includes any of the following:
> a) a structure presently being used as residence;
> b) a structure that is capable of being used as a residence which has overnight accommodations of any type;
> c) a structure that has in the last six years been used at any time for overnight accommodations, regardless if it is presently being used as such; or
> d) a structure that is capable of being used as a residence or for overnight accommodations and the landowner intends in the future to use it as such.

¶22 **DEFINITION OPTION 3** In the event the PSC would prefer a more detailed definition to adopt as a rule or regulation relating to wind farms, the PSC may want to consider the following:

> 1.1 It is the public policy of the public service commission to protect the property of all landowners, particularly any buildings or structures that are used in any farming or ranching operation, or have been or can be used as a residence.
> 1.2 For purposes of determining the appropriate placement of any wind turbine, "occupied residence" shall mean
> 1) any structure that is capable of being used as a residence for overnight accommodations, regardless if it is being used as such;
> 2) any structure that has been used for overnight accommodations in the past; and
> 3) any structure with the landowner considers to be residence or plans on employing as a residence.
> Every application relating to the placement of when towers shall include a listing of every structure within 1 mile of the proposed site of any wind tower, with specific reference to the description of the structure, the history of the structure, whether the structure is abandoned, whether the structure has ever been used as a residence, whether the structure is presently being used as a resident, and whether the landowner intends to use the structure as a residence in the future.
> 1.3 A structure is not considered to be abandoned if it any time in the last three years the structure has been used either as a residence or for overnight accommodations; in addition, a structure is not considered abandoned merely because it is not presently being occupied; if the structure serves as a residence, has previously served as a residence, or could in the future serve as a residence, then the fact that no one is presently living in the structure cannot serve as a basis for considering the structure is abandoned, regardless of the duration in which the structure is not physically occupied.
> 1.4 If the structure has ever been used as a residence, is presently being used as a residence, or is intended to be used as a residence by the landowner, that all applicable avoidance areas, setbacks, statutes, and rules and regulations relating to the placement of the wind tower shall be applicable unless the application includes a specific waiver by the landowner as to the placement of the tower.

¶23 **DEFINITION OPTION 4** We understand that Mercer, Oliver, and McLean counties are in the process of re-writing their regulations relating to

wind farms and the respective states attorneys have drafted a version presently being reviewed by those county commissioners that adopts the definition used for dwelling in the criminal code as Section 12.1-22-06:

> **O. WIND ENERGY FACILITIES**
>
> . . .
>
> 2. **Definitions**
>
> . . .
>
> e. Occupied Dwelling: (1) Where any person lives or carries on business or other calling; or (2) Which is used for overnight accommodation of persons for any duration.
>
> . . .
>
> **3. Criteria**
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> . . .
>
> n. Setbacks
>
> 1. General: Must meet all applicable federal, state and county setback requirements.
>
> 2. From occupied dwelling, commercial building or publicly you structure or facility. The horizontal distance between the center of a turbine monopole in any occupied structure shall not be less than 1500 feet, unless otherwise negotiated with the landowner of the structure.

Mercer County Planning and Zoning Meeting DRAFT Wind Energy Facilities Proposal – reviewed at Mercer County Planning and Zoning Meeting 12-17-20 (emphasis in original).

II. ARGUMENT AS TO MATERIAL FACTS IN DISPUTE

¶24 Under applicable North Dakota law, each of the facts alleged by the Kessler's that are contained in their Second Amended Complaint or in their testimony provided at the deposition must be taken as true in regards to any motion to dismiss. These facts in summary fashion are as follows:

> 1. Because Tower 441 is placed immediately adjacent to the Kessler's property but is NOT on the Kessler property, Minnesota Power did not obtain a lease signed by the Kessler's that applies to that tower.

2. At the time of planning and construction, the Kessler's had on their land a structure capable of being used as a residence adjacent to where the tower at issue was placed.

3. The residence had repeatedly used by the Kessler's as a second residence for many years prior to the planning and construction.

4. The Kessler's repeatedly told Minnesota Power that although their son was a college, the residence was going to be used when he returned.

5. Minnesota Power is obligated to provide correct and accurate information to the PSC as part of the application process.

6. Minnesota Power – through any of its agents or employees – becomes aware of any facts that relate to the placement of towers in reference to any avoidance areas or setbacks, is required to provide that information to the PSC or its designated representative, the hearing officer at the public hearing.

7. The maps provided to the PSC and at the public hearing failed to sufficiently delineate the applicable avoidance area and setback area in a manner capable of informing the public or the Kessler's the actual distances between the tower and the second residence on the Kessler's property.

8. The maps presented at the public hearing to the public – and the Kessler's – were not specific enough to indicate that the placement of the tower at issue was in violation of the setback and avoidance requirements as they relate to the Kessler second residence.

9. Despite the prior use of the second residence (at the time of planning and construction), it's present capability as a second residence (at the time of planning and construction), and the stated intentions of the Kessler's (at the time of the planning and construction) to use that residence in the near future, Minnesota Power failed to include the structure on the exhibit presented to the PSC and the hearing officer.

10. Nor did Minnesota Power at any time disclose the facts to which it was aware to the PSC or the hearing officer

11. The disingenuousness of the map provided to the PSC and the public is made plain by the fact that the map lists – in addition to actual occupied residences –

a) structures that have been abandoned for decades,
b) residences that have not been used for decades, and

c) structures that no one would consider a residence

12. The Kessler's repeatedly informed Minnesota Power throughout the planning process that they considered the structure to be a residence that has been used as a residence, and will be used as an occupied residence as soon as there's some returns from college

13. The Kessler's at the public hearing specifically raise their concern about the location of the turbine at issue to their second residence to a representative of Minnesota Power

14. Minnesota Powers representative insisted that the Kessler's not raise this issue at the hearing, that any delay in approval of the application would affect its tax credits, that Minnesota Power was required to comply with the setback and North Dakota law and as such this was not an issue that needed to be raised, and that Minnesota Powers representatives would discuss the issue with them at their office the next week.

15. Based on these representations from Minnesota Power, the Kessler's did not raise their concern about the location of the turbine at issue at the public hearing.

16. Once the issue of improper placement of the tower was raised by the Kessler's to the PSC, Minnesota Power lied about many of the facts listed above, including lying under oath that its representative did not speak to the Kessler's at the public hearing – a factual assertion that is contrary to both the Kessler's testimony and the testimony of Jerry Lien, a PSC staff member who witnessed a conversation between the Kessler's and Minnesota Powers representative during a break.

17. Tower 441 is approximately 1000 feet from the Kessler second residence, and as such is in violation of the avoidance area and setback requirements that apply to this project.

18. Tower 441 is negatively affecting the Kessler's property by its proximity to the Kessler residence, both in reference to sound and flickering.

19. The placement of Tower 441 is in violation of North Dakota law, the application approved by the PSC, and the county avoidance area and setback requirements.

20. Minnesota Power is obligated to mitigate any adverse effects due to the improper placement of Tower 441.

21. If the adverse effects upon the Kessler's second residence cannot be sufficiently remedied, Minnesota Powers obligated to move Tower 441 away from the Kessler's second residence and in compliance with the avoidance area and setback requirements.

22. Minnesota Power has the ability to move Tower 441 away from the Kessler second residence and to a proper location.

¶25 Finally, it is appropriate to provide a picture of the residence, which is KESSLER BRIEF EXHIBIT 12. Were there times when it needed a painting, or new shingles; yes. But there can be no mistake that this home was a residence, used as a place to have overnight accommodations. And if Minnesota Power or any other entity that wants to place wind towers near any buildings that might serve as a residence or is planned to be used as a residence, then that entity should have the obligation to perform due diligence and look into the facts surrounding the structure; and while they are at it, why not take the time to ask the owner. They are asking all the landowners about rights of ways; why not ask about the structures on the property as well?

III. DISCUSSION AS TO REQUIRING A SOUND TEST

¶26 Minnesota Power next argues in its motion to dismiss that it should not have to conduct a sound study as to the Kessler residence, arguing that it has already done so (despite the fact that they have NOT done so – it has only done a modeling). Frankly, modeling just isn't sufficient. To use a phrase, garbage in, garbage out. Minnesota Power ought to have to demonstrate by actually testing one hundred feet from the house the actual decibel readings in regard to the Kessler residence. Because the facts alleged by the Kesslers is that the decibel

reading is above that allowed, an actual test on-site and using a properly calibrated decibel meter should be conducted and required by the PSC.

IV. Request for Evidentiary Hearing and Oral Arguments as to Minnesota Power's Motion to Dismiss

¶27 As noted above the Kesslers assert that the issues raised by Minnesota Power in its Motion to Dismiss should not be decided on motion but instead should be decided following an evidentiary hearing. In addition, if an evidentiary hearing is not allowed then the Kesslers request oral argument on the two issues raised by Minnesota Power.

VI. Conclusion

¶28 For the reasons stated above, the Kessler respectfully request that the PSC deny Minnesota Power's motion to dismiss as to both issues raised.

¶29 Dated this 31st day of December, 2020.

/s/

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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 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. 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]

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[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 2015[3], 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.

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[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 the 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 disclose 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 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.



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STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler,	:	
	:	
Complainants/Petitioners,	:	
	:	
-vs-	:	Case No. PU-20-194
Minnesota Power, a division of ALLETE, Inc.,	:	
	:	
	:	
Respondent.	:	

TRANSCRIPT OF

ZOOM TELE/VIDEOCONFERENCE DEPOSITION OF JERRY LEIN

Taken Via
Zoom Videoconference
October 30, 2020

(APPEARANCES AS NOTED HEREIN)

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ALSO PRESENT:

MR. KEITH KESSLER, (Appearing Via Zoom.)

C O N T E N T S

DEPOSITION OF JERRY LEIN Page

Examination by Mr. Mahlberg..... 5

Examination by Mr. Boughey..... 54

Further Examination by Mr. Mahlberg..... 81

Further Examination by Mr. Boughey..... 83

CERTIFICATE OF DEPONENT..... 88

CERTIFICATE OF COURT REPORTER..... 89

4

(Pursuant to Notice of Taking Zoom Tele/Videoconference Deposition of **JERRY LEIN** in the above-entitled cause, the following examination came on for taking before Stephanie A. Smith, a Registered Professional Reporter and a Notary Public in and for the State of North Dakota, via Zoom Tele/Videoconference, on the 30th day of October, 2020, commencing at 9:35 a.m., counsel appearing on behalf of the respective parties as hereinbefore indicated:)

(The following proceedings were had and made of record:)

MR. MAHLBERG: This is Patrick Mahlberg, counsel for Minnesota Power. I'm putting on the record a stipulation among counsel that due to the ongoing COVID-19 pandemic, this deposition is being conducted remotely by Zoom and related telephone calls. In light of that, we are stipulating that the court reporter may swear in the witness remotely, and I stipulate to that on behalf of Minnesota Power.

MR. BOUGHEY: And I do so on behalf of the Kesslers.

THE WITNESS: And to clarify, I'm not

5

zoomed. All you have is the audio.

MR. MAHLBERG: Understood.

JERRY LEIN,

being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. MAHLBERG:

Q. Good morning, Mr. Lein. My name is Pat Mahlberg. We met briefly before the deposition began. I represent Minnesota Power, and I'm going to be taking your deposition today.

Have you been deposed before, Mr. Lein?

A. No.

Q. Okay. So I --

A. Or maybe. I said maybe, I guess. I don't remember.

Q. Okay. So just -- we'll go over a couple of ground rules. I know you're very familiar with -- with proceedings and the building of records through court reporters, but just some things to keep in mind. As we go through here today if there's any question that you don't understand, Mr. Lein, please correct me or advise me so that I can ask you a better question.

We'll do our best to also try to not talk

6

over each other so as to let the court reporter have a fair chance of taking down what we're saying today. It can be more difficult as we do this remotely.

You know, and -- and beyond that, Mr. Lein, if at any point you want to take a break today, by all means, just say so and we can go off the record and come back on whenever you're ready. Does that all sound fair?

A. Okay. I'm -- I'm ready for a break. No. That all sounds very good. Thank you.

Q. All right. Mr. Lein, what's your position at the -- at the North Dakota Public Service Commission?

A. I'm an analyst for -- for the public utilities division.

Q. And how long have you been an analyst?

A. I don't know. 20-some years, 30 years.

Q. And generally that same role over that period, Mr. Lein?

A. Yes. I also worked for a different commission, but, yes, same kind of job.

Q. And this can be a tough question, Mr. Lein, but generally describe what your -- what your job is.

7

A. I basically look into filings and things that the commission has in front of them and give the commission a recommendation on them.

Q. Mr. Lein, does addressing landowner complaints fit within that scope of work that you just described?

A. Yes. Usually, though, a landowner complaint is -- is resolved. We resolve it. It never gets to the commission.

Q. When you say "we resolve it," do you mean at the -- the staff and company and landowner level?

A. Yes.

Q. Very good. Mr. Lein, were you the analyst assigned to what's known as the Bison 4 project?

A. Yes.

Q. And were you the analyst that was on the prior Bison project?

A. I believe so. I think I did them all.

Q. In advance of today, Mr. Lein, did you do anything to prepare for this deposition, like review any particular documents?

A. No.

Q. Do you have a general understanding, Mr. Lein, of the matter that we're here on in the

8

complaint of the Kesslers regarding Minnesota Power and the Bison 4 wind project?

A. Yes.

Q. Okay. Mr. Lein, do you recall attending the September 13, 2013, hearing on Minnesota Power's application for a certificate of site capability for the Bison 4 wind project?

A. Yes.

Q. Do you recall, Mr. Lein, that there were map exhibits on display in the hearing room?

A. Yes.

Q. Do you recall what those maps showed?

A. Generally the project layout.

Q. Do you recall where those maps were displayed in the hearing room that day?

A. If I'm remembering right, I think back behind the tables where all the participants were at and I think in front of the audience.

Q. Got it. And, Mr. Lein, did you have any role in -- in bringing those maps to the hearing or setting them up?

A. No. Well, I might have told them where to put them, but, otherwise, no.

Q. Do you recall viewing the maps yourself during that hearing, Mr. Lein?

9

A. Yes.

Q. Mr. Lein, I'm going to ask you in the email that I have sent you, there is a document that is titled Map Exhibit 1a. If you could pull that up.

MR. MAHLBERG: And as you're doing that, I have attempted to share the screen for those who are on the Zoom call. If you would confirm, Lynn, that you see it.

MR. BOUGHEY: I confirm that I am able to see Exhibit 1a on the screen. Thank you, counsel.

THE WITNESS: Okay.

Q. (MR. MAHLBERG CONTINUING) Mr. Lein, let me know when you have that up there.

A. Hang on. I've got nine attachments in this email, and it only shows me three of them, so I have to figure out how to get to the other nine. Since it will only show me these three, can you send me that again?

Q. Yes, sir. Mr. Lein, I sent you an email now that has two attachments to it.

A. Okay. It's not here yet. Hang on. This is weird. Were they big? There we go, it came. Maps. Okay. 1a and 2. Open 1?

Q. Yeah, if you would open map Exhibit 1a

10

there.

A. Okay. Got it.

Q. All right. Mr. Lein, do you recognize this -- this document as one of the exhibits that was on display at the September 13, 2013, hearing?

A. You know, I -- I believe it is. Can I recognize or remember it? That was a long time ago. If I really needed to answer that question for sure, we could go back and look at the record and -- and show that it -- that it is the same one.

Q. Got it. So as you sit here today, Mr. Lein, this -- you don't have a --

A. It looks -- it looks like it.

Q. Okay. Do you recall, Mr. Lein, having any discussions with anyone on a break or before or after the hearing about this map?

A. Generally I think I recall that, you know, there was discussion of the map and -- and people from the audience that would like to try and find out, you know, where they live on the map and stuff like that, and so I would have been of assistance to people in the audience with questions.

Q. Do you recall, Mr. Lein, any specific conversations that day with -- with anyone about the maps?

11

A. No, I don't.

Q. If you would open that map, Exhibit 2.

A. Okay.

Q. Down in the lower right it says Exhibit 2, Exclusion and Avoidance Areas. Do you see that?

A. Exhibit 2, yep.

Q. Similar question, Mr. Lein. Do you recognize this document as one of the exhibits that was on display at the September 13, 2013, hearing?

A. And, once again, not specifically, but, yeah, it looks like it.

Q. Okay.

A. It looks familiar.

Q. And similarly to the last map, Mr. Lein, do you recall having any specific discussions with anyone about what was on Exhibit 2 on the day of the hearing?

A. At -- no, not specifically. Once again, you know, the -- the black dots show where people live, so the people would have been, "Is that my house," type thing, and I -- so I'd tell them. Nothing -- just general discussions. I don't remember exactly what they were.

Q. Sure. Do you remember, Mr. Lein, having general discussions or -- or do you just assume

12

that they would have happened if they needed to?
A. Yeah, I don't remember specifically any. I just remember people talking about the map during breaks.
Q. Do you remember who was talking about the maps during breaks?
A. No. Just landowners.
Q. Mr. Lein, do you recall whether Keith Kessler and Deanna Kessler were in attendance at the hearing or not?
A. Yes, they were.
Q. Do you recall having any conversations with Mr. Kessler on the day of the hearing?
A. No.
Q. Do you have a -- a recollection of not having any discussions with Mr. Kessler on the day of the hearing?
A. No.
Q. Did you have any discussions with Deanna Kessler on the day of the hearing?
A. I don't remember.
Q. Do you recall whether Mr. or Mrs. Kessler spoke on the record at the hearing?
A. Mr. Kessler did. I can't remember if Mrs. Kessler did or not, but Mr. Kessler is in the

13

transcript.
Q. And have you -- have you recently reviewed that transcript, Mr. Lein?
A. Not recently, but I did review it when this matter first came up.
Q. Mr. Lein, do you have any recollection on the day of the hearing of observing Mr. or Mrs. Kessler speaking with anyone before the hearing, during a break or after the hearing was over?
A. Not specifically. Everybody was talking to everybody.
Q. Do you recall hearing from anyone else prior to when this complaint was filed that Mr. or Mrs. Kessler had an exchange with any representative of the project that day before the hearing, during a break in the hearing or after the hearing was over?
A. I remember a discussion that Minnesota Power -- somebody from Minnesota Power, I don't know who, but had wanted to talk with the Kesslers, and they were supposed to get together during a break or something or somewhere at some point and -- and have a discussion off the record.
Q. And, Mr. Lein, are you -- there are you

14

describing an instruction or communication that was on the record that the Kesslers and the project should have a discussion?
A. I don't think it was on the record. I think they just said -- they just said, "Let's have this discussion," and I don't think the court reporter was taking down what they said when they said that.
Q. Do you recall where people were when that -- when that conversation you just referenced was had?
A. No. Generally just in the room. It was one big room and everybody was everywhere in there.
Q. Do you recall who from Minnesota Power it was that asked to speak with the Kesslers?
A. No.
Q. And was it a -- was it a representative of Minnesota Power that you observed directly asking the Kesslers for a conversation?
A. I think so.
Q. Do you remember anything else about that -- viewing that exchange, Mr. Lein?
A. No.
Q. Do you know whether Minnesota Power and the Kesslers did, in fact, talk on a break or after

15

the hearing that day?
A. I believe they did. I don't remember specifically, but, yeah, I believe they did.
Q. And what is it that causes you to have a belief that they did?
A. Somehow or other in my memory, it's -- I feel like I can recall them going and talking.
Q. But you're not sure who it was or -- or where they went to talk or what they talked about; is that right?
A. That's right.
Q. After the hearing, Mr. Lein, the commission granted the certificate for the project; right?
A. Yes.
Q. All right. Now, Mr. Lein, if you would tell me whether you are able to pull up the document from the emails that is labeled 10-5-20 John Schuh Deposition Exhibit No. 1.
A. Okay. I have two John Schuh deposition exhibits, and --
Q. Yep. So if you could pull up --
A. -- I can't read the -- I can't read the whole title on this. So let me just pull up one and see what it is. It says 10-5-20 John Schuh

16

dep, 102 KB, and it is a memorandum dated March 1, 2017.
Q. Very good.
A. That's the one you're looking for?
Q. That is the one. In the lower right-hand corner there's a box that says Deposition Exhibit 1, John Schuh, 10-5-2020; right?
A. Yep.
Q. Do you recognize the document, Mr. Lein?
A. Yes, I do recognize it. I might have wrote it.
Q. Okay. And we'll -- we'll go through some of the entries in the document --
A. Okay. Let me -- let me rephrase that. I wrote the first part of it and Mr. Schuh added the addendum to the end of it.
Q. Very good. Thank you.
We're going to go through some of the entries in the document, but before that, towards the bottom of the page, there is a label of sorts with I-15-0195. Do you see that?
A. This is where?
Q. At the bottom of the page or toward the bottom of the page.
A. Of page 1?

17

Q. Yes.
A. Yep. Yep. I-15 and Pages 2, Memorandum. Yep, that is a commission label.
Q. And does that tell us that this document was placed into what's called an iFile?
A. Yes.
Q. Generally speaking, Mr. Lein, can you describe your -- your process for deciding what goes into the iFile versus other notes or documents that you decide not to put into the iFile?
A. Generally, if it's something that we think that we may need in this case at some point or is something we want to remember or do in an iFile -- if it does not reach the level of something that we want to put in the formal file, we have what's called an iFile, and that's where this went. So when this began, we were using an iFile for the memos and stuff, and I think the iFile has some other things in it that -- sent by Mr. Kessler too.
Q. Sure. Mr. Lein, do you create memorandum or a note of every interaction you have with -- with a landowner?
A. No.
Q. You create them, as I understand it, when it reaches some level of -- I don't know --

18

significance for you; is that right?
A. Yeah. In this case, I probably talked to Mr. Kessler a couple times by phone prior to writing any memos or anything, and there was a -- we tried to -- to resolve this with Minnesota Power right off the bat when it first came, and it didn't get resolved.
Q. Sure. So after it continued for some time, you decided that it was time to commit it to a memorandum to go into the iFile; right?
A. Yes. Yeah.
Q. The date of this memorandum is March 1, 2017; correct?
A. Yes.
Q. Do you recall drafting this memorandum?
A. Yes.
Q. Do you recall why you drafted it?
A. I don't recall exactly, but I think Mr. Schuh asked me to.
Q. Do you know -- do you know why you were asked to write it?
A. Just so we would have a record of us -- of this stuff.
Q. Do you recall what sources of information you used or relied on or referred to when drafting

19

the document?
A. I think it was mainly my own head, but we also had some documents that were provided by Mr. Kessler. He sent a map or something showing his -- if I remember this right, showing how the turbine and his property and boundaries and so forth -- part of his issues were that there was a turbine with a fence around it that cut across the turbine pad and split his property. The fence put his property wrongly or something like that. And so that was one of the issues that was initially brought up to the -- to Minnesota Power to try to resolve.
Q. Okay. I'm going to walk through, Mr. Lein, some of the events described in the memorandum so that I can follow along --
A. Okay.
Q. -- with the timeline here. First, the next couple of questions, I just want to try and figure out whether we have a typo on a date in the first paragraph. So in the first paragraph, second sentence, it -- it states, "On June 11, 2016, Mr. Kessler left voice mail with Commissioner Kalk regarding fencing and other issues with Minnesota Power."

20

Do you see that?
A. Yes.
Q. Now, if I go down to the -- if I go down to the second paragraph and then on to the third paragraph -- and take your time to look at them -- in the second paragraph it says that you next heard from Mr. Kessler by phone on November 30. And then the third paragraph goes on to January -- an event on January 5 of 2016. Do you see that?
A. Yes.
Q. So what I'm wondering, Mr. Lein, is that reference in the second sentence of the first paragraph to June 11, 2016, should that be 2015?
A. You know, I don't know. Obviously there's a typo on one of those.
Q. Sure.
A. I'm thinking that we could go back and straighten that out in our records by tracing down dates.
Q. Sure. Regardless -- and maybe we can clear it up this way: Do you recall your first communication with Mr. Kessler regarding fencing and -- and other issues in connection with the project?
A. I recall getting a telephone call from

21

him, and that's all I recall about it. And -- and then I think when I got that call, I sent an email to Minnesota Power and asked them to get it fixed.
Q. Okay. Do you --
A. So if we could find --
Q. Do you recall specifically the conversation that you had with Mr. Kessler, that first one?
A. Not specifically. Just he was not happy.
Q. Do you recall, Mr. Lein, whether you had any conversations with Mr. Kessler during 2014 while the project was under construction?
A. No, I don't recall that, but I may have. I get landowner calls all the time.
Q. Got it. So in the first -- or at least in your communications with Mr. Kessler, he's raised an issue about fencing. Do you recall specifically in that first communication what the other issues were?
A. No, but I'm -- I'm thinking that there were some emails or something with Minnesota Power that -- that said what they were. Wait a minute. Let me think back more on it. As I remember this, I think I asked Mr. Kessler to send me an email, to write down all this stuff and send it to me.

22

Q. Got it. And if we look at the second paragraph of your memorandum -- and we'll pull up that -- pull up some more documents here in a second -- there you reported that if you remember correctly, you next heard from Mr. Kessler by phone on November 30. Do you see that?
A. Yep.
Q. And that he had a list of issues which you asked him to email to you; right?
A. Yep.
Q. Other than what's written there, Mr. Lein, do you have a recollection of the telephone conversation with Mr. Kessler that took place on November 30?
A. No, not any more than just asking him to email me the problems. We -- he had the fencing issue and I think it was more than just the -- the fence, the one turbine being -- his property being fenced off on one of the turbine pads, but I kind of remember that he wanted new fence instead of spliced fence and things like that. He wanted -- one of the fences, the wire was on the wrong side of the poles, things like that. Just -- and I just kind of generally remember those issues a little bit.

23

Q. Do you have any specific recollection, Mr. Lein, of Mr. Kessler making a claim to you in that November 30 phone call that a tower had been placed too close to a residence that he and his wife owned?
A. You know, I can't say that I remember that. I remember the subject coming up for the first time at somewhere, but I can't remember when or how, and I remember I looked at it at that time and thought, yes, that's too close.
Q. And if we go -- if we go -- let's go to the second page of that memorandum.
A. Yep.
Q. I'll give you a second to refamiliarize yourself with what's there, starting with that first paragraph. Let me know when you're ready, Mr. Lein.
A. Okay. I read the first paragraph.
Q. In that first paragraph you describe a telephone call between Mr. Kessler and Mr. Schuh in February of 2017; right?
A. Okay. And so -- yeah, that may have been when I first heard that the turbine was too close.
Q. And the second sentence states, "Mr. Kessler raises a new issue with noise from a

24

turbine that is too close to his son's residence."
Do you see that?
A. Yep.
Q. Does that refresh your recollection, Mr. Lein, as to the first time you heard that Mr. Kessler had an issue with the proximity of a turbine to a residence?
A. Yes, it would appear so.
Q. And that paragraph goes on to -- to provide the distance from the turbine to the house.
A. And that was -- we got that from pulling up GIS pictures of the area.
Q. And is that something that -- that you were looking into on your own, Mr. Lein, or were you doing it with Mr. Schuh?
A. I think we both did it, but I don't remember for sure.
Q. If you had been told before February 2017 that there was an issue with a turbine being too proximate to a residence, would you have investigated it at that time, Mr. Lein?
A. Yeah, I would have looked into it right away.
Q. Moving in -- in that second page, second paragraph still, you go on to describe, I guess,

25

some more of your analysis of the issue; right?
A. Yes.
Q. Do you recall, Mr. Lein, what you did other than identify the GIS distance?
A. I think I did go back and listen to the transcript, to the recording, and so what I've said in here is what I got out of that transcript.
Q. Got it. Now, back at the time when the project was being sited or permitted, would you have done any independent analysis of whether a residence was occupied at that time?
A. No. Back before when?
Q. Back while the -- while the project was still under -- under permitting.
A. Oh, no.
Q. All right. Mr. Lein, if you can keep -- keep that memorandum handy because we may -- we may go back and forth a couple of times with it, but you should have another PDF that is labeled November 30, 2015.
A. December 8. And -- no, I can't get it open -- or can't find it here. Can you send it again?
Q. You bet.
MR. BOUGHEY: Counsel, so I can locate it,

26

once you send it, would you give me the date you're referring to so I can find that document?
MR. MAHLBERG: Yeah. And I'll publish it here, too, Lynn.
MR. BOUGHEY: Sure. Great. But if you give me the date now, I'll be able to find it in my stack of documents.
MR. MAHLBERG: Yep. November 30, 2015.
MR. BOUGHEY: Thank you.
MR. MAHLBERG: Let me know when you have that document in front of you, Mr. Lein.
THE WITNESS: I've got it.
Q. (MR. MAHLBERG CONTINUING) All right. So that we're all on the same page, the first page of that document, Mr. Lein, does it appear to be an email from rancher@westriv.com to you?
A. Yes.
Q. Do you recognize this document?
A. Yes.
Q. And what is it?
A. It's the list of issues that I asked him for.
Q. And is this the list of issues that you had asked him for in your November 30 telephone conversation?

27

A. Yes.
Q. Do you recall reviewing the email and the attachment?
A. Yes.
Q. Do you recall whether the list of issues that were on that attachment were the same that Mr. Kessler had raised with you during the telephone call?
A. I think they generally were, but if they were exactly, I can't say that.
Q. As I understand it, Mr. Lein, your testimony is that if as of November 30, 2015, Mr. Kessler had told you that a residence had been -- excuse me, that a turbine had been built too close to a residence, that is something that you would have specifically followed up on; right?
A. Yes.
Q. Do you recall what you did with this document?
A. I believe I forwarded it to Minnesota Power, told them to fix it.
Q. Do you recall any conversation with Mr. Kessler after receiving this but before reaching out to Minnesota Power?
A. No.

28

Q. Do you recall any conversations with Minnesota Power?
A. No. I just sent it to them and -- and told them to let me know when they got it fixed.
Q. Mr. Lein, the time stamp on that email is 8:56 p.m.; right?
A. Yeah, that's what the computer said; right? Yep.
Q. Would you, Mr. Lein, have had a habit of sending an email like this or forwarding it on yet that night or would it have waited until the next business day?
A. I'm expecting it probably didn't -- I'm expecting I probably didn't see it till the next day and would have sent it out the next day.
Q. Okay. Mr. Lein, do you have access there to another document that is titled -- or labeled December 8, 2015?
A. I have a December 8, 2015. It's a response from Minnesota Power.
Q. Got it. So the document that you have in front of you, Mr. Lein, is it dated in the center December 8, 2015, on the first page?
A. Yes.
Q. And it has a stamp of Received by North

29

Dakota Public Service Commission in the upper right as December 8, 2015?
A. Yep. Yes.
MR. MAHLBERG: Okay. And, Mr. Boughey, I should be showing that on the -- the screen sharing here as well. Let me know if it's not there.
MR. BOUGHEY: I am seeing it. Thank you, counsel.
Q. (MR. MAHLBERG CONTINUING) All right. Mr. Lein, do you recognize this document?
A. Yes.
Q. And what is it?
A. It's a Minnesota Power -- it is their answer to the -- the complaint that I had forwarded on to them from Mr. Kessler.
Q. So the list of issues that you had received on November 30?
A. Were being addressed in this memo.
Q. If the issue of a turbine having been placed too close to a residence had been raised by this point, you would expect Minnesota Power to have responded to it; correct?
A. Yes.
Q. And this response does, in fact, not address that issue; correct?

30

A. No, it does not.
Q. Mr. Lein, I want to turn to another document. Do you have one that is labeled January 6, 2016?
A. Hang on, before we do --
Q. Yep.
A. -- if we could back up to your question on the -- the dates on the very first letter and I said it was 2016. All of this had happened by then, so it must have been 2015.
Q. And you're referencing there, Mr. Lein, that first communication that you had with Mr. Kessler that you reference in the first paragraph of the first page of your March 1, 2017, memorandum?
A. Yes.
MR. BOUGHEY: Counsel, I have to note an objection of speculation. I think we need him to actually go back and look at the record. You have asserted that maybe the first date is incorrect, but it's possible it's the third date, the January 5, 2016. That perhaps should be 2017. So I think the only safe thing to do is ask this witness to go back, review his notes, review whatever file he has access to and determine of the

31

three dates listed on those first three paragraphs of his March 1, 2017, memorandum, which of the dates, if any, need to be corrected. Again, I note for the record it's possible that the first date's right and it's the third date that's wrong.
So we need him to look into it separately, which you asked him to do, and then he should supplement that information to counsel. Otherwise, I'd object as it's speculation until he looks at the file.
THE WITNESS: So can I ask you to give me a request to officially look at the dates that -- that you want me to so I have specifically what you're asking me to do?
MR. BOUGHEY: Well, my suggestion is as to your March 1, 2017, memorandum, that you look at all three dates in the first three paragraphs and determine if any of those need to be corrected.
THE WITNESS: Okay. But I remember -- I need to remember to do that, and so send me something.
MR. BOUGHEY: I will send -- I will definitely send that to you with specificity. Thank you.
THE WITNESS: Okay. Thank you.

32

MR. BOUGHEY: And I'll have to do that through your attorney, Mr. Johnson.
THE WITNESS: That works.
MR. BOUGHEY: Thank you.
Q. (MR. MAHLBERG CONTINUING) All right. Mr. Lein, I think we were at whether you have a document that is labeled January 6, 2016.
A. We were -- we were looking at December 8, 2015.
Q. Yeah.
A. Are we done with that one?
Q. Yep. We're done with that one. I'm going to try and move us to the January 6, 2016, which I think will partly address what Mr. Boughey was just asking you to do.
A. Okay. I don't find that one.
Q. I'll send it.
A. Sorry about that.
Q. That's okay.
A. I don't know why this email will only show me three of them.
Q. I will send it separately to you right now.
MR. BOUGHEY: Counsel, could you display that, as well, please?

33

MR. MAHLBERG: Yep.
MR. BOUGHEY: Thank you.
MR. MAHLBERG: While the email is in transit, Mr. Boughey, there should be now displaying on the screen a January 6, 2016 --
MR. BOUGHEY: Yes. And the reason I -- thank you for doing that. But now since I don't have control to make it larger, once you do that I then have to find my copy so I'm able to read it. So we're good. Thanks.
MR. MAHLBERG: I'll try to -- I'll try to enlarge it there so you can see it.
MR. BOUGHEY: Yep. I can see it now. Thank you.
MR. MAHLBERG: Yep.
THE WITNESS: Okay. I have it open.
Q. (MR. MAHLBERG CONTINUING) All right. So, Mr. Lein, we're all looking at a document that is an email from you to rancher@westriv.com dated January 6, 2016, at 12:30 p.m.; right?
A. Yes.
Q. Do you recognize that document?
A. Yeah.
Q. And what is it?
A. I sent the response from Minnesota Power

34

back to Mr. Kessler. And so this is just an email telling him that I'm sending it, the --
Q. And in --
A. -- cover letter.
Q. -- the first -- sorry.
In the first paragraph of your email, it says, "Thank you for your telephone call yesterday."
Do you see that?
A. Yeah.
Q. Do you recall a conversation with Mr. Kessler that took place on January 5, 2016?
A. No.
Q. And in the first sentence it goes on to describe Mr. Kessler's November 30 email of concerns regarding Bison 4 reclamation on your land. Do you see that?
A. Yes.
Q. And was it your understanding at that point in time that the concerns Mr. Kessler had raised related to reclamation?
A. Yes.
Q. And it's your testimony that at this point in time, in January of 2016, Mr. Kessler had not told you that he thought a turbine was built too

35

close to a residence; right?
A. It looks that way from this, yes.
Q. The email in the second paragraph describes a conversation that you had with Daniel McCourtney?
A. Yes.
Q. Do you see that?
A. Yes.
Q. Do you recall that conversation?
A. Generally.
Q. And what do you recall from that conversation?
A. Just calling Dan up and asking him, you know, what's going on with this.
Q. In your experience, is Minnesota Power responsive to landowner concerns on this or other projects?
A. Yes.
Q. Do you recall whether you received a written response from Mr. Kessler to your January 6 email?
A. I do not recall.
Q. Do you recall whether you received a telephone call from Mr. Kessler in response to your email?

36

A. No.
Q. Mr. Lein, I'm going to ask you to go back now to have that March 1, 2017, memorandum up. Let me know when you have it.
A. What was that date again, March 1?
Q. Yes, your March 1, 2017, memorandum.
A. What did it say?
Q. I'm sorry, I did not catch that.
A. I can't seem to find it here. What did it say?
Q. This is your -- this is your -- the memorandum we were discussing earlier that Mr. Schuh has an addendum to.
A. Okay. So it was one of the first -- the original batch you sent me?
Q. Yep. And I can resend it separately here too.
A. Okay. Hang on a second. December 8. Oops.
Q. Some of the confusion, Mr. Lein, the label of the PDF is going to be 10-5-20, John Schuh Deposition.
A. Okay. Got it.
Q. Down at the third paragraph on the first page of the memorandum, it describes --

37

A. There was a cattle guard?
Q. On the -- on the third paragraph it should begin, "On January 5, 2016." Do you see that?
A. No. I think we're looking at different things. I'm looking at -- oh, okay. We are looking at different things. I'm looking at something dated May 15.
Q. That -- keep that handy. We'll use the May 15 one here in a bit, but we're back at the other memorandum.
MR. BOUGHEY: Counsel, if I may interrupt --
THE WITNESS: Yep, I've got it.
MR. BOUGHEY: This is Lynn Boughey here.
THE WITNESS: Yep.
MR. BOUGHEY: Maybe now since we've been over an hour and a half would be a good time for a short break, and during that maybe Mr. Lein would find the March 1, 2017, memorandum, which is a two pager, and on the second page also has John Schuh's addition. So during the break, if he could find that, I think that would be great.
MR. MAHLBERG: That's fine. We can go off the record. Is five minutes enough, everybody?
THE WITNESS: Okay.

38

(Recessed at 10:36 a.m. and reconvened at 10:51 a.m.)
Q. (MR. MAHLBERG CONTINUING) Mr. Lein, we're back on the record now after a short break. You have logged into the Zoom meeting.
Do you see in front of you the March 1, 2017, memorandum?
A. Yes.
Q. I call your attention at this point to the third paragraph.
A. Yes.
Q. If you'd take just a minute and familiarize yourself with that paragraph.
A. Yes. Got it.
Q. Got it. So this is about the same time as the last email we looked at where you had forwarded the Minnesota Power response on to Mr. Kessler; right?
A. Yes.
Q. The paragraph describes a number of things, but it does not mention anything about an issue of a residence [sic] being located too close to a residence; right?
A. No.
Q. If we look to the next paragraph that

39

begins, "On February 6, 2017," do you see that?
A. Yes.
Q. Did you have any communications with Mr. Kessler or Mrs. Kessler between January of 2016 and February of 2017?
A. I don't recall.
Q. If Mr. Kessler had called or written to you about any outstanding issues in that time period, would you have done something about it?
A. Probably, unless I thought they were already being taken care of.
Q. No recollection --
A. I --
Q. -- no recollection --
A. I --
Q. -- Mr. Lein -- I'm sorry, Mr. Lein. Go ahead.
A. No recollection. You know, he had a lot of issues here going on.
Q. Okay.
A. I do remember him refusing to sign that agreement on how they would fix everything.
Q. You remember the Kesslers refusing to sign the agreement proposed by Minnesota Power; is that right?

40

A. Yes.
Q. Okay. I'm going to publish another document here, Mr. Lein. I'm going to enlarge it. Do you see a document that at the top in the upper left has your name?
A. Yes.
Q. And this is an email from Daniel McCourtney to you dated March 1, 2017, at 9:15 a.m.?
A. Yes.
Q. All right. The beginning of Mr. McCourtney's email states, "Hi Jerry, I wanted to follow up on our conversation from yesterday."
Do you see that?
A. Yes.
Q. Do you recall the conversation that you had with Mr. McCourtney at the end of February in 2017?
A. No.
Q. If you continue in that email, the second sentence says, "Attached is a map from Minnesota Power's application for a Certificate of Site Compatibility for its Bison 4 wind project."
Second paragraph goes on to say, "As you will notice, the house location was not recognized

41

as occupied during project development. As a result, it was not included as an exclusion/constraint area."
Do you see that?
A. Yes. So assuming the conversation that I'm not remembering, now that I see the rest of this, was us talking about what is this house.
Q. And when you say you were talking about what is this house, are you -- are you referencing a complaint at that point about the proximity of a turbine to a house?
A. Yes. I would think, just from looking at these documents, that my first reaction when I saw that house sitting there would have been to call them up and say, "What's this?"
Q. So I'm clear on it, Mr. Lein, you don't recall specifically having that conversation; is that right?
A. That's right.
Q. Now I'm going to go back to the March 1 memorandum. Do you recall, Mr. Lein, after you received that information from Mr. McCourtney having a follow-up conversation with Mr. Kessler?
A. No.
Q. Okay. I'm going to go to the second page

42

of the March 1 memorandum, which has an addendum at the --
A. Okay.
Q. -- we'll call it halfway through page 2. Do you see that?
A. Yeah.
Q. The addendum is dated March 2, 2017; is that right?
A. Yep.
Q. The first line of the addendum entry is that Jerry and I followed up with Mr. Kessler via phone.
Do you see that?
A. Yep.
Q. Does that entry in Mr. Schuh's addendum refresh your recollection at all about the follow-up phone call with Mr. Kessler?
A. Not really, but -- other than I think we had a call with him afterwards to try and straighten things out. I kind of remember John -- Jack -- Jack is Mr. Schuh. I kind of remember Mr. Schuh and I having a discussion with him.
Q. And do you remember anything about that discussion?
A. No, not really.

43

Q. And so, Mr. Lein, when you give me an answer that's "no, not really," it causes me to follow up --
A. I remember -- I remember that we set up a meeting. We decided to -- to go out to his house and look at it, but I can't remember if we made that decision right there on that call or if we made the arrangements later.
Q. And you're talking about a -- a site visit out to the Kessler property; is that right?
A. Yes.
Q. And did that site visit take place?
A. Yes.
Q. Did you attend that site visit?
A. Yes.
Q. Do you recall who else from the commission or public utilities division attended?
A. John Schuh did.
Q. And do you have specific recollections, Mr. Lein, about that site visit?
A. Specific? Well, you know, I remember generally some things needed to be done better for -- on the reclamation, and I do recall the house and the turbine and -- and I also recall a cattle guard that he was showing me was not good

44

enough to keep the cattle from going across it. They had to work -- further work on their cattle guard. I recall some fencing that he wasn't happy with, and that's probably about it. We drove around the property and he pointed out rut marks and stuff like that.

Q. Okay. I'm going to publish another document here, Mr. Lein. There should be a document now -- and I will enlarge it slightly -- that is titled Memorandum at the top with a date of May 15, 2017. Do you see that?

A. Yep.

Q. And -- oops. Boy, did I screw that up.

In the lower right-hand corner is MP000076. Do you see that?

A. Yes. Yes.

Q. Do you recognize this document, Mr. Lein?

A. Yes.

Q. And what is it?

A. I think it was our summary from John Schuh and I on our site visit.

Q. Do you recall preparing this memorandum?

A. I don't, but I probably did.

Q. Now, it says in the "From" line that it's from John Schuh and Jerry Lein. Do you see that?

45

A. Yes.

Q. In his deposition, Mr. Schuh testified that he did not have a role in preparing this memorandum and only viewed it at a later date. Is that consistent with your recollection?

A. I don't have a recollection there on how we did this.

Q. Okay. Do you recall --

A. It would have been me writing it, though.

Q. Okay. As we go through the memorandum, there are four numbered paragraphs. Do you see those?

A. Yes.

Q. And the first paragraph describes some reclamation issues; right?

A. Yes.

Q. And the second and the third paragraph describe fencing and cattle guard issues respectively; right?

A. Yes.

Q. And the fourth paragraph, which begins, "Turbine #441," addresses the issue of proximity of a residence to a turbine; right?

A. Yes.

Q. Do you recall conversations at the site

46

visit about the proximity of the turbine to the residence?

A. Yes.

Q. What do you recall about those conversations?

A. The only thing I can -- I really remember about it is I made the remark that it was too close.

Q. Where were you when you made that remark, Mr. Lein?

A. Standing in the yard of the house.

Q. And that remark, was that based on the investigation that you had done that identified the -- the distance looking at GIS between the turbine and the residence?

A. Yes, on that and then me standing there listening and looking at the turbine.

Q. In the second sentence down there in the numbered paragraph 4, you wrote, "The residence was not occupied when Bison 4 was sited and constructed."

Do you see that?

A. Yes.

Q. Do you recall the basis for that statement?

47

A. Only that it was not zoned as an occupied residence, you know, on the maps, and the discussions that we had with the Kesslers and discussions that Minnesota Power had said to me, all of the things that I had heard up to that point indicated that it was not an occupied residence at that time. Plus standing there looking at it, it didn't look like it had been occupied long.

Q. Okay. The next sentence goes on, Mr. Lein, to say that Mr. and Mrs. Kessler state they informed the right-of-way agents before the turbine was sited that they did not want turbines near the residence because their son was planning to occupy it.

Do you see that?

A. Yep.

Q. Do you recall that part of the conversation at the site visit?

A. I recall Mr. Kessler insisting that he had told them that, but that's all I really got from it was his insistence that he had told them that.

Q. Did Minnesota Power agree that -- with what Mr. Kessler was insisting?

A. I don't think that they did.

Q. If they had agreed with that, do you think

48

you would have recorded it in the memorandum?
A. Yeah.
Q. In Mr. Schuh's deposition, Mr. Lein, he described after the site visit a conversation about you collecting information and data and -- and potentially reaching an opinion on the merits of the Kesslers' complaint. Do you recall having such a discussion with Mr. Schuh?
A. Can you just repeat that question?
Q. Yeah. In Mr. Schuh's deposition, there was some discussion about after the site visit, you collecting your information and -- and data and reaching an opinion on the Kesslers' complaint. Do you recall a conversation about that?
A. Okay. I recall -- I'd say yes.
Q. Okay. And what do you recall about that conversation?
A. Well, Mr. Kessler is not easy to please, and I didn't think that Minnesota Power would ever be able to make him happy no matter what they did out there. And I wanted to give the thing a chance to settle. If Mr. Kessler does the work himself and Minnesota Power pays him to do it, then the issue gets resolved. And so that's what I was -- we had those kind of discussions, and I wanted to

49

give it some time and see if they could work out a settlement.
Q. And so did you, in fact, give it some time, Mr. Lein, to see if they could work out a settlement?
A. We did, and there was some back and forth between them.
Q. When you say back and forth between -- between them, do you mean back and forth between the Kesslers and Minnesota Power directly?
A. Yes.
Q. Do you recall being involved at that point?
A. No. We would not have been involved in any settlement discussions. If they can settle, then we'll be out of it.
Q. I'm going to share another document here, Mr. Lein.
A. The reclamation would have -- the reclamation would have needed to get done, though.
Q. Mr. Lein, do you see in front of you another document entitled Memorandum?
A. Yes.
Q. This one's dated September 28, 2018?
A. Yep.

50

Q. And at the bottom it was filed into the iFile as well as into Case Number 13-127; is that right?
A. Yes. And the 13-127 was the Bison 4 siting case where they had some of this stuff filed.
Q. Okay. Mr. Lein, are you familiar with the document?
A. Yes.
Q. And what is it?
A. Just a memo updating the -- where we're at with this situation. It had been a while since we'd put anything in the file, and we decided we needed to get this -- get the thing updated.
Q. Okay. The first paragraph of the memorandum describes you sending a letter to Minnesota Power, emphasizing that reclamation was to be completed during spring of 2018 and requesting the filing of weekly progress reports beginning in April and continuing until completion; right?
A. Yes.
Q. And do you know whether Minnesota Power went on to file those progress reports?
A. Yes, it did.

51

Q. In this period of time beginning with the spring of 2018, do you recall whether you were having direct communications with the Kesslers at all?
A. I don't recall.
Q. And is that you don't recall whether you were or weren't or that you did not have conversations with them?
A. I don't recall whether we had conversations or not.
Q. Okay. Now, down in the sixth paragraph, it begins, "During late August."
A. Okay.
Q. That, I believe, is the first reference on the memo to a conversation that you wrote down or -- or have summarized in this memorandum. Does that refresh your recollection at all as to whether you were having conversations with Mr. Kessler between --
A. There were --
Q. -- the spring of 2018 -- sorry, between the spring of '18 and in August?
A. Okay. Yeah, there were various conversations, attempts to get this done, and so we likely did have some calls and -- well, he seemed

52

to have a problem with letting them on his land to do the work.

Q. Okay. When you say that, do you mean Mr. Kessler had a problem letting Minnesota Power on to complete reclamation work?

A. Yes.

Q. Do you recall a telephone conversation where you discussed that with Mr. Kessler?

A. I recall that he didn't want them in his cattle area, and I think I -- if I'm remembering right here, he had some time when some gate had been left open and some cows got out or something like that, and other instances where he didn't want them on. But what I recall most was when they tried to get out there on his land and he wouldn't let them on because he wanted them to get a -- he said their -- their access easement had expired and he wanted them to pay them -- he wanted them to pay him for a new access easement in order to get on there and do the work.

Q. Do you recall anything else from those conversations in late August or September?

A. No.

Q. Now, between the date of this memorandum, Mr. Lein, which is September 28, 2018, and let's

53

just say up till today, did you have further conversations with Mr. Kessler?

A. I don't believe so.

MR. MAHLBERG: Mr. Lein, I don't have any other questions for you right now. I'm certain Mr. Boughey does and it will be his turn next.

THE WITNESS: Okay. Thank you.

MR. MAHLBERG: Thank you for your time, Mr. Lein.

MR. BOUGHEY: All right. If you'll take off your document, I'll be able to share screen.

MR. MAHLBERG: Oh, sorry, Lynn.

MR. BOUGHEY: That's all right. It'll take me a few moments. I need to bring up the documents I'll be using and then be able to share screen. So if anyone wants to go get a cup of coffee, now is the time to do it. Let's go off the record for about three to five minutes while I pull up the documents. Is that okay with everybody?

MR. MAHLBERG: Fine here.

MR. BOUGHEY: Okay. We're off the record.

(Recessed at 11:17 a.m. and reconvened at 11:26 a.m.)

54

EXAMINATION

BY MR. BOUGHEY:

Q. All right. Mr. Lein, is it okay if I call you Jerry and you can feel free to call me Lynn?

A. That sounds good. Thanks, Lynn.

Q. No problem.

All right. I'm showing you on the screen -- and a lot of these documents you've already seen. And all I'm going to do is just ask some very specific questions as to each one. Remember that you'll have to wait till my question is fully asked and then I will wait for you to fully answer whatever you need to say. Is that okay?

A. Yep.

Q. Fantastic.

All right. So I wanted to show you the first page so we know which exhibit we're looking at and which memorandum. Now, I'm going to highlight on here -- you asked which dates was I concerned about, and there's three --

A. Yeah. I --

Q. I need you to hold --

A. -- I see your 2016 date again.

Q. Okay.

55

A. So I --

Q. I need you to wait until I'm done asking the question.

A. Okay.

Q. So right now I'm just laying the groundwork for something. So the first date is the June 11, 2016, date. And then after that I'm looking down here at the November 30 date. And after that I'm looking at the January 2016 date.

And so as to those three dates, those are the specific dates I would like you to go back and figure out if any of those years are incorrect, and as to the November 30, paragraph two, let's make sure what year that is too.

So just to be clear, on this memorandum, those three dates, one in each of the first three paragraphs are the ones I'd like you to get back with us and make sure we know if there was a typo or if any of the dates need to be corrected.

Are you willing to do that for us, sir?

A. Yes, I will. And, you know, it is entirely possible that I did not have -- well, that I had conversations with Mr. Kessler prior to his call to Commissioner Kalk.

Q. Understandable.

56

A. So that could be that those dates are accurate.

Q. Okay. Well, we just want to make sure. One possibility, as I reviewed this, is in my experience a lot of times people tend to put things in chronological order. If that's true and if 2016 is right on the first one, then the second one might be November 30, 2016, and the third one might be January 5, 2017, but the only way to know that is for you to review the file. It's also possible that the first one is supposed to be 2015. We just want to know what the correct order is and what the correct dates are. And so we'd just like you to look into that for us. Okay?

A. Will do.

Q. Fantastic. Now I'm going to move down to the second page. And, again, it's the same document. And now we're looking at -- in reference to the very first line, "Also, in February 2017," and there's reference to a telephone call with Mr. Kessler with Mr. John Schuh online as well.

And so I have a couple questions relating to that next sentence. It says in your memo, "Mr. Kessler raises a new issue with noise from a turbine that's too close to his son's residence."

57

Is it fair to state that that new issue is new to you but may not be new to Mr. Kessler?

A. I could -- I could go with that.

Q. Okay.

A. It was new to us.

Q. All right.

A. It was new to us.

Q. Got it. That's what I wanted to make sure on.

And so you don't have any inside information or were you a witness at any time where Mr. Kessler or Mrs. Kessler raised this issue with Minnesota Power previously? Do you have any information or been part of any conversation relating to the Kesslers raising this earlier?

A. No.

Q. Okay. Now, there's also a reference where Minnesota Power reports that this residence was unoccupied at the time Bison 4 was permitted and construct -- constructed. Is it fair to state that you received that information from Minnesota Power and you have no personal information as to whether or not that house or residence was occupied or unoccupied during that time frame? Is that a fair statement?

58

A. Yes.

Q. Okay. So you -- the only time you saw the house is when you went there on what we're calling the Good Friday, 2017, I believe, meeting where you were physically present at the house. Other than that, were you ever previously at the house?

A. No, just that -- during that site visit.

Q. Very good.

So any information as to whether or not that house or residence, that structure, was either a residence or occupied, you received that from third persons and it's not anything of your personal knowledge; correct?

A. Correct.

Q. Now, I know you've already described your general conversations with Mr. Kessler on the phone, but I have to ask you now that you've had a chance to review these documents and testify today at your deposition, do you by chance recall Mr. Kessler previously raising the issue of a structure being too close to the turbine that is being used as a residence prior to this memorandum?

A. No, I do not recall that. I do not recall any -- I didn't know about that thing being a problem until --

59

Q. Very good.

A. -- this.

Q. And same with the next paragraph where there's discussions about unoccupied or abandoned residences. I assume that you have no personal knowledge other than the time you actually went on-site much later in the year as to whether -- as to any issues -- factual issues relating to whether it was abandoned, whether it was a residence, whether it was occupied or unoccupied. Is that fair to state?

A. As I say in the paragraph, only the -- it was not identified -- in the siting application they need to identify all the occupied residences, and --

Q. Sure. And --

A. -- [indiscernible].

Q. I'm sorry.

THE REPORTER: I'm sorry. I missed the end of that answer.

THE WITNESS: It was not identified there in the siting application as occupied.

Q. (MR. BOUGHEY CONTINUING) And who prepares the siting application and the map with the black dots showing any occupied residences? Who does

60

that?
A. The applicant.
Q. And do you rely on the applicant, meaning Minnesota Power --
A. Yes. Yes.
MR. MAHLBERG: I'd object as to form in terms of who "you" is in that question, Mr. Boughey.
MR. BOUGHEY: I will rephrase.
Q. (MR. BOUGHEY CONTINUING) Jerry, I need you to wait till I'm all the way done and I will try very hard to make my questions more precise so that we can get through this easier. And so I will ask again.
In -- as part of the application process for this particular project, was it Minnesota Power that prepared the application for this project?
A. Yes, or their consultants.
Q. Okay. And Minnesota Power is the one who submitted what is Exhibit 2, which as you've already seen is a map that shows black dots showing where there are occupied residences; is that correct?
A. Yes.
Q. Does the Public Service Commission rely on

61

the applicant, in this case Minnesota Power, to provide accurate information to the Public Service Commission?
MR. MAHLBERG: Objection as to foundation. You can go ahead and answer it.
THE WITNESS: They would rely upon the information that's provided in the application unless they have a reason to think otherwise.
Q. (MR. BOUGHEY CONTINUING) Okay.
A. Public information, public speakers come in during these hearings and so forth and testify and -- and whatever other reason. If the commission has a reason to look into something further than what's provided in the application, they would do so.
Q. Okay. Now, you then went -- or you then scheduled -- according to this memorandum, you scheduled an on-site meeting at -- where the Kesslers live and -- that's correct?
A. Yes.
Q. Now, I'm showing you what is our page 318, and I can tell you I'm going to have you review this, but these are the notes that the Kesslers had as to the meeting with -- that occurred on Good Friday, April 14, 2017. So I'm going to let you

62

read this on your own. When you're done reading it -- not out loud. When you're done reading it, when you get down to the -- the bottom, what you can see right now, I will then scroll it down to the rest of it. And so if you would please read the one, two, three, four, five major paragraphs that are presently before you. When you're done, tell me, and then I'll scroll down to the lower one. Okay?
A. Yep.
Q. Thank you.
A. Okay.
Q. And I'm just scrolling down. Now you can see the rest of that document from where it has "Tower on 15" to the end. Tell me when you're done reading that, please.
A. Yes.
Q. Okay. Very good. Now I'm going to ask you some questions to find out if reading this refreshed any of your recollections as to the conversation that occurred on Good Friday, 2017. So the first thing I want to go back to is when there was the initial discussion, I think it said near a cattle guard, do you recall standing there and observing a discussion with the Kesslers and

63

anybody from Minnesota Power?
A. I recall the cattle guard and -- and us all standing around it, and the Kesslers weren't -- they'd had trouble with it because the cattle could walk over it or something like that.
Q. Okay. Now, according to Mr. Kessler's notes, he says that we talked about how we were told that the tower was not going to bother our land.
Do you remember Mr. Kessler raising that issue of the tower bothering our land at that time standing by the cattle guard?
A. No. General conversations.
Q. Okay. And I need to find out what you recall, so that's fine.
A. Okay.
Q. Now, Mr. Kessler says, "Scott" -- was one of the persons there from Minnesota Power named Scott, if you recall?
A. Yep, I recall Scott.
Q. Okay. And do you recall Mr. Kessler telling Scott at any point that this tower -- this turbine and tower was not going to bother our land? Do you recall Mr. Kessler raising that issue with Scott at that time?

64

A. No, not specifically. I could add that Mr. Kessler was not in a good mood, and he was --

Q. Well, let's go on to the rest of this.

A. All right.

Q. So then Mr. Kessler has Scott -- he claims that Scott agreed that we did talk about it. Do you recall Scott of Minnesota Power providing any confirmation at that time that they had previously talked about the tower not going to bother our land?

A. No, I do not recall -- I don't recall the conversations or anything.

Q. Do you recall anyone present from Minnesota Power during that conversation by the name of Wade?

A. Yes, Wade was there too. Scott and Wade.

Q. All right. And then the next issue is is do you recall Wade during that conversation asking at any time words to the effect, "Do you have that in writing?" Do you recall anything like that?

A. You know, I can kind of generally remember him asking at one point if you have something in writing, but I don't remember what it was and I don't think I was even paying attention to it. They were squabbling.

65

Q. All right. Would it be fair to state that when Wade asked, "Do you have it in writing," Keith got upset and the discussion became animated?

MR. MAHLBERG: Objection. Mischaracterizes the testimony. Go ahead, Mr. Lein.

THE WITNESS: I recall Keith getting upset and the discussions becoming animated, but I can't remember why. It's just -- he seemed easily upset.

Q. (MR. BOUGHEY CONTINUING) And just to finish out this next line, do you recall Mr. Kessler saying -- and excuse my language -- saying any words to the effect, "Goddammit, we had an agreement and I should not have to have it in writing"? Do you recall Mr. Kessler saying that to anyone from Minnesota Power on that day?

A. Yes, I do recall him saying that and I don't remember to who, and it seems like he said it more than once.

Q. All right. Now I'm going to the next paragraph, and I want to just ask you first what you recall. Do you recall any other discussions standing near the cattle guard before you moved to the house? Do you recall any other aspects of any other discussions with the Kesslers, Minnesota Power, you or John Schuh that you haven't described so far?

66

A. I can't remember. I --

Q. That's fine. And then it says -- I apologize. Go ahead and finish up.

A. Oh, no, I'll just stay with I can't remember. I mean, there were all kinds of discussions going on there, and like I said before, that Mr. Kessler was a bit animated and upset and I was kind of tuning out some of that.

Q. Okay. Next you apparently went up to the yard on Section 15 and were near the house. Do you recall leaving the cattle guard area and going up towards the house?

A. Yeah. Kind of. I mean, I recall that we left that and we went towards the house, but I don't recall the trip.

Q. That's fine. Do you recall how close to the house you ended up getting to it?

A. Right in the front yard.

Q. Okay. And in the front yard, would you then be between the house and Turbine 441 where you were standing?

A. Yes.

Q. And were you -- if you can estimate, how close were you to the house so I can figure out how close you were to the turbine?

67

A. I'd say -- and I don't know how accurate this is, but I'd say a couple hundred feet.

Q. From the turbine or to the house?

A. The house.

Q. Okay.

A. Maybe less.

Q. All right. And now while there, what was your impression based on your sight and hearing in regards to being able to hear Turbine 441 from the house?

A. I thought that it was bothering the house. It was too close.

Q. Okay. And then did you at any time mention to the Kesslers or anybody else while on-site that you would not want to live there that close to the turbine?

A. I don't remember specifically saying that, but I probably did.

Q. Now, in regards to any observations of the house at that time, did you go into the house or observe anything to determine whether or not that house has -- was being used as a residence or had previously been used as a residence?

68

A. No. I recall that there had been a lot of recent work done to it.
Q. But you have no personal knowledge as to when that work was done; correct?
A. No. Another thing I recall is there was a dog that looked like he lived there.
Q. Do you recall Keith Kessler making any statements while you were on-site, both at the house and at the cattle guard, relating to the use of that house as a residence for many years? Do you recall any discussions about that?
A. No. I recall arguments between them and Minnesota Power about whether they had told Minnesota Power that it was a residence, not -- and so forth, but otherwise, no, I don't recall anything.
Q. And I take it you have no personal knowledge of Keith Kessler saying that to Minnesota Power because you weren't present if and when he did that; correct?
A. Correct.
Q. You mentioned earlier that when the issue of the house being too close to the turbine first was brought to your attention, you said you looked at -- I think you called it a CIS. What is that?

69

A. GIS. It's a graphic information system. You can look at maps and things and see where things are at.
Q. And is that something that you are able to get to easily? Is that like on a website and a public access?
A. You can and I can't -- I don't recall if I did or not. You can go on Google and they have maps, and you can see things that way from satellite views, or a graphic information system that's private vended that you buy the program and you can do different things, including distances and stuff like that. And we used the GIS that the commission had in-house.
Q. Do you have any knowledge of what Minnesota Power has access to in regards to any type of graphic information system?
A. I'd assume the same stuff.
Q. Okay.
A. But, no, I don't have any direct knowledge.
Q. Okay. And you said earlier in your testimony that as soon as the issue of the house was raised, you looked at the GIS and you then had a concern that it was -- the tower was too close to

70

that structure; correct?
A. The -- the words that bother me is "as soon as" because I can't remember exactly when we did it, but, yes, we looked at the map.
Q. So to modify the statement, at some time after the concern was raised, you pulled up the GIS and you were able to determine rather easily that the tower was too close to that structure; correct?
A. Yes. And strike the words "rather easily" too.
Q. Okay. Fine. Well, do you recall figuring out the distance at the time you looked at the GIS in reference to Tower 441 -- Turbine 441 and the Kessler house?
A. Say again.
Q. Sure. When you looked up the GIS, were you able to determine through that GIS the distance from the Turbine 441 to the Kessler structure or house?
A. We were able to give our best estimate based on the -- the GIS and the distances on the map, and that's where I came up with the 1100-some feet.
Q. All right. And what is the distance supposed to be from a turbine and any occupied

71

structure or residence?
A. That varies, depending on local ordinances mostly. The commission does not have a -- a set number, and the --
Q. If the applicant -- sorry.
A. Say again. Or go ahead.
Q. If the application has a set number, would you assume that the company is obligated to apply that number in regards to placement of turbines?
MR. MAHLBERG: Objection to form.
THE WITNESS: Yes.
Q. (MR. BOUGHEY CONTINUING) Okay. Now, I have another quick question area relating to the criteria -- there's a statute -- or I should say an Administrative Code that has Energy Conversion Facility Siting Criteria, and I'm trying to find out would that particular provision apply to the wind towers that were part of this project? Just so I know if I'm using the right regulations.
A. Well --
MR. MAHLBERG: Object as to form. Can we get a citation number, Lynn?
MR. BOUGHEY: Certainly.
Q. (MR. BOUGHEY CONTINUING) Mr. Lein, I'm looking right now at Chapter 69-06-08 which is

72

entitled Energy Conversion Facility Siting Criteria, and then subpart 2 is Transmission Facility Corridor and Route Criteria. And I'm just trying to find out if the Energy Conversion Facility Siting Criteria is applicable to this project. If it isn't, fine. Then I've got the wrong regulation.

A. Okay. We --

MR. MAHLBERG: I'll just object to the extent it's calling for a legal conclusion, but go ahead, Mr. Lein.

THE WITNESS: Okay. We have made some rule changes that have changed those sections, and I do not know if the ones you're looking at are the ones that were in effect at the time of the siting.

Q. (MR. BOUGHEY CONTINUING) Okay. We will check with your counsel on that and try and find out what changes were made, when they were made. Now I'm going to go to the question I have then. Again, regardless of which one was in effect at the time that this project was completed, to your knowledge, would this criteria be applicable to this project?

A. Well, again, we're back to the question of what criteria are we talking about? There were

73

new -- at some point around here, there were new rules in place strictly for wind turbines as to what is an avoidance area and so forth.

Q. All right.

A. So I'd ask you --

Q. Let me --

A. -- if what you're looking at has a section in there on additional avoidance areas for wind turbines.

Q. That's exactly what I'm looking at. It has additional exclusion areas for wind energy conversion facilities, which is subdivision 2. Are you telling me that was not in effect when this project was done but was added later?

A. I do not know.

Q. Okay. Then let's -- we'll figure that out later. Here's my specific question then. It's my understanding that Section 15 where this structure is located was not part of Mr. Kessler's land where they were using it or they had an easement, and so I'll put it to you another way. In reference to Section 15 near this Turbine 441, would Mr. Kessler be considered a -- a person who is a nonparticipating landowner? That's what I'm trying to figure out, if you know.

74

MR. MAHLBERG: Objection as to form, relevance, to the extent it's calling for a legal conclusion. Go ahead, Mr. Lein.

THE WITNESS: Well, the question was participating landowner, and so he has -- if I remember right, he has some turbines on his land.

Q. (MR. BOUGHEY CONTINUING) Yes, but that's a different section. What I'm trying to find out is if he has turbines on his land in a different section but he doesn't --

A. Okay.

Q. -- have anything related to Section 15, does that make him a nonparticipating landowner as to Turbine 441 and Section 15, if you know?

MR. MAHLBERG: Objection.

THE WITNESS: Again, I --

MR. MAHLBERG: Hold on -- hold on, Mr. Lein. Objection as to relevance. Objection to the extent it's calling for a legal conclusion. These administrative regulations speak for themselves and we don't even know what was applicable. Go ahead, Mr. Lein.

THE WITNESS: Okay. And my answer is I don't know if it does or not. I would consider him a participating landowner because he has turbines.

75

Q. (MR. BOUGHEY CONTINUING) Okay. All right. We will figure that out at some point. Thank you.

In any event, the Turbine 441 was, in your opinion, too close to that building or house if it was inhabited; is that correct?

A. At the time that the project was constructed.

Q. What if it was inhabited prior to the time it was constructed -- constructed and was considered a residence -- residence by the owner?

A. That, I don't know. I think we are looking at a legal conclusion on the language and the -- and the statutes.

Q. All right. Let's go back now -- way back to the hearing, which I believe was -- let me look at my notes. I believe it was March 13, 2013, the hearing you previously testified being at. Do you recall describing that today to us?

A. Yes, I do.

Q. I have a couple of follow-up questions of some things I'm not positive about. The first thing I want to talk about with you is -- and I wrote this down. You said that the maps were back behind the tables where all the participants were

76

at and in front of the audience. So I want to try and ask you a little more -- in more detail where the maps were.

So, first of all, I understand that you were in the courtroom and that's where the hearing was held; is that correct?

A. Yes.

Q. Okay. And so then you have an administrative law judge up in front and he's facing towards the audience; correct?

A. Yes.

Q. Then -- and I've been in that courtroom a lot. Then I assume we have the -- the tables which are for the attorneys and the participants to be on, and then behind that is like -- we call it a bar where there's a -- you know, the public is separated. Do you recall that in that particular room?

A. No, I don't. There would have been a podium right there -- back there, too, for witnesses to stand at if I remember right.

Q. Sure. So as I'm looking at the judge, I see the judge, then I see some tables, and then there's a podium. Do I have it right?

A. Yes.

77

Q. Okay. And in reference to where the maps were at, and it sounds like there were two of them, would they be facing towards the judge or towards the audience, if you recall?

A. And, you know, that I can't recall exactly how they were, but they would have been placed so that the commissioners can see them and that the audience can see them too. And so that's our objective in where we put the maps and how we put them. That's all I can remember about it.

Q. That's fine. Now, you just mentioned "so that the commissioners can see them." Isn't it correct that at this hearing an administrative law judge was assigned and his name was Patrick Ward and the commissioners were not present. Is that your recollection, sir?

A. No, I don't believe so. I could be wrong, but I believe that --

Q. That's all right.

A. -- we had the commissioners there too.

Q. In any event, at some point you previously testified that at some point the -- there was a break in the action and landowners were coming up and looking at the maps that were displayed; is that correct?

78

A. Yes.

Q. And you specifically stated you did recall Mr. Kessler being one of those people; correct?

A. Well, no, he just mixed into the crowd at that point. So as to, you know, remembering him specifically, no.

Q. Well, let me restate what you said earlier.

A. Let's -- let me restate that again. If I walked up to Mr. Kessler on the street today, I wouldn't remember him.

Q. Okay. Let me review what you said earlier so I can go into that. I remember a discussion that someone from Minnesota Power wanted to talk to the Kesslers. They wanted to get together at some point and have a discussion off the record.

Do you recall stating that earlier today?

A. Yes.

Q. Okay. So now that's what I'm focused on, is you recall the Kesslers talking to somebody from Minnesota Power during apparently -- was it during the break?

A. I don't remember when or where, but it was -- they wanted to -- they wanted to talk to him about what he was bringing up in his testimony.

79

Q. Okay. And they said -- according to what you just described a while ago, they said that -- that they would want to talk to them later about that off the record; correct?

A. I don't know if it was later or if we had a break or what, but in my mind, it was an attempt from Minnesota Power to resolve any problems that he had rather than him bringing them up on the stand.

Q. And then what did you observe next? Did anybody -- did Mr. Kessler or the person from Minnesota Power that was talking to him, did they leave the area? Did they stay there? What did you observe?

A. I don't remember. All I remember is that they wanted to talk to them and I believe they did.

Q. Thus when you previously testified today that Minnesota Power was asking for a conversation and then you said -- when asked, "Did they have a conversation," you said, "I believe so." So that was the prior testimony today and that's still correct; right?

A. Yes.

MR. BOUGHEY: All right. It is 12:04. I would like to take just a moment to call my client

80

and see if I have forgotten anything. I can tell, counsel, that I think I'm done, but I have to at least talk to my client and make sure that's the case.

So with counsel's permission, I would like to go off the record for, say, five minutes, and when I show back up, we can go back on the record. Is that all right?

MR. MAHLBERG: Sounds fine.

MR. BOUGHEY: Fantastic. I'm going to figure out how to use this system and do just that. All right. We're off the record.

(Recessed at 12:05 p.m. and reconvened at 12:13 p.m.)

MR. BOUGHEY: We are back on the record.

Jerry, I thank you very much for your time. I do not have any additional questions. Your attorney, Mr. Johnson, will --

MR. MAHLBERG: Wait.

MR. BOUGHEY: Wait. Wait. I'm sorry. Patrick may have some additional questions. My mistake. And then once that's done, he will -- since it's his deposition, he will either advise you of how to sign or his attorney, Brian Johnson -- your attorney will do that. I

81

apologize, counsel. I have no further questions of this witness.

MR. MAHLBERG: And, Mr. Lein, I have a brief follow-up just so I'm clear on it.

FURTHER EXAMINATION

BY MR. MAHLBERG:

Q. There was some testimony in response to Mr. Boughey's questions about the house being -- the words were "too close to the turbine" or vice versa, I suppose, is correct. And I just want to make sure I understand that answer in context.

You're saying that if that house were an occupied residence at the time of permitting and subject to a 1400-foot setback, that the turbine is then within 1400 feet and that therefore too close to the residence; is that what you --

MR. BOUGHEY: Sorry, counsel, I have to note an objection as to simply assuming facts not in evidence and mischaracterization of the facts that are in evidence. So I'll just leave that objection out there. Thank you.

Q. (MR. MAHLBERG CONTINUING) Mr. Lein, you can go ahead and answer if you recall the question.

A. Okay. When I said "too close," I was thinking to an occupied residence.

82

Q. Got it. And so when you testified --

A. So --

Q. -- about -- I'm sorry, Mr. Lein. I'm talking over you here. I'll let you finish and then I'll go.

A. Well, we didn't say anything about whether that residence was occupied at the time, so I -- I don't know if -- if the question even gets to that. But I think it was too close to where somebody lives.

Q. All right. When --

A. Unless that was a separate question.

Q. That's fine. So when you say "too close" or that a turbine is too close to a residence, if I understand you correctly, you're referring to it being too close to a residence if that residence is occupied when permitting is occurring; correct?

A. Right.

MR. BOUGHEY: And I object to the form and I object to assuming facts because it might involve prior dates before permitting. And so I object as to vague, lack of foundation and assuming facts not in evidence and contrary to facts that are in evidence. Thank you, counsel.

Q. (MR. MAHLBERG CONTINUING) Mr. Lein, did I

83

hear you say "right" in response to my question?

A. If I understood what you were asking, that would -- the answer would be that's correct.

MR. MAHLBERG: Okay. That's all I wanted to follow up on to make sure I was tracking the context. I don't have further questions on that.

MR. BOUGHEY: And I do have one follow-up question.

FURTHER EXAMINATION

BY MR. BOUGHEY:

Q. In determining whether or not a residence is occupied, is it fair to state that all the facts relating to the use of that property need to be looked at, Jerry?

MR. MAHLBERG: Object as to form, to the extent it's calling for a legal conclusion, to the extent it's calling for speculation and a lack of foundation. Go ahead.

Q. (MR. BOUGHEY CONTINUING) Go ahead and answer, sir.

A. So if -- if we could hear that question again.

MR. BOUGHEY: Sure. And I note for the record that the objection made will be applied to this question.

84

Q. (MR. BOUGHEY CONTINUING) And my question was isn't it correct that in determining whether or not a house or structure is occupied, all the facts need to be taken into account? Isn't that correct, Jerry, question mark?

A. Sure.

Q. All right. Now, I have to assume that in deciding whether to place -- from your standpoint from the Public Service Commission deciding whether or not a residence is being -- is occupied or not occupied is something that the Public Service Commission wants to look over -- wants to look at everything to make that determination; is that a fair statement?

MR. MAHLBERG: Object as to foundation, as to form. Don't think this witness gets to speak for the Public Service Commission.

Q. (MR. BOUGHEY CONTINUING) Answer if you can, sir.

A. I would agree that that's something that the commission would have to decide what they are considering, if they're considering whether it's occupied or not.

Q. And it's my understanding from a previous deposition, I believe of Mr. Schuh, that the Public

85

Service Commission doesn't have a specific definition as unoccupied and occupied. Is that a fair statement, sir?

A. Yes. That's correct.

Q. Okay. And just out of curiosity, if somebody is living in that location overnight, living there, staying there, and they go to Bismarck for the weekend, in your view is that structure still occupied?

MR. MAHLBERG: I'm going to object as to relevance, to speculation and every other basis that's out there.

THE WITNESS: And so I take it you guys want me to answer anyway?

Q. (MR. BOUGHEY CONTINUING) Yes, please. Go ahead.

A. All right. If I go away for the weekend and I would expect when I come home my house had been occupied. It was still an occupied residence and had been so the whole time.

Q. Now, how about if somebody is a snowbird and during that cold winter they go to Arizona for a month or two or three? Same answer?

MR. MAHLBERG: Same -- same objections. We're now getting into the world of -- of

86

speculation and you're having this witness answer questions that are up to the commission to answer.

Q. (MR. BOUGHEY CONTINUING) Answer if you can, sir.

A. Yeah, I -- I -- personally I agree that the place is still occupied if somebody's using it for a winter or a summer residence.

MR. BOUGHEY: Okay. I have nothing further. I believe -- Mr. Mahlberg, anything else, or shall we allow Brian to give him the read-and-sign speech?

MR. MAHLBERG: Yeah. Either Brian can do it or I can do it. Doesn't matter.

MR. JOHNSON: Go ahead. Yours will be much better than mine.

MR. MAHLBERG: Well, we'll see about that.

Mr. Lein, you have a right to read and review the deposition and to make corrections as necessary and as allowed by the Rules of Civil Procedure applicable to this action. You can also waive that right to read and sign. But you need to tell us now whether you exercise that right or not.

THE WITNESS: I imagine there will be a transcript?

MR. MAHLBERG: That is -- that is correct.

87

And so you have an opportunity to read that transcript and provide any corrections to it consistent with the rules or to waive the right to do that.

MR. BOUGHEY: And, sir --

THE WITNESS: Okay.

MR. BOUGHEY: -- this is Lynn Boughey. I would request you read it because we have to have you check those dates. And so unless your attorney instructs you otherwise, I can tell you it's our preference to have you read it.

THE WITNESS: And I have no desire to correct -- or, I mean, to waive my right to correct things if I see something wrong in there. So the answer would be, no, I don't grant any waiver.

MR. MAHLBERG: Very good. The witness will read and sign and I think we're done.

MR. BOUGHEY: And then as soon as we go off the record, I have one more little thing.

(Concluded at 12:23 p.m., the same day.)

CERTIFICATE OF DEPONENT

I, **JERRY LEIN**, the deponent in the foregoing deposition,

DO HEREBY CERTIFY that I have read the foregoing and attached 87 typewritten pages, and that the same are, with changes or corrections, if any, set forth on the following correction sheets (setting forth the reason assigned for each change or correction, and duly signed by me), a full, true, accurate and correct transcript of my deposition on oral examination given at the time and place therein indicated.

Dated this _____ day of _____, 2020.

_____

JERRY LEIN

CERTIFICATE OF COURT REPORTER AND NOTARY PUBLIC

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

BE IT KNOWN that I, Stephanie A. Smith, a Registered Professional Reporter, took the deposition herein pursuant to notice or agreement; that I was then and there a Notary Public in and for said County and State; that I exercised the power of that office in taking said deposition; that by virtue thereof, I was then and there authorized to administer an oath; that said witness, before testifying, was duly sworn to testify the truth, the whole truth and nothing but the truth relative to the cause specified therein;

That the said deposition, having been transcribed, was subsequently submitted by me to the said witness, who thereupon read the said deposition and made changes or corrections, if any, as appear noted therein, along with the reason for each thereof, and that the said deposition was thereupon subscribed to by the said witness; that the examination was conducted at the time and place therein specified on behalf of the respective parties as therein indicated; that the foregoing and attached typewritten pages contain a full, true, accurate and correct transcript of my shorthand notes, as they purport to contain, then and there taken;

That I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which said deposition is taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

WITNESS MY HAND AND SEAL this _____ day of _____, 2020.

_____
STEPHANIE A. SMITH
Court Reporter and Notary Public
My Commission expires: 6-19-22

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#441 [1] - 45:22

'

'18 [1] - 51:22

1

1 [17] - 9:24, 15:19, 16:1, 16:7, 16:25, 18:12, 30:14, 31:2, 31:16, 36:3, 36:5, 36:6, 37:19, 38:6, 40:8, 41:20, 42:1
10-5-20 [3] - 15:18, 15:25, 36:21
10-5-2020 [1] - 16:7
102 [1] - 16:1
107 [1] - 2:4
10:36 [1] - 38:1
10:51 [1] - 38:2
11 [3] - 19:22, 20:13, 55:7
1100-some [1] - 70:22
11:17 [1] - 53:22
11:26 [1] - 53:23
1202 [1] - 2:4
12:04 [1] - 79:24
12:05 [1] - 80:13
12:13 [1] - 80:14
12:23 [1] - 87:20
12:30 [1] - 33:20
13 [4] - 8:5, 10:5, 11:9, 75:17
13-127 [2] - 50:2, 50:4
14 [1] - 61:25
1400 [1] - 81:15
1400-foot [1] - 81:14
15 [9] - 37:7, 37:9, 44:11, 62:15, 66:12, 73:18, 73:22, 74:12, 74:14
1a [4] - 9:4, 9:11, 9:24, 9:25

2

2 [11] - 9:24, 11:2, 11:4, 11:6, 11:16, 17:2, 42:4, 42:7, 60:20, 72:2, 73:12
20-some [1] - 6:18
200 [1] - 2:12
2013 [4] - 8:5, 10:5, 11:9, 75:17
2014 [1] - 21:11
2015 [11] - 20:13, 25:20, 26:8, 27:12, 28:18, 28:19, 28:23, 29:2, 30:10, 32:9, 56:11
2016 [19] - 19:22, 20:9, 20:13, 30:4, 30:9, 30:22, 32:7, 32:13, 33:5, 33:20, 34:12, 34:24, 37:3, 39:4, 54:24, 55:7, 55:9, 56:6, 56:8
2017 [23] - 16:2, 18:13, 23:21, 24:18, 30:14, 30:22, 31:2, 31:16, 36:3, 36:6, 37:19, 38:7, 39:1, 39:5, 40:8, 40:18, 42:7, 44:11, 56:9, 56:19, 58:4, 61:25, 62:21
2018 [5] - 49:24, 50:18, 51:2, 51:21, 52:25
2020 [4] - 1:19, 4:8, 88:16, 89:22
28 [2] - 49:24, 52:25

3

30 [15] - 1:19, 6:18, 20:7, 22:6, 22:14, 23:3, 25:20, 26:8, 26:24, 27:12, 29:17, 34:15, 55:8, 55:13, 56:8
30th [1] - 4:7
318 [1] - 61:21

4

4 [9] - 7:15, 8:2, 8:7, 34:16, 40:23, 46:19, 46:20, 50:4, 57:19
4000 [1] - 2:11
408 [1] - 2:17
441 [8] - 66:22, 67:11, 70:13, 70:18, 73:22, 74:14, 75:4

5

5 [6] - 3:3, 20:9, 30:22, 34:12, 37:3, 56:9
54 [1] - 3:4
55402-1425 [1] - 2:12
58505-0480 [1] - 2:18
58554-1202 [1] - 2:5

6

6 [7] - 30:4, 32:7, 32:13, 33:5, 33:20, 35:20, 39:1
6-19-22 [1] - 89:24
600 [1] - 2:18
69-06-08 [1] - 71:25

8

8 [7] - 25:21, 28:18, 28:19, 28:23, 29:2, 32:8, 36:18
81 [1] - 3:5
83 [1] - 3:6
87 [1] - 88:7
88 [1] - 3:8
89 [1] - 3:9
8:56 [1] - 28:6

9

9:15 [1] - 40:9
9:35 [1] - 4:8

A

a.m [6] - 4:8, 38:1, 38:2, 40:9, 53:22, 53:23
abandoned [2] - 59:4, 59:9
able [12] - 9:10, 15:17, 26:6, 33:9, 48:20, 53:11, 53:15, 67:11, 69:4, 70:7, 70:17, 70:20
above-entitled [1] - 4:3
access [6] - 28:16, 30:25, 52:17, 52:19, 69:6, 69:16
according [3] - 61:17, 63:6, 79:1
account [1] - 84:4
accurate [5] - 56:2, 61:2, 67:3, 88:12, 89:16
action [4] - 77:23, 86:20, 89:19, 89:20
add [1] - 64:1
added [2] - 16:15, 73:14
addendum [6] - 16:16, 36:13, 42:1, 42:7, 42:10, 42:15
addition [1] - 37:21
additional [4] - 73:8, 73:11, 80:17, 80:21
address [2] - 29:25, 32:14
addressed [1] - 29:18
addresses [1] - 45:22
addressing [1] - 7:4
administer [1] - 89:8
administrative [3] - 74:20, 76:9, 77:13
Administrative [1] - 71:15
advance [1] - 7:20
advise [2] - 5:23, 80:23
afterwards [1] - 42:19
agents [1] - 47:11
ago [2] - 10:8, 79:2
agree [3] - 47:22, 84:20, 86:5
agreed [2] - 47:25, 64:6
agreement [4] - 39:22, 39:24, 65:14, 89:5
ahead [13] - 39:17, 61:5, 65:5, 66:5, 71:6, 72:11, 74:3, 74:22, 81:23, 83:18, 83:19, 85:16, 86:14
ALLETE [1] - 1:8
allow [1] - 86:10
allowed [1] - 86:19
ALSO [1] - 2:22
analysis [2] - 25:1, 25:10
analyst [4] - 6:15, 6:17, 7:14, 7:17
AND [2] - 89:1, 89:21
animated [3] - 65:3, 65:8, 66:9
answer [18] - 10:8, 29:14, 43:2, 54:13, 59:20, 61:5, 74:23, 81:11, 81:23, 83:3, 83:20, 84:18, 85:14, 85:23, 86:1, 86:2, 86:3, 87:15
anyway [1] - 85:14
apologize [2] - 66:5, 81:1
appear [3] - 24:8, 26:15, 89:12
APPEARANCES [1] - 1:23
appearing [1] - 4:9
Appearing [4] - 2:7, 2:14, 2:20, 2:23
applicable [4] - 72:5, 72:22, 74:22, 86:20
applicant [4] - 60:2, 60:3, 61:1, 71:5
application [10] - 8:6, 40:22, 59:13, 59:22, 59:24, 60:15, 60:17, 61:7, 61:14, 71:7
applied [1] - 83:24
apply [2] - 71:8, 71:17
April [2] - 50:20, 61:25
area [7] - 24:12, 41:3, 52:10, 66:13, 71:13, 73:3, 79:13
Areas [1] - 11:5
areas [2] - 73:8, 73:11
arguments [1] - 68:12
Arizona [1] - 85:22
arrangements [1] - 43:8
AS [1] - 1:23
aspects [1] - 65:24
asserted [1] - 30:20
assigned [3] - 7:15, 77:14, 88:10
assistance [1] - 10:21
assume [6] - 11:25, 59:5, 69:18, 71:8, 76:13, 84:7
assuming [4] - 41:5, 81:18, 82:20, 82:22
attached [3] - 40:21, 88:7, 89:15
attachment [2] - 27:3, 27:6
attachments [2] - 9:15, 9:21
attempt [1] - 79:6
attempted [1] - 9:7
attempts [1] - 51:24

attend [1] - 43:14
attendance [1] - 12:9
attended [1] - 43:17
attending [1] - 8:4
attention [3] - 38:9, 64:24, 68:24
attorney [7] - 32:2, 80:18, 80:24, 80:25, 87:9, 89:18, 89:20
attorneys [1] - 76:14
Attorneys [3] - 2:3, 2:11, 2:17
audience [7] - 8:18, 10:19, 10:22, 76:1, 76:10, 77:4, 77:8
audio [1] - 5:1
August [3] - 51:12, 51:22, 52:22
authorized [1] - 89:8
Avenue [2] - 2:4, 2:18
avoidance [2] - 73:3, 73:8
Avoidance [1] - 11:5

B

bar [1] - 76:16
based [3] - 46:12, 67:10, 70:21
basis [2] - 46:24, 85:11
bat [1] - 18:6
batch [1] - 36:15
BE [1] - 89:4
became [1] - 65:3
becoming [1] - 65:8
began [2] - 5:10, 17:17
begin [1] - 37:3
beginning [3] - 40:11, 50:20, 51:1
begins [3] - 39:1, 45:21, 51:12
behalf [4] - 4:9, 4:21, 4:23, 89:14
behind [3] - 8:17, 75:25, 76:15
belief [1] - 15:5
best [2] - 5:25, 70:20
bet [1] - 25:24
better [3] - 5:24, 43:22, 86:15
between [12] - 23:20, 39:4, 46:14, 49:7, 49:8, 49:9, 51:19, 51:21, 52:24, 66:22, 68:12
beyond [1] - 6:5
big [2] - 9:23, 14:13
Bismarck [2] - 2:18, 85:8
Bison [9] - 7:15, 7:18, 8:2, 8:7, 34:16, 40:23, 46:20, 50:4, 57:19
bit [3] - 22:25, 37:9, 66:9
black [3] - 11:19, 59:24, 60:21
bother [4] - 63:8, 63:23, 64:9, 70:2
bothering [2] - 63:11, 67:13
bottom [5] - 16:20, 16:23, 16:24, 50:1, 62:3
BOUGHEY [52] - 2:2, 4:23, 9:10, 25:25, 26:5, 26:9, 29:7, 30:17, 31:15, 31:22, 32:1, 32:4, 32:24, 33:2, 33:6, 33:13, 37:11, 37:14, 37:16, 53:10, 53:13, 53:21, 54:2, 59:23, 60:9, 60:10, 61:9, 65:10, 71:12, 71:23, 71:24, 72:16, 74:7, 75:1, 79:24, 80:10, 80:15, 80:20, 81:17, 82:19, 83:7, 83:10, 83:19, 83:23, 84:1, 84:18, 85:15, 86:3, 86:8, 87:5, 87:7, 87:18
Boughey [8] - 2:3, 29:4, 32:14, 33:4, 37:14, 53:6, 60:8, 87:7
Boughey's [1] - 81:8
Boughey..... [1] - 3:6
Boughey..... [1] - 3:4
Boulevard [1] - 2:18
boundaries [1] - 19:6
box [1] - 16:6
Box [1] - 2:4
boy [1] - 44:13
break [13] - 6:6, 6:10, 10:15, 13:9, 13:17, 13:23, 14:25, 37:18, 37:21, 38:4, 77:23, 78:22, 79:6
breaks [2] - 12:4, 12:6
Brian [3] - 80:24, 86:10, 86:12
BRIAN [1] - 2:16
brief [1] - 81:4
briefly [1] - 5:9
bring [1] - 53:14
bringing [3] - 8:20, 78:25, 79:8
brought [2] - 19:12, 68:24
building [2] - 5:19, 75:5
built [2] - 27:14, 34:25
BURLEIGH [1] - 89:3
business [1] - 28:12
buy [1] - 69:11
BY [4] - 5:7, 54:2, 81:6, 83:10
Byron [1] - 2:10

C

capability [1] - 8:7
care [1] - 39:11
case [5] - 17:12, 18:2, 50:5, 61:1, 80:4
Case [2] - 1:7, 50:2
catch [1] - 36:8
cattle [13] - 37:1, 43:25, 44:1, 44:2, 45:18, 52:10, 62:24, 63:2, 63:4, 63:12, 65:23, 66:13, 68:9
causes [2] - 15:4, 43:2
center [1] - 28:22
certain [1] - 53:5
certainly [1] - 71:23
CERTIFICATE [4] - 3:8, 3:9, 88:1, 89:1
certificate [2] - 8:6, 15:13
Certificate [1] - 40:22
CERTIFY [1] - 88:6
chance [4] - 6:2, 48:21, 58:18, 58:19
change [1] - 88:10
changed [1] - 72:13
changes [4] - 72:13, 72:18, 88:8, 89:12
Chapter [1] - 71:25
check [2] - 72:17, 87:9
chronological [1] - 56:6
CIS [1] - 68:25
citation [1] - 71:22
Civil [1] - 86:19
claim [1] - 23:2
claims [1] - 64:5
clarify [1] - 4:25
clear [4] - 20:21, 41:16, 55:15, 81:4
client [2] - 79:25, 80:3
close [27] - 23:4, 23:10, 23:23, 24:1, 27:15, 29:20, 35:1, 38:22, 46:8, 56:25, 58:21, 66:18, 67:1, 67:2, 67:14, 67:18, 68:23, 69:25, 70:8, 75:5, 81:9, 81:15, 81:24, 82:9, 82:13, 82:14, 82:16
Code [1] - 71:15
coffee [1] - 53:17
cold [1] - 85:22
collecting [2] - 48:5, 48:12
coming [2] - 23:7, 77:23
commencing [1] - 4:8
COMMISSION [1] - 1:3
commission [12] - 6:22, 7:2, 7:3, 7:9, 15:13, 17:3, 43:16, 61:13, 69:14, 71:3, 84:21, 86:2
Commission [10] - 2:16, 6:14, 29:1, 60:25, 61:3, 84:9, 84:12, 84:17, 85:1, 89:24
Commissioner [2] - 19:23, 55:24
commissioners [4] - 77:7, 77:12, 77:15, 77:20
commit [1] - 18:9
communication [4] - 14:1, 20:22, 21:18, 30:12
communications [3] - 21:16, 39:3, 51:3
company [2] - 7:11, 71:8
Compatibility [1] - 40:23
COMPLAINANTS [1] - 2:6
Complainants/Petitioners [1] - 1:6
complaint [7] - 7:8, 8:1, 13:14, 29:14, 41:10, 48:7, 48:13
complaints [1] - 7:5
complete [1] - 52:5
completed [2] - 50:18, 72:21
completion [1] - 50:20
computer [1] - 28:7
concern [2] - 69:25, 70:6
concerned [1] - 54:21
concerns [3] - 34:16, 34:20, 35:16
Concluded [1] - 87:20
conclusion [5] - 72:10, 74:3, 74:19, 75:13, 83:16
conducted [2] - 4:18, 89:14
confirm [2] - 9:8, 9:10
confirmation [1] - 64:8
confusion [1] - 36:20
connection [1] - 20:23
consider [1] - 74:24
considered [2] - 73:23, 75:11
considering [2] - 84:22
consistent [2] - 45:5, 87:3
construct [1] - 57:20
constructed [5] - 46:21, 57:20, 75:8, 75:10
construction [1] - 21:12
consultants [1] - 60:18
contain [2] - 89:15, 89:16
context [2] - 81:11, 83:6
continue [1] - 40:20
continued [1] - 18:8
continuing [1] - 50:20
CONTINUING [22] - 9:13, 26:13, 29:9, 32:5, 33:17, 38:3, 59:23, 60:10, 61:9, 65:10, 71:12, 71:24, 72:16, 74:7, 75:1, 81:22, 82:25, 83:19, 84:1, 84:18, 85:15, 86:3
contrary [1] - 82:23
control [1] - 33:8
conversation [27] - 14:10, 14:19, 21:7, 22:13, 26:25, 27:22, 34:11, 35:4, 35:9, 35:12, 40:13, 40:16, 41:5, 41:17, 41:23, 47:18, 48:4,

48:14, 48:17, 51:15, 52:7, 57:14, 62:21, 64:14, 64:18, 79:18, 79:20
conversations [16] - 10:24, 12:12, 21:11, 28:1, 45:25, 46:5, 51:8, 51:10, 51:18, 51:24, 52:22, 53:2, 55:23, 58:16, 63:13, 64:12
conversion [1] - 73:12
Conversion [3] - 71:15, 72:1, 72:4
copy [1] - 33:9
corner [2] - 16:6, 44:14
correct [34] - 5:23, 18:13, 29:22, 29:25, 56:12, 56:13, 58:13, 58:14, 60:23, 61:19, 68:4, 68:20, 68:21, 70:1, 70:8, 75:6, 76:6, 76:10, 77:13, 77:25, 78:3, 79:4, 79:22, 81:10, 82:17, 83:3, 84:2, 84:4, 85:4, 86:25, 87:13, 88:12, 89:16
corrected [3] - 31:3, 31:18, 55:19
correction [2] - 88:9, 88:11
corrections [4] - 86:18, 87:2, 88:8, 89:12
correctly [2] - 22:5, 82:15
Corridor [1] - 72:3
counsel [17] - 4:8, 4:15, 4:16, 9:11, 25:25, 29:8, 30:17, 31:8, 32:24, 37:11, 72:17, 80:2, 81:1, 81:17, 82:24, 89:18, 89:20
counsel's [1] - 80:5
COUNTY [1] - 89:3
County [1] - 89:6
couple [7] - 5:17, 18:3, 19:19, 25:18, 56:22, 67:4, 75:21
COURT [2] - 3:9, 89:1
Court [1] - 89:24
court [4] - 4:20, 5:20, 6:1, 14:6
courtroom [2] - 76:5, 76:12
cover [1] - 34:4
COVID-19 [1] - 4:17
cows [1] - 52:12
create [2] - 17:20, 17:24
criteria [3] - 71:14, 72:22, 72:25
Criteria [4] - 71:16, 72:2, 72:3, 72:5
crowd [1] - 78:4
cup [1] - 53:16
curiosity [1] - 85:5
cut [1] - 19:8

D

D.J [1] - 2:9
DAKOTA [2] - 1:2, 89:2
Dakota [6] - 2:5, 2:16, 2:18, 4:6, 6:13, 29:1
Dan [1] - 35:13
Daniel [2] - 35:4, 40:7
data [2] - 48:5, 48:12
date [16] - 18:12, 19:20, 26:1, 26:6, 30:20, 30:21, 31:5, 36:5, 44:10, 45:4, 52:24, 54:24, 55:6, 55:7, 55:8, 55:9
date's [1] - 31:4
Dated [1] - 88:15
dated [7] - 16:1, 28:22, 33:19, 37:7, 40:8, 42:7, 49:24
dates [15] - 20:19, 30:8, 31:1, 31:3, 31:12, 31:17, 54:20, 55:10, 55:11, 55:16, 55:19, 56:1, 56:13, 82:21, 87:9
Deanna [3] - 1:5, 12:9, 12:19
December [7] - 25:21, 28:18, 28:19, 28:23, 29:2, 32:8, 36:18
decide [2] - 17:10, 84:21
decided [3] - 18:9, 43:5, 50:13
deciding [3] - 17:8, 84:8, 84:9
decision [1] - 43:7
definitely [1] - 31:23
definition [1] - 85:2
dep [1] - 16:1
Department [1] - 2:17
deponent [1] - 88:4
DEPONENT [2] - 2:19, 88:1
DEPONENT..... [1] - 3:8
deposed [1] - 5:12
DEPOSITION [2] - 1:14, 3:2
deposition [20] - 4:17, 5:9, 5:11, 7:21, 15:20, 45:2, 48:3, 48:10, 58:19, 80:23, 84:25, 86:18, 88:5, 88:13, 89:5, 89:7, 89:10, 89:12, 89:13, 89:19
Deposition [4] - 4:2, 15:19, 16:6, 36:22
describe [6] - 6:24, 17:8, 23:19, 24:25, 34:15, 45:18
described [6] - 7:6, 19:15, 48:4, 58:15, 66:1, 79:2
describes [5] - 35:4, 36:25, 38:20, 45:14, 50:16
describing [2] - 14:1, 75:19
desire [1] - 87:12
detail [1] - 76:2
determination [1] - 84:13
determine [5] - 30:25, 31:18, 67:23, 70:7, 70:17
determining [2] - 83:11, 84:2
development [1] - 41:1
different [6] - 6:21, 37:4, 37:6, 69:12, 74:8, 74:9
difficult [1] - 6:3
direct [2] - 51:3, 69:20
directly [2] - 14:18, 49:10
discussed [1] - 52:8
discussing [1] - 36:12
discussion [14] - 10:18, 13:19, 13:24, 14:3, 14:6, 42:22, 42:24, 48:8, 48:11, 62:23, 62:25, 65:3, 78:13, 78:16
discussions [16] - 10:15, 11:15, 11:22, 11:25, 12:16, 12:19, 47:3, 47:4, 48:25, 49:15, 59:4, 65:8, 65:22, 65:25, 66:8, 68:11
display [4] - 8:10, 10:5, 11:9, 32:24
displayed [2] - 8:15, 77:24
displaying [1] - 33:5
distance [6] - 24:10, 25:4, 46:14, 70:12, 70:17, 70:24
distances [2] - 69:12, 70:21
division [3] - 1:7, 6:16, 43:17
DO [1] - 88:6
document [32] - 9:3, 10:4, 11:8, 15:18, 16:9, 16:13, 16:19, 17:4, 19:1, 26:2, 26:11, 26:15, 26:18, 27:19, 28:17, 28:21, 29:10, 30:3, 32:7, 33:18, 33:22, 40:3, 40:4, 44:8, 44:9, 44:17, 49:17, 49:22, 50:8, 53:11, 56:18, 62:14
documents [10] - 7:22, 17:9, 19:3, 22:3, 26:7, 41:13, 53:15, 53:19, 54:8, 58:18
dog [1] - 68:6
done [20] - 25:10, 32:11, 32:12, 39:9, 43:22, 46:13, 49:20, 51:24, 55:2, 60:11, 62:1, 62:2, 62:7, 62:15, 68:2, 68:4, 73:14, 80:2, 80:22, 87:17
dots [3] - 11:19, 59:25, 60:21
down [18] - 6:2, 11:4, 14:7, 20:3, 20:18, 21:25, 36:24, 46:18, 51:11, 51:15, 55:8, 56:16, 62:3, 62:4, 62:8, 62:13, 75:24
drafted [1] - 18:17
drafting [2] - 18:15, 18:25
drove [1] - 44:4
due [1] - 4:16
duly [3] - 5:4, 88:11, 89:8
during [21] - 8:25, 12:3, 12:6, 13:9, 13:17, 13:22, 21:11, 27:7, 37:18, 37:21, 41:1, 50:18, 51:12, 57:24, 58:7, 61:11, 64:14, 64:18, 78:21, 85:22

E

easement [3] - 52:17, 52:19, 73:20
easier [1] - 60:13
easily [4] - 65:9, 69:5, 70:7, 70:9
East [1] - 2:18
easy [1] - 48:18
effect [5] - 64:19, 65:13, 72:15, 72:20, 73:13
either [3] - 58:10, 80:23, 86:12
email [24] - 9:3, 9:16, 9:20, 21:2, 21:24, 22:9, 22:16, 26:16, 27:2, 28:5, 28:10, 32:20, 33:3, 33:19, 34:1, 34:6, 34:15, 35:3, 35:21, 35:25, 38:16, 40:7, 40:12, 40:20
emails [2] - 15:18, 21:21
emphasizing [1] - 50:17
employed [2] - 89:18, 89:20
employee [1] - 89:19
end [4] - 16:16, 40:17, 59:20, 62:15
ended [1] - 66:19
energy [1] - 73:11
Energy [3] - 71:15, 72:1, 72:4
enlarge [3] - 33:12, 40:3, 44:9
entirely [1] - 55:22
entitled [3] - 4:3, 49:22, 72:1
entries [2] - 16:13, 16:19
entry [2] - 42:10, 42:15
estimate [2] - 66:25, 70:20
event [3] - 20:8, 75:4, 77:21
events [1] - 19:15
everywhere [1] - 14:13
evidence [4] - 81:19, 81:20, 82:23, 82:24
exactly [6] - 11:23, 18:18, 27:10, 70:3, 73:10, 77:5
EXAMINATION [4] - 5:6, 54:1, 81:5, 83:9
Examination [4] - 3:3, 3:4, 3:5, 3:6
examination [3] - 4:3, 88:13, 89:14
examined [1] - 5:4

exchange [2] - 13:15, 14:22
exclusion [1] - 73:11
Exclusion [1] - 11:5
exclusion/constraint [1] - 41:3
excuse [2] - 27:14, 65:12
exercise [1] - 86:22
exercised [1] - 89:6
Exhibit [10] - 9:4, 9:11, 9:25, 11:2, 11:4, 11:6, 11:16, 15:19, 16:7, 60:20
exhibit [1] - 54:18
exhibits [4] - 8:10, 10:4, 11:8, 15:21
expect [2] - 29:21, 85:18
expecting [2] - 28:13, 28:14
experience [2] - 35:15, 56:5
expired [1] - 52:17
expires [1] - 89:24
extent [5] - 72:10, 74:2, 74:19, 83:16, 83:17

F

facilities [1] - 73:12
Facility [4] - 71:16, 72:1, 72:3, 72:5
facing [2] - 76:10, 77:3
fact [3] - 14:25, 29:24, 49:3
facts [7] - 81:18, 81:19, 82:20, 82:22, 82:23, 83:12, 84:3
factual [1] - 59:8
fair [10] - 6:2, 6:9, 57:1, 57:20, 57:24, 59:11, 65:1, 83:12, 84:14, 85:3
familiar [3] - 5:18, 11:13, 50:7
familiarize [1] - 38:13
fantastic [3] - 54:16, 56:16, 80:10
far [1] - 66:2
February [6] - 23:21, 24:18, 39:1, 39:5, 40:17, 56:19
feet [3] - 67:4, 70:23, 81:15
fence [5] - 19:8, 19:9, 22:18, 22:20, 22:21
fenced [1] - 22:19
fences [1] - 22:22
fencing [6] - 19:24, 20:22, 21:17, 22:16, 44:3, 45:18
few [1] - 53:14
figure [8] - 9:17, 19:20, 55:12, 67:1, 73:16, 73:25, 75:2, 80:11
figuring [1] - 70:11
file [6] - 17:15, 30:25, 31:10, 50:13, 50:24, 56:10
filed [3] - 13:14, 50:1, 50:6
filing [1] - 50:19
filings [1] - 7:1
financially [1] - 89:20
fine [10] - 37:23, 53:20, 63:15, 66:4, 66:18, 70:11, 72:6, 77:11, 80:9, 82:13
finish [3] - 65:11, 66:5, 82:4
Firm [1] - 2:3
first [49] - 5:4, 13:5, 16:15, 18:6, 19:18, 19:21, 20:12, 20:21, 21:8, 21:15, 21:18, 23:8, 23:16, 23:18, 23:19, 23:23, 24:5, 26:14, 28:23, 30:8, 30:12, 30:13, 30:14, 30:20, 31:1, 31:4, 31:17, 34:5, 34:6, 34:14, 36:14, 36:24, 41:13, 42:10, 45:14, 50:15, 51:14, 54:18, 55:6, 55:16, 56:7, 56:11, 56:19, 62:22, 65:21, 68:23, 75:22, 76:4
First [1] - 2:4
fit [1] - 7:5
five [4] - 37:24, 53:18, 62:6, 80:6
fix [2] - 27:21, 39:22
fixed [2] - 21:3, 28:4
focused [1] - 78:19
follow [9] - 19:16, 40:13, 41:23, 42:17, 43:3, 75:21, 81:4, 83:5, 83:7
follow-up [5] - 41:23, 42:17, 75:21, 81:4, 83:7
followed [2] - 27:16, 42:11
following [3] - 4:3, 4:12, 88:9
follows [1] - 5:5
FOR [3] - 2:6, 2:13, 2:19
foregoing [3] - 88:5, 88:7, 89:15
forgotten [1] - 80:1
form [7] - 60:6, 71:10, 71:21, 74:1, 82:19, 83:15, 84:16
formal [1] - 17:15
forth [10] - 19:7, 25:18, 49:6, 49:8, 49:9, 61:11, 68:15, 73:3, 88:9, 88:10
forwarded [3] - 27:20, 29:14, 38:16
forwarding [1] - 28:10
foundation [4] - 61:4, 82:22, 83:18, 84:15
four [2] - 45:11, 62:6
fourth [1] - 45:21
frame [1] - 57:24
Fredrikson [1] - 2:10
free [1] - 54:4
Friday [3] - 58:4, 61:25, 62:21
front [10] - 7:2, 8:18, 26:11, 28:22, 38:6, 49:21, 66:20, 66:21, 76:1, 76:9
full [2] - 88:11, 89:15
fully [2] - 54:12, 54:13
FURTHER [2] - 81:5, 83:9

G

gate [1] - 52:11
general [5] - 7:24, 11:22, 11:25, 58:16, 63:13
generally [12] - 6:19, 6:24, 8:13, 10:17, 14:12, 17:7, 17:11, 22:24, 27:9, 35:10, 43:22, 64:21
GIS [11] - 24:12, 25:4, 46:14, 69:1, 69:13, 69:24, 70:6, 70:12, 70:16, 70:17, 70:21
given [1] - 88:13
goddammit [1] - 65:13
Google [1] - 69:8
grant [1] - 87:15
granted [1] - 15:13
graphic [3] - 69:1, 69:10, 69:17
great [2] - 26:5, 37:22
ground [1] - 5:18
groundwork [1] - 55:6
guard [10] - 37:1, 43:25, 44:3, 45:18, 62:24, 63:2, 63:12, 65:23, 66:13, 68:9
guess [2] - 5:15, 24:25
guys [1] - 85:13

H

habit [1] - 28:9
half [1] - 37:17
halfway [1] - 42:4
HAND [1] - 89:21
hand [2] - 16:5, 44:14
handy [2] - 25:17, 37:8
hang [4] - 9:15, 9:22, 30:5, 36:18
happy [3] - 21:9, 44:3, 48:20
hard [1] - 60:12
head [1] - 19:2
hear [3] - 67:11, 83:1, 83:21
heard [5] - 20:6, 22:5, 23:23, 24:5, 47:5
hearing [28] - 8:5, 8:10, 8:15, 8:20, 8:25, 10:5, 10:16, 11:9, 11:17, 12:10, 12:13, 12:17, 12:20, 12:23, 13:7, 13:9, 13:13, 13:17, 13:18, 15:1, 15:12, 67:10, 75:16, 75:18, 76:5, 77:13
hearings [1] - 61:11
held [1] - 76:6
HEREBY [1] - 88:6
HEREIN [1] - 1:23
herein [1] - 89:5
hereinbefore [1] - 4:10
hereto [1] - 89:20
hi [1] - 40:12
highlight [1] - 54:20
himself [1] - 48:22
hold [3] - 54:23, 74:17
home [1] - 85:18
hour [1] - 37:17
house [41] - 11:21, 24:10, 40:25, 41:7, 41:9, 41:11, 41:14, 43:5, 43:24, 46:11, 57:23, 58:3, 58:5, 58:6, 58:10, 65:24, 66:12, 66:14, 66:16, 66:19, 66:22, 67:1, 67:5, 67:6, 67:12, 67:13, 67:22, 67:24, 68:9, 68:10, 68:23, 69:14, 69:23, 70:14, 70:19, 75:5, 81:8, 81:12, 84:3, 85:18
hundred [1] - 67:4

I

I-15 [1] - 17:2
I-15-0195 [1] - 16:21
identified [3] - 46:13, 59:13, 59:21
identify [2] - 25:4, 59:14
iFile [9] - 17:5, 17:9, 17:10, 17:13, 17:16, 17:17, 17:18, 18:10, 50:2
imagine [1] - 86:23
impression [1] - 67:10
in-house [1] - 69:14
Inc [1] - 1:8
included [1] - 41:2
including [1] - 69:12
incorrect [2] - 30:20, 55:12
independent [1] - 25:10
indicated [4] - 4:10, 47:6, 88:14, 89:15
indiscernible] [1] - 59:17
information [16] - 18:24, 31:8, 41:22, 48:5, 48:12, 57:11, 57:14, 57:21, 57:22, 58:9, 61:2, 61:7, 61:10, 69:1, 69:10, 69:17
informed [1] - 47:11
inhabited [2] - 75:6, 75:9
initial [1] - 62:23
inside [1] - 57:10
insistence [1] - 47:21
insisting [2] - 47:19, 47:23
instances [1] - 52:13
instead [1] - 22:20
instruction [1] - 14:1

instructs [1] - 87:10
interaction [1] - 17:21
interested [1] - 89:20
interrupt [1] - 37:12
investigated [1] - 24:21
investigation [1] - 46:13
involve [1] - 82:20
involved [2] - 49:12, 49:14
issue [20] - 21:17, 22:17, 23:25, 24:6, 24:19, 25:1, 29:19, 29:25, 38:22, 45:22, 48:24, 56:24, 57:1, 57:12, 58:20, 63:11, 63:24, 64:17, 68:22, 69:23
issues [17] - 19:7, 19:11, 19:24, 20:23, 21:18, 22:8, 22:24, 26:21, 26:23, 27:5, 29:16, 39:8, 39:19, 45:15, 45:18, 59:8
IT [1] - 89:4
it'll [1] - 53:13

J

Jack [2] - 42:21
January [15] - 20:8, 20:9, 30:4, 30:22, 32:7, 32:13, 33:5, 33:20, 34:12, 34:24, 35:20, 37:3, 39:4, 55:9, 56:9
JERRY [6] - 1:14, 3:2, 4:2, 5:3, 88:4, 88:20
Jerry [8] - 40:12, 42:11, 44:25, 54:4, 60:10, 80:16, 83:14, 84:5
job [2] - 6:22, 6:25
John [12] - 15:19, 15:20, 15:25, 16:7, 36:21, 37:20, 42:20, 43:18, 44:20, 44:25, 56:21, 66:1
Johnson [3] - 32:2, 80:18, 80:25
JOHNSON [2] - 2:16, 86:14
judge [5] - 76:9, 76:22, 76:23, 77:3, 77:14
June [3] - 19:22, 20:13, 55:7

K

Kalk [2] - 19:23, 55:24
KB [1] - 16:1
keep [5] - 5:21, 25:16, 25:17, 37:8, 44:1
Keith [6] - 1:5, 12:8, 65:2, 65:7, 68:7, 68:18
KEITH [1] - 2:23
Kessler [81] - 1:5, 12:9, 12:13, 12:16, 12:20, 12:22, 12:24, 12:25, 13:8, 13:15, 17:19, 18:3, 19:4, 19:23, 20:7, 20:22, 21:7, 21:11, 21:16, 21:24, 22:5, 22:13, 23:2, 23:20, 23:25, 24:6, 27:7, 27:13, 27:23, 29:15, 30:13, 34:1, 34:12, 34:20, 34:24, 35:20, 35:24, 38:17, 39:4, 39:7, 41:23, 42:11, 42:17, 43:10, 47:10, 47:19, 47:23, 48:18, 48:22, 51:18, 52:4, 52:8, 53:2, 55:23, 56:21, 56:24, 57:2, 57:12, 58:16, 58:20, 63:10, 63:17, 63:21, 63:24, 64:2, 64:5, 65:12, 65:15, 66:9, 68:7, 68:18, 70:14, 70:18, 73:22, 78:3, 78:10, 79:11
KESSLER [1] - 2:23
Kessler's [3] - 34:15, 63:6, 73:19
Kesslers [20] - 4:24, 8:1, 13:21, 14:2, 14:15, 14:19, 14:25, 39:23, 47:3, 49:10, 51:3, 57:15, 61:19, 61:23, 62:25, 63:3, 65:25, 67:16, 78:15, 78:20
Kesslers' [2] - 48:7, 48:13
kind [9] - 6:22, 22:19, 22:24, 42:20, 42:21, 48:25, 64:21, 66:10, 66:15
kinds [1] - 66:7
knowledge [7] - 58:13, 59:6, 68:3, 68:18, 69:15, 69:21, 72:22
KNOWN [1] - 89:4
known [1] - 7:15

L

label [3] - 16:20, 17:3, 36:20
labeled [5] - 15:18, 25:19, 28:17, 30:3, 32:7
lack [2] - 82:22, 83:17
land [10] - 34:17, 52:1, 52:15, 63:9, 63:11, 63:23, 64:10, 73:19, 74:6, 74:9
landowner [10] - 7:4, 7:7, 7:11, 17:22, 21:14, 35:16, 73:24, 74:5, 74:13, 74:25
landowners [2] - 12:7, 77:23
language [2] - 65:12, 75:13
larger [1] - 33:8
last [2] - 11:14, 38:16
late [2] - 51:12, 52:22
law [2] - 76:9, 77:13
Law [4] - 2:3, 2:3, 2:11, 2:17
laying [1] - 55:5
layout [1] - 8:13
least [2] - 21:15, 80:3
leave [2] - 79:13, 81:20
leaving [1] - 66:13
left [4] - 19:23, 40:5, 52:12, 66:16
legal [5] - 72:10, 74:2, 74:19, 75:13, 83:16
Lein [94] - 5:8, 5:12, 5:23, 6:6, 6:12, 6:20, 6:24, 7:4, 7:14, 7:20, 7:25, 8:4, 8:9, 8:19, 8:25, 9:2, 9:13, 9:20, 10:3, 10:12, 10:14, 10:23, 11:7, 11:14, 11:24, 12:8, 13:3, 13:6, 13:25, 14:22, 15:12, 15:16, 16:9, 17:7, 17:20, 19:15, 20:11, 21:10, 22:11, 23:2, 23:17, 24:5, 24:14, 24:21, 25:3, 25:16, 26:11, 26:15, 27:11, 28:5, 28:9, 28:16, 28:22, 29:10, 30:2, 30:11, 32:6, 33:18, 36:2, 36:20, 37:18, 38:3, 39:16, 40:3, 41:16, 41:21, 43:1, 43:20, 44:8, 44:17, 44:25, 46:10, 47:10, 48:3, 49:4, 49:18, 49:21, 50:7, 52:25, 53:4, 53:9, 54:3, 65:6, 71:24, 72:11, 74:3, 74:18, 74:22, 81:3, 81:22, 82:3, 82:25, 86:17
LEIN [6] - 1:14, 3:2, 4:2, 5:3, 88:4, 88:20
less [1] - 67:8
letter [3] - 30:8, 34:4, 50:16
letting [2] - 52:1, 52:4
level [3] - 7:12, 17:14, 17:25
light [1] - 4:19
likely [1] - 51:25
line [4] - 42:10, 44:24, 56:19, 65:11
list [5] - 22:8, 26:21, 26:23, 27:5, 29:16
listed [1] - 31:1
listen [1] - 25:5
listening [1] - 46:17
live [4] - 10:20, 11:20, 61:19, 67:17
lived [1] - 68:6
lives [1] - 82:10
living [2] - 85:6, 85:7
local [1] - 71:2
locate [1] - 25:25
located [2] - 38:22, 73:19
location [2] - 40:25, 85:6
logged [1] - 38:5
look [17] - 7:1, 10:9, 20:5, 22:1, 30:19, 31:6, 31:12, 31:16, 38:25, 43:6, 47:8, 56:14, 61:13, 69:2, 75:16, 84:12
looked [10] - 23:9, 24:22, 38:16, 68:6, 68:24, 69:24, 70:4, 70:12, 70:16, 83:14
looking [23] - 16:4, 24:14, 32:8, 33:18, 37:4, 37:5, 37:6, 41:12, 46:14, 46:17, 47:7, 54:18, 55:8, 55:9, 56:18, 71:25, 72:14, 73:7, 73:10, 75:13, 76:22, 77:24
looks [6] - 10:13, 11:11, 11:13, 31:9, 35:2
loud [1] - 62:2
lower [4] - 11:4, 16:5, 44:14, 62:8
Lynn [8] - 9:8, 26:4, 37:14, 53:12, 54:4, 54:5, 71:22, 87:7
LYNN [1] - 2:2

M

Mahlberg [3] - 4:14, 5:9, 86:9
MAHLBERG [48] - 2:9, 4:14, 5:2, 5:7, 9:6, 9:13, 26:3, 26:8, 26:10, 26:13, 29:4, 29:9, 32:5, 33:1, 33:3, 33:11, 33:15, 33:17, 37:23, 38:3, 53:4, 53:8, 53:12, 53:20, 60:6, 61:4, 65:4, 71:10, 71:21, 72:9, 74:1, 74:15, 74:17, 80:9, 80:19, 81:3, 81:6, 81:22, 82:25, 83:4, 83:15, 84:15, 85:10, 85:24, 86:12, 86:16, 86:25, 87:16
Mahlberg.... [1] - 3:5
Mahlberg..... [1] - 3:3
mail [1] - 19:23
major [1] - 62:6
Mandan [1] - 2:5
map [14] - 8:10, 9:25, 10:16, 10:18, 10:20, 11:2, 11:14, 12:3, 19:4, 40:21, 59:24, 60:21, 70:4, 70:22
Map [1] - 9:4
maps [15] - 8:12, 8:14, 8:20, 8:24, 9:24, 10:25, 12:6, 47:2, 69:2, 69:9, 75:24, 76:3, 77:1, 77:9, 77:24
March [15] - 16:1, 18:12, 30:14, 31:2, 31:16, 36:3, 36:5, 36:6, 37:19, 38:6, 40:8, 41:20, 42:1, 42:7, 75:17
mark [1] - 84:5
marks [1] - 44:5
matter [4] - 7:25, 13:5, 48:20, 86:13
McCourtney [4] - 35:5, 40:8, 40:17, 41:22

McCourtney's [1] - 40:12
mean [6] - 7:10, 49:9, 52:3, 66:7, 66:15, 87:13
meaning [1] - 60:3
means [1] - 6:7
meeting [5] - 38:5, 43:5, 58:4, 61:18, 61:24
memo [4] - 29:18, 50:11, 51:15, 56:23
memorandum [32] - 16:1, 17:20, 18:10, 18:12, 18:15, 19:16, 22:2, 23:12, 25:17, 30:15, 31:2, 31:16, 36:3, 36:6, 36:12, 36:25, 37:10, 37:19, 38:7, 41:21, 42:1, 44:22, 45:4, 45:10, 48:1, 50:16, 51:16, 52:24, 54:19, 55:15, 58:22, 61:17
Memorandum [3] - 17:2, 44:10, 49:22
memory [1] - 15:6
memos [2] - 17:18, 18:4
mention [2] - 38:21, 67:16
mentioned [2] - 68:22, 77:11
merits [1] - 48:6
met [1] - 5:9
might [5] - 8:22, 16:10, 56:8, 82:20
mind [2] - 5:21, 79:6
mine [1] - 86:15
Minneapolis [1] - 2:12
Minnesota [58] - 1:7, 2:12, 4:15, 4:22, 5:10, 8:1, 8:5, 13:19, 13:20, 14:14, 14:18, 14:24, 18:5, 19:12, 19:24, 21:3, 21:21, 27:20, 27:24, 28:2, 28:20, 29:13, 29:21, 33:25, 35:15, 38:17, 39:24, 40:21, 47:4, 47:22, 48:19, 48:23, 49:10, 50:17, 50:23, 52:4, 57:13, 57:18, 57:21, 60:4, 60:16, 60:19, 61:1, 63:1, 63:18, 64:7, 64:14, 65:16, 65:25, 68:13, 68:14, 68:18, 69:16, 78:14, 78:21, 79:7, 79:12, 79:18
minute [2] - 21:22, 38:12
minutes [3] - 37:24, 53:18, 80:6
mischaracterization [1] - 81:19
mischaracterizes [1] - 65:5
missed [1] - 59:19
mistake [1] - 80:22
mixed [1] - 78:4
modify [1] - 70:5
MOLLIE [1] - 2:10
moment [1] - 79:25
moments [1] - 53:14
month [1] - 85:23
mood [1] - 64:2
morning [1] - 5:8
most [1] - 52:14
mostly [1] - 71:3
move [2] - 32:13, 56:16
moved [1] - 65:23
moving [1] - 24:24
MP000076 [1] - 44:15
MR [103] - 2:2, 2:9, 2:16, 2:23, 4:14, 4:23, 5:2, 5:7, 9:6, 9:10, 9:13, 25:25, 26:3, 26:5, 26:8, 26:9, 26:10, 26:13, 29:4, 29:7, 29:9, 30:17, 31:15, 31:22, 32:1, 32:4, 32:5, 32:24, 33:1, 33:2, 33:3, 33:6, 33:11, 33:13, 33:15, 33:17, 37:11, 37:14, 37:16, 37:23, 38:3, 53:4, 53:8, 53:10, 53:12, 53:13, 53:20, 53:21, 54:2, 59:23, 60:6, 60:9, 60:10, 61:4, 61:9, 65:4, 65:10, 71:10, 71:12, 71:21, 71:23, 71:24, 72:9, 72:16, 74:1, 74:7, 74:15, 74:17, 75:1, 79:24, 80:9, 80:10, 80:15, 80:19, 80:20, 81:3, 81:6, 81:17, 81:22, 82:19, 82:25, 83:4, 83:7, 83:10, 83:15, 83:19, 83:23, 84:1, 84:15, 84:18, 85:10, 85:15, 85:24, 86:3, 86:8, 86:12, 86:14, 86:16, 86:25, 87:5, 87:7, 87:16, 87:18
MS [1] - 2:10
must [1] - 30:10
MY [1] - 89:21

N

name [4] - 5:8, 40:5, 64:15, 77:14
named [1] - 63:18
near [5] - 47:13, 62:24, 65:23, 66:12, 73:22
necessary [1] - 86:19
need [17] - 17:12, 30:18, 31:3, 31:6, 31:18, 31:20, 53:14, 54:13, 54:23, 55:2, 55:19, 59:14, 60:10, 63:14, 83:13, 84:4, 86:21
needed [5] - 10:8, 12:1, 43:22, 49:20, 50:14
never [1] - 7:9
new [11] - 22:20, 23:25, 52:19, 56:24, 57:1, 57:2, 57:5, 57:7, 73:1
next [16] - 19:19, 20:6, 22:5, 28:11, 28:14, 28:15, 38:25, 47:9, 53:6, 56:23, 59:3, 64:17, 65:11, 65:20, 66:11, 79:10
night [1] - 28:11
nine [2] - 9:15, 9:17
noise [2] - 23:25, 56:24
nonparticipating [2] - 73:24, 74:13
NORTH [2] - 1:2, 89:2
North [6] - 2:5, 2:16, 2:18, 4:6, 6:13, 28:25
Northwest [1] - 2:4
NOTARY [1] - 89:1
Notary [3] - 4:5, 89:6, 89:24
note [5] - 17:21, 30:17, 31:3, 81:18, 83:23
NOTED [1] - 1:23
noted [1] - 89:12
notes [6] - 17:9, 30:24, 61:23, 63:7, 75:17, 89:16
nothing [3] - 11:22, 86:8, 89:9
Notice [1] - 4:1
notice [2] - 40:25, 89:5
November [13] - 20:7, 22:6, 22:14, 23:3, 25:20, 26:8, 26:24, 27:12, 29:17, 34:15, 55:8, 55:13, 56:8
number [5] - 38:20, 71:4, 71:7, 71:9, 71:22
Number [1] - 50:2
numbered [2] - 45:11, 46:19

O

oath [1] - 89:8
object [10] - 31:9, 60:6, 71:21, 72:9, 82:19, 82:20, 82:21, 83:15, 84:15, 85:10
objection [11] - 30:18, 61:4, 65:4, 71:10, 74:1, 74:15, 74:18, 81:18, 81:21, 83:24
objections [1] - 85:24
objective [1] - 77:9
obligated [1] - 71:8
observations [1] - 67:21
observe [3] - 67:23, 79:10, 79:14
observed [1] - 14:18
observing [2] - 13:7, 62:25
obviously [1] - 20:14
occupied [28] - 25:11, 41:1, 46:20, 47:1, 47:6, 47:8, 57:23, 58:11, 59:10, 59:14, 59:22, 59:25, 60:22, 70:25, 81:13, 81:25, 82:7, 82:17, 83:12, 84:3, 84:10, 84:11, 84:23, 85:2, 85:9, 85:19, 86:6
occupy [1] - 47:14
occurred [2] - 61:24, 62:21
occurring [1] - 82:17
October [2] - 1:19, 4:8
OF [10] - 1:2, 1:13, 1:14, 3:2, 3:8, 3:9, 88:1, 89:1, 89:2, 89:3
office [1] - 89:7
officially [1] - 31:12
on-site [4] - 59:7, 61:18, 67:17, 68:8
once [6] - 11:10, 11:18, 26:1, 33:8, 65:19, 80:22
one [35] - 10:4, 10:10, 11:8, 14:13, 15:24, 16:4, 16:5, 19:11, 20:15, 21:8, 22:18, 22:19, 22:22, 30:3, 32:11, 32:12, 32:16, 36:14, 37:9, 54:10, 55:16, 56:4, 56:7, 56:8, 56:11, 60:19, 62:6, 62:9, 63:17, 64:22, 72:20, 78:3, 83:7, 87:19
one's [1] - 49:24
ones [3] - 55:17, 72:14, 72:15
ongoing [1] - 4:17
online [1] - 56:21
oops [2] - 36:19, 44:13
open [6] - 9:24, 9:25, 11:2, 25:22, 33:16, 52:12
opinion [3] - 48:6, 48:13, 75:5
opportunity [1] - 87:1
oral [1] - 88:13
order [3] - 52:19, 56:6, 56:12
ordinances [1] - 71:2
original [1] - 36:15
otherwise [5] - 8:23, 31:8, 61:8, 68:15, 87:10
outstanding [1] - 39:8
overnight [1] - 85:6
own [3] - 19:2, 24:14, 62:1
owned [1] - 23:5
owner [1] - 75:11

P

P.A [1] - 2:10
p.m [5] - 28:6, 33:20, 80:13, 80:14, 87:20
P.O [1] - 2:4
pad [1] - 19:9
pads [1] - 22:19
page [17] - 16:20, 16:23, 16:24, 16:25, 23:12, 24:24, 26:14, 28:23, 30:14, 36:25, 37:20, 41:25, 42:4, 54:18, 56:17, 61:21
Page [1] - 3:2

pager [1] - 37:20
pages [2] - 88:7, 89:15
Pages [1] - 17:2
pandemic [1] - 4:17
paragraph [33] - 19:21, 20:4, 20:5, 20:6, 20:8, 20:13, 22:2, 23:16, 23:18, 23:19, 24:9, 24:25, 30:14, 34:6, 35:3, 36:24, 37:2, 38:10, 38:13, 38:20, 38:25, 40:24, 45:14, 45:17, 45:21, 46:19, 50:15, 51:11, 55:13, 59:3, 59:12, 65:21
paragraphs [5] - 31:1, 31:17, 45:11, 55:17, 62:6
part [7] - 16:15, 19:7, 47:17, 57:14, 60:15, 71:18, 73:19
participants [3] - 8:17, 75:25, 76:14
participating [2] - 74:5, 74:25
particular [4] - 7:22, 60:16, 71:17, 76:17
parties [4] - 4:9, 89:15, 89:18, 89:20
partly [1] - 32:14
Pat [1] - 5:8
PATRICK [1] - 2:9
Patrick [3] - 4:14, 77:14, 80:21
pay [2] - 52:18
paying [1] - 64:24
pays [1] - 48:23
PDF [2] - 25:19, 36:21
people [8] - 10:18, 10:22, 11:19, 11:20, 12:3, 14:9, 56:5, 78:3
perhaps [1] - 30:22
period [3] - 6:20, 39:9, 51:1
permission [1] - 80:5
permitted [2] - 25:9, 57:19
permitting [4] - 25:14, 81:13, 82:17, 82:21
person [2] - 73:23, 79:11
personal [5] - 57:22, 58:13, 59:5, 68:3, 68:17
personally [1] - 86:5
persons [2] - 58:12, 63:18
PETITIONERS [1] - 2:7
phone [7] - 18:3, 20:7, 22:5, 23:3, 42:12, 42:17, 58:17
physically [1] - 58:5
pictures [1] - 24:12
place [8] - 22:13, 34:12, 43:12, 73:2, 84:8, 86:6, 88:14, 89:14
placed [4] - 17:5, 23:4, 29:20, 77:6
placement [1] - 71:9
planning [1] - 47:13
plus [1] - 47:7
podium [2] - 76:20, 76:24
point [18] - 6:6, 13:23, 17:12, 29:21, 34:20, 34:23, 38:9, 41:10, 47:5, 49:13, 63:22, 64:22, 73:1, 75:2, 77:21, 77:22, 78:5, 78:16
pointed [1] - 44:5
poles [1] - 22:23
position [1] - 6:12
positive [1] - 75:22
possibility [1] - 56:4
possible [4] - 30:21, 31:4, 55:22, 56:10
potentially [1] - 48:6
Power [55] - 1:7, 4:15, 4:22, 5:10, 8:1, 13:20, 14:14, 14:18, 14:24, 18:5, 19:12, 19:25, 21:3, 21:21, 27:21, 27:24, 28:2, 28:20, 29:13, 29:21, 33:25, 35:15, 38:17, 39:24, 47:4, 47:22, 48:19, 48:23, 49:10, 50:17, 50:23, 52:4, 57:13, 57:18, 57:21, 60:4, 60:16, 60:19, 61:1, 63:1, 63:18, 64:7, 64:14, 65:16, 66:1, 68:13, 68:14, 68:19, 69:16, 78:14, 78:21, 79:7, 79:12, 79:18
power [1] - 89:7
Power's [2] - 8:6, 40:22
precise [1] - 60:12
preference [1] - 87:11
prepare [1] - 7:21
prepared [1] - 60:17
prepares [1] - 59:23
preparing [2] - 44:22, 45:3
present [4] - 58:5, 64:13, 68:19, 77:15
PRESENT [1] - 2:22
presently [1] - 62:7
previous [1] - 84:24
previously [8] - 57:13, 58:6, 58:20, 64:8, 67:25, 75:18, 77:21, 79:17
private [1] - 69:11
problem [4] - 52:1, 52:4, 54:6, 58:25
problems [2] - 22:16, 79:7
Procedure [1] - 86:20
proceedings [2] - 4:12, 5:19
process [2] - 17:8, 60:15
Professional [2] - 4:5, 89:5
program [1] - 69:11
progress [2] - 50:19, 50:24
project [22] - 7:15, 7:18, 8:2, 8:7, 8:13, 13:16, 14:2, 15:13, 20:24, 21:12, 25:9, 25:13, 40:23, 41:1, 60:16, 60:17, 71:18, 72:6, 72:21, 72:23, 73:14, 75:7
projects [1] - 35:17
property [7] - 19:6, 19:9, 19:10, 22:18, 43:10, 44:5, 83:13
proposed [1] - 39:24
provide [3] - 24:10, 61:2, 87:2
provided [3] - 19:3, 61:7, 61:14
providing [1] - 64:7
provision [1] - 71:17
proximate [1] - 24:20
proximity [4] - 24:6, 41:10, 45:22, 46:1
PU-20-194 [1] - 1:7
public [6] - 6:15, 43:17, 61:10, 69:6, 76:16
Public [12] - 2:16, 4:6, 6:13, 29:1, 60:25, 61:2, 84:9, 84:11, 84:17, 84:25, 89:6, 89:24
PUBLIC [2] - 1:3, 89:1
publish [3] - 26:3, 40:2, 44:7
pull [7] - 9:4, 15:17, 15:22, 15:24, 22:2, 22:3, 53:18
pulled [1] - 70:6
pulling [1] - 24:11
purport [1] - 89:16
pursuant [1] - 89:5
Pursuant [1] - 4:1
put [9] - 8:23, 17:10, 17:15, 19:9, 50:13, 56:5, 73:21, 77:9
putting [1] - 4:15

Q

questions [14] - 10:22, 19:19, 53:5, 54:10, 56:22, 60:12, 62:19, 75:21, 80:17, 80:21, 81:1, 81:8, 83:6, 86:2
quick [1] - 71:13

R

raised [7] - 21:16, 27:7, 29:20, 34:21, 57:12, 69:24, 70:6
raises [2] - 23:25, 56:24
raising [4] - 57:15, 58:20, 63:10, 63:24
rancher@westriv.com [2] - 26:16, 33:19
rather [3] - 70:7, 70:9, 79:8
reach [1] - 17:14
reaches [1] - 17:25
reaching [3] - 27:24, 48:6, 48:13
reaction [1] - 41:13
read [15] - 15:23, 23:18, 33:9, 62:1, 62:5, 86:11, 86:17, 86:21, 87:1, 87:8, 87:11, 87:17, 88:6, 89:11
read-and-sign [1] - 86:11
reading [4] - 62:1, 62:2, 62:16, 62:19
ready [3] - 6:8, 6:10, 23:16
really [6] - 10:8, 42:18, 42:25, 43:2, 46:6, 47:20
reason [6] - 33:6, 61:8, 61:12, 61:13, 88:10, 89:12
Received [1] - 28:25
received [6] - 29:17, 35:19, 35:23, 41:22, 57:21, 58:11
receiving [1] - 27:23
recent [1] - 68:2
recently [2] - 13:2, 13:4
Recessed [3] - 38:1, 53:22, 80:13
reclamation [8] - 34:16, 34:21, 43:23, 45:15, 49:19, 49:20, 50:17, 52:5
recognize [9] - 10:3, 10:7, 11:8, 16:9, 16:10, 26:18, 29:10, 33:22, 44:17
recognized [1] - 40:25
recollection [13] - 12:15, 13:6, 22:12, 23:1, 24:4, 39:12, 39:14, 39:18, 42:16, 45:5, 45:6, 51:17, 77:16
recollections [2] - 43:19, 62:20
recommendation [1] - 7:3
reconvened [3] - 38:1, 53:22, 80:13
record [23] - 4:13, 4:16, 6:8, 10:9, 12:23, 13:24, 14:2, 14:4, 18:22, 30:19, 31:4, 37:24, 38:4, 53:18, 53:21, 78:16, 79:4, 80:6, 80:7, 80:12, 80:15, 83:24, 87:19
recorded [1] - 48:1
recording [1] - 25:6
records [2] - 5:20, 20:18
refamiliarize [1] - 23:14
reference [9] - 20:12, 30:13, 51:14, 56:18, 56:20, 57:17, 70:13, 73:21, 77:1
referenced [1] - 14:10
referencing [2] - 30:11, 41:9
referred [1] - 18:25
referring [2] - 26:2, 82:15
refresh [3] - 24:4, 42:16, 51:17
refreshed [1] - 62:20
refusing [2] - 39:21, 39:23

regarding [4] - 8:1, 19:24, 20:22, 34:16
regardless [2] - 20:20, 72:20
regards [4] - 67:11, 67:21, 69:16, 71:9
Registered [2] - 4:5, 89:5
regulation [1] - 72:7
regulations [2] - 71:19, 74:20
related [4] - 4:18, 34:21, 74:12, 89:18
relating [6] - 56:22, 57:15, 59:8, 68:9, 71:13, 83:13
relative [2] - 89:9, 89:19
relevance [3] - 74:2, 74:18, 85:11
relied [1] - 18:25
rely [3] - 60:3, 60:25, 61:6
remark [3] - 46:7, 46:9, 46:12
remember [53] - 5:16, 10:7, 11:23, 11:24, 12:2, 12:3, 12:5, 12:21, 12:24, 13:19, 14:21, 15:2, 17:13, 19:5, 21:23, 22:4, 22:20, 22:24, 23:6, 23:7, 23:8, 23:9, 24:17, 31:19, 31:20, 39:21, 39:23, 42:20, 42:21, 42:23, 43:4, 43:6, 43:21, 46:6, 54:11, 63:10, 64:21, 64:23, 65:9, 65:18, 66:3, 66:7, 67:19, 70:3, 74:6, 76:21, 77:10, 78:11, 78:13, 78:23, 79:15
remembering [4] - 8:16, 41:6, 52:10, 78:5
remotely [3] - 4:18, 4:21, 6:4
repeat [1] - 48:9
rephrase [2] - 16:14, 60:9
reported [1] - 22:4
Reporter [3] - 4:5, 89:5, 89:24
reporter [3] - 4:20, 6:1, 14:7
REPORTER [2] - 59:19, 89:1
REPORTER..... [1] - 3:9
reporters [1] - 5:20
reports [3] - 50:19, 50:24, 57:18
represent [1] - 5:10
representative [2] - 13:16, 14:17
request [2] - 31:12, 87:8
requesting [1] - 50:19
resend [1] - 36:16
residence [43] - 23:4, 24:1, 24:7, 24:20, 25:11, 27:13, 27:15, 29:20, 35:1, 38:22, 38:23, 45:23, 46:2, 46:15, 46:19, 47:2, 47:6, 47:13, 56:25, 57:18, 57:23, 58:10, 58:11, 58:22, 59:9, 67:24, 67:25, 68:10, 68:14, 71:1, 75:11, 81:13, 81:16, 81:25, 82:7, 82:14, 82:16, 83:11, 84:10, 85:19, 86:7
residences [4] - 59:5, 59:14, 59:25, 60:22
resolve [5] - 7:8, 7:10, 18:5, 19:13, 79:7
resolved [3] - 7:8, 18:7, 48:24
respective [2] - 4:9, 89:14
respectively [1] - 45:19
responded [1] - 29:22
Respondent [1] - 1:9
RESPONDENT [1] - 2:13
response [8] - 28:20, 29:24, 33:25, 35:20, 35:24, 38:17, 81:7, 83:1
responsive [1] - 35:16
rest [4] - 41:6, 62:5, 62:14, 64:3
restate [2] - 78:7, 78:9
result [1] - 41:2
review [9] - 7:22, 13:4, 30:24, 56:10, 58:18, 61:22, 78:12, 86:18
reviewed [2] - 13:2, 56:4
reviewing [1] - 27:2
right-hand [2] - 16:5, 44:14
right-of-way [1] - 47:11
role [3] - 6:19, 8:20, 45:3
room [5] - 8:10, 8:15, 14:12, 14:13, 76:18
Route [1] - 72:3
rule [1] - 72:13
rules [3] - 5:18, 73:2, 87:3
Rules [1] - 86:19
rut [1] - 44:5

S

safe [1] - 30:23
satellite [1] - 69:10
saw [2] - 41:13, 58:2
scheduled [2] - 61:17, 61:18
Schuh [20] - 15:19, 15:20, 15:25, 16:7, 16:15, 18:19, 23:20, 24:15, 36:13, 36:21, 42:21, 42:22, 43:18, 44:20, 44:25, 45:2, 48:8, 56:21, 66:1, 84:25
Schuh's [4] - 37:20, 42:15, 48:3, 48:10
scope [1] - 7:5
Scott [9] - 63:17, 63:19, 63:20, 63:22, 63:25, 64:5, 64:6, 64:7, 64:16
screen [7] - 9:7, 9:11, 29:5, 33:5, 53:11, 53:16, 54:8
screw [1] - 44:13
scroll [2] - 62:4, 62:8
scrolling [1] - 62:13
SEAL [1] - 89:21
second [21] - 19:21, 20:4, 20:6, 20:12, 22:1, 22:4, 23:12, 23:14, 23:24, 24:24, 35:3, 36:18, 37:20, 40:20, 40:24, 41:25, 45:17, 46:18, 56:7, 56:17
section [3] - 73:7, 74:8, 74:10
Section [5] - 66:12, 73:18, 73:22, 74:12, 74:14
sections [1] - 72:13
see [46] - 9:9, 9:11, 11:5, 15:25, 16:21, 20:1, 20:9, 22:6, 24:2, 28:14, 33:12, 33:13, 34:9, 34:17, 35:7, 37:3, 38:6, 39:1, 40:4, 40:14, 41:4, 41:6, 42:5, 42:13, 44:11, 44:15, 44:25, 45:11, 46:22, 47:15, 49:1, 49:4, 49:21, 54:24, 62:4, 62:14, 69:2, 69:9, 76:23, 77:7, 77:8, 77:12, 80:1, 86:16, 87:14
seeing [1] - 29:7
seem [1] - 36:9
send [10] - 9:19, 21:24, 21:25, 25:22, 26:1, 31:20, 31:22, 31:23, 32:17, 32:22
sending [3] - 28:10, 34:2, 50:16
sent [9] - 9:3, 9:20, 17:19, 19:4, 21:2, 28:3, 28:15, 33:25, 36:15
sentence [8] - 19:22, 20:12, 23:24, 34:14, 40:21, 46:18, 47:9, 56:23
separate [1] - 82:12
separated [1] - 76:17
separately [3] - 31:6, 32:22, 36:16
September [6] - 8:5, 10:5, 11:9, 49:24, 52:22, 52:25
Service [9] - 2:16, 6:13, 29:1, 60:25, 61:2, 84:9, 84:11, 84:17, 85:1
SERVICE [1] - 1:3
set [4] - 43:4, 71:3, 71:7, 88:9
setback [1] - 81:14
setting [2] - 8:21, 88:10
settle [2] - 48:22, 49:15
settlement [3] - 49:2, 49:5, 49:15
shall [1] - 86:10
share [4] - 9:7, 49:17, 53:11, 53:15
sharing [1] - 29:5
sheets [1] - 88:9
short [2] - 37:18, 38:4
shorthand [1] - 89:16
show [6] - 9:18, 10:10, 11:19, 32:20, 54:17, 80:7
showed [1] - 8:12
showing [8] - 19:4, 19:5, 29:5, 43:25, 54:7, 59:25, 60:21, 61:21
shows [2] - 9:16, 60:21
sic [1] - 38:22
side [1] - 22:22
sight [1] - 67:10
sign [6] - 39:21, 39:23, 80:24, 86:11, 86:21, 87:17
signed [1] - 88:11
significance [1] - 18:1
similar [1] - 11:7
similarly [1] - 11:14
simply [1] - 81:18
sit [1] - 10:11
Site [1] - 40:22
site [15] - 8:6, 43:9, 43:12, 43:14, 43:20, 44:21, 45:25, 47:18, 48:4, 48:11, 58:7, 59:7, 61:18, 67:17, 68:8
sited [3] - 25:9, 46:20, 47:12
Siting [3] - 71:16, 72:1, 72:5
siting [5] - 50:5, 59:13, 59:22, 59:24, 72:15
sitting [1] - 41:14
situation [1] - 50:12
Sixth [1] - 2:12
sixth [1] - 51:11
slightly [1] - 44:9
SMITH [2] - 2:10, 89:23
Smith [2] - 4:4, 89:4
snowbird [1] - 85:21
someone [1] - 78:14
somewhere [2] - 13:23, 23:8
son [1] - 47:13
son's [2] - 24:1, 56:25
soon [3] - 69:23, 70:3, 87:18
sorry [12] - 32:18, 34:5, 36:8, 39:16, 51:21, 53:12, 59:18, 59:19, 71:5, 80:20, 81:17, 82:3
sorts [1] - 16:20
sound [1] - 6:9
sounds [4] - 6:11, 54:5, 77:2, 80:9
sources [1] - 18:24
South [1] - 2:12
speakers [1] - 61:10
speaking [2] - 13:8, 17:7
specific [9] - 10:23, 11:15, 23:1, 43:19, 43:21, 54:10,

55:11, 73:17, 85:1
specifically [15] - 11:10, 11:18, 12:2, 13:11, 15:3, 21:6, 21:9, 21:17, 27:16, 31:13, 41:17, 64:1, 67:19, 78:2, 78:6
specificity [1] - 31:23
specified [2] - 89:9, 89:14
speculation [5] - 30:18, 31:9, 83:17, 85:11, 86:1
speech [1] - 86:11
spliced [1] - 22:21
split [1] - 19:9
spring [4] - 50:18, 51:2, 51:21, 51:22
squabbling [1] - 64:25
ss [1] - 89:3
stack [1] - 26:7
staff [1] - 7:11
stamp [2] - 28:5, 28:25
stand [2] - 76:21, 79:9
standing [8] - 46:11, 46:16, 47:7, 62:24, 63:3, 63:12, 65:23, 66:23
standpoint [1] - 84:8
starting [1] - 23:15
STATE [2] - 1:2, 89:2
State [2] - 4:6, 89:6
state [6] - 47:10, 57:1, 57:20, 59:11, 65:1, 83:12
statement [5] - 46:25, 57:25, 70:5, 84:14, 85:3
statements [1] - 68:8
states [3] - 19:22, 23:24, 40:12
stating [1] - 78:17
statute [1] - 71:14
statutes [1] - 75:14
stay [2] - 66:6, 79:13
staying [1] - 85:7
STEPHANIE [1] - 89:23
Stephanie [2] - 4:4, 89:4
still [6] - 24:25, 25:14, 79:21, 85:9, 85:19, 86:6
stipulate [1] - 4:21
stipulating [1] - 4:19
stipulation [1] - 4:16
straighten [2] - 20:18, 42:20
Street [1] - 2:12
street [1] - 78:10
strictly [1] - 73:2
strike [1] - 70:9
structure [9] - 58:10, 58:21, 70:1, 70:8, 70:18, 71:1, 73:18, 84:3, 85:9
stuff [8] - 10:20, 17:18, 18:23, 21:25, 44:6, 50:5, 69:13, 69:18
subdivision [1] - 73:12
subject [2] - 23:7, 81:14
submitted [2] - 60:20, 89:11
subpart [1] - 72:2
subscribed [1] - 89:13
subsequently [1] - 89:11
suggestion [1] - 31:15
Suite [1] - 2:11
summarized [1] - 51:16
summary [1] - 44:20
summer [1] - 86:7
supplement [1] - 31:8
suppose [1] - 81:10
supposed [3] - 13:22, 56:11, 70:25
swear [1] - 4:20
sworn [2] - 5:4, 89:8
system [4] - 69:1, 69:10, 69:17, 80:11

T

tables [4] - 8:17, 75:25, 76:13, 76:23
TELE/ VIDEOCONFERENCE [1] - 1:14
Tele/Videoconference [2] - 4:2, 4:7
telephone [10] - 4:18, 20:25, 22:12, 23:20, 26:24, 27:8, 34:7, 35:24, 52:7, 56:20
tend [1] - 56:5
terms [1] - 60:7
testified [6] - 5:4, 45:2, 75:18, 77:22, 79:17, 82:1
testify [3] - 58:18, 61:11, 89:9
testifying [1] - 89:8
testimony [7] - 27:12, 34:23, 65:5, 69:23, 78:25, 79:21, 81:7
THE [28] - 2:6, 2:13, 2:19, 4:25, 9:12, 26:12, 31:11, 31:19, 31:25, 32:3, 33:16, 37:13, 37:15, 37:25, 53:7, 59:19, 59:21, 61:6, 65:7, 71:11, 72:12, 74:4, 74:16, 74:23, 85:13, 86:23, 87:6, 87:12
themselves [1] - 74:21
therefore [1] - 81:15
therein [5] - 88:14, 89:9, 89:12, 89:14, 89:15
thereof [2] - 89:7, 89:13
thereupon [2] - 89:11, 89:13
thinking [3] - 20:17, 21:20, 81:25
third [10] - 20:4, 20:8, 30:21, 31:5, 36:24, 37:2, 38:10, 45:17, 56:8, 58:12
three [14] - 9:16, 9:18, 31:1, 31:17, 32:21, 53:18, 54:21, 55:10, 55:16, 62:6, 85:23
timeline [1] - 19:18
title [1] - 15:24
titled [3] - 9:4, 28:17, 44:10
today [13] - 5:11, 5:22, 6:3, 6:7, 7:20, 10:11, 53:1, 58:18, 75:19, 78:10, 78:17, 79:17, 79:21
together [2] - 13:22, 78:15
took [3] - 22:13, 34:12, 89:5
top [2] - 40:4, 44:10
tough [1] - 6:23
toward [1] - 16:23
towards [6] - 16:19, 66:14, 66:16, 76:10, 77:3
Tower [2] - 62:15, 70:13
tower [8] - 23:3, 63:8, 63:11, 63:22, 63:23, 64:9, 69:25, 70:8
towers [1] - 71:18
tracing [1] - 20:18
tracking [1] - 83:5
transcribed [1] - 89:11
TRANSCRIPT [1] - 1:13
transcript [8] - 13:1, 13:3, 25:6, 25:7, 86:24, 87:2, 88:12, 89:16
transit [1] - 33:4
Transmission [1] - 72:2
tried [2] - 18:5, 52:15
trip [1] - 66:17
trouble [1] - 63:4
true [3] - 56:6, 88:12, 89:16
truth [3] - 89:9, 89:9
try [11] - 5:25, 10:19, 19:12, 19:19, 32:13, 33:11, 42:19, 60:12, 72:17, 76:1
trying [4] - 71:16, 72:4, 73:24, 74:8
tuning [1] - 66:10
turbine [32] - 19:6, 19:8, 19:9, 22:18, 22:19, 23:23, 24:1, 24:7, 24:10, 24:19, 27:14, 29:19, 34:25, 41:11, 43:24, 45:22, 45:23, 46:1, 46:15, 46:17, 47:12, 56:25, 58:21, 63:23, 67:2, 67:5, 67:18, 68:23, 70:25, 81:9, 81:14, 82:14
Turbine [7] - 66:22, 67:11, 70:13, 70:18, 73:22, 74:14, 75:4
turbines [7] - 47:12, 71:9, 73:2, 73:9, 74:6, 74:9, 74:25
turn [2] - 30:2, 53:6
two [7] - 9:21, 15:20, 37:19, 55:13, 62:6, 77:2, 85:23
type [2] - 11:21, 69:17
typewritten [2] - 88:7, 89:15
typo [3] - 19:20, 20:15, 55:18

U

under [3] - 21:12, 25:14
understandable [1] - 55:25
understood [1] - 83:2
Understood [1] - 5:2
unless [4] - 39:10, 61:8, 82:12, 87:9
unoccupied [5] - 57:19, 57:24, 59:4, 59:10, 85:2
up [47] - 8:21, 9:5, 9:14, 13:5, 15:17, 15:22, 15:24, 19:12, 20:21, 22:2, 22:3, 23:7, 24:12, 27:16, 30:7, 35:13, 36:3, 40:13, 41:15, 41:23, 42:11, 42:17, 43:3, 43:4, 44:13, 47:5, 53:1, 53:14, 53:19, 66:5, 66:11, 66:13, 66:19, 70:6, 70:16, 70:22, 75:21, 76:9, 77:23, 78:10, 78:25, 79:8, 80:7, 81:4, 83:5, 83:7, 86:2
updated [1] - 50:14
updating [1] - 50:11
upper [2] - 29:1, 40:4
upset [4] - 65:3, 65:7, 65:9, 66:9
utilities [2] - 6:16, 43:17

V

vague [1] - 82:22
varies [1] - 71:2
various [1] - 51:23
vended [1] - 69:11
versa [1] - 81:10
versus [1] - 17:9
Via [5] - 1:18, 2:7, 2:14, 2:20, 2:23
via [2] - 4:6, 42:11
vice [1] - 81:9
Videoconference [1] - 1:18
view [1] - 85:8
viewed [1] - 45:4
viewing [2] - 8:24, 14:22
views [1] - 69:10
virtue [1] - 89:7
visit [10] - 43:9, 43:12, 43:14, 43:20, 44:21, 46:1, 47:18, 48:4, 48:11, 58:7
voice [1] - 19:23
vs [1] - 1:7

W

Wade [5] - 64:15, 64:16, 64:18, 65:2
wait [8] - 21:22, 54:11, 54:12, 55:2, 60:11, 80:19, 80:20
waited [1] - 28:11
waive [3] - 86:21, 87:3, 87:13
waiver [1] - 87:15
walk [2] - 19:14, 63:5
walked [1] - 78:10
wants [3] - 53:16, 84:12
Ward [1] - 77:14
website [1] - 69:5
weekend [2] - 85:8, 85:17
weekly [1] - 50:19
weird [1] - 9:23
whole [3] - 15:24, 85:20, 89:9
wife [1] - 23:5
willing [1] - 55:20
wind [7] - 8:2, 8:7, 40:23, 71:18, 73:2, 73:8, 73:11
winter [2] - 85:22, 86:7
wire [1] - 22:22
witness [10] - 4:20, 30:24, 57:11, 81:2, 84:16, 86:1, 87:16, 89:8, 89:11, 89:13
WITNESS [25] - 4:25, 9:12, 26:12, 31:11, 31:19, 31:25, 32:3, 33:16, 37:13, 37:15, 37:25, 53:7, 59:21, 61:6, 65:7, 71:11, 72:12, 74:4, 74:16, 74:23, 85:13, 86:23, 87:6, 87:12, 89:21
witnesses [1] - 76:21
wondering [1] - 20:11
words [5] - 64:19, 65:13, 70:2, 70:9, 81:9
works [1] - 32:3
world [1] - 85:25
write [2] - 18:21, 21:25
writing [6] - 18:4, 45:9, 64:20, 64:23, 65:2, 65:15
written [3] - 22:11, 35:20, 39:7
wrongly [1] - 19:10
wrote [5] - 16:11, 16:15, 46:19, 51:15, 75:24

Y

yard [4] - 46:11, 66:12, 66:20, 66:21
year [2] - 55:14, 59:7
years [4] - 6:18, 55:12, 68:10
yesterday [2] - 34:8, 40:13
yourself [3] - 8:24, 23:15, 38:13

Z

zoned [1] - 47:1
ZOOM [1] - 1:14
Zoom [10] - 1:18, 2:7, 2:14, 2:20, 2:23, 4:1, 4:7, 4:18, 9:8, 38:5
zoomed [1] - 5:1

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

* * * * * * * * * * * * * * * * * *

Keith and Deanna Kessler,	)	Case No. PU-20-194
	)	OAH File No. 20200211
Complainants/ Petitioners,	)	
vs.	)	
Minnesota Power, a division of ALLETE, Inc.,	)	
Respondent.	)	

* * * * * * * * * * * * * * * * * *

ZOOM VIDEOCONFERENCE DEPOSITION OF JOHN SCHUH

taken by Mr. Patrick D.J. Mahlberg, Attorney At Law, pursuant to notice and pursuant to the North Dakota Rules of Civil Procedure, before Lori L. Hauge, a Notary Public in and for the County of Williams and State of North Dakota, via Zoom videoconference, on Monday, October 5, 2020, commencing at 3:06 p.m.

* * * * * * * * * * * * * * * * * *

*Appearances as noted herein.

LORI L. HAUGE, RPR, CRR
Phone: 701-572-8222

A P P E A R A N C E S

MR. LYNN M. BOUGHEY, Attorney At Law, of the Boughey Law Firm, P.O. Box 1202, Mandan, North Dakota, appeared via Zoom videoconference as counsel for and on behalf of the Complainants/Petitioners.

MR. PATRICK D.J. MAHLBERG, Attorney At Law, and MS. MOLLIE M. SMITH, Attorney At Law, of Fredrikson & Byron, P.A., 200 South Sixth Street, Suite 4000, Minneapolis, Minnesota, appeared via Zoom videoconference as counsel for and on behalf of the Respondent.

MR. BRIAN L. JOHNSON, Attorney At Law, of the North Dakota Public Service Commission, 600 East Boulevard Avenue, Department 408, Bismarck, North Dakota, appeared via Zoom videoconference as counsel for and on behalf of the North Dakota Public Service Commission.

ALSO APPEARING VIA ZOOM VIDEOCONFERENCE: MR. JOHN SCHUH, Deponent; MR. KEITH KESSLER, Complainant/Petitioner; and MS. DEANNA KESSLER, Complainant/Petitioner.

LORI L. HAUGE, RPR, CRR
Phone: 701-572-8222

TABLE OF CONTENTS

JOHN SCHUH

Examination by Mr. Mahlberg ..... Page 5

Examination by Mr. Boughey ..... Page 46

Examination by Mr. Mahlberg ..... Page 65

EXHIBITS

No.	Description	Marked	Identified
1	March 1, 2017, Memorandum, and March 2, 2017, Addendum	4	17
2	May 15, 2017, Email with Attachments, MP000075-000079	4	28
3	Kessler Notes from April 14, 2017, Meeting with PSC and Minnesota Power	54	47

Certificate of Deponent ..... Page 69

Certificate of Court Reporter ..... Page 70

LORI L. HAUGE, RPR, CRR
Phone: 701-572-8222

(Deposition Exhibit Numbers 1 and 2 were marked for identification by Mr. Mahlberg prior to the commencement of the proceedings. The proceedings commenced at 3:06 p.m.)

THE COURT REPORTER: The attorneys participating in this deposition acknowledge that I am not physically present in the deposition room and that I will be reporting this deposition remotely. They further acknowledge that, in lieu of an oath administered in person, the deponent will verbally declare his testimony in this matter under penalty of perjury. The parties and their counsel consent to this arrangement and waive any objections to this manner of reporting. Please indicate your agreement by stating your name, whom you represent, and your agreement on the record.

MR. JOHNSON: Brian Johnson, PSC. I agree.

MR. BOUGHEY: Lynn Boughey for the Petitioners and Plaintiffs. We agree.

MR. MAHLBERG: Pat Mahlberg from Minnesota Power, and we agree.

Whereupon,

JOHN SCHUH,

called as a witness by the respondent, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. MAHLBERG:

Q. Good afternoon, Mr. Schuh. My name is Pat Mahlberg. We've -- we met real briefly before -- before we came on here. It's nice to meet you, though.

Mr. Schuh, am I pronouncing your last name correctly?

A. That's correct.

Q. Okay. Have you been deposed before?

A. I haven't.

Q. Okay. I assume --

A. I've taken depositions, though.

Q. I assume you've taken plenty of depositions and -- and been present for them. And I don't want to belabor those rules, and so I won't go over them with you, Mr. Schuh, unless -- unless you want to talk about them some more. Then, by -- by all means, let me know.

A. Sure.

Q. Mr. Schuh, when did you start working for the Public Service Commission?

A. I believe that I started working for the Public Service Commission in 2014. Sounds correct to me.

Q. Do you recall when in 2014?

A. I would like to say that it was earlier in the year, probably into January. January 15 is -- at a -- in 2014.

Q. You said January 15 of 2014?

A. Around that time, give or take a few days.

Q. Were you working at the Public Service Commission, Mr. Schuh, at the time that the Bison 4 project was permitted?

A. I -- I'm unaware of the time that it was permitted, so I guess I couldn't say.

Q. Do you recall having an active role in -- in your employment with the Bison 4 project, Mr. Schuh?

A. I didn't have an active role.

Q. If you had worked on the Bison 4 project, Mr. Schuh, would you recall that?

A. If -- for this siting process, I would recall it if I worked on that.

Q. Okay. And I'm just trying to figure out

the timeline, make sure that I'm -- I'm talking with you about things that are in your bailiwick and -- and not wasting your time with things that aren't.

A. Sure.

Q. In -- in preparation for today, Mr. Schuh, can -- can you just briefly tell me what you've gone back and -- and looked at in terms of documents relating to this Kessler and Minnesota Power matter.

A. I went back, and I think I read the orig -- original memorandum--it was filed by Jerry Lein--and that was the extent of it.

Q. And when you talk about that original memorandum that was filed by Jerry Lein, are you referring to the March 1, 2017, memorandum that was filed into what's called an I-File?

A. That is correct.

Q. And is that I-File I-15-0195, Mr. Schuh?

A. I don't recall the -- the file, but --

Q. Other than that one memorandum, did you review any other documents?

A. I didn't.

Q. As part of that memorandum, Mr. Schuh--and I can certainly pull it up if you would like--what

I have as having been put into the -- the I-File is Mr. Lein's March 1, 2017, memorandum, as well as a March 2, 2017, addendum that was authored by you. Do you recall that?

A. I do.

Q. And the memorandum that you just referred to, are you tending to be -- intending to be inclusive of the addendum that you wrote?

A. Yes.

Q. Okay. So you -- you've looked at Mr. Lein's memorandum and your addendum, and that's all that you have looked at in terms of -- in terms of this file?

A. I did. Yep.

Q. Generally speaking, in terms of what goes into the I-File --

A. Mm-hmm.

Q. -- can you take me through that process. Is it all notes? Is there some materiality level? Just walk -- walk me through your understanding of what gets into the I-File.

A. Sure. And it varies from case to case and the type of cases that we receive. Generally, when there's an analyst who feels that something needs to be followed or we need to start creating some

documentation record--maybe there's a recurring issue that they would like to refer back to--frequently, the analysts will request an I-File be opened so that they can put documentation in there, including any correspondence or any notes that relate to that specific case or a specific issue that they feel is important.

Q. Well, in this case, when you say "the" -- "the analyst," would Mr. Lein have been the analyst here?

A. In this specific case, I believe, primarily, Jerry Lein was the analyst.

Q. Do you have reason to think, Mr. Schuh, that there were others that played a more secondary analyst role?

A. Well, with most things with analysts, their director has some sort of interaction, and at times, they'll request some assistance from other analysts as well. I'm unaware of any sort of interactions that he had with other analysts.

Q. Sure.

And the director in this case, is that Mr. Fahn?

A. That would be Patrick Fahn.

Q. Have -- having reviewed the I-File myself,

Mr. Schuh, is -- is the procedure on these recurring issues or outstanding issues that merit attention that all documents created or received on that issue go into the I-File, or is there still some level of analyst discretion for filtering in and out stuff that makes it into that formal file?

A. Sorry. Maybe you can flesh that a little bit. Are you talk -- what type of product are we talking about?

Q. Yeah. I'm -- I'm just trying to figure out if that -- if what's out there in the I-File is the world of --

A. Sure.

Q. -- of documents or if there's -- you know, only those things deemed material enough by Mr. Lein to make it into the I-File would have made it in, and there may be more documents that exist out there.

A. I -- I couldn't speak to whether anything was left out of that I-File, but generally, they tend to be fairly comprehensive.

Q. Got it. Thank you.

A. You're welcome.

Q. So let's -- let's -- let's get to the meat a little bit more here. Do you recall, personally,

any conversations that you had with Mr. or Mrs. Kessler about the Bison 4 project?

A. I had a number of conversations with them, a few brief conversations over the phone. Primarily, the interaction would have been with the analyst and Mr. Kessler, and I -- at one on-site visit, I had -- had the opportunity to speak with Keith and Deanna.

Q. And we'll get to that--I think that's an April 2017 site visit--here in a little bit. Just sticking with the conversations you had and what you might recall about them, you say you talked with Mr. or Mrs. Kessler a number of times. Did I hear that right?

A. I -- I think I did speak with them a few times. I -- I couldn't tell you the exact number. Usually what would occur was they were having a conversation with Jerry Lein, and at that point in time, I think there was an instance or two where Jerry asked that I come in and join in the conversation, and usually there was some brief interaction.

Q. Do you have any specific recollection, Mr. Schuh, about the -- the dates of those telephone calls?

A. I don't.

Q. Do you have any specific recoll -- recollection as to the substance of any of those telephone calls?

A. The substance would have been the reclamation issues, for the most part.

Q. Do you have any specific recollection as to the time frame of those conversations?

A. I don't.

Q. Do you recall whether your conversations were primarily with Mr. Kessler, Mrs. Kessler, or the -- or both of the Kesslers?

A. Primarily with Mr. Kessler, Keith.

Q. You described that your recollection is there were times where Mr. Lein asked you to take part in -- in conversations that he was having with Mr. Kessler. Did you also have separate conversations with Mr. or Mrs. Kessler that Mr. Lein would not have been party to?

A. I don't recall any conversation.

Q. Do you happen to recall or have a recollection, Mr. Schuh, as to what the first time you talked with Mr. or Mrs. Kessler about the Bison 4 project was about specifically?

A. Specifically, I -- I don't have a -- have

a direct recollection of that conversation.

Q. Okay. You described that you recall the substance of those communications, the -- sort of the lot of them generally being about reclamation issues. Can you expound on that a little bit.

A. It was likely a fairly broad -- topically broad, but I believe they tended to be fairly short because usually there was a specific issue. Say, for example, he had concerns about easements or that he had a -- generally, I know there -- it did relate to reclamation issues. Again, Mr. Lein probably would be better suited to discuss what those reclamation issues were, in fact, since he had -- primarily had the discussion.

Sometimes it was the best manner in which to facilitate reclamation issues and, of course, the -- (Zoom audio distortion) -- of those issues. I apologize. That's a fair --

THE COURT REPORTER: Excuse me. The what of those issues?

THE DEPONENT: The resolution of those reclamation issues.

THE COURT REPORTER: Thank you.

BY MR. MAHLBERG:

Q. Do you recall -- Mr. Schuh, having looked

at the March 1, 2017, memorandum, there's reference in there to a February 2017 conversation between you and Mr. Kessler. Do you recall that?

A. That conversation?

Q. That -- yes. Do you recall that conversation happening in February of 2017?

A. I don't.

Q. Okay. Do -- do you have any recollection of any conversation that took place prior to February 2017?

A. Regarding this issue?

Q. Correct.

A. Right. Regarding these specific issues, I don't recall having any sort of conversation. I -- regarding these specific issues. I did have a conversation with Mr. Kessler during a legislative session where he said he had -- was having issues, reclamation issues, and then I referred him to contact the PSC; specifically, Jerry Lein.

Q. Got it.

Which legislative session was that in, Mr. Schuh?

A. I'm assuming that is the 2017 legislative session.

Q. The conversations that -- sorry. Strike

that.

Do you recall whether that was one conversation or a series of conversations?

A. That would -- that would have been, I believe, a single conversation, and I -- just to clarify, it may not have been the 2017 legislative session. It may have been the 2015. I -- I -- I can't recall the exact date or timing of that.

Q. Regardless of when it took place, I -- I want to make sure that I heard you correctly about the scope of that discussion.

A. Mm-hmm.

Q. Was it limited to reclamation issues?

A. I couldn't recall dir -- everything that was discussed, but I can tell you that it was short, and it was briefly after committee hearing, and I referred him to contact the commission.

Q. Do you recall from that conversation any discussion about an issue on the proximity of a turbine to any of Mr. Kessler's -- Mr. or Mrs. Kessler's structures?

A. The legislative session discussion or --

Q. Yes.

A. -- following discussions?

Q. Let's start with the legislative session

discussion.

A. Sure.

I don't recall that --

Q. Okay.

A. -- from the discussion.

Q. You recall at some point being part of a conversation with Mr. and/or Mrs. Kessler about the proximity of a turbine to a structure that they own; is that right?

A. At some point in time, we had a conversation.

Q. Do you recall, having looked back at that March 1, 2017, memorandum of Mr. Lein and your addendum to it, whether that conversation took place in February of 2017?

A. I -- I don't specifically recall that conversation. If -- I believe that memorandum, if -- if this is the one I -- I recall, it -- it followed a site visit, but I -- I guess I don't recall the timing of this specifically. But I -- I do know at some point in time, that there was a discussion about being a turbine location issue, whether it was at this -- but I -- I can say that it did -- we did have a conversation when I was at Mr. Kessler's -- at his property, that location.

Q. Got it.

And I'm just -- I'm just trying to make sure we walk through the timeline and -- and -- and get everything right here. I am going to attempt, now, through the miracle of the internet, Mr. Schuh, to pull up and share my screen with that March 1, 2017, memorandum. So if you will bear -- bear with me here. If everyone will bear with me, frankly.

A. Of course.

Q. Let me know, Mr. Schuh, if on the screen now appears a memorandum.

A. Yes. I see it.

Q. Do you see the -- the date on there?

A. Yes. March 1, 2017.

Q. I scrolled to the second page. Do you see a March 2 addendum that appears to be authored by you, Mr. Schuh?

A. Yes.

Q. Is this the document you referenced earlier as having reviewed in advance of today's deposition?

A. Yes. I briefly reviewed that.

Q. On this second page of what I've marked as Exhibit 1, there is what appear to be the

handwritten initials "JS" at the bottom. Are those your initials, Mr. Schuh?

A. Yes, those are my initials.

Q. Is -- is that the way that you would have signed off on that addendum?

A. Yes. With a -- generally, when there's a staff memorandum and I would like to provide some input in it or I had some part in it, I would then follow up with writing an addendum and initial it.

Q. Okay. I'm going to refer you, Mr. Schuh, to the very top paragraph on that page.

A. Okay. The "Also, in February 2017," that one?

Q. Correct. The -- the -- yes. Beginning there, if -- if you would take a minute, and I just want to give you an opportunity to -- to get familiar with the -- those top two paragraphs there --

A. Sure.

Q. -- before I have any questions. If you could look at them and let me know.

A. (The deponent complied with Counsel's request.) Yes, I -- I'm finished reading it.

Q. Thank you.

You read there that in Mr. Lein's portion

of the memorandum, he reports that you had a conversation with Mr. Kessler by telephone in February 2017. Do you see that?

A. Yes.

Q. Do you recall having that conversation with Mr. Kessler in February of 2017?

A. I don't recall it.

Q. Is it that you don't recall having the conversation at all, or just that you don't recall it having taken place in February 2017, Mr. Schuh?

A. I don't recall the conversation at all.

Q. Very good.

Would you have reviewed the memorandum portion of -- of this document before it was put into the I-File?

A. I may; I may not have.

Q. In -- in this instance where you drafted an addendum to it, at some point, would you have read Mr. Lein's memorandum?

A. There -- there's a good chance that I -- I did. I -- I don't recall reading his -- that portion. I do remember writing the addendum, though.

Q. Okay. I'm sorry. It cut out there on me. You -- you do recall writing the addendum?

A. I do recall writing the addendum. I do not recall reading his memorandum --

Q. Okay.

A. -- and -- but I -- I'm assuming that I did.

Q. And would it be a fair assumption, Mr. Schuh, that if you had disagreed with something in the memorandum written by Mr. Lein, that you would have addressed it with Mr. Lein and -- and a revised memorandum would have been issued?

A. That hasn't always been the case, no.

Q. And it hasn't always been the case that a revised memorandum was issued or that you would raise an issue of -- of disagreement with Mr. Lein?

A. I -- I likely would have -- if -- if I read this and I disagreed with a -- some portrayal in that or, more than likely, facts in the portrayal, I probably would have rails it -- re -- probably would have raised it if it related to something that I was part of.

Q. Got it.

And -- and so here, part of the memorandum is reporting about a phone call that it looks like you had that Mr. Lein was not part of. Is that fair?

A. It does look like that.

Q. And if Mr. Lein had reported something factually incorrect, you expect that you would have raised it at that time and had it corrected?

A. I -- I -- about that, maybe not, and I'm not sure exactly how this conversation would have arisen. It may have been just following a conversation Mr. Lein had where he requested that I call back with his participation, or it may not have. If -- if I would have had an issue with a -- with what -- what -- with what was contained in that phone -- or in this memorandum, though, I prob -- I would have raised it.

Q. Okay. So then let's move down to the addendum portion that you do recall drafting. Are you familiar with it enough that I can just keep going, Mr. Schuh, or do you want a minute to refresh yourself on that?

A. I'd like a minute, please.

Q. Yep.

A. (The deponent reviewed Deposition Exhibit Number 1.) Okay.

Q. Mr. Schuh, the addendum appears to report out about a telephone call that you and Mr. Lein had with Mr. Kessler. Is that fair?

A. Yes.

Q. Do you recall that telephone conversation with Mr. Kessler?

A. I do not recall the conversation.

Q. I may have asked you this earlier, Mr. Schuh. Do you have any specific recollections of any of the conversations over the telephone with Mr. or Mrs. Kessler?

A. I remember having conversations over the telephone with them. I do not recall specific issues that were discussed.

Q. And does looking at this memorandum refresh your recollection at all about that conversation in either February or March of 2017?

A. I recall having it.

Q. Do you recall Mr. Kessler raising issues regarding reclamation in that phone call?

A. I do -- well, I -- I -- I really do not re -- recall the conversation, but based upon in my addendum, it does seem to have been discussed.

Q. And, likewise, Mr. Schuh, fair to say you have no recollection, independent of reviewing the memorandum, about a discussion of a wind turbine being allegedly too close to a residence; is that fair?

A. As it relates to this -- this phone call that -- that was addressed in the memorandum, that's -- that's fair.

Q. Was it your practice to make these addendum or similar addenda or notes contemporaneous with having phone calls about issues like these?

A. I wouldn't say that it's a practice.

Q. Do you know why you and/or Mr. Lein determined that recording the memorandum and/or addendum was appropriate in this case?

A. In this case, I -- there would have been a reason why I did an addendum to it, specifically, and -- and signed it as well. I do not recall that specific reason.

Q. Do you have any general recollection of it, Mr. Schuh?

A. I believe it had to do with the following-up on -- on the -- the waiting until the snowmelt and Mr. Kessler reaching back out to -- to the staff. I think that's the -- the specific fact that I was, I think, following up with in the -- in the memorandum.

Q. As you sit here, do you have any recollection of whether the conversations in --

24

that you took part in in February and/or March of 2017 raised, from your perspective, a new issue about the turbine's proximity to the Kesslers' structure?

A. I -- I don't specifically recall that, but I -- I did write that addendum.

Q. Okay. What do you recall, Mr. Schuh, happening after the addendum was drafted with respect to the follow-up that's referenced there?

A. Meaning -- over what time period are you -- are we speaking of? Perpet -- like, till -- to today or shortly after that or --

Q. Yeah, I'm trying -- I'm trying to start shortly after that and --

A. Okay.

Q. -- and for -- build towards the present. So I apologize for the -- the question. It -- I'll -- I'll restate it.

Do you have a recollection, Mr. Schuh, of what took place in the couple to few months after you wrote this memorandum with respect to the -- the issues raised therein?

A. After -- as -- after I wrote the addendum, I -- the vast majority of this, again, is -- is handled by the analyst in the case, and nearly all

25

the landowner interactions would be held -- would be taking part between the analyst. And so I -- I can't say that I am -- I recollect what occurred after this or how it was addressed.

Q. Do you recollect conversations with the analyst about any progress being made on these issues?

MR. BOUGHEY: I just will note an objection as to any hearsay and would -- would request a standing objection in the event that -- so I don't have to interrupt anymore as to any requests of discussions with a third person.

Will that work for you, Mr. Mahlberg?

MR. MAHLBERG: I'm not a huge fan of standing objections, Mr. Boughey. I -- I'm just trying to ask Mr. Schuh what his recollection is. How about --

MR. BOUGHEY: Well, then I'll --

MR. MAHLBERG: -- if I -- if I have a -- a series of questions we're asking about, you know, what -- what a third party said and it seems like I'm making you object more than -- more than is reasonable, then I'll give you the standing objection then. But for -- for now, why don't you pop in when I'm violating the Rules of Evidence,

26

and we'll go from there.

MR. BOUGHEY: All right. Well, go ahead, then, and if you'd be so kind as to reask the question, and I will keep my objection very concise. I'll just say, "Objection. Hearsay," and nothing else, and then I'll -- I'll have it on the record. How is that?

MR. MAHLBERG: That -- that sounds -- that sounds fine with me.

BY MR. MAHLBERG:

Q. I've not a clue what the last question was, and so, Mr. Schuh, I'll -- I'll just ask a different one or the same one, depending upon what it was.

MR. BOUGHEY: I can read it back to you if you'd like.

MR. MAHLBERG: No. That's --

MR. BOUGHEY: It was --

MR. MAHLBERG: That's --

MR. BOUGHEY: -- what discussions did he have with Jerry Lein --

MR. MAHLBERG: Sure.

MR. BOUGHEY: -- and what did he say.

BY MR. MAHLBERG:

Q. Do you recall any discussions with the

27

analyst in this case--Mr. Lein--in the couple to few months after you drafted the March 2 addendum?

A. I do not recall any.

MR. BOUGHEY: And just answer "yes" or "no," sir.

THE DEPONENT: Sorry. I didn't catch that, Mr. Boughey.

MR. BOUGHEY: Please answer "yes" or "no" as to whether you recall any discussions --

THE DEPONENT: I do not --

MR. BOUGHEY: -- with Mister --

THE DEPONENT: -- recall discussions with Mr. Lein.

BY MR. MAHLBERG:

Q. And is it that you do not recall the specific discussions or you don't recall that they happened at all, Mr. Schuh?

A. It would depend on the time frame.

Q. Sure.

So do you have a recollection of conducting a site visit with Mr. Lein and representatives of Minnesota Power at the Kesslers' residence in 2017?

A. I do recall having a site visit with Mr. Lein and the Kesslers. I do not recall which

28

year it was.
Q. Do you happen to recall whether it was -- whether it was Friday, April 14 of 2017, Mr. Schuh?
A. I don't recall.
Q. Okay. I'm going to do my best to publish another document here.
A. Sure.
Q. As long as I've not screwed up, you should be viewing a memorandum that is dated May 15 of 2017. Is that what's on your screen, Mr. Schuh?
A. Yep. That's correct.
Q. If you would just take a -- a minute and familiarize yourself with the document, if you don't mind.
A. (The deponent complied with Counsel's request.) Okay.
Q. Mr. Schuh, are you familiar with this document?
A. I am generally familiar with it.
Q. You -- you notice in this document there's reference to an April 14 visit to the Keith Kessler ranch. Do you see that?
A. Yes.
Q. Does that refresh your recollection at all as to when the site visit with the Kesslers and

29

Mr. Lein that you attended took place?
A. I couldn't verify the date. That was the visit that I was referring to.
Q. Okay. Can you describe for me, Mr. Schuh, what your role was in the preparation of this memorandum.
A. I had zero role in preparing this -- this memorandum.
Q. Can you describe for me, Mr. Schuh, what your role was in reviewing this memorandum after it was prepared.
A. I did not review this memorandum prior to it being filed.
Q. And so is it fair, Mr. Schuh, that in the second substantive line from the top where it reads, "From: John Shuh [sic] and Jerry Lein," your recollection is that that's not quite accurate?
A. That's not accurate, and I think the fact that my name was misspelled only proves that.
Q. Do you know when you would have first reviewed this memorandum, Mr. Schuh?
A. I do not know when I would have first reviewed this memorandum. I do generally recall seeing it at a much later date in the file.

30

Q. Do you recall discussions leading up to the site visit, Mr. Schuh?
A. I do not recall on -- the discussions leading up to the site visit. I -- I do recall that there were issues related to reclamation that were discussed, but that's about the extent of it.
Q. Is it typical for you, Mr. Schuh, to attend, along with an analyst, to one of these site visits?
A. This was atypical. Atypical.
Q. Do you recall why you attended this particular site visit?
A. Yes. It was more of a favor. Generally, the analyst will go -- or the analysts will go do the site visits or do the vast majority of the investigations.
(Cell phone interruption at 3:42 p.m.)
THE DEPONENT: Excuse me. Just have to ring it -- let it ring out.
But Mr. Lein is unable to drive, and it was looking like it would be a much later date when we would have another person available to -- to accompany him out there and drive him out there, and so I drove him out there.

31

BY MR. MAHLBERG:
Q. Do you recall -- do you recall the meeting?
A. The -- at -- at the site visit?
Q. Yes.
A. I do recall the site visit.
Q. Do you recall who was present?
A. I do not recall everyone who was present. I remember Mr. Lein was there; of course, I was there; I did meet Keith and Deanna Kessler as well. To the extent that Deanna was there the whole time, I -- I'm -- I don't recollect. And there were, I believe, members of Minnesota Power -- or ALLETE or Minnesota Power. There were a number of representatives, but I -- I could not tell you how many or who they were.
Q. Do you have a recollection, Mr. Schuh, of talking about reclamation issues at that site visit?
A. I do have a recollection of discussing reclamation issues.
Q. And when you were out there, are you -- are you in one of the structures? are you having this meeting outside? What -- what do you recall about this setting?

A. The setting, if I -- my recollection is that we were driving through a portion of his property, and he was advising Mr. Lein about a number of the reclamation issues. And at the end, I believe we went up to discuss a cattle crossing issue, and that is where the -- it was right next to the turbine that I believe is the subject of the Complaint.

Q. Do you have any specific recollections of any other issues being raised while you were out there other than reclamation issues, which you described generally, and the cattle crossing issue?

A. I recall that there were a number of issues regarding easements, Mr. Kessler's relationship with the -- with the company, and I believe that he also brought up the noise as well as it pertained to the then-occupied residence where his son was occupying.

Q. Do you recall -- do you recall more specifically, Mr. Schuh, what the conversations about the easements were?

A. I -- I do not recall specifically what the discussions regarding easements were.

Q. Do you recall it generally, or just that the topic of easements was one that was discussed

that day?

A. I remember there was a topic of easements being discussed that day, and I believe there were a number of topics regarding easements. But specifically, I -- the only one that I -- I believe that -- that was discussed that I can recollect had to do with fencing -- a fence along -- being built in a right-of-way. I think it had something to do with that. But I -- I don't remember specifically what the issue was.

Q. One of the other issues that you recall being talked about was the Kesslers' relationship with the company?

A. I do --

Q. Do you have any -- do you have any specific recollection about the conversations on that topic?

A. I do not. The only recoll -- recollection I have regarding that conversation would have been that they had tried to meet a number of times and work out these issues, and it did not seem to be constructive.

Q. The other issue you mentioned having a recollection of being the subject of discussion that day was noise regarding the turbine and the

structure that was then occupied by one of the Kesslers' children.

Do you have any specific recollection of the discussions about that topic from that day?

A. There was a specific discussion relating to that topic, and it had to do with the use of that property. Just give me a minute to -- to try to collect my thoughts on that.

There was a -- there was a discussion relating to the -- the use of the property and issues that he believed, I think -- and issues related to that, and I asked that he pass along any documentation that he would have--any texts, emails, voice mails, or anything, so forth--related to that, and he seemed to indicate that he did not have any, but he was going to look.

Q. When you say "he," Mr. Schuh, are you talking about Mr. Kessler?

A. Yes. I'm speaking of Mr. Kess -- Kessler.

Q. So you were part of a conversation on April 14 where the use of the property and issues related to that were specifically discussed with and by Mr. Kessler?

A. Yes. It was related to -- there was a -- a brief discussion related to that, and I believe,

if I remember correctly, I -- I asked if he had any sort of documentation regarding this matter, and -- and if he did, to provide it to Mr. Lein.

Q. Do you recall whether that conversation took place just between you and Mr. Lein and Mr. Kessler or whether that was part of the larger group's discussion that day?

A. I do not recall who specifically was involved in that portion of the discussion; however, I believe at that point in time, all members who were part of that site visit were in close proximity.

Q. And at that point, are you out at the -- the turbine site? are you in the -- the yard? Do you recall where you were?

A. We were up by the -- the cattle -- cattle crossing that was an issue for Mr. Kessler.

Q. Do you recall any discussions on that visit about whether the property had been occupied when the project was sited?

A. I be -- I believe there was a discussion related to that, a brief one.

Q. And what do you recall about that part of the discussion, Mr. Schuh?

A. I don't recall -- I don't really recall

what was said.

Q. Just that there was a conversation?

A. I -- I do recall that there was a conversation related to it, but I do not recall specifically what was said.

Q. Do you recall who talked about that specific issue, even though you don't recall what was said?

A. I believe that it was Mr. Kessler, and I believe a representative from Minnesota Power did most of the conversation related to that.

Q. The memorandum from May 15 of 2017 that is published on the screen --

A. Mm-hmm.

Q. -- reports in Number 4 about what would appear to be a -- a summary of the turbine proximity and -- and noise issues; right?

A. That's what it looks like.

Q. In there, the -- the very last sentence of it says that "Mr. and Mrs. Kessler state they informed the right-of-way agents before the turbine was sited that they did not want turbines near that residence because their son was planning to occupy it."

Do you see that?

A. I do see that.

Q. Do you have a -- any recollection of that portion of -- of the discussion that day?

A. Specifically, I don't have a recollection of that.

Q. It would just fall into that, generally, you remember some issues about the use of the property having been discussed that day?

A. Correct.

Q. And beyond that general recollection, you do have a specific recollection of asking for any documents on the topic to be provided to you by the Kesslers; is that right?

A. I do recall that. I am not -- I guess, not to me. To Mr. Lein, the -- the analyst that was doing the investigations -- (Zoom audio distortion) --

THE COURT REPORTER: Excuse me. You're really cutting out there. Could you --

THE DEPONENT: I'm sorry about that.

I said the -- I -- I believe the request was to provide that information to Mr. Lein because the analysts generally do the investigations into the matter and then provide a recommendation to the division director.

THE COURT REPORTER: Thank you.

MR. MAHLBERG: Got it.

BY MR. MAHLBERG:

Q. So you -- you made the request to the Kesslers to have them provide whatever documents they might have to Mr. Lein so that it could become part of his analysis of the issue. Is that fair?

A. That's fair.

Q. Okay. Do you have a recollection, Mr. Schuh, of what documents were provided relating to the -- to that issue?

A. I -- my understanding, and this is from following up to this -- on to this issue with -- with the analyst, was that no documentation was provided.

Q. Do you recall anything else about that meeting on April 14 of 2017 that you haven't already testified about here?

A. I recall being up next to the -- the house where Mr. Kessler's son was, and I recall that there was a very heated exchange with Mr. Kessler and one of the representatives.

Q. You say a heated exchange with Mr. Kessler and one of the Minnesota Power representatives?

A. Yes. And when I say "heated," I -- I -- I

wouldn't -- probably not characterize it both ways as heated; straight from Mr. Kessler. He had a heated communication with a representative, and the representative did not provide a heated exchange back.

Q. I -- I don't want to put words in your mouth on that one, Mr. Schuh, but, I mean, it -- it sounds to me like Mr. Kessler was upset with and gave an earful to one of the Minnesota Power representatives.

A. That is -- that is accurate.

Q. And whoever that Minnesota Power representative was -- I don't know if exercised restraint in the response is the right phrase, but did not respond in kind; is that correct?

A. He did not seem to --

MR. BOUGHEY: Objection to form. Sorry.

MR. MAHLBERG: Go ahead, Mr. Schuh.

THE DEPONENT: Sure.

To my recollection, he did not. I believe the response was, "I know that's how you see it, Keith." And I'm not specifically -- I -- I believe whatever was -- the response was was fairly close to that -- to that verbiage.

BY MR. MAHLBERG:

Q. Do you recall -- do you recall exactly or -- or to -- or in a paraphrasing way what Mr. Kessler said in that heated fashion?

A. I do believe it involved whether he could trust -- trust what Minnesota Power was doing. I -- I could not provide you the exact verbiage, but it was -- it had something to do with him feeling betrayed.

Q. Do you recall what he -- he was voicing that he felt betrayed about?

A. I do not.

Q. Any more detail that you can provide, Mr. Schuh, about the statements Mr. Kessler made that he had informed right-of-way agents before the turbine was sited about turbine siting issues?

A. Specifically, I -- I cannot recall anything else.

Q. Other than that exchange that you've described and the matters you -- you previously testified to, is there anything that you recall about that Friday, April 14, 2017, meeting that you've not talked about here in your testimony today?

A. I -- as it relates to the reclamation

issues, I have very specific recollections, but not of anything else.

Q. Do you have any recollection, Mr. Schuh, of what follow-up took place after the -- the April 14, 2017, site visit?

A. I -- I do not have a recollection. That primarily would be between the analyst and the -- and the landowner and the company.

Q. Do you recall taking part in any conversations with the analyst or with the landowner or with the company after the site visits -- excuse me -- after the site visit took place?

A. I do recall having conversations with the analyst. I believe that there was a brief conversation with Mr. Kessler as well at one point, but I -- I couldn't -- I couldn't recall the -- the topic of the discussion.

Q. Do you recall generally when that conversation took place?

A. I don't.

Q. Any recollection whether it's 2018, 2019, twenty -- later in 2017, or just no recollection at all?

A. I -- I have no recollection of the

specific date because, more than likely, I -- I was probably called in from something else, briefly engaged, and then probably went back to my work.

Q. Okay. Do you recall -- do you recall any of the -- the back-and-forth about reclamation issues that took place after the site visit?

A. I do recall a few back-and-forths, but not from my communications with Mr. Kessler or the company, but from, I believe, Mr. Lein discussing it either at a meeting and -- a meeting with the Public Utilities Division or with me specifically, but I -- I do not specifically recall how that conversation occurred.

Q. And do you have any recollection at all, Mr. Schuh, of efforts by Mr. Lein or yourself or others on the commission staff about--I don't know--investigating the turbine proximity issues after the site visit took place?

A. I recall a discussion relating to the turbine location, and in that discussion, I believe that I was waiting for Mr. Lein to collect his information, his data, and his opinion and provide it.

Q. Do you recall when that was?

A. I do not recall.

Q. Do you have a sense as to whether that was -- that conversation was a product of the meetings that were taking place in 2017?

A. I -- that would only be speculation whenever that was.

Q. It's also not something that's happened in 2020?

A. The conversation with Mr. Lein and myself?

Q. Yeah.

A. I do not believe -- I do not recall a more recent conversation with Mr. Lein since a Complaint was filed.

Q. Got it.

So I --

A. (Zoom audio distortion.)

Q. Sorry. I don't mean to step over you there, Mr. Schuh.

A. That's all right. Go ahead.

Q. Just so that I'm -- I'm tracking you on this, at -- at some point, you had a conversation with Mr. Lein about looking into the issue of the turbine siting and whether Mr. Lein had an opinion about it. Is that fair?

A. That's fair.

Q. Did Mr. Lein ever produce for you the

outcome of his looking into it?

A. Well, Mr. Lein likely would have provided the output of his opinion on the matter and provided it to the director, and then usually, subsequently, it would -- it would come to me.

I do not recall him providing any sort of input on an opinion on that matter. I do recall specifically asking that if he had any information regarding the issue and he was looking to go forward with it, to provide -- forward it to me so that I could create a case file on it.

Q. You just don't have a sense as to what year that conversation may have been in?

A. I don't, and this is largely due to the fact that Mr. Lein large -- was taking -- doing most of the communicating of the matter.

Q. Do you recall the last conversation that you had with either Mr. Kessler or Mrs. Kessler or a representative of the Kesslers about the siting of Turbine 441?

A. I -- the representative would have been Mr. Boughey would have been the last conversation I -- I likely had with -- with anyone regarding this issue.

Q. Do you recall when that was?

A. I don't recall. It -- but it would likely have been in the last year.

Q. Do you recall whether it was before or after the -- the time the Complaint was filed?

A. I -- I believe there was a discussion prior to the Complaint being filed, and I believe that there was a discussion -- I -- I don't re -- recollect if it came after the Complaint was filed.

Q. Do you recall what the discussion was about, Mr. Schuh?

A. I believe it was generally related to Mr. Boughey's representation and -- on the matter.

Q. When you say "generally related to Mr. Boughey's representation," do you mean a general contact that Mr. Boughey will be representing the Kesslers or something more than that?

A. I believe Mr. Boughey filed a memorandum to the commission regarding a number of things. There were some follow-up conversations about the issues; however, with Mr. Boughey having representation, my understanding was that he was going to carry the issues forward.

MR. MAHLBERG: I -- you know, for now, Mr. Schuh, that -- that's all the questions that I

have of you. I -- I appreciate your time.

Certainly, Mr. Boughey is -- is going to have an opportunity, and I will be surprised if he doesn't take it, to ask you just a few questions of his own.

And at the end of this, your lawyer's going to give you the -- the lowdown on reading and signing, as though you needed that too.

But I appreciate your time.

THE DEPONENT: Sure.

EXAMINATION

BY MR. BOUGHEY:

Q. Mr. Schuh, can you hear me?

A. I can.

Q. Fantastic.

First of all, just to clarify the last topic you had where I had contacted your office, just so that the other side can feel comfortable, it's my recollection that once it was determined that we need to file some sort of Complaint or memorandum, I did contact you as to how to file it, what was the proper format, kind of basic things like that.

Would that be a fair statement of what we generally talked about?

A. I do recall briefly discussing the content of the memorandum and that you intended to subsequently file a formal Complaint.

Q. Okay. Very well.

And, again, it would be kind of the standard a lawyer talking to the lawyer from the PSC, "How do we do this? What do you want me to do?" in regards to getting it properly before the PSC. Would that make sense?

A. To -- to be honest, Mr. Boughey, I -- I don't remember the majority of the conversations, but I do recall specifically your discussing how to file a Complaint.

Q. Okay. Thank you.

Now let's go into -- and I'm not sure. I've never tried to share a document. So we're going to see if this shows up. So I have a -- I apologize. Let's just see if it works. It does not. All right. Let's see what I can get here. Very good.

Do you see a document now that on the top says "Kessler notes from Keith" as showing up for you?

A. Yes. I do recall that.

Q. Do you see, on the screen right now, that

document?

A. I do.

Q. I've attempted to share.

A. I -- I see it.

Q. Good. Excellent. All right.

And so I just want to go through, because Keith has documented what he recalls, and I just want to know if this either refreshes your recollection or if you recall any of these discussions occurring while you were there on April 14, 2017, Good Friday.

So we're going to go down to the part where it says, "Tower on 15," and there was an issue about -- we're on "Tower on 15, Talked about cattle guard and putting in a double fence. Talked about how we were"--apparently--"told that the tower was not going to bother our land."

Do you remember Mr. Kessler saying anything to Minnesota Power about they -- asserting that he had told them -- or that they were previously told that "the tower was not going to bother our land"? Do you recall that anytime during the discussion?

MR. MAHLBERG: Object as to form.

MR. BOUGHEY: All right. Well, I'll --

MR. MAHLBERG: You -- you can -- you can answer --

MR. BOUGHEY: Go ahead and answer if you can.

MR. MAHLBERG: -- it.

THE DEPONENT: Sure.

MR. BOUGHEY: Yeah.

THE DEPONENT: I -- I -- this -- I would not be able to tell you whether this is a specific instance that -- that I recall. I -- this is Mr. Kessler's recollection, and I'm not sure exactly which conversation this is related to.

BY MR. BOUGHEY:

Q. Then --

A. But --

Q. -- I'll phrase it another way.

A. Sure.

Q. I'm sorry to interrupt. Go ahead and --

A. Go ahead.

Q. -- expand. Finish your --

My question, then, is do you recall, at any time, Mr. Kessler--at any time during this meeting on Good Friday--stating to the company, "You told us that this tower wasn't going to bother our land"? Do you recall any type of discussion

like that where Mr. Kessler said that to somebody from the company?

A. Just give me a moment to -- to try to recollect.

Q. Sure.

A. I -- I -- I believe what this conversation is referring to is that -- the conversation that ended up being in a -- a heated exchange from Mr. Kessler to their representative. I do not recall that specific -- those -- that specific language of what Mr. Kessler expressed. I do recall he stated that it was about -- something about dis -- a matter of being able -- a lack of trust or something like that or that he -- that he was counting on from them or -- or something related to that.

Q. Okay. Mr. Schuh, I'd like you to actually read the two paragraphs, the one that starts with, "Tower on 15," and the next one, "Went to yard on 15." And once you've read those, would you please tell me, and then I will ask you some questions relating to it. And as you can tell, I'm trying to break down what I understand the conversation was, which did result in a heated exchange, but I'm doing it item by item.

So if you'd respond when you're done reading those two paragraphs, and then I will ask a few more questions.

A. Sure (complying with Counsel's request). Okay. I've read them.

Q. Fantastic. Thank you.

A. Mm-hmm.

Q. Now, so the first part of this conversation apparently, according to Keith, was we "talked about how we were told that the tower was not going to bother our land."

Do you recall any -- Mr. Keith Kessler stating anything like that while you were on-site that day?

A. I -- I do not recall specifically that language that he used.

Q. Do you then recall what Keith then says -- do you recall Scott from Minnesota Power saying -- agreeing, "We did talk about it"? Do you recall any comment from Scott at that time?

A. And the -- I guess this is as it relates to fencing or the -- the location?

Q. No. All this relates to the tower.

A. Okay.

Q. So the first sentence relates to the

second.
A. Sure.
Q. "We were told the tower was not going to bother our land" is what Keith initially said, and then the next question I have is, "Scott agreed that we did talk about it."
Do you recall Scott Monroe say -- making any type of statement in agreement that they had, indeed, talked about the tower not bothering his land?
A. I -- I do not --
MR. MAHLBERG: Well --
THE DEPONENT: -- recollect --
MR. MAHLBERG: -- I'll object as to form. Sorry for stepping over you there, Mr. --
THE DEPONENT: No.
MR. MAHLBERG: -- Schuh.
THE DEPONENT: Sure.
MR. MAHLBERG: Go ahead.
BY MR. BOUGHEY:
Q. All right. And your answer again, please?
A. Sure.
I don't -- I do not recall, specifically, that being stated.
Q. Okay. Do you recall when Wade Isaacson

asked, "Did you have it in writing?" and then things got heated? Did -- do you recall that?
A. I do not recall him saying that.
Q. Okay. Now, in the next paragraph, do you recall Keith asserting -- while you were there in the presence of Minnesota Power, Keith stating, "We told you that one of our sons was going to live there"?
Do you recall Keith making that assertion in front of Minnesota Power?
A. I -- I don't specifically recall that statement.
Q. Okay. And then the next sentence, "Scott agreed that we did tell him and Wade."
Do you recall Scott stating that?
A. I do not recall Scott stating that.
Q. Okay. And then the next sentence relates to what supposedly or -- you had said --
A. Mm-hmm.
Q. -- "Jerry and John"--"John" meaning you, of course--"both said they would not want to live there."
Do you recall making any statement relating -- or words to that effect about living at that residence close to 441?

A. I do recall making a statement in -- in general relating to the turbine noise to the -- outside the front of the house.
(The court reporter requested clarification.)
MR. BOUGHEY: And for the record, the document that I have on the screen, I will turn that into Exhibit 3 for the deposition.
I notice, Counsel, that you had Number 1 and 2, and I assume that, so that they are part of the exhibit [sic], at some point you'll want to offer both, and then I will offer 3 once that occurs. Does that sound like a plan?
MR. MAHLBERG: Yeah, that -- that sounds -- that sounds fine, Lynn. My thought is I'll send these to the court reporter and to you after we're done here. I didn't know if we would use --
MR. BOUGHEY: And I'll do the same.
MR. MAHLBERG: -- them, so I didn't want to send them beforehand.
MR. BOUGHEY: Make -- makes sense.
Okay. Now I have just a few more questions, so I'm going to try and switch to the screen again. Stop share. Perfect. All right.

Mr. Mahlberg, would you be so kind as to put your Exhibit 1 up on the screen, share screen.
MR. MAHLBERG: I will be so kind as to try. Here we go.
MR. BOUGHEY: Perfect.
BY MR. BOUGHEY:
Q. Now, we've already reviewed this, and I am not going to beat the proverbial dead horse, Mr. Schuh. All I'm going to do is ask a couple things that I need to tie in.
The first page of Exhibit 1 mainly relates to issues not about the tower, and so I'm going to go to the second page.
MR. BOUGHEY: Are we able to go to the next page?
(Mr. Mahlberg complied with Counsel's request.)
MR. BOUGHEY: Perfect. Thank you.
BY MR. BOUGHEY:
Q. So, now, in regards to all these discussions that you had or -- that you had or you found out that Jerry had, my question is -- is as a result of Mr. Kessler raising the assertion that he had previously told Minnesota Power that that house was going to be used, did you personally take any

steps to investigate whether or not that was, first of all, truly an occupied residence as asserted in this memorandum?

A. Personally?

Q. Yes.

Did you personally -- I have to go personally first. So did you -- did you take any steps to personally check and determine the facts as to whether or not this was an unoccupied residence as it would relate to this tower?

A. Mr. Lein was tasked with doing the investigation as the analyst doing his cases.

Q. So to cut to the chase, since somebody else in your department was tasked to do the investigation, would it be fair to state that you did not, in any way, investigate whether the assertions made by Mr. Kessler, the counterassertions made by Minnesota Power, you didn't delve into any of that? Is that a fair statement, sir?

A. It is -- it is the analyst who worked on the case that would --

Q. And not you?

A. -- investigate the case.

Yes.

Q. Now, I can tell you just for the record, the application, according to our documents, was submitted on May 3, 2013, and the hearing was on September 13, 2013. And at that point, you obviously had -- you weren't working at the PSC until 2014; is that correct?

A. That sounds correct.

Q. Okay. And so, obviously, you were not at the -- the hearing; you didn't even work there yet.

A. Yes. I -- I am unaware of the siting process.

Q. All right. Very good. I just thought it would be good to put in the record as to why.

And do you recall, other than the administrative law judge, because I'm sure you've looked -- reviewed the record, were any members of the Public Service Commission in attendance at the public meeting that occurred on September 13, 2013, if you know?

A. I -- I wasn't part of that proceeding, so I -- I -- I do -- I did listen back to the portion where Mr. Kessler provided his -- his comments. I -- I could not speak to who was there at that time.

Q. Let me ask you now a more generic

question, then. When this is assigned by the Public Service Commission to an administrative law judge, is it standard procedure for someone from the Public Service Commission, staff or otherwise, to attend the actual public hearing?

MR. MAHLBERG: Objection as to form.

Mr. Boughey, I can't tell if you're asking Mr. Schuh to opine about what standard procedure is today or back from before the time where he was working at the commission.

MR. BOUGHEY: Fair enough. Then I'll cut to the chase. This is just a discovery deposition.

BY MR. BOUGHEY:

Q. Mr. Schuh, I have reviewed the sign-in sheet in regards to the hearing that occurred on September 13, 2013, and I can tell you that the -- the only person that has any connection with the PSC is the -- the administrative law judge, and nobody has signed in on that sheet from the Public Service Commission itself.

And so assuming that nobody did show up from Public Service Commission to that hearing, I'm just trying to find out, once you started working for Public Service Commission, is it standard procedure or normal that you just let the ALJ deal

with it and you guys don't go to the hearing? I just need to find that out.

A. I believe that you're looking to have someone -- to find out who the appearances were. They would have it on the record there if you listen to it at the beginning.

Q. Okay. Now, as to your addendum, you've already stated, I take it, that in regards to the top two paragraphs which were done by Mr. Lein--again, go ahead and review those--but it's my understanding you did not take any -- you did not conduct any investigation to determine if any of those facts were correct. Would that be a fair statement?

A. Yes. It would be the analyst who does the investigation until it's --

Q. And, now --

A. -- until it's referred forward.

Q. Now, of course, once you were on-site, you would be in a position to, obviously, have observations and -- and have the ability to opine on what you observed, but you didn't take any formal investigation yourself; correct?

A. Yes. It would be the analyst who would do any sort of investigation.

Q. Okay. Now I'm looking at your addendum. I apologize. What I'm looking for, and I'm not finding it, there was a reference to Mr. Kessler supposedly raising a new issue, and the phrase was "new issue," and I was just wondering, the -- the new issue, and I'm trying to find where that language is at on here, and I'm not. But, in any event, it was a new issue to you, but you -- you don't have any information as to whether or not it had been raised by Mr. Kessler previously with either -- with the company; correct?

A. That's correct. I would not be privy to -- (Zoom audio distortion) --

THE COURT REPORTER: Excuse me. You would not be privy to what?

THE DEPONENT: The conversations between the Kesslers and the company.

THE COURT REPORTER: Thank you.

BY MR. BOUGHEY:

Q. I'm just reviewing the memo to see if I have any other questions, Mr. Schuh. I'll be done very shortly.

A. Sure.

Q. I did find the phrase. It is the second sentence on this document on the top of the page.

Second sentence, "Mr. Kessler raises a new issue with noise from a turbine that is too close to his son's residence."

And so, again, that is a, in your -- and apparently -- and you didn't write that. Apparently, Jerry Lein wrote that, but it was a new issue to the PSC, but might -- might not have necessarily been a new issue to him; correct?

A. To whom? Are we -- are we speaking of --

Q. To Mr. Kessler.

A. Oh.

MR. MAHLBERG: Object as to form.

BY MR. BOUGHEY:

Q. And it was a lousy question. Let me try again.

Mr. Schuh, I'm just going to -- you've already answered it previously. It's just I couldn't find where that phrase was, and so I'll just cut to the chase on this one as well. That second sentence, the answer you provided earlier which said you would have no information as to whether Mr. Kessler had raised this -- this issue previously with the company, and so when -- that reference to the new issue with noise relates that it's a new issue as it relates to the Public

Service Commission and to you guys. Would that be a fair statement?

A. I would say that I would not be knowledgeable about his conversations with the company.

Q. Okay. Now, if you'll give me just a moment. I'm looking over my notes to see if I have any other questions, so it won't take long.

A. Sure.

Q. The only other area I have is -- and I don't know if you can answer this, Mr. Schuh, but the reference to an unoccupied residence. Does the Public Service Commission have any specific standards or definitions as to what "unoccupied" means when it is an adjective to residence?

MR. MAHLBERG: Object as to form.

THE DEPONENT: So to follow up, would you restate that question or at least provide it to me again?

BY MR. BOUGHEY:

Q. Yeah, I'll -- I'll rephrase it. I'll rephrase it.

Does -- to your knowledge, does the Public Service Commission provide any specific definition to what "unoccupied" means as it relates to the --

the words "unoccupied residence"?

A. I am unaware of any precedent or anything outside of the law or administrative rules that discusses inhabited residence.

Q. And it's my understanding that the word -- the phrase "inhabited residence" or "occupied residence," I think it comes from the actual statute relating to avoidance areas. Is that your understanding as well?

A. I -- I don't have it in front of me. I -- so I -- I couldn't --

Q. That's fine.

A. -- help you out.

Q. In any event -- and, again, this is discovery. I just want to make sure that if you guys have a specific definition or more detailed standards, definitions, examples somewhere within your -- your code or some of your precedents or your rules and regulations, I -- I'm just wanting to know now. I can tell you I haven't found any, but I thought I better ask the expert, which is you.

A. Sure.

Q. So as just to summarize, then, as far as you know, there are no other specific definitions

64

as to "unoccupied residence" or "inhabited residence" that the Public Service Commission employs outside of the statutory language?

MR. MAHLBERG: I'm going to object as to form and probably as to foundation and -- and some other basis that I can't quite put my finger on, Mr. Boughey, but asking commission -- a commission attorney to testify about what may be employed by the commission itself is, I think, probably not an appropriate line of inquiry for Mr. Schuh to be responding to.

However that might take a real form of an objection, I will make it there.

BY MR. BOUGHEY:

Q. All right. Mr. Schuh, go ahead and answer if you can. Are there any other standards you know of besides the stat -- for that other than the statutory language relating to that term "inhabited residence" or "unoccupied residence" that you happen to know of?

A. In the -- in the moment, I -- I only recall the administrative code, as well as the statutory language. That's it.

Q. Very good. And I -- I thought as much, but I wanted to find out, just educate myself on

65

that.

MR. BOUGHEY: All right. Mr. Schuh, that is all I have at the moment. I believe Mr. Johnson is going to give you an opportunity to read and sign, if that is your choice, and so I have no further questions.

I should first check if Mr. Mahlberg has any additional follow-up before we go that route.

MR. MAHLBERG: Yeah, I -- I -- I do. I have exactly, like, three questions' worth of follow-up, and I'll try and keep it shorter than that.

EXAMINATION

BY MR. MAHLBERG:

Q. Mr. Schuh, do you recall when Mr. Boughey was asking you questions about what appeared to be notes that his client had recorded?

A. Yes.

Q. Do you recall -- you were asked some questions about whether you recalled things taking place the way that they had been recorded, and your answer to a number of those questions was, "I don't recall that."

Do you -- do you recall that testimony?

A. I -- I do recall that.

66

Q. I just want to make sure on this point, when you say, "I don't recall," your testimony is you're not sure one way or the other, or conversely, are you offering affirmative testimony that you have a memory of those conversations and that they did not take place as they were recorded in those notes?

A. I -- I don't recall the content of those conversations, if they occurred.

Q. Very good.

MR. MAHLBERG: Thanks. Thanks. That's -- I just wanted that point of clarity, and I appreciate it, Mr. Schuh. I don't have anything else for you. I appreciate your time.

THE DEPONENT: Thanks.

MR. BOUGHEY: I had to unmute. Sorry. I don't have anything else -- further.

Mr. Johnson, do you want to give him the standard language, or do you want me to -- to give it or Mr. Mahlberg as to his options as to signing?

(No audible response.)

MR. BOUGHEY: I'll go ahead and do it.

There you are. Now you're on, Brian. Go ahead.

MR. JOHNSON: Thank you. Yeah, go ahead.

67

You can give it, Lynn. That's fine.

MR. BOUGHEY: I'll just real quickly. Mr. Schuh, you -- you, as a deponent, have an option to review this and check for any, you know, typographical errors or misspellings or things like that. You also have an opportunity to make corrections if you find the need to correct any of your testimony. The way that is normally done is the court reporter will send you a deposition transcript and a sheet that you will write on as to any corrections, and she'll tell you you have so many days in which to get that back to her. And then if you do so, it will then be sent to all the parties. If you send nothing back, then we'll assume that everything in there was just fine. You have the opportunity to read and review it and make those corrections. You also have the opportunity to waive the reading, and if you choose to do so, that's entirely up to you.

That would be your attorney's advice, not mine, as to what you want to do. All we need to know, so the court reporter knows, is whether you would like to waive the reading or whether you would like to read it and review it and have an opportunity to make any additions or corrections or

anything else like that.
THE DEPONENT: Yes, I'd like to exercise the Rule 30(e) review.
MR. BOUGHEY: Very good. It's always nice to have a lawyer as the deponent who actually knows the rules.
All right. I have nothing else.
Mr. Mahlberg, do you have anything else?
MR. MAHLBERG: No, I don't. Thanks, everybody.
MR. BOUGHEY: Mr. Johnson, I know you're on mute, but is there anything else you need to add or have anything else?
MR. JOHNSON: Nothing from me.
MR. BOUGHEY: Then I take it, the -- Mr. Mahlberg, it's your deposition. Is it okay if we close this out now?
MR. MAHLBERG: It would be great if we did.
(The proceedings concluded at 4:32 p.m.)

CERTIFICATE OF DEPONENT

I, John Schuh, the deponent in the foregoing deposition, certify that I have read the attached 68 typewritten pages of my deposition upon oral examination, taken at the time and place indicated, and that it is a complete and accurate transcript of my deposition, with corrections, if any, noted herein along with the reason for each correction.

Dated at Bismarck, North Dakota, this _____ day of _____, 2020.

_____
JOHN SCHUH

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1

1 [14] - 3:12, 4:1, 7:16, 8:2, 14:1, 16:13, 17:7, 17:15, 17:25, 21:22, 54:9, 55:2, 55:11
1202 [1] - 2:7
13 [3] - 57:4, 57:18, 58:16
14 [8] - 3:17, 28:3, 28:21, 34:21, 38:17, 40:22, 41:5, 48:11
15 [9] - 3:14, 6:8, 6:10, 28:9, 36:12, 48:13, 48:14, 50:19, 50:20
17 [1] - 3:13

2

2 [7] - 3:13, 3:14, 4:1, 8:3, 17:17, 27:2, 54:10
200 [1] - 2:11
2013 [4] - 57:3, 57:4, 57:18, 58:16
2014 [5] - 6:4, 6:6, 6:9, 6:10, 57:6
2015 [1] - 15:7
2017 [34] - 3:12, 3:13, 3:14, 3:17, 7:16, 8:2, 8:3, 11:10, 14:1, 14:2, 14:6, 14:10, 14:23, 15:6, 16:13, 16:15, 17:7, 17:15, 18:12, 19:3, 19:6, 19:10, 22:14, 24:2, 27:23, 28:3, 28:10, 36:12, 38:17, 40:22, 41:5, 41:23, 43:3, 48:11
2018 [1] - 41:22
2019 [1] - 41:22
2020 [3] - 1:19, 43:7, 69:11
20200211 [1] - 1:5
28 [1] - 3:15

3

3 [4] - 3:16, 54:8, 54:12, 57:3
30(e [1] - 68:3
3:06 [2] - 1:20, 4:4
3:42 [1] - 30:17

4

4 [8] - 3:13, 3:15, 6:13, 6:18, 6:21, 11:2, 12:24, 36:15
4000 [1] - 2:12
408 [1] - 2:15
441 [2] - 44:20, 53:25
46 [1] - 3:5
47 [1] - 3:18
4:32 [1] - 68:20

5

5 [2] - 1:19, 3:4
54 [1] - 3:18

6

600 [1] - 2:15
65 [1] - 3:6
68 [1] - 69:4
69 [1] - 3:24

7

70 [1] - 3:25

A

ability [1] - 59:21
able [3] - 49:9, 50:13, 55:14
accompany [1] - 30:23
according [2] - 51:9, 57:2
accurate [4] - 29:18, 29:19, 39:11, 69:6
acknowledge [2] - 4:6, 4:9
active [2] - 6:17, 6:20
actual [2] - 58:5, 63:7
add [1] - 68:12
addenda [1] - 23:5
addendum [23] - 8:3, 8:8, 8:11, 16:14, 17:17, 18:5, 18:9, 19:18, 19:22, 19:25, 20:1, 21:15, 21:23, 22:20, 23:5, 23:11, 23:13, 24:6, 24:8, 24:23, 27:2, 59:7, 60:1
Addendum [1] - 3:13
additional [1] - 65:8
additions [1] - 67:25
addressed [3] - 20:9, 23:2, 25:4
adjective [1] - 62:15
administered [1] - 4:10
administrative [5] - 57:15, 58:2, 58:18, 63:3, 64:22
advance [1] - 17:21
advice [1] - 67:20
advising [1] - 32:3
afternoon [1] - 5:8
agents [2] - 36:21, 40:15
agree [3] - 4:18, 4:20, 4:22
agreed [2] - 52:5, 53:14
agreeing [1] - 51:19
agreement [3] - 4:15, 4:16, 52:8
ahead [12] - 26:2, 39:18, 43:18, 49:3, 49:18, 49:19, 52:19, 59:10, 64:15, 66:22, 66:24, 66:25
ALJ [1] - 58:25
allegedly [1] - 22:24
ALLETE [2] - 1:8, 31:13
ALSO [1] - 2:18
analysis [1] - 38:7
analyst [22] - 8:24, 9:9, 9:12, 9:15, 10:5, 11:6, 24:25, 25:2, 25:6, 27:1, 30:8, 30:14, 37:15, 38:14, 41:7, 41:10, 41:15, 56:12, 56:21, 59:15, 59:24
analysts [6] - 9:3, 9:16, 9:19, 9:20, 30:14, 37:23
answer [9] - 27:4, 27:8, 49:2, 49:3, 52:21, 61:20, 62:11, 64:15, 65:22
answered [1] - 61:17
anytime [1] - 48:22
apologize [4] - 13:18, 24:17, 47:18, 60:2
appear [2] - 17:25, 36:16
Appearances [1] - 1:23
appearances [1] - 59:4
appeared [4] - 2:8, 2:12, 2:16, 65:16
APPEARING [1] - 2:18
application [1] - 57:2
appreciate [4] - 46:1, 46:9, 66:13, 66:14
appropriate [2] - 23:11, 64:10
April [9] - 3:17, 11:10, 28:3, 28:21, 34:21, 38:17, 40:22, 41:5, 48:11
area [1] - 62:10
areas [1] - 63:8
arisen [1] - 21:7
arrangement [1] - 4:13
asserted [1] - 56:2
asserting [2] - 48:19, 53:5
assertion [2] - 53:9, 55:23
assertions [1] - 56:17
assigned [1] - 58:1
assistance [1] - 9:18
assume [4] - 5:17, 5:19, 54:10, 67:15
assuming [3] - 14:23, 20:4, 58:21
assumption [1] - 20:6
attached [1] - 69:3
Attachments [1] - 3:15
attempt [1] - 17:4
attempted [1] - 48:3
attend [2] - 30:8, 58:5
attendance [1] - 57:17
attended [2] - 29:1, 30:11
attention [1] - 10:3
attorney [1] - 64:8
Attorney [5] - 1:14, 2:7, 2:10, 2:11, 2:14
attorney 's [1] - 67:20
attorneys [1] - 4:5
atypical [2] - 30:10
audible [1] - 66:21
audio [4] - 13:17, 37:16, 43:15, 60:13
authored [2] - 8:3, 17:17
available [1] - 30:22
Avenue [1] - 2:15
avoidance [1] - 63:8

B

back-and-forth [1] - 42:5
back-and-forths [1] - 42:7
bailiwick [1] - 7:2
based [1] - 22:19
basic [1] - 46:22
basis [1] - 64:6
bear [3] - 17:7, 17:8
beat [1] - 55:8
become [1] - 38:6
beforehand [1] - 54:21
beginning [2] - 18:14, 59:6
behalf [3] - 2:8, 2:12, 2:16
belabor [1] - 5:21
best [2] - 13:15, 28:5
betrayed [2] - 40:9, 40:11
better [2] - 13:12, 63:21
between [5] - 14:2, 25:2, 35:5, 41:7, 60:16
beyond [1] - 37:10
Bismarck [2] - 2:15, 69:10
Bison [5] - 6:13, 6:18, 6:21, 11:2, 12:24
bit [4] - 10:8, 10:25, 11:10, 13:5
bother [5] - 48:17, 48:22, 49:24, 51:11, 52:4
bothering [1] - 52:9
bottom [1] - 18:1
BOUGHEY [40] - 2:7, 4:19, 25:8, 25:18, 26:2, 26:15, 26:18, 26:20, 26:23, 27:4, 27:8, 27:11, 39:17, 46:12, 48:25, 49:3, 49:7, 49:13, 52:20, 54:6, 54:19, 54:22, 55:5, 55:6, 55:14, 55:18, 55:19, 58:11, 58:13, 60:19, 61:13, 62:20, 64:14, 65:2, 66:16, 66:22, 67:2, 68:4, 68:11, 68:15
Boughey [14] - 2:7, 3:5, 4:19, 25:15, 27:7, 44:22, 45:15, 45:18, 45:21, 46:2, 47:10, 58:7, 64:7, 65:15
Boughey 's [2] - 45:12, 45:14
Boulevard [1] - 2:15
Box [1] - 2:7
break [1] - 50:23
BRIAN [1] - 2:14
Brian [2] - 4:17,

66:23
brief [5] - 11:4, 11:21, 34:25, 35:22, 41:15
briefly [6] - 5:9, 7:7, 15:16, 17:23, 42:2, 47:1
broad [2] - 13:6, 13:7
brought [1] - 32:16
build [1] - 24:16
built [1] - 33:7
BY [19] - 5:7, 13:24, 26:10, 26:24, 27:14, 31:1, 38:3, 40:1, 46:12, 49:13, 52:20, 55:6, 55:19, 58:13, 60:19, 61:13, 62:20, 64:14, 65:14
Byron [1] - 2:11

C

cannot [1] - 40:17
carry [1] - 45:23
Case [1] - 1:4
case [15] - 8:22, 9:6, 9:8, 9:11, 9:22, 20:11, 20:12, 23:11, 23:12, 24:25, 27:1, 44:11, 56:22, 56:24
cases [2] - 8:23, 56:12
catch [1] - 27:6
cattle [5] - 32:5, 32:12, 35:16, 48:15
cell [1] - 30:17
certainly [2] - 7:25, 46:2
CERTIFICATE [1] - 69:1
Certificate [2] - 3:24, 3:25
certify [1] - 69:3
chance [1] - 19:20
CHANGE [4] - 69:18, 69:20, 69:22, 69:24
characterize [1] - 39:1
chase [3] - 56:13, 58:12, 61:19
check [3] - 56:8, 65:7, 67:4
children [1] - 34:2
choice [1] - 65:5
choose [1] - 67:18
Civil [1] - 1:16
clarification [1] - 54:5
clarify [2] - 15:6, 46:16
clarity [1] - 66:12
client [1] - 65:17
close [6] - 22:24, 35:12, 39:23, 53:25, 61:2, 68:17
clue [1] - 26:11
code [2] - 63:18, 64:22
collect [2] - 34:8, 42:21
comfortable [1] - 46:18
commenced [1] - 4:4
commencement [1] - 4:3
commencing [1] - 1:20
comment [1] - 51:20
comments [1] - 57:22
Commission [15] - 2:15, 2:17, 6:2, 6:4, 6:13, 57:17, 58:2, 58:4, 58:20, 58:22, 58:24, 62:1, 62:13, 62:24, 64:2
COMMISSION [1] - 1:2
commission [7] - 15:17, 42:16, 45:19, 58:10, 64:7, 64:9
committee [1] - 15:16
communicating [1] - 44:16
communication [1] - 39:3
communications [2] - 13:3, 42:8
company [11] - 32:15, 33:13, 41:8, 41:11, 42:9, 49:23, 50:2, 60:11, 60:17, 61:23, 62:5
Complainant / Petitioner [2] - 2:19, 2:20
Complainants [1] - 1:5
Complainants / Petitioners [1] - 2:9
complaint [2] - 32:8, 43:11
Complaint [6] - 45:4, 45:6, 45:8, 46:20, 47:3, 47:13
complete [1] - 69:6
complied [3] - 18:22, 28:15, 55:16
complying [1] - 51:4
comprehensive [1] - 10:21
concerns [1] - 13:9
concise [1] - 26:5
concluded [1] - 68:20
conduct [1] - 59:12
conducting [1] - 27:21
connection [1] - 58:17
consent [1] - 4:13
constructive [1] - 33:22
contact [4] - 14:19, 15:17, 45:15, 46:21
contacted [1] - 46:17
contained [1] - 21:11
contemporaneous [1] - 23:6
content [2] - 47:1, 66:8
conversation [49] - 11:18, 11:21, 12:20, 13:1, 14:2, 14:4, 14:6, 14:9, 14:14, 14:16, 15:3, 15:5, 15:18, 16:7, 16:11, 16:14, 16:17, 16:24, 19:2, 19:5, 19:9, 19:11, 21:6, 21:8, 22:2, 22:4, 22:14, 22:19, 33:19, 34:20, 35:4, 36:2, 36:4, 36:11, 41:16, 41:20, 42:13, 43:2, 43:8, 43:11, 43:20, 44:13, 44:17, 44:22, 49:12, 50:6, 50:7, 50:23, 51:9
conversations [24] - 11:1, 11:3, 11:4, 11:11, 12:8, 12:10, 12:16, 12:18, 14:25, 15:3, 22:7, 22:9, 23:25, 25:5, 32:20, 33:16, 41:10, 41:14, 45:20, 47:11, 60:16, 62:4, 66:5, 66:9
conversely [1] - 66:4
correct [16] - 5:14, 6:4, 7:18, 14:12, 18:14, 28:11, 37:9, 39:15, 57:6, 57:7, 59:13, 59:23, 60:11, 60:12, 61:8, 67:7
corrected [1] - 21:4
correction [1] - 69:8
corrections [5] - 67:7, 67:11, 67:17, 67:25, 69:7
correctly [3] - 5:13, 15:10, 35:1
correspondence [1] - 9:5
counsel [5] - 2:8, 2:12, 2:16, 4:13, 54:9
Counsel 's [4] - 18:22, 28:15, 51:4, 55:16
counterassertions [1] - 56:18
counting [1] - 50:15
County [1] - 1:17
couple [3] - 24:20, 27:1, 55:9
course [5] - 13:16, 17:10, 31:9, 53:21, 59:19
court [4] - 54:4, 54:16, 67:9, 67:22
Court [1] - 3:25
COURT [7] - 4:5, 13:19, 13:23, 37:18, 38:1, 60:14, 60:18
create [1] - 44:11
created [1] - 10:3
creating [1] - 8:25
crossing [3] - 32:5, 32:12, 35:17
cut [4] - 19:24, 56:13, 58:11, 61:19
cutting [1] - 37:19

D

D.J [2] - 1:14, 2:10
DAKOTA [1] - 1:1
Dakota [7] - 1:16, 1:18, 2:8, 2:15, 2:16, 2:16, 69:10
data [1] - 42:22
date [6] - 15:8, 17:14, 29:2, 29:25, 30:21, 42:1
dated [1] - 28:9
Dated [1] - 69:10
dates [1] - 11:24
days [2] - 6:11, 67:12
dead [1] - 55:8
deal [1] - 58:25
Deanna [4] - 1:4, 11:8, 31:10, 31:11
DEANNA [1] - 2:19
declare [1] - 4:11
deemed [1] - 10:15
definition [2] - 62:24, 63:16
definitions [3] - 62:14, 63:17, 63:25
delve [1] - 56:19
Department [1] - 2:15
department [1] - 56:14
DEPONENT [18] - 13:21, 27:6, 27:10, 27:12, 30:18, 37:20, 39:19, 46:10, 49:6, 49:8, 52:13, 52:16, 52:18, 60:16, 62:17, 66:15, 68:2, 69:1
deponent [7] - 4:10, 18:22, 21:21, 28:15, 67:3, 68:5, 69:2
Deponent [2] - 2:19, 3:24
deposed [1] - 5:15
Deposition [2] - 4:1, 21:21
DEPOSITION [1] - 1:13
deposition [11] - 4:6, 4:7, 4:8, 17:22, 54:8, 58:12, 67:9, 68:16, 69:3, 69:4, 69:7
depositions [2] - 5:18, 5:20
describe [2] - 29:4, 29:9
described [4] - 12:14, 13:2, 32:12, 40:20
Description [1] - 3:11
detail [1] - 40:13
detailed [1] - 63:16
determine [2] - 56:8, 59:12
determined [2] - 23:10, 46:19
different [1] - 26:13
dir [1] - 15:14
direct [1] - 13:1
director [4] - 9:17, 9:22, 37:25, 44:4
dis [1] - 50:13
disagreed [2] - 20:7, 20:16
disagreement [1] - 20:14
discovery [2] - 58:12, 63:15
discretion [1] - 10:5
discuss [2] - 13:12, 32:5
discussed [9] - 15:15, 22:11, 22:20, 30:6, 32:25, 33:3, 33:6, 34:22, 37:8
discusses [1] - 63:4

discussing [4] - 31:20, 42:9, 47:1, 47:12
discussion [25] - 13:14, 15:11, 15:19, 15:22, 16:1, 16:5, 16:22, 22:23, 33:24, 34:5, 34:9, 34:25, 35:7, 35:9, 35:21, 35:24, 37:3, 41:18, 42:19, 42:20, 45:5, 45:7, 45:9, 48:23, 49:25
discussions [14] - 15:24, 25:12, 26:20, 26:25, 27:9, 27:12, 27:16, 30:1, 30:3, 32:23, 34:4, 35:18, 48:10, 55:21
distortion [4] - 13:17, 37:17, 43:15, 60:13
Division [1] - 42:11
division [2] - 1:8, 37:25
document [11] - 17:20, 19:14, 28:6, 28:13, 28:18, 28:20, 47:16, 47:21, 48:1, 54:7, 60:25
documentation [5] - 9:1, 9:4, 34:13, 35:2, 38:14
documented [1] - 48:7
documents [9] - 7:9, 7:22, 10:3, 10:14, 10:17, 37:12, 38:5, 38:10, 57:2
done [5] - 51:1, 54:17, 59:9, 60:21, 67:8
double [1] - 48:15
down [3] - 21:14, 48:12, 50:23
drafted [3] - 19:17, 24:8, 27:2
drafting [1] - 21:15
drive [2] - 30:20, 30:23
driving [1] - 32:2
drove [1] - 30:24
due [1] - 44:14
duly [1] - 5:4
during [3] - 14:16, 48:23, 49:22

E

earful [1] - 39:9
easements [7] - 13:9, 32:14, 32:21, 32:23, 32:25, 33:2, 33:4
East [1] - 2:15
educate [1] - 64:25
effect [1] - 53:24
efforts [1] - 42:15
either [5] - 22:14, 42:10, 44:18, 48:8, 60:11
Email [1] - 3:14
emails [1] - 34:14
employed [1] - 64:8
employment [1] - 6:18
employs [1] - 64:3
end [2] - 32:4, 46:6
ended [1] - 50:8
engaged [1] - 42:3
entirely [1] - 67:19
errors [1] - 67:5
event [3] - 25:10, 60:8, 63:14
Evidence [1] - 25:25
exact [3] - 11:16, 15:8, 40:7
exactly [4] - 21:6, 40:2, 49:12, 65:10
EXAMINATION [3] - 5:6, 46:11, 65:13
examination [1] - 69:5
Examination [3] - 3:4, 3:5, 3:6
examined [1] - 5:4
example [1] - 13:9
examples [1] - 63:17
excellent [1] - 48:5
exchange [6] - 38:21, 38:23, 39:4, 40:19, 50:8, 50:24
excuse [5] - 13:19, 30:18, 37:18, 41:12, 60:14
exercise [1] - 68:2
exercised [1] - 39:13
exhibit [1] - 54:11
Exhibit [6] - 4:1, 17:25, 21:21, 54:8, 55:2, 55:11
EXHIBITS [1] - 3:10
exist [1] - 10:17
expand [1] - 49:20
expect [1] - 21:3
expert [1] - 63:21
expound [1] - 13:5
expressed [1] - 50:11
extent [3] - 7:13, 30:6, 31:11

F

facilitate [1] - 13:16
fact [4] - 13:13, 23:21, 29:19, 44:15
facts [3] - 20:17, 56:8, 59:13
factually [1] - 21:3
Fahn [2] - 9:23, 9:24
fair [18] - 13:18, 20:6, 20:25, 21:25, 22:21, 22:25, 23:3, 29:14, 38:7, 38:8, 43:23, 43:24, 46:24, 56:15, 56:19, 58:11, 59:14, 62:2
fairly [4] - 10:21, 13:6, 13:7, 39:23
fall [1] - 37:6
familiar [4] - 18:17, 21:16, 28:17, 28:19
familiarize [1] - 28:13
fan [1] - 25:14
fantastic [2] - 46:15, 51:6
far [1] - 63:24
fashion [1] - 40:4
favor [1] - 30:13
February [10] - 14:2, 14:6, 14:10, 16:15, 18:12, 19:3, 19:6, 19:10, 22:14, 24:1
felt [1] - 40:11
fence [2] - 33:7, 48:15
fencing [2] - 33:7, 51:22
few [9] - 6:11, 11:4, 11:15, 24:20, 27:2, 42:7, 46:4, 51:3, 54:23
figure [2] - 6:25, 10:10
File [13] - 1:4, 7:17, 7:19, 8:1, 8:16, 8:21, 9:3, 9:25, 10:4, 10:11, 10:16, 10:20, 19:15
file [9] - 7:20, 8:13, 10:6, 29:25, 44:11, 46:20, 46:21, 47:3, 47:13
filed [9] - 7:12, 7:15, 7:17, 29:13, 43:12, 45:4, 45:6, 45:8, 45:18
filtering [1] - 10:5
fine [5] - 26:9, 54:15, 63:12, 67:1, 67:15
finger [1] - 64:6
finish [1] - 49:20
finished [1] - 18:23
Firm [1] - 2:7
first [11] - 5:4, 12:22, 29:21, 29:23, 46:16, 51:8, 51:25, 55:11, 56:1, 56:7, 65:7
flesh [1] - 10:7
follow [7] - 18:9, 24:9, 41:4, 45:20, 62:17, 65:8, 65:11
follow-up [5] - 24:9, 41:4, 45:20, 65:8, 65:11
followed [2] - 8:25, 16:19
following [5] - 15:24, 21:7, 23:19, 23:22, 38:13
following-up [1] - 23:19
follows [1] - 5:5
foregoing [1] - 69:2
form [8] - 39:17, 48:24, 52:14, 58:6, 61:12, 62:16, 64:5, 64:12
formal [3] - 10:6, 47:3, 59:23
format [1] - 46:22
forth [2] - 34:14, 42:5
forths [1] - 42:7
forward [4] - 44:10, 45:23, 59:18
foundation [1] - 64:5
frame [2] - 12:8, 27:18
frankly [1] - 17:9
Fredrikson [1] - 2:11
frequently [1] - 9:3
Friday [4] - 28:3, 40:22, 48:11, 49:23
front [3] - 53:10, 54:3, 63:10

G

general [4] - 23:16, 37:10, 45:15, 54:2
generally [17] - 8:15, 8:23, 10:20, 13:4, 13:10, 18:6, 28:19, 29:24, 30:13, 32:12, 32:24, 37:6, 37:23, 41:19, 45:11, 45:13, 46:25
generic [1] - 57:25
great [1] - 68:18
group's [1] - 35:7
guard [1] - 48:15
guess [4] - 6:16, 16:19, 37:14, 51:21
guys [3] - 59:1, 62:1, 63:16

H

handled [1] - 24:25
handwritten [1] - 18:1
Hauge [1] - 1:17
hear [2] - 11:14, 46:13
heard [1] - 15:10
hearing [7] - 15:16, 57:3, 57:9, 58:5, 58:15, 58:22, 59:1
hearsay [2] - 25:9, 26:5
heated [10] - 38:21, 38:23, 38:25, 39:2, 39:3, 39:4, 40:4, 50:8, 50:24, 53:2
held [1] - 25:1
help [1] - 63:13
herein [2] - 1:23, 69:8
hmm [5] - 8:17, 15:12, 36:14, 51:7, 53:19
honest [1] - 47:10
horse [1] - 55:8
house [3] - 38:19, 54:3, 55:24
huge [1] - 25:14

I

I-15-0195 [1] - 7:19
I-File [12] - 7:17, 7:19, 8:1, 8:16, 8:21, 9:3, 9:25, 10:4, 10:11, 10:16, 10:20, 19:15
identification [1] - 4:2
Identified [1] - 3:11
important [1] - 9:7
Inc [1] - 1:9
including [1] - 9:5
inclusive [1] - 8:8
incorrect [1] - 21:3
indeed [1] - 52:9
independent [1] - 22:22
indicate [2] - 4:15, 34:15
indicated [1] - 69:5

information [5] - 37:22, 42:22, 44:8, 60:9, 61:21
informed [2] - 36:21, 40:15
inhabited [4] - 63:4, 63:6, 64:1, 64:18
initial [1] - 18:9
initials [3] - 18:1, 18:2, 18:3
input [2] - 18:8, 44:7
inquiry [1] - 64:10
instance [3] - 11:19, 19:17, 49:10
intended [1] - 47:2
intending [1] - 8:7
interaction [3] - 9:17, 11:5, 11:22
interactions [2] - 9:20, 25:1
internet [1] - 17:5
interrupt [2] - 25:11, 49:18
interruption [1] - 30:17
investigate [3] - 56:1, 56:16, 56:24
investigating [1] - 42:17
investigation [6] - 56:12, 56:15, 59:12, 59:16, 59:23, 59:25
investigations [3] - 30:16, 37:16, 37:23
involved [2] - 35:9, 40:5
Isaacson [1] - 52:25
issue [33] - 9:2, 9:7, 10:4, 13:8, 14:11, 15:19, 16:22, 20:14, 21:10, 24:2, 32:6, 32:12, 33:10, 33:23, 35:17, 36:7, 38:7, 38:11, 38:13, 43:21, 44:9, 44:24, 48:14, 60:4, 60:5, 60:6, 60:8, 61:1, 61:7, 61:8, 61:22, 61:24, 61:25
issued [2] - 20:10, 20:13
issues [41] - 10:2, 12:6, 13:5, 13:11, 13:13, 13:16, 13:17, 13:20, 13:22, 14:13, 14:15, 14:17, 14:18, 15:13, 22:11, 22:16, 23:7, 24:22, 25:7, 30:5, 31:18, 31:21, 32:4, 32:10, 32:11, 32:14, 33:11, 33:21, 34:11, 34:21, 36:17, 37:7, 40:16, 41:1, 42:6, 42:17, 45:21, 45:23, 55:12
item [2] - 50:25
itself [2] - 58:20, 64:9

J

January [3] - 6:8, 6:10
Jerry [11] - 7:12, 7:15, 9:12, 11:18, 11:20, 14:19, 26:21, 29:16, 53:20, 55:22, 61:6
JOHN [5] - 1:13, 2:19, 3:3, 5:2, 69:14
John [4] - 29:16, 53:20, 69:2
JOHNSON [4] - 2:14, 4:17, 66:25, 68:14
Johnson [4] - 4:17, 65:3, 66:18, 68:11
join [1] - 11:20
JS [1] - 18:1
judge [3] - 57:15, 58:3, 58:18

K

keep [3] - 21:16, 26:4, 65:11
Keith [15] - 1:4, 11:8, 12:13, 28:21, 31:10, 39:22, 47:22, 48:7, 51:9, 51:12, 51:17, 52:4, 53:5, 53:6, 53:9
KEITH [1] - 2:19
Kess [1] - 34:19
KESSLER [2] - 2:19, 2:19
Kessler [56] - 1:4, 3:16, 7:9, 11:2, 11:6, 11:13, 12:11, 12:13, 12:17, 12:18, 12:23, 14:3, 14:16, 16:7, 19:2, 19:6, 21:25, 22:3, 22:8, 22:16, 23:20, 28:21, 31:10, 34:18, 34:19, 34:23, 35:6, 35:17, 36:9, 36:20, 38:21, 38:23, 39:2, 39:8, 40:4, 40:14, 41:16, 42:8, 44:18, 47:22, 48:18, 49:22, 50:1, 50:9, 50:11, 51:12, 55:23, 56:17, 57:22, 60:3, 60:10, 61:1, 61:10, 61:22
Kessler's [6] - 15:20, 15:21, 16:25, 32:14, 38:20, 49:11
Kesslers [8] - 12:12, 27:25, 28:25, 37:13, 38:5, 44:19, 45:16, 60:17
Kesslers' [4] - 24:3, 27:22, 33:12, 34:2
kind [6] - 26:3, 39:15, 46:22, 47:5, 55:1, 55:3
knowledge [1] - 62:23
knowledgeable [1] - 62:4
knows [2] - 67:22, 68:5

L

lack [1] - 50:13
land [6] - 48:17, 48:22, 49:25, 51:11, 52:4, 52:10
landowner [3] - 25:1, 41:8, 41:11
language [7] - 50:11, 51:16, 60:7, 64:3, 64:18, 64:23, 66:19
large [1] - 44:15
largely [1] - 44:14
larger [1] - 35:6
last [7] - 5:12, 26:11, 36:19, 44:17, 44:22, 45:2, 46:16
Law [6] - 1:15, 2:7, 2:7, 2:11, 2:14
law [4] - 57:15, 58:2, 58:18, 63:3
lawyer [3] - 47:6, 68:5
lawyer's [1] - 46:6
leading [2] - 30:1, 30:4
least [1] - 62:18
left [1] - 10:20
legislative [6] - 14:16, 14:21, 14:23, 15:6, 15:22, 15:25
Lein [47] - 7:13, 7:15, 9:9, 9:12, 10:16, 11:18, 12:15, 12:19, 13:11, 14:19, 16:13, 20:8, 20:9, 20:14, 20:24, 21:2, 21:8, 21:24, 23:9, 26:21, 27:1, 27:13, 27:21, 27:25, 29:1, 29:16, 30:20, 31:9, 32:3, 35:3, 35:5, 37:15, 37:22, 38:6, 42:9, 42:15, 42:21, 43:8, 43:11, 43:21, 43:22, 43:25, 44:2, 44:15, 56:11, 59:10, 61:6
Lein's [4] - 8:2, 8:11, 18:25, 19:19
level [2] - 8:19, 10:5
lieu [1] - 4:9
likely [7] - 13:6, 20:15, 20:17, 42:1, 44:2, 44:23, 45:1
likewise [1] - 22:21
limited [1] - 15:13
LINE [4] - 69:17, 69:19, 69:21, 69:23
line [2] - 29:15, 64:10
listen [2] - 57:21, 59:6
live [2] - 53:7, 53:21
living [1] - 53:24
location [4] - 16:22, 16:25, 42:20, 51:22
look [3] - 18:21, 21:1, 34:16
looked [6] - 7:8, 8:10, 8:12, 13:25, 16:12, 57:16
looking [9] - 22:12, 30:21, 43:21, 44:1, 44:9, 59:3, 60:1, 60:2, 62:7
looks [2] - 20:23, 36:18
Lori [1] - 1:16
lousy [1] - 61:14
lowdown [1] - 46:7
Lynn [3] - 4:19, 54:15, 67:1
LYNN [1] - 2:7

M

MAHLBERG [38] - 2:10, 4:21, 5:7, 13:24, 25:14, 25:19, 26:8, 26:10, 26:17, 26:19, 26:22, 26:24, 27:14, 31:1, 38:2, 38:3, 39:18, 40:1, 45:24, 48:24, 49:1, 49:5, 52:12, 52:14, 52:17, 52:19, 54:14, 54:20, 55:3, 58:6, 61:12, 62:16, 64:4, 65:9, 65:14, 66:11, 68:9, 68:18
Mahlberg [13] - 1:14, 3:4, 3:6, 4:2, 4:21, 5:9, 25:13, 55:1, 55:16, 65:7, 66:20, 68:8, 68:16
mails [1] - 34:14
majority [3] - 24:24, 30:15, 47:11
Mandan [1] - 2:7
manner [2] - 4:14, 13:15
March [13] - 3:12, 3:13, 7:16, 8:2, 8:3, 14:1, 16:13, 17:7, 17:15, 17:17, 22:14, 24:1, 27:2
marked [2] - 4:2, 17:24
Marked [1] - 3:11
material [1] - 10:15
materiality [1] - 8:19
matter [9] - 4:11, 7:10, 35:2, 37:24, 44:3, 44:7, 44:16, 45:12, 50:13
matters [1] - 40:20
mean [3] - 39:7, 43:16, 45:14
meaning [2] - 24:10, 53:20
means [3] - 5:24, 62:15, 62:25
meat [1] - 10:24
meet [3] - 5:10, 31:10, 33:20
meeting [8] - 31:3, 31:24, 38:17, 40:22, 42:10, 49:23, 57:18
Meeting [1] - 3:17
meetings [1] - 43:3
members [3] - 31:13, 35:11, 57:16
memo [1] - 60:20
memorandum [41] - 7:12, 7:15, 7:16, 7:21, 7:24, 8:2, 8:6, 8:11, 14:1, 16:13, 16:17, 17:7, 17:12, 18:7, 19:1, 19:13, 19:19, 20:2, 20:8, 20:10, 20:13, 20:22, 21:12, 22:12, 22:23, 23:2, 23:10, 23:23, 24:21, 28:9, 29:6, 29:8, 29:10, 29:12, 29:22, 29:24, 36:12, 45:18, 46:21, 47:2, 56:3
Memorandum [1] - 3:12
memory [1] - 66:5

mentioned [1] - 33:23
merit [1] - 10:2
met [1] - 5:9
might [5] - 11:12, 38:6, 61:7, 64:12
mind [1] - 28:14
mine [1] - 67:21
Minneapolis [1] - 2:12
Minnesota [19] - 1:8, 2:12, 3:18, 4:21, 7:9, 27:22, 31:13, 31:14, 36:10, 38:24, 39:9, 39:12, 40:6, 48:19, 51:18, 53:6, 53:10, 55:24, 56:18
minute [5] - 18:15, 21:17, 21:19, 28:12, 34:7
miracle [1] - 17:5
misspelled [1] - 29:20
misspellings [1] - 67:5
Mister [1] - 27:11
MOLLIE [1] - 2:11
moment [4] - 50:3, 62:7, 64:21, 65:3
Monday [1] - 1:19
Monroe [1] - 52:7
months [2] - 24:20, 27:2
most [4] - 9:16, 12:6, 36:11, 44:16
mouth [1] - 39:7
move [1] - 21:14
MP 000075 -000079 [1] - 3:15
MR [84] - 2:7, 2:10, 2:14, 2:19, 4:17, 4:19, 4:21, 5:7, 13:24, 25:8, 25:14, 25:18, 25:19, 26:2, 26:8, 26:10, 26:15, 26:17, 26:18, 26:19, 26:20, 26:22, 26:23, 26:24, 27:4, 27:8, 27:11, 27:14, 31:1, 38:2, 38:3, 39:17, 39:18, 40:1, 45:24, 46:12, 48:24, 48:25, 49:1, 49:3, 49:5, 49:7, 49:13, 52:12, 52:14, 52:17, 52:19, 52:20, 54:6, 54:14, 54:19, 54:20, 54:22, 55:3, 55:5, 55:6, 55:14, 55:18, 55:19, 58:6, 58:11, 58:13, 60:19, 61:12, 61:13, 62:16, 62:20, 64:4, 64:14, 65:2, 65:9, 65:14, 66:11, 66:16, 66:22, 66:25, 67:2, 68:4, 68:9, 68:11, 68:14, 68:15, 68:18
MS [2] - 2:11, 2:19
mute [1] - 68:12

N

name [4] - 4:15, 5:8, 5:12, 29:20
near [1] - 36:22
nearly [1] - 24:25
necessarily [1] - 61:8
need [7] - 8:25, 46:20, 55:10, 59:2, 67:7, 67:21, 68:12
needed [1] - 46:8
needs [1] - 8:24
never [1] - 47:16
new [10] - 24:2, 60:4, 60:5, 60:6, 60:8, 61:1, 61:6, 61:8, 61:24, 61:25
next [8] - 32:6, 38:19, 50:19, 52:5, 53:4, 53:13, 53:17, 55:15
nice [2] - 5:10, 68:4
nobody [2] - 58:19, 58:21
noise [6] - 32:16, 33:25, 36:17, 54:2, 61:2, 61:24
normal [1] - 58:25
normally [1] - 67:8
NORTH [1] - 1:1
North [7] - 1:15, 1:18, 2:7, 2:15, 2:16, 2:16, 69:10
Notary [1] - 1:17
note [1] - 25:8
noted [2] - 1:23, 69:7
notes [7] - 8:19, 9:5, 23:5, 47:22, 62:7, 65:17, 66:7
Notes [1] - 3:16
nothing [4] - 26:6, 67:14, 68:7, 68:14
notice [3] - 1:15, 28:20, 54:9
number [11] - 11:3, 11:13, 11:16, 31:14, 32:4, 32:13, 33:4, 33:20, 45:19, 54:9, 65:22
Number [2] - 21:22, 36:15
Numbers [1] - 4:1

O

OAH [1] - 1:4
oath [1] - 4:10
object [6] - 25:22, 48:24, 52:14, 61:12, 62:16, 64:4
objection [8] - 25:9, 25:10, 25:24, 26:4, 26:5, 39:17, 58:6, 64:13
objections [2] - 4:14, 25:15
observations [1] - 59:21
observed [1] - 59:22
obviously [3] - 57:5, 57:8, 59:20
occupied [5] - 32:17, 34:1, 35:19, 56:2, 63:6
occupy [1] - 36:23
occupying [1] - 32:18
occur [1] - 11:17
occurred [5] - 25:3, 42:13, 57:18, 58:15, 66:9
occurring [1] - 48:10
occurs [1] - 54:13
October [1] - 1:19
OF [3] - 1:1, 1:13, 69:1
offer [2] - 54:12
offering [1] - 66:4
office [1] - 46:17
on-site [3] - 11:6, 51:13, 59:19
once [5] - 46:19, 50:20, 54:12, 58:23, 59:19
one [24] - 7:21, 11:6, 15:2, 16:18, 18:13, 26:13, 30:8, 31:23, 32:25, 33:5, 33:11, 34:1, 35:22, 38:22, 38:24, 39:7, 39:9, 41:16, 50:18, 50:19, 53:7, 61:19, 66:3
opened [1] - 9:4
opine [2] - 58:8, 59:21
opinion [4] - 42:22, 43:22, 44:3, 44:7
opportunity [8] - 11:7, 18:16, 46:3, 65:4, 67:6, 67:16, 67:17, 67:25
option [1] - 67:4
options [1] - 66:20
oral [1] - 69:4
orig [1] - 7:12
original [2] - 7:12, 7:14
otherwise [1] - 58:4
outcome [1] - 44:1
output [1] - 44:3
outside [4] - 31:24, 54:3, 63:3, 64:3
outstanding [1] - 10:2
own [2] - 16:9, 46:5

P

P.A [1] - 2:11
p.m [4] - 1:20, 4:4, 30:17, 68:20
P.O [1] - 2:7
page [7] - 17:16, 17:24, 18:11, 55:11, 55:13, 55:15, 60:25
PAGE [4] - 69:17, 69:19, 69:21, 69:23
Page [5] - 3:4, 3:5, 3:6, 3:24, 3:25
pages [1] - 69:4
paragraph [2] - 18:11, 53:4
paragraphs [4] - 18:17, 50:18, 51:2, 59:9
paraphrasing [1] - 40:3
part [20] - 7:24, 12:6, 12:16, 16:6, 18:8, 20:20, 20:22, 20:24, 24:1, 25:2, 34:20, 35:6, 35:11, 35:23, 38:7, 41:9, 48:12, 51:8, 54:10, 57:20
participating [1] - 4:6
participation [1] - 21:9
particular [1] - 30:12
parties [2] - 4:12, 67:14
party [2] - 12:19, 25:21
pass [1] - 34:12
Pat [2] - 4:21, 5:8
PATRICK [1] - 2:10
Patrick [2] - 1:14, 9:24
penalty [1] - 4:12
perfect [3] - 54:25, 55:5, 55:18
period [1] - 24:10
perjury [1] - 4:12
permitted [2] - 6:14, 6:16
perpet [1] - 24:11
person [4] - 4:10, 25:12, 30:22, 58:17
personally [6] - 10:25, 55:25, 56:4, 56:6, 56:7, 56:8
perspective [1] - 24:2
pertained [1] - 32:17
Petitioners [2] - 1:6, 4:20
phone [7] - 11:4, 20:23, 21:12, 22:17, 23:1, 23:6, 30:17
phrase [6] - 39:14, 49:16, 60:4, 60:24, 61:18, 63:6
physically [1] - 4:7
place [16] - 14:9, 15:9, 16:15, 19:10, 24:20, 29:1, 35:5, 41:4, 41:13, 41:20, 42:6, 42:18, 43:3, 65:21, 66:6, 69:5
Plaintiffs [1] - 4:20
plan [1] - 54:13
planning [1] - 36:23
played [1] - 9:14
plenty [1] - 5:19
point [13] - 11:18, 16:6, 16:10, 16:21, 19:18, 35:10, 35:13, 41:16, 43:20, 54:11, 57:4, 66:1, 66:12
pop [1] - 25:25
portion [8] - 18:25, 19:14, 19:22, 21:15, 32:2, 35:9, 37:3, 57:21
portrayal [2] - 20:16, 20:18
position [1] - 59:20
Power [18] - 1:8, 3:18, 4:22, 7:10, 27:22, 31:13, 31:14, 36:10, 38:24, 39:9, 39:12, 40:6, 48:19, 51:18, 53:6, 53:10, 55:24, 56:18
practice [2] - 23:4, 23:8
precedent [1] - 63:2
precedents [1] - 63:18

preparation [2] - 7:6, 29:5
prepared [1] - 29:11
preparing [1] - 29:7
presence [1] - 53:6
present [5] - 4:7, 5:20, 24:16, 31:7, 31:8
previously [6] - 40:20, 48:21, 55:24, 60:10, 61:17, 61:23
primarily [6] - 9:12, 11:5, 12:11, 12:13, 13:14, 41:7
privy [2] - 60:12, 60:15
prob [1] - 21:13
Procedure [1] - 1:16
procedure [4] - 10:1, 58:3, 58:8, 58:25
proceeding [1] - 57:20
proceedings [3] - 4:3, 4:4, 68:20
process [3] - 6:23, 8:18, 57:11
produce [1] - 43:25
product [2] - 10:8, 43:2
progress [1] - 25:6
project [6] - 6:14, 6:18, 6:21, 11:2, 12:24, 35:20
pronouncing [1] - 5:12
proper [1] - 46:22
properly [1] - 47:8
property [7] - 16:25, 32:3, 34:7, 34:10, 34:21, 35:19, 37:8
proverbial [1] - 55:8
proves [1] - 29:20
provide [12] - 18:7, 35:3, 37:22, 37:24, 38:5, 39:4, 40:7, 40:13, 42:22, 44:10, 62:18, 62:24
provided [7] - 37:12, 38:10, 38:15, 44:2, 44:4, 57:22, 61:20
providing [1] - 44:6
proximity [6] - 15:19, 16:8, 24:3, 35:12, 36:17, 42:17
PSC [8] - 3:17, 4:17, 14:19, 47:7, 47:9, 57:5, 58:18, 61:7
PU-20-194 [1] - 1:4
public [2] - 57:18, 58:5
PUBLIC [1] - 1:2
Public [17] - 1:17, 2:15, 2:17, 6:2, 6:4, 6:12, 42:11, 57:17, 58:2, 58:4, 58:19, 58:22, 58:24, 61:25, 62:13, 62:23, 64:2
publish [1] - 28:5
published [1] - 36:13
pull [2] - 7:25, 17:6
pursuant [2] - 1:15
put [7] - 8:1, 9:4, 19:14, 39:6, 55:2, 57:13, 64:6
putting [1] - 48:15

Q

questions [13] - 18:20, 25:20, 45:25, 46:4, 50:21, 51:3, 54:24, 60:21, 62:8, 65:6, 65:16, 65:20, 65:22
questions ' [1] - 65:10
quickly [1] - 67:2
quite [2] - 29:17, 64:6

R

rails [1] - 20:18
raise [1] - 20:14
raised [8] - 20:19, 21:4, 21:13, 24:2, 24:22, 32:10, 60:10, 61:22
raises [1] - 61:1
raising [3] - 22:16, 55:23, 60:4
ranch [1] - 28:22
re [3] - 20:18, 22:19, 45:7
reaching [1] - 23:20
read [12] - 7:11, 18:25, 19:19, 20:16, 26:15, 50:18, 50:20, 51:5, 65:4, 67:16, 67:24, 69:3
reading [7] - 18:23, 19:21, 20:2, 46:7, 51:2, 67:18, 67:23
reads [1] - 29:16
real [3] - 5:9, 64:12, 67:2
really [3] - 22:18, 35:25, 37:19
reask [1] - 26:3
REASON [4] - 69:17, 69:19, 69:21, 69:23
reason [4] - 9:13, 23:13, 23:15, 69:8
reasonable [1] - 25:23
recalled [1] - 65:20
receive [1] - 8:23
received [1] - 10:3
recent [1] - 43:11
reclamation [16] - 12:6, 13:4, 13:11, 13:13, 13:16, 13:22, 14:18, 15:13, 22:17, 30:5, 31:18, 31:21, 32:4, 32:11, 40:25, 42:5
recoll [2] - 12:2, 33:18
recollect [7] - 25:3, 25:5, 31:12, 33:6, 45:8, 50:4, 52:13
recollection [38] - 11:23, 12:3, 12:7, 12:14, 12:22, 13:1, 14:8, 22:13, 22:22, 23:16, 23:25, 24:19, 25:16, 27:20, 28:24, 29:17, 31:17, 31:20, 32:1, 33:16, 33:18, 33:24, 34:3, 37:2, 37:4, 37:10, 37:11, 38:9, 39:20, 41:3, 41:6, 41:22, 41:23, 41:25, 42:14, 46:19, 48:9, 49:11
recollections [3] - 22:6, 32:9, 41:1
recommendation [1] - 37:24
record [8] - 4:16, 9:1, 26:7, 54:6, 57:1, 57:13, 57:16, 59:5
recorded [3] - 65:17, 65:21, 66:6
recording [1] - 23:10
recurring [2] - 9:1, 10:2
refer [2] - 9:2, 18:10
reference [5] - 14:1, 28:21, 60:3, 61:24, 62:12
referenced [2] - 17:20, 24:9
referred [4] - 8:6, 14:18, 15:17, 59:18
referring [3] - 7:16, 29:3, 50:7
refresh [3] - 21:18, 22:13, 28:24
refreshes [1] - 48:8
regarding [13] - 14:11, 14:13, 14:15, 22:17, 32:14, 32:23, 33:4, 33:19, 33:25, 35:2, 44:9, 44:23, 45:19
regardless [1] - 15:9
regards [4] - 47:8, 55:20, 58:15, 59:8
regulations [1] - 63:19
relate [3] - 9:6, 13:11, 56:10
related [14] - 20:19, 30:5, 34:12, 34:14, 34:22, 34:24, 34:25, 35:22, 36:4, 36:11, 45:11, 45:13, 49:12, 50:16
relates [10] - 23:1, 40:25, 51:21, 51:23, 51:25, 53:17, 55:11, 61:24, 61:25, 62:25
relating [10] - 7:9, 34:5, 34:10, 38:10, 42:19, 50:22, 53:24, 54:2, 63:8, 64:18
relationship [2] - 32:15, 33:12
remember [9] - 19:22, 22:9, 31:9, 33:2, 33:9, 35:1, 37:7, 47:11, 48:18
remotely [1] - 4:9
rephrase [2] - 62:21, 62:22
report [1] - 21:23
reported [1] - 21:2
reporter [4] - 54:4, 54:16, 67:9, 67:22
Reporter [1] - 3:25
REPORTER [7] - 4:5, 13:19, 13:23, 37:18, 38:1, 60:14, 60:18
reporting [3] - 4:8, 4:14, 20:23
reports [2] - 19:1, 36:15
represent [1] - 4:16
representation [3] - 45:12, 45:14, 45:22
representative [7] - 36:10, 39:3, 39:4, 39:13, 44:19, 44:21, 50:9
representatives [5] - 27:22, 31:15, 38:22, 38:24, 39:10
representing [1] - 45:16
request [8] - 9:3, 9:18, 18:23, 25:10, 28:16, 37:21, 38:4, 55:17
request) [1] - 51:4
requested [2] - 21:8, 54:4
requests [1] - 25:12
residence [18] - 22:24, 27:23, 32:17, 36:23, 53:25, 56:2, 56:10, 61:3, 62:12, 62:15, 63:1, 63:4, 63:6, 63:7, 64:1, 64:2, 64:19
resolution [1] - 13:21
respect [2] - 24:9, 24:21
respond [2] - 39:15, 51:1
respondent [1] - 5:3
Respondent [2] - 1:10, 2:13
responding [1] - 64:11
response [4] - 39:14, 39:21, 39:23, 66:21
restate [2] - 24:18, 62:18
restraint [1] - 39:14
result [2] - 50:24, 55:23
review [7] - 7:22, 29:12, 59:10, 67:4, 67:16, 67:24, 68:3
reviewed [10] - 9:25, 17:21, 17:23, 19:13, 21:21, 29:22, 29:24, 55:7, 57:16, 58:14
reviewing [3] - 22:22, 29:10, 60:20
revised [2] - 20:10, 20:13
right-of-way [3] - 33:8, 36:21, 40:15
ring [2] - 30:19
role [6] - 6:17, 6:20, 9:15, 29:5, 29:7, 29:10
room [1] - 4:7
route [1] - 65:8
Rule [1] - 68:3
Rules [2] - 1:16, 25:25
rules [4] - 5:21, 63:3, 63:19, 68:6

S

SCHUH [5] - 1:13, 2:19, 3:3, 5:2, 69:14
Schuh [71] - 5:8, 5:12, 5:22, 6:1, 6:13, 6:19, 6:22, 7:6, 7:19, 7:24, 9:13, 10:1, 11:24, 12:22, 13:25, 14:22, 17:6, 17:11, 17:18, 18:2, 18:10, 19:10, 20:7, 21:17, 21:23, 22:6, 22:21, 23:17, 24:7, 24:19, 25:16, 26:12, 27:17, 28:3, 28:10, 28:17, 29:4, 29:9, 29:14, 29:22, 30:2, 30:7, 31:17, 32:20, 34:17, 35:24, 38:10, 39:7, 39:18, 40:14, 41:3, 42:15, 43:17, 45:10, 45:25, 46:13, 50:17, 52:17, 55:9, 58:8, 58:14, 60:21, 61:16, 62:11, 64:10, 64:15, 65:2, 65:15, 66:13, 67:3, 69:2
scope [1] - 15:11
Scott [7] - 51:18, 51:20, 52:5, 52:7, 53:13, 53:15, 53:16
screen [9] - 17:6, 17:11, 28:10, 36:13, 47:25, 54:7, 54:25, 55:2
screwed [1] - 28:8
scrolled [1] - 17:16
second [8] - 17:16, 17:24, 29:15, 52:1, 55:13, 60:24, 61:1, 61:20
secondary [1] - 9:14
see [16] - 17:13, 17:14, 17:16, 19:3, 28:22, 36:25, 37:1, 39:21, 47:17, 47:18, 47:19, 47:21, 47:25, 48:4, 60:20, 62:7
seeing [1] - 29:25
seem [3] - 22:20, 33:21, 39:16
send [4] - 54:16, 54:21, 67:9, 67:14
sense [4] - 43:1, 44:12, 47:9, 54:22
sent [1] - 67:13
sentence [7] - 36:19, 51:25, 53:13, 53:17, 60:25, 61:1, 61:20
separate [1] - 12:17
September [3] - 57:4, 57:18, 58:16
series [2] - 15:3, 25:20
SERVICE [1] - 1:2
Service [15] - 2:15, 2:17, 6:2, 6:4, 6:12, 57:17, 58:2, 58:4, 58:20, 58:22, 58:24, 62:1, 62:13, 62:24, 64:2
session [6] - 14:17, 14:21, 14:24, 15:7, 15:22, 15:25
setting [2] - 31:25, 32:1
share [5] - 17:6, 47:16, 48:3, 54:25, 55:2
sheet [3] - 58:15, 58:19, 67:10
short [2] - 13:7, 15:16
shorter [1] - 65:11
shortly [3] - 24:12, 24:14, 60:22
show [1] - 58:21
showing [1] - 47:22
shows [1] - 47:17
Shuh [1] - 29:16
sic [2] - 29:16, 54:11
side [1] - 46:18
sign [2] - 58:14, 65:5
sign-in [1] - 58:14
signed [3] - 18:5, 23:14, 58:19
signing [2] - 46:8, 66:20
similar [1] - 23:5
single [1] - 15:5
sit [1] - 23:24
site [23] - 11:6, 11:10, 16:19, 27:21, 27:24, 28:25, 30:2, 30:4, 30:8, 30:12, 30:15, 31:4, 31:6, 31:18, 35:11, 35:14, 41:5, 41:11, 41:12, 42:6, 42:18, 51:13, 59:19
sited [3] - 35:20, 36:22, 40:16
siting [5] - 6:23, 40:16, 43:22, 44:19, 57:10
Sixth [1] - 2:11
SMITH [1] - 2:11
snowmelt [1] - 23:20
someone [2] - 58:3, 59:4
sometimes [1] - 13:15
somewhere [1] - 63:17
son [3] - 32:18, 36:23, 38:20
son's [1] - 61:3
sons [1] - 53:7
sorry [10] - 10:7, 14:25, 19:24, 27:6, 37:20, 39:17, 43:16, 49:18, 52:15, 66:16
sort [8] - 9:17, 9:19, 13:3, 14:14, 35:2, 44:6, 46:20, 59:25
sound [1] - 54:13
sounds [7] - 6:4, 26:8, 26:9, 39:8, 54:15, 57:7
South [1] - 2:11
speaking [4] - 8:15, 24:11, 34:19, 61:9
specific [29] - 9:6, 9:11, 11:23, 12:2, 12:7, 13:8, 14:13, 14:15, 22:6, 22:10, 23:15, 23:21, 27:16, 32:9, 33:16, 34:3, 34:5, 36:7, 37:11, 41:1, 42:1, 49:9, 50:10, 62:13, 62:24, 63:16, 63:25
specifically [24] - 12:24, 12:25, 14:19, 16:16, 16:20, 23:13, 24:5, 32:20, 32:22, 33:5, 33:9, 34:22, 35:8, 36:5, 37:4, 39:22, 40:17, 42:11, 42:12, 44:8, 47:12, 51:15, 52:23, 53:11
speculation [1] - 43:4
staff [4] - 18:7, 23:21, 42:16, 58:4
standard [5] - 47:6, 58:3, 58:8, 58:24, 66:19
standards [3] - 62:14, 63:17, 64:16
standing [3] - 25:10, 25:15, 25:23
start [4] - 6:1, 8:25, 15:25, 24:13
started [2] - 6:3, 58:23
starts [1] - 50:18
stat [1] - 64:17
state [2] - 36:20, 56:15
STATE [1] - 1:1
State [1] - 1:18
statement [8] - 46:24, 52:8, 53:12, 53:23, 54:1, 56:20, 59:14, 62:2
statements [1] - 40:14
stating [6] - 4:15, 49:23, 51:13, 53:6, 53:15, 53:16
statute [1] - 63:8
statutory [3] - 64:3, 64:18, 64:23
step [1] - 43:16
stepping [1] - 52:15
steps [2] - 56:1, 56:8
sticking [1] - 11:11
still [1] - 10:4
stop [1] - 54:25
straight [1] - 39:2
Street [1] - 2:11
strike [1] - 14:25
structure [3] - 16:8, 24:4, 34:1
structures [2] - 15:21, 31:23
stuff [1] - 10:6
subject [2] - 32:7, 33:24
submitted [1] - 57:3
subsequently [2] - 44:5, 47:3
substance [3] - 12:3, 12:5, 13:3
substantive [1] - 29:15
Suite [1] - 2:12
suited [1] - 13:12
summarize [1] - 63:24
summary [1] - 36:16
supposedly [2] - 53:18, 60:4
surprised [1] - 46:3
switch [1] - 54:24
sworn [1] - 5:4

T

tasked [2] - 56:11, 56:14
telephone [7] - 11:25, 12:4, 19:2, 21:24, 22:2, 22:7, 22:10
tend [1] - 10:21
tended [1] - 13:7
tending [1] - 8:7
term [1] - 64:18
terms [4] - 7:8, 8:12, 8:15
testified [3] - 5:4, 38:18, 40:21
testify [1] - 64:8
testimony [6] - 4:11, 40:23, 65:24, 66:2, 66:4, 67:8
texts [1] - 34:13
THE [24] - 4:5, 13:19, 13:21, 13:23, 27:6, 27:10, 27:12, 30:18, 37:18, 37:20, 38:1, 39:19, 46:10, 49:6, 49:8, 52:13, 52:16, 52:18, 60:14, 60:16, 60:18, 62:17, 66:15, 68:2
then-occupied [1] - 32:17
therein [1] - 24:22
third [2] - 25:12, 25:21
thoughts [1] - 34:8
three [1] - 65:10
tie [1] - 55:10
timeline [2] - 7:1, 17:3
timing [2] - 15:8, 16:20
today [4] - 7:6, 24:12, 40:24, 58:9
today's [1] - 17:21
took [12] - 14:9, 15:9, 16:14, 24:1, 24:20, 29:1, 35:5, 41:4, 41:12, 41:20, 42:6, 42:18
top [6] - 18:11, 18:17, 29:15, 47:21, 59:9, 60:25
topic [8] - 32:25, 33:2, 33:17, 34:4, 34:6, 37:12, 41:18, 46:17
topically [1] - 13:6
topics [1] - 33:4
towards [1] - 24:16
tower [12] - 48:13, 48:14, 48:17, 48:21, 49:24, 50:19, 51:10, 51:23, 52:3, 52:9, 55:12, 56:10
tracking [1] - 43:19
transcript [2] - 67:10, 69:6
tried [2] - 33:20, 47:16
truly [1] - 56:2

trust [3] - 40:6, 50:14
try [6] - 34:7, 50:3, 54:24, 55:4, 61:14, 65:11
trying [9] - 6:25, 10:10, 17:2, 24:13, 25:16, 50:22, 58:23, 60:6
turbine [16] - 15:20, 16:8, 16:22, 22:23, 32:7, 33:25, 35:14, 36:16, 36:21, 40:16, 42:17, 42:20, 43:22, 54:2, 61:2
Turbine [1] - 44:20
turbine's [1] - 24:3
turbines [1] - 36:22
turn [1] - 54:7
twenty [1] - 41:23
two [5] - 11:19, 18:17, 50:18, 51:2, 59:9
type [4] - 8:23, 10:8, 49:25, 52:8
typewritten [1] - 69:4
typical [1] - 30:7
typographical [1] - 67:5

U

unable [1] - 30:20
unaware [4] - 6:15, 9:19, 57:10, 63:2
under [1] - 4:12
unless [2] - 5:22
unmute [1] - 66:16
unoccupied [7] - 56:9, 62:12, 62:14, 62:25, 63:1, 64:1, 64:19
up [25] - 7:25, 17:6, 18:9, 23:19, 23:22, 24:9, 28:8, 30:1, 30:4, 32:5, 32:16, 35:16, 38:13, 38:19, 41:4, 45:20, 47:17, 47:22, 50:8, 55:2, 58:21, 62:17, 65:8, 65:11, 67:19
upset [1] - 39:8
Utilities [1] - 42:11

V

varies [1] - 8:22
vast [2] - 24:24, 30:15
verbally [1] - 4:11
verbiage [2] - 39:24, 40:7
verify [1] - 29:2
via [4] - 1:18, 2:8, 2:12, 2:16
VIA [1] - 2:18
VIDEOCONFERENCE [2] - 1:13, 2:18
videoconference [4] - 1:19, 2:8, 2:12, 2:16
viewing [1] - 28:9
violating [1] - 25:25
visit [20] - 11:7, 11:10, 16:19, 27:21, 27:24, 28:21, 28:25, 29:3, 30:2, 30:4, 30:12, 31:4, 31:6, 31:19, 35:11, 35:19, 41:5, 41:12, 42:6, 42:18
visits [3] - 30:9, 30:15, 41:12
voice [1] - 34:14
voicing [1] - 40:10
vs [1] - 1:7

W

Wade [2] - 52:25, 53:14
waiting [2] - 23:19, 42:21
waive [3] - 4:13, 67:18, 67:23
walk [3] - 8:20, 17:3
wasting [1] - 7:3
ways [1] - 39:1
welcome [1] - 10:23
whole [1] - 31:11
Williams [1] - 1:18
wind [1] - 22:23
witness [1] - 5:3
wondering [1] - 60:5
word [1] - 63:5
words [3] - 39:6, 53:24, 63:1
works [1] - 47:18
world [1] - 10:12
worth [1] - 65:10
write [3] - 24:6, 61:5, 67:10
writing [5] - 18:9, 19:22, 19:25, 20:1, 53:1
written [1] - 20:8
wrote [4] - 8:8, 24:21, 24:23, 61:6

Y

yard [2] - 35:14, 50:19
year [4] - 6:8, 28:1, 44:13, 45:2
yourself [4] - 21:18, 28:13, 42:15, 59:23

Z

zero [1] - 29:7
ZOOM [2] - 1:13, 2:18
Zoom [8] - 1:18, 2:8, 2:12, 2:16, 13:17, 37:16, 43:15, 60:13

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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Keith and Deanna Kessler,	)	Case No. PU-20-194
	)	OAH File No.
	)	20200211
Complainants/ Petitioners,	)	
	)	
vs.	)	
	)	
Minnesota Power, a division of ALLETE, Inc.,	)	
	)	
Respondent.	)	

* * * * * * * * * * * * * * * * * *

ZOOM VIDEOCONFERENCE DEPOSITION OF

MATTHEW FREUDENRICH

taken by Mr. Lynn M. Boughey, Attorney At Law, pursuant to notice and pursuant to the North Dakota Rules of Civil Procedure, before Lori L. Hauge, a Notary Public in and for the County of Williams and State of North Dakota, via Zoom videoconference, on Monday, October 5, 2020, commencing at 9:02 a.m.

* * * * * * * * * * * * * * * * * *

*Appearances as noted herein.

LORI L. HAUGE, RPR, CRR
Phone: 701-572-8222

A P P E A R A N C E S

MR. LYNN M. BOUGHEY, Attorney At Law, of the Boughey Law Firm, P.O. Box 1202, Mandan, North Dakota, appeared via Zoom videoconference as counsel for and on behalf of the Complainants/Petitioners.

MR. PATRICK D.J. MAHLBERG, Attorney At Law, and MS. MOLLIE M. SMITH, Attorney At Law, of Fredrikson & Byron, P.A., 200 South Sixth Street, Suite 4000, Minneapolis, Minnesota, appeared via Zoom videoconference as counsel for and on behalf of the Respondent.

ALSO APPEARING VIA ZOOM VIDEOCONFERENCE: MR. MATTHEW FREUDENRICH, Deponent; MR. KEITH KESSLER, Complainant/Petitioner; and MS. DEANNA KESSLER, Complainant/Petitioner.

LORI L. HAUGE, RPR, CRR
Phone: 701-572-8222

TABLE OF CONTENTS

MATTHEW FREUDENRICH

Examination by Mr. Boughey ..... Page 5
Examination by Mr. Mahlberg ..... Page 38
Examination by Mr. Boughey ..... Page 42

Certificate of Deponent ..... Page 50
Certificate of Court Reporter ..... Page 51

LORI L. HAUGE, RPR, CRR
Phone: 701-572-8222

(The proceedings commenced at 9:02 a.m.)

THE COURT REPORTER: The attorneys participating in this deposition acknowledge that I am not physically present in the deposition room and that I will be reporting this deposition remotely. They further acknowledge that, in lieu of an oath administered in person, the deponent will verbally declare his testimony in this matter under penalty of perjury. The parties and their counsel consent to this arrangement and waive any objections to this manner of reporting. Please indicate your agreement by stating your name, whom you represent, and your agreement on the record.

THE DEPONENT: So Matthew Freudenrich representing Minnesota Power. And, yes, I'm in agreement.

MR. MAHLBERG: Pat Mahlberg, outside counsel for Minnesota Power. I agree.

MR. BOUGHEY: Lynn Boughey, counsel for the plaintiffs. I agree.

Whereupon,

MATTHEW FREUDENRICH,

called as a witness by the Complainants/Petitioners, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BOUGHEY:

Q. Mr. Freudenrich, is it okay if I call you Matt?

A. Yes.

Q. Thank you. And I appreciate that. And you're welcome to call me Lynn, by the way.

Have you ever had your deposition taken before?

A. I have not.

Q. Okay. I want to just go over a couple of guidelines. Your attorney has probably already mentioned this to you, but this is a discovery deposition, and so basically, I'm trying to have it so you educate me about the facts so I understand the case better.

It is, as you know, under oath. And a couple of guidelines you might want to think about. The first and most important for our court reporter is that you wait for me to actually ask the question and be done asking the question, and then you answer it. If we both talk at the same time, it's going to be a problem for her to get this down, especially remotely.

The other thing is -- is because she's

taking this down word for word, "um" or things like that won't work. If you can answer a yes, answer "yes." If you have to answer "no," fine. If you have to explain your answer, all that's fine, but it has to be something other than just a "mm-hmm" or an "um" or something like that. Otherwise, it will be unclear what you said. And so that's the most important thing.

If at any point you need to take a break to visit with your attorney, that's fine. All you say is, "I need a minute," and then you -- we can -- everybody goes on mute, and you call your lawyer direct or however you want to do it. That's not a problem.

And, again, this is a discovery deposition, so a lot of my questions are going to be really basic. You have to realize that I have not been involved in the process -- the earlier process of this project and its approval by the PSC. And because of that, some of my questions may seem so basic you're going to, you know, "What is" -- you know, "What's the deal here?" But I can tell you I'm not being coy. I need to figure out exactly how this process works, so --

The last thing I'll tell you is if you

don't understand the question and you need me to rephrase it, that's also fine anytime. Okay?

Do you understand everything I just mentioned to you, sir?

A. Yes.

Q. Okay. Thank you, Matt. All right.

Well, the first thing is -- I need to find out is -- the court reporter, I assume, has your correct spelling, but for the record, would you please spell both your first and last name.

A. Sure. Matthew, M-a-t-t-h-e-w. Last name is Freudenrich, F-r-e-u-d-e-n-r-i-c-h.

Q. Very good. All right.

And what is your, I guess, title or your role or duties at Minnesota Power? What do you do, and what is your title?

A. Senior engineer for Minnesota Power.

Q. And as a senior engineer, what was your role relating to -- and I'll just get this done now. The -- the project we're talking about, just for the record, what was the name of the -- the wind project that was being done that relates to the Kesslers?

A. It was the Bison 4 Wind Project.

Q. Very good.

8

And so from now on, when I use the word "project," we will be referring to it automatically as that. Is that okay?

A. Yes.

Q. All right. Fantastic.

And so in regards to that project, what was your role as a senior engineer?

A. I was a project implementation manager for Bison 4.

Q. Okay. Give me one moment. I just received a message, "I'm off the phone," from my client. Let me --

MR. BOUGHEY: Keith, are you able to hit "mute off" and so we know you're still there? Modern technology. I'm going to -- let's go off the record for a moment.

(The proceedings recessed at 9:07 a.m. and reconvened with everyone present at 9:07 a.m.)

MR. BOUGHEY: Okay. Go ahead and go back to mute, and we'll go back on the record. Thank you.

Sorry about that, Matt. I'm not very much used to this new technology either.

BY MR. BOUGHEY:

Q. All right. I was asking you as a senior

9

engineer, what was your role as to this specific project?

A. So I supported project development, and I oversaw engineering and construction.

Q. And in regards to the engineering and construction, I'd like to take you back to -- were you at a meeting on September 13, 2013, where it was a public hearing on this project? Do you recall attending that meeting?

A. Yes.

Q. And at that meeting, at that point, as of September 13, 2013, had the decision been made as to exactly where Turbine 441 would be?

A. Yes.

Q. And I understand that there were certain maps or diagrams that were placed, I assume, on the wall somewhere or perhaps on some boards. Please describe to me what items were placed so that the landowners and anyone else could take a look at them. What were those items?

A. To be honest, I don't have the map in front of me. I -- I can say typically what -- what should be on the map.

Q. Go ahead, then. I'm -- I'm more interested, of course, as to whether there was a

10

specific location as to 441. For example--let's just walk through this a little bit--did the number "441" appear on the map that was presented at this public hearing?

A. I believe, yes.

Q. Okay. And how big of a map was it? I mean, I assume the area of the project is -- is rather large, and so would the map be showing all of where the various turbines are going to go?

A. Yes.

Q. So that one map would be rather -- relatively small in the sense that it would be -- you could see -- you could see where 441 was, but you couldn't tell exactly from that map how close it was to any of the residences. Were the residences -- I'll backtrack.

Were the residences shown on that map?

MR. MAHLBERG: Object as to form.

BY MR. BOUGHEY:

Q. All right. We'll just walk through this slowly, then. That's no problem. So let's go back to the map. What did the map have on it? If it had 441, did it also show any residences in that big area?

A. There would have been residences on the

11

map, yes.

Q. Okay. And then, again, how big was this map, if you recall? Was it 2 feet by 3 feet? Any idea of the size?

A. Approximately that, yes.

Q. Okay. And from looking at the project area, would it be fair to state that the placement of the turbines and the entire project area was something like, maybe, 12 feet across, meaning east-west, and about -- I'm sorry -- 12 miles across east-west and about 5 miles north-south? Is that a fair description?

A. Yes.

Q. All right. So in a map that size, would you agree it would be pretty difficult for anyone to determine precisely where 441 was going to go? Would you agree with that?

MR. MAHLBERG: Object as to form.

BY MR. BOUGHEY:

Q. Go ahead and answer, please.

A. The background would have been shown. You could see some -- there would be aerial imagery.

Q. Mm-hmm. Well, the aerial imagery doesn't -- all right. We'll go back to some other things.

Let's talk about avoidance areas. Now, it's my understanding that one of the areas of avoidance that you guys are supposed to take into account is any type of residences in that project area. Is that a fair statement, sir?

A. Yes.

Q. And who would be in charge of developing a map -- one of the exhibits, too, is a map that shows all -- shows a whole bunch of residences and -- as black dots throughout the -- the project area. Would you be the person in charge of -- of either making that map or having somebody do that?

A. I -- no, I was not.

Q. Who is -- is in charge of creating the avoidance area map that relates to residences for this project, if you recall?

A. I believe Barry Gartner was the one.

Q. Does Barry Gartner still work for Minnesota Power?

A. Yes.

Q. Okay. And where is he located?

A. Duluth.

Q. So he's at what I would call your headquarters. Is that a fair statement?

A. Yes.

Q. Okay. And were you in charge of him in the sense that he's one of the people that you assigned tasks to?

A. I was not.

Q. Who would be the one in charge of him in regards to this project, then?

A. Barry would have reported to our strategy and planning vice president.

Q. And in regards to the creation of that map, for -- have you dealt with any aspects of an understanding of how that map is put together? Have you ever dealt with that issue as -- for Minnesota Power?

A. Yeah, please -- please restate the question.

Q. That's all right. My -- I apologize.

In regards to the formation and creation of these particular maps that show where the residences are in the area of the project, do you have familiarity with that process and have had anything to do with that process while working for Minnesota Power?

A. I did not.

Q. So just to make sure I understand, you're not in a position today to tell me how those maps

are pulled together and what activities Minnesota Power does to create that map; is that correct, sir?

A. Yes.

Q. And the person whom I'd have to talk to from Minnesota Power who apparently did that particular map for this project would be Barry Gartner; is that correct?

A. Yes.

Q. Okay. Great.

Now, help me out. I understand that these projects -- I mean, I've read the application. These things take a lot of time and a lot of planning, and you have to go through the Public Service Commission. So I understand it's a very labor-intensive proj -- process, and there are a lot of documentation and things like that that have to be done. But I need to do -- kind of get up to about 30,000 feet and take a look at -- at what is the background of some of the financial aspects, for example.

And so, if you're aware, are there any types of incentives that the government provides for wind power projects such as this?

A. Yes.

Q. Okay. And what are some of those incentives?

A. Production tax credit.

Q. And did any of those tax credits apply in any way to this project?

A. Yes.

Q. Now, how does that work? Is there a federal law that says, "If you do X, Y, and Z"--whatever this project is--"then you will get a tax credit that will lower your taxes in reference to what you pay," for example, "that year"? Is that how this works?

A. I -- I don't know the specifics.

Q. All right. Fine. But you are aware -- let me ask one other thing, then.

You're aware there were tax credits. In regards to this project, were you aware of any type of deadline where the project had to be done by a certain time in order to obtain those tax credits?

A. Yes.

Q. What was that deadline?

A. If I recall correctly, it was the end of -- end of 2014.

Q. End of what?

A. 2014.

Q. Thank you. I'm sorry. I wasn't -- I want to make sure I got that. All right.

And was that a factor, in your mind, in regards to getting this project done by then?

A. So -- yes.

Q. Okay. Now, at the meeting of September 13, 2013, that public meeting relating to this project, first of all, do you -- I see you were one of the first people to sign in. So I take it you got there pretty early and -- and set things up. Would that be a fair statement?

A. Yeah, I can't recall exactly when I got there.

Q. That's fine.

And in regards to Wade Isaacson--I'll start with him--did you work with him in any regards relating to this project?

A. Yes.

Q. And what was his role or function?

A. He was a land agent for Minnesota Power.

Q. And what does the land agent do? What are their -- you know, what is their assignment, so to speak?

A. Primary duties are contacts with landowners and sign options and easements.

Q. Okay. And then Scott Monroe, what -- did you work with him at any time in regards to this project?

A. Yes.

Q. And what was his assignment or duties?

A. It would be the same as Wade.

Q. Okay. Now, do you recall, did you testify at the hearing?

A. Yes.

Q. Okay. Do you recall, separate from your testimony, at any time visiting with any of the landowners out in the area where the maps were located?

A. I do not.

Q. Okay. Do you recall -- and I -- I guess I can figure your answer out, but I have to ask, do you recall having any discussions with Keith Kessler or his wife, Deanna Kessler?

A. No.

Q. Do you recall, at any time during the hearing, any discussion relating to the residence that was near where Turbine 441 was going to be located?

A. No.

Q. The Kesslers have indicated in their

answers to discovery and other items sent to the PSC that they recall having a conversation with you. Do you have any reason to doubt their reference to that conversation?

A. Yeah, I'm not sure what they recall.

Q. That wasn't my question.

Do you have any reason that you can provide today that would in -- that would in any way counter or demonstrate that the conversation the Kesslers describe happened or didn't happen?

A. No.

Q. All right. I'm going to very briefly describe what they said and see if this refreshes your recollection. So I'm reading the answers that the Kesslers have provided to Minnesota Power. I'd like you to listen to this, and then when I'm done, I'm going to ask you if this in any way helps you remember the discussion or in any way do you recall the discussion as a result of me reading this to you.

Do you understand, sir?

A. Yes.

Q. Okay. And it's a little bit lengthy, but I want to -- want to find out if you have any -- any re -- recollection as a result of my reading

this that you might remember something they said to you.

So at the public hearing, it -- the question from Minnesota Power was, Number 8, asking, "Did you raise any concerns as to the location of Turbine 441 to the commission at the public hearing?"

And here's what they say: "I don't believe they had any numbers for the turbines at that point, but it was not a very good map. It was very vague and not specific enough as to location."

All right. Would you have any reason to contest what they have just said in that -- those two sentences, sir?

MR. MAHLBERG: Object as to form.

BY MR. BOUGHEY:

Q. Do you in any way have anything to -- to -- I'll rephrase, then.

Do you have any testimony today that would counter what was just read to you, sir?

MR. MAHLBERG: Object --

THE DEPONENT: No.

MR. MAHLBERG: -- as to form.

BY MR. BOUGHEY:

Q. And I -- I understand your answer was

"no." Is that correct?
A. Yes.
Q. All right. Now, I'm going down -- do you -- they state that somebody from Minnesota Power -- during that break, that they were informed that the turbine -- turbine would have to be within the statutory required distance away from any homes.
Do you recall making any type of statement to the Kesslers stating that?
A. No.
Q. Did you hear either -- anyone else from Minnesota Power state to the Kesslers, "You don't have to" -- words to the effect, "You don't have to worry about this because we have to, by statute, be at least so many feet away from a residence"? Do you recall anyone having that discussion with the Kesslers?
A. No.
Q. I'm now back to the hearing. Do you recall -- and this is their description they have, and I'll read this again, "During the break, we were able to get up close to the maps, and we had a concern, because they were not detailed enough, that we couldn't tell exactly where the turbine

would be that's next to Section 15. We raised the issue with Scott and Matt, and Matt blew up and said," quote, "'We don't have time for this shit. We have to get going on this. We need those tax credits,'" end quote.
Do you recall these words or this discussion with the Kesslers in any way now that I've tried to refresh your recollection?
A. No.
Q. Do you have any reason or basis for a view that this didn't happen?
A. Yes.
Q. Okay. Tell me, in what way do you think -- what evidence do you have -- since you don't remember the conversation, what evidence do you have as to whether or not this conversation occurred?
A. Scott Monroe was not at the hearing.
Q. I apologize. I -- I believe it -- we -- we phrased him -- I believe that was a mistake that I was supposed to correct.
It was Wade that was at the hearing; correct?
A. Wade was not at the hearing.
Q. Okay. Let me look at the sign-in sheet.

Well, who was there? At the time you were at the break -- do you recall, on the break, being -- talking to any of the landowners?
A. There might have been some informal conversation, but I -- no.
Q. Okay. And now let's forget about whether Wade, Scott, anyone else was there. I want to know, do you have any reason to contest the Kesslers' statement that that quoted material I just read to you, that you had said that to them?
A. No.
MR. MAHLBERG: Objection. Asked and answered.
BY MR. BOUGHEY:
Q. Okay. Following this hearing on September 13, 2013, did you have any other activities or duties relating to Turbine 441 and its placement?
A. I -- its placement, no; but, as I stated previously, I was involved in the -- in the engineering part of the design.
Q. Okay. And who would be in charge of the actual decision as to where to place 441? Now, I appreciate you have it on the map. I'll backtrack.
Back in 2013, you had a map showing where

441 was going to be; is that correct?
A. Yes.
Q. And does that mean it would for sure be in that location, or was there--I'll -- I'll phrase it this way--wiggle room where once you got on-site, you might choose to move it a little bit left, a little bit right, something like that?
A. So the location was set. When we do a -- something called the soil boring, we can move it roughly 50 feet from that soil boring without having to do another one.
Q. I see.
So at the time you're standing before the commission, you know within about 50 feet the exact location of that turbine; is that correct?
A. Yes.
Q. Now, in regards to providing the landowners more details, like a closer drawing of where 441 is going, was there present at this public meeting a more detailed map showing where 441 was located more precisely in conjunction with the Section 15? Do you know whether any more detailed maps were provided at that time to the public?
A. I do not.

Q. Did you have any other dealings with -- in regards to 441 and the distance to the house on Section 15 that the Kesslers own, or is -- or were you done after this hearing?

A. There was no more dealings. No.

Q. So I'm still trying to figure out. I understand you're doing the engineering. After this public hearing, des -- describe again what you're doing as the senior engineer as to this project so I know if there are any other questions I might have regarding any -- anything relating to the Kesslers or Turbine 441. So following the hearing, what were your duties, what were you doing that in any way related to 441 or the Kesslers?

A. Finalizing road design, collection design, working on fencing maps.

Q. Now --

(The court reporter requested clarification.)

BY MR. BOUGHEY:

Q. Say the last two words again, sir. Something maps.

A. Yeah, fencing.

Q. Fencing maps. Thank you.

Now, have you had any occasion, while

working for Minnesota Power, where after the placement was decided for the turbine, an avoidance area issue came up and you had to move the turbine because of that? Has that ever occurred while you've worked for Minnesota Power?

A. No.

Q. Now, in regards to 441, following the hearing, how long was it before you actually started doing work on that 441 site? Do you have --

A. It was the --

Q. -- any idea what year?

A. Yeah. It was -- it was the following spring.

Q. So in the spring of 2014 is when work was starting to be conducted relating to actually building Turbine 441; is that correct, sir?

A. Yes.

Q. Now, at the time you're on-site--Minnesota Power is on-site--and if they discover that there is a concern with an avoidance area or a residence nearby, before the construction begins on 441, do you have any option of going back -- or moving it; and, if so, what process would you have to go through to move it farther away from that avoidance

area?

A. So we could have the option, yes. The main thing would be new soil borings for the foundation. We would have to update the engineering design for the roads and the collector. And then we would have to update our FAA permit.

Q. What were those letters? Your what permit?

A. Federal Aviation permit.

Q. And have you, while working for Minnesota Power, ever gone through that process?

A. No.

Q. Do you know of Minnesota Power ever having to go through that process separately from anything you've personally worked on?

A. Not that I know of, no.

Q. But this was a process that could have been employed in regards to Turbine 441; correct?

A. Yes.

Q. Now, did you ever go on-site to where the Kesslers either live or near Section 15?

A. Yes.

Q. And when did that occur?

A. It was sometime in the summer of 2013.

Q. Was that 2015, sir?

A. No. 2013.

Q. Thank you.

And this was -- obviously, when you say "summer," that was before the public hearing? In other words, before that occurred; is that correct?

A. Yes.

Q. And where did you go when you were on-site? Did you go to their home? Did you go to the location where 441 was? Did you go to where Section 15 is? Tell me, in detail, where -- where did you physically go?

A. I went by the -- the location that -- that location in Section 15.

Q. All right. Now, you have in your discovery a reference to just you walk -- you drove up or walked up to a gate. Might I -- I'm guessing that the gate was actually a cattle guard with the fence on each side. Would -- does that sound right to you?

A. Yeah. I guess I don't recall a -- a gate. I drove up to the house. I was trying to find access and fencing to the south.

Q. All right. So when you say you drove up to the house, maybe I misunderstood your -- your discovery, but I thought you just stopped at -- at

the gate. Did you actually enter Section 15 and enter their property?

A. Yes.

Q. And how far did you go into their property?

A. I drove through it to the fence to the south.

Q. Did you, by counting -- and I'm -- I'll try it another way.

I know exactly -- I've been there. I know where Turbine 441 is, and there's a fence that goes to the Kessler property on the west side of Turbine 441. Does that make sense to you?

A. Yes.

Q. Okay. And then did you start at 441 when you went towards Section 15?

A. No. Actually, I went through the residence and traveled south. So I would have paralleled the north-south fence, and I came up to a perpendicular fence that ran east-west, and that's where I stopped.

Q. Okay. I think what I'm going to have to do is I'm going to have to have you draw a map that shows me the Turbine 441 and -- because I'm -- I'm lost as to this because -- first of all, let's try

one more time.

So you weren't near 441 when you entered onto their property? Were you on the opposite side, which would be the northwest corner of the property?

A. That's correct.

Q. All right. Now -- now I'm getting closer to where I understand.

And then when entering that property from the northwest, how far into the property did you drive? I mean, how -- either by yards or any -- any way you can describe it, tell me how far in you went.

A. I -- I drove through, and I drove through the property and continued south down to that east-west fence.

Q. All right. And did you, at any time, get out of your vehicle and look at the residence at issue here?

A. I did not.

Q. And it was in the summer. Was the weather good? Were you able to -- to see the building?

A. Yes.

Q. And there's more than one building on-site there besides the residence; isn't that true?

A. Yes.

Q. Okay. What other structures do you recall when you drove through from the -- the corner at the northwest down to the south fence?

A. I'm not sure. There were some other outbuildings.

Q. Okay. How close were you when you drove by the residence itself? How -- how many feet away from the residence were you when you drove by?

A. Approximately 50 feet.

Q. Was there anybody with you at the time?

A. There was not.

Q. And what was the purpose of your driving through Section 15 that day?

A. I was trying to look at the fencing and get access to 441 area.

Q. Was your focus at that time in any way related to the residence, the type of residence, or whether somebody lived in the residence?

A. It was not.

Q. Who would have had the responsibility to determine whether that residence was occupied or not? What person within Minnesota Power would have had that responsibility?

A. Well, it came back to Barry Gartner.

Q. Did you, at any time, talk to Barry Gartner while you were on-site that day in the summer of -- I -- I take it it was before -- summer 2013?

A. Did I talk to Barry that day?

Q. Yeah. Or was he -- was he on-site? Is he somebody that would be there, and you'd be working with him in any way?

A. He was not.

Q. Do you have any knowledge of anything as to what steps Barry Gartner took to confirm whether the residence was occupied or not?

A. No.

Q. When did you become aware that there was an issue as to this Kessler residence being too close to 441?

A. It was sometime after I was gone, which would have been after December of 2014.

Q. And after December 2014, do you know when Turbine 441 was actually -- the construction began in -- on that particular turbine?

A. I -- if you give me one second here.

Q. That would be great. Thank you.

A. Looks like we started on roads in May of 2014.

Q. And then when did you start on the turbine?
A. I have that we did the foundation in July, so --
Q. July of 2014?
A. Yes, sir.
Q. And then did the turbine get put up in 2014, or was it just the foundation?
A. No. It got put up in October 2014.
Q. While the construction was taking place on 441, were you ever on-site during the -- May when they were building the roads or July when they were doing the foundation or when they actually constructed it in October of 2014? Were you ever there during those times?
A. Yes.
Q. Did you, at any time during those phases, happen to look over at the buildings in Section 15 and observe the distance between 441 and those buildings?
A. So I -- I'm sure I looked at it, yes; as far as a distance, no.
Q. Now, as an engineer, and maybe you're a hunter, but I know there are certain devices you can use that you can very quickly tell distances

from one point to the next point.
Do you carry any type of device like that with you when you're out in the field?
A. No.
Q. Did you take any steps at any time in 2014 while you were on-site to determine whether or not 441 was too close to any of the buildings in Section 15?
A. No.
Q. I assume that as the senior engineer, you were aware at that time, in 2014, of the distance that is required from avoidance areas, including residences. Is that a fair statement, sir?
MR. MAHLBERG: Object as to form.
MR. BOUGHEY: Okay. I'll ask.
BY MR. BOUGHEY:
Q. Did you know at the time in 2014 when you were on-site what distance was required from a turbine to a residence?
A. Yeah, I -- I understood the setback. Yes.
Q. And what was the setback?
A. It was 1,400 feet.
Q. Okay. I might have already asked this, but you said the tax credits was to the end of 2014. So I'm just curious, the fact that you built

441 in the summer of 2014, does that mean that if for any reason you had to stop and maybe finish it up in 2015, would you lose the tax credit, by chance, if you know?
A. Yeah, I'm -- I'm not sure.
Q. But you knew the deadline. Who told you of the deadline as to the tax credit? How did you know about that, then?
A. It came from Minnesota Power upper management. Sure. Yeah.
Barry was monitoring it as well.
Q. Okay. So is it fair to state that -- that there was a -- a push to get this done in 2014 so you could get the tax credit? Would that be a fair statement, sir?
A. The goal was to get it done in 2014, yes.
Q. And if it hadn't gotten done in 2014, do you know what the ramifications would have been as to that tax credit?
A. I -- I don't know, no.
Q. Who would know that?
A. Barry.
Q. If in the summer -- I'll have to go back.
If, in May or June or the beginning of July of 2014, Minnesota Power realized -- again,

this is a hypothetical. But if -- before the foundation was built or even started, if anyone from Minnesota Power had discovered they had a problem with 441 being too close to some of the buildings in Section 15, would there have been time to make a correction? In other words, could you have, within 2014, gone through that process of a new soil boring, update the design, and update the federal permit? Would there have been time, if this would have been discovered, say, on July 1, to move this particular turbine to a place that didn't cause a problem relating to the setback?
A. Yes.
MR. MAHLBERG: Object as to form.
BY MR. BOUGHEY:
Q. Once you build a foundation, which you did in July, but you haven't put the turbine up, is it still possible at that point to say, "Whoops. We're going to have to move" -- "do another foundation and move it over here so many feet so that we can qualify and" -- "and go with the proper setback"? Is that something that could have been done as well?
A. Yes.
Q. How long does it take to do a foundation

for the type of turbine of 441?

A. From my previous experience, roughly three to four weeks, you could have a new foundation installed.

Q. And are there any aspects of the old foundation that would be able to be moved over to the new one, or is that just a -- the first one -- a complete loss?

A. You would have to knock it off below grade. So you could not reuse anything from the first one.

MR. BOUGHEY: All right. Right now, what I'm going to do is I'm going to hit mute. I'm going to step away. We'll go off the record in just a moment. I need to call my clients and see if they have any additional thoughts or questions that they would like me to ask.

So at this time, why don't we take -- let's see. It's 9:46. Patrick, what do you think? Should we sign back on in -- let's see. We can do ten minutes, or we can -- what -- what would you like?

MR. MAHLBERG: Yeah, about 9:55 is -- is fine, Lynn.

MR. BOUGHEY: All right. Very good. I

will -- I'm going to hit mute, and I'm going to go offline here, and then I will -- we'll be coming back on at 9:55. We are now off the record.

Lori, does this work for you?

THE COURT REPORTER: Yes. That's fine. Thank you.

MR. BOUGHEY: All right. Thank you. See you at 9:55.

(The proceedings recessed at 9:46 a.m. and reconvened with everyone present at 9:57 a.m.)

MR. BOUGHEY: We'll go back on the record.

Matt, I'd like to thank you for your time. This was your first deposition, and I -- I hope you found that we really are just trying to figure out the details. I appreciate your time, and I do not have any other additional questions at this time.

Your attorney may decide to ask some questions or may not. That's entirely up to them.

And I -- again, I appreciate your time, and I -- this concludes my portion of the deposition.

You have a right to sign -- read and sign this, and I assume your attorney will tell you this, but I -- I'll put it on the record now while I'm -- I'm talking. The court reporter types up

word for word what you've said, and then you have an opportunity to review that, and if something's misspelled or there's a correction or -- of some sort, then she gives you a sheet in which you're able to, you know, make any corrections. It's not that you're supposed to, you know, totally redo your testimony, but mainly looking for typos and things like that. You have an opportunity to do that, or you can waive that, and I need your attorney to basically tell you what he wants you to do, and we'll go from there.

Thank you again for your time.

THE DEPONENT: Thank you.

MR. MAHLBERG: May as well do it now. We'll read and sign at the end here.

So, Mr. Freudenrich, I do have just a couple of follow-ups.

EXAMINATION

BY MR. MAHLBERG:

Q. As Mr. Boughey said, we're -- we're doing a discovery deposition trying to get some of the facts out and trying our best to get things as clear as possible. So I want to go back.

There were some questions that Mr. Boughey was asking you that -- that specifically related to

some of the written discovery responses that the Kesslers had provided, and I'm going to have a couple of questions in there.

First, Mr. Boughey read a couple of sentences regarding the maps at the hearing, and he -- he asked you to confirm that the -- the following description by the Kesslers was accurate about the maps. It was, quote, "I don't believe they had any numbers for the turbines at that point, but it was not a very good map. It was very vague and not specific enough as to location," close quote.

Mr. Freudenrich, were you viewing that map this morning?

A. I was not, no.

Q. Do you recall precisely what was on that map?

A. I do not.

Q. With that in mind, are you in a position, as you sit here today, to confirm the Kesslers' descriptions of that map?

A. I am not.

Q. Out of that same written discovery response that you were asked about, Mr. Freudenrich, there was a discussion about a

conversation that allegedly took place on a break. Do you recall testifying about that?

A. Yes.

Q. Mr. Boughey asked you, and I'll -- I'll paraphrase, whether --

A. Okay.

Q. -- you had evidence to counter the Kesslers' testimony that they had a conversation with you during a break, and I won't re -- I won't repeat all the language, but that they had a conversation with you during the break at the PSC hearing.

Do you recall giving that testimony this morning?

A. Yeah. So sorry, Pat, I -- I had some line workers in the background. Could -- could you restate that, please.

Q. I will -- I will -- I will restate that. You bet.

You were asked by Mr. Boughey some questions about a -- a conversation that you allegedly had with the Kesslers on a break at the PSC hearing. Do you recall that testimony this morning?

A. Yes.

Q. And you were asked whether you had any evidence to counter what the Kesslers had written in their discovery responses about that conversation.

Do you recall that testimony?

A. Yes.

Q. And, Mr. Freudenrich, what is your position on whether that conversation took place as reported by the Kesslers?

A. Yeah, it did not happen.

Q. So your testimony, Mr. Freudenrich, if -- if we can be clear on it, is not necessarily that you just don't recall it happening but, affirmatively, that that conversation did not take place; is that right?

A. That's correct.

MR. MAHLBERG: Okay. I -- I don't have anything other than that, Mr. Freudenrich. I just wanted to clear up those -- those couple of points so that we all knew where we stood on that. Thank you.

MR. BOUGHEY: I apologize, Counsel. I need to tell you that I said objection to form--you probably saw my lips moving, but unfortunately, I was still on mute--for the last question, and so I

apologize, as this technology -- I might have to leave it off mute from now on.

I now have just two very quick follow-ups for you, Matt, and I -- two areas, anyway, that I want to go into.

EXAMINATION

BY MR. BOUGHEY:

Q. I'm not clear what was on -- provided either on -- I don't know if you taped them up on a wall, or were they on a board? So where were these things that the public were looking at, including that map you just mentioned? Where were they located during the public hearing?

A. They were in the room on a stand.

Q. All right. And on that stand -- I'm trying to visualize. Is it a stand like a tripod and it's just one item, or was it something else?

A. Yeah, I -- I can't recall exactly how they were --

Q. All right.

A. -- displayed.

Q. And you just said "they." So tell me, what were the items that were presented to the public during the public hearing? We had -- we know about one of them is a map with 441 listed,

you said. What else was there besides that?

A. I'm not sure.

Q. Okay. Who has that map that was on display? Do you know?

A. It would be Barry or -- or Dan, one of the two, would have brought it.

Q. Barry or whom?

A. Dan McCourtney.

Q. Okay. And, again, because you're at the hearing and I wasn't, I have to ask, was the map given or presented to the judge as an exhibit, or did you guys bring it back? If you know.

A. It should have been an exhibit, yes.

Q. And by that, I understand that a copy of it might have been an exhibit, but I want to know, was the actual map that was out on the board, to use your word -- what happened to that particular map?

A. I'm not sure.

MR. BOUGHEY: All right. Is it possible, Counsel, to try and locate that map? Mr. Mahlberg?

MR. MAHLBERG: We can certainly have further inquiries on that, Mr. Boughey.

MR. BOUGHEY: Thank you.

I believe it -- that my interrogatories

44

and requests for production documents included that, and I don't recall whether that -- the actual map. So I will tell you that once you do locate it, I do need an actual-size copy of that provided to me. So if we could have the -- the answers to interrogatories and requests for production supplemented so I can actually see that map, that would be very helpful, and I appreciate that.

MR. MAHLBERG: Yeah, assuming -- assuming that it exists from that long ago, Mr. Boughey, and -- and is located, then sure.

MR. BOUGHEY: All right. Also, now that I know who created that--Barry Gartner--it looks like we're going to need to add him in on -- on somebody I need to depose within the next two weeks, I guess, or we'll have to ask for an extension.

We can deal with those scheduling matters later.

BY MR. BOUGHEY:

Q. Matt, my last area of inquiry is at the beginning of your deposition when I asked you about this conversation with the Kesslers, you simply said, "I did not" -- "I do not recall," and you also said you had no evidence to counter whether or not this conversation happened or not.

45

After the break, you're now saying positively, "This conversation didn't happen." Do I have that correct as kind of a review of what you said today relating to that conversation?

A. Yes.

Q. Do you have any way to explain to me how the Kesslers would have any knowledge of any tax credits unless you told them?

MR. MAHLBERG: Object as to form.

BY MR. BOUGHEY:

Q. Go ahead and answer, sir.

A. So please restate the question.

MR. BOUGHEY: Sure.

And I -- your objection is noted, Counsel.

BY MR. BOUGHEY:

Q. Do you have any explanation for how the Kesslers would have known about any of these tax credits unless somebody from Minnesota Power mentioned it at that hearing?

A. Could I --

MR. MAHLBERG: Objection as to form.

THE DEPONENT: Yeah, Pat, do you want me to answer that?

MR. MAHLBERG: Yeah. When -- when I -- when I object, Matt, unless I instruct you not to

46

answer, you -- you do your best to answer.

THE DEPONENT: Okay. So, Lynn, it -- they could have spoke to someone from Minnesota Power. They could have read it in the newspaper. It -- it's pretty common information of production tax credits.

(The court reporter requested clarification.)

BY MR. BOUGHEY:

Q. During the break -- do you recall anyone who was with you or anyone you talked to during any of the breaks during this public hearing? So let's start with Minnesota Power.

During the break when you were -- is it in a hallway, or were you just all in the room? Where were you during the breaks?

A. I'm not sure. I'm assuming I used the restroom, so --

Q. Okay. Well, let's go back, then, because, again, you know, you -- were you in a commissioner meeting room? Were you in the courtroom? Where were you physically at during the public hearing?

A. It was in the courtroom.

Q. Okay. And then were the -- was the map -- I'll go back again. I want to make sure.

47

Is the map the only thing you recall being placed for the public to review, or were there any other items that the people --

A. I'm not sure about that.

Sorry.

Q. Say that again.

A. I said I'm -- I'm not sure. I know the map was -- was one item.

Q. Where was the map located, if you recall?

A. It was -- yeah, it was in the courtroom on display.

Q. Okay. In the back where people would have access to it or up by where the judge was?

A. I believe it was up by where the judge was.

Q. Okay. Now let's talk about the breaks. During the breaks, were people allowed -- do you recall any people going up and looking at the map?

A. I'm not sure.

Q. Okay. Do you recall about how many people were even at the hearing?

A. I don't. I don't. I do not.

Q. Okay. Do you recall, in your mind today, any of the breaks and observing anybody looking at the -- the map?

A. There were people looking at the map, yes.
Q. Okay. And do you recall any of those people being the Kesslers, by chance?
A. I do not.
Q. Do you recall whom you would have been with during the breaks? Was there somebody from Minnesota Power that you'd be hanging out with during the breaks and talking about whatever?
A. I do not.
Q. Do you recall any discussions with anybody -- Minnesota Power, Kesslers, any landowners, the press -- do you recall any discussions during the break with anybody that you had?
A. No.
Q. Did you have any discussions with anybody during the break?
A. I'm not sure.
Q. Then how can you be sure whether or not you had this discussion with the Kesslers?
A. I would have remembered a discussion like that.
MR. BOUGHEY: I have nothing further. I appreciate, again, your time.
Counsel, anything else?

MR. MAHLBERG: No. Thank you. We will --
MR. BOUGHEY: All right, then.
MR. MAHLBERG: We will read and sign.
MR. BOUGHEY: Understood. And, for the record, we now will close the deposition. Again, Matt, thank you for your time. I'm not even going to try to pronounce your last name. And -- and if you want to leave, I'm sure your counsel will let you, and then we --
Lori, can we still continue talking? We have some scheduling matters to do. If you go away, then it ends; right? So could you --
THE COURT REPORTER: I'll leave it up.
MR. BOUGHEY: -- allow us some -- a few minutes?
THE COURT REPORTER: Yes, I will.
MR. BOUGHEY: Thank you. All right. Then Patrick and Mollie and I will try to figure out this afternoon.
Matt, thank you again for your time.
THE DEPONENT: Thanks.
(The proceedings concluded at 10:11 a.m.)

CERTIFICATE OF DEPONENT

I, Matthew Freudenrich, the deponent in the foregoing deposition, certify that I have read the attached 49 typewritten pages of my deposition upon oral examination, taken at the time and place indicated, and that it is a complete and accurate transcript of my deposition, with corrections, if any, noted herein along with the reason for each correction.

Dated at Fort Ripley, Minnesota, this _____ day of _____, 2020.

_____
MATTHEW FREUDENRICH

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'

'We [1] - 21:3

1

1 [1] - 35:10
1,400 [1] - 33:22
10:11 [1] - 49:22
12 [2] - 11:9, 11:10
1202 [1] - 2:8
13 [4] - 9:7, 9:12, 16:7, 22:16
15 [12] - 21:1, 23:22, 24:3, 26:21, 27:10, 27:13, 28:1, 28:16, 30:14, 32:18, 33:8, 35:5

2

2 [1] - 11:3
200 [1] - 2:15
2013 [8] - 9:7, 9:12, 16:7, 22:16, 22:25, 26:24, 27:1, 31:4
2014 [20] - 15:23, 15:25, 25:15, 31:18, 31:19, 31:25, 32:5, 32:8, 32:9, 32:14, 33:5, 33:11, 33:17, 33:25, 34:1, 34:13, 34:16, 34:17, 34:25, 35:7
2015 [2] - 26:25, 34:3
2020 [2] - 1:20, 50:12
20200211 [1] - 1:5

3

3 [1] - 11:3
30,000 [1] - 14:19
38 [1] - 3:5

4

4 [2] - 7:24, 8:9
4000 [1] - 2:16
42 [1] - 3:6
441 [37] - 9:13, 10:1, 10:3, 10:13, 10:23, 11:16, 17:22, 19:6, 22:17, 22:23, 23:1, 23:19, 23:21, 24:2, 24:12, 24:14, 25:7, 25:9, 25:17, 25:22, 26:18, 27:9, 28:11, 28:13, 28:15, 28:24, 29:2, 30:16, 31:16, 31:20, 32:11, 32:19, 33:7, 34:1, 35:4, 36:1, 42:25
49 [1] - 50:4

5

5 [3] - 1:20, 3:4, 11:11
50 [4] - 3:24, 23:10, 23:14, 30:10
51 [1] - 3:25

8

8 [1] - 19:4

9

9:02 [2] - 1:20, 4:1
9:07 [2] - 8:17, 8:18
9:46 [2] - 36:19, 37:9
9:55 [3] - 36:23, 37:3, 37:8
9:57 [1] - 37:10

A

a.m [7] - 1:20, 4:1, 8:17, 8:18, 37:9, 37:10, 49:22
able [5] - 8:13, 20:23, 29:22, 36:6, 38:5
access [3] - 27:22, 30:16, 47:13
account [1] - 12:4
accurate [2] - 39:7, 50:6
acknowledge [2] - 4:3, 4:6
activities [2] - 14:1, 22:17
actual [4] - 22:23, 43:16, 44:2, 44:4
actual-size [1] - 44:4
add [1] - 44:14
additional [2] - 36:16, 37:16
administered [1] - 4:7
aerial [2] - 11:22, 11:23
affirmatively [1] - 41:14
afternoon [1] - 49:19
agent [2] - 16:20, 16:21
ago [1] - 44:10
agree [4] - 4:18, 4:20, 11:15, 11:17
agreement [3] - 4:12, 4:13, 4:16
ahead [4] - 8:19, 9:24, 11:20, 45:11
allegedly [2] - 40:1, 40:22
ALLETE [1] - 1:8
allow [1] - 49:14
allowed [1] - 47:17
ALSO [1] - 2:20
answer [12] - 5:22, 6:2, 6:3, 6:4, 11:20, 17:16, 19:25, 45:11, 45:23, 46:1
answered [1] - 22:13
answers [3] - 18:1, 18:14, 44:5
anytime [1] - 7:2
anyway [1] - 42:4
apologize [4] - 13:16, 21:19, 41:22, 42:1
appear [1] - 10:3
Appearances [1] - 1:23
appeared [2] - 2:9, 2:16
APPEARING [1] - 2:20
application [1] - 14:12
apply [1] - 15:4
appreciate [6] - 5:6, 22:24, 37:15, 37:19, 44:8, 48:24
approval [1] - 6:19
area [14] - 10:7, 10:24, 11:7, 11:8, 12:5, 12:11, 12:15, 13:19, 17:12, 25:3, 25:21, 26:1, 30:16, 44:20
areas [4] - 12:1, 12:2, 33:12, 42:4
arrangement [1] - 4:10
aspects [3] - 13:10, 14:20, 36:5
assigned [1] - 13:3
assignment [2] - 16:22, 17:5
assume [5] - 7:8, 9:16, 10:7, 33:10, 37:23
assuming [3] - 44:9, 46:17
attached [1] - 50:4
attending [1] - 9:9
attorney [5] - 5:12, 6:10, 37:17, 37:23, 38:10
Attorney [4] - 1:15, 2:7, 2:13, 2:14
attorneys [1] - 4:2
automatically [1] - 8:2
Aviation [1] - 26:9
avoidance [7] - 12:1, 12:3, 12:15, 25:2, 25:21, 25:25, 33:12
aware [6] - 14:22, 15:14, 15:16, 15:17, 31:14, 33:11

B

background [3] - 11:21, 14:20, 40:16
backtrack [2] - 10:16, 22:24
Barry [13] - 12:17, 12:18, 13:7, 14:7, 30:25, 31:1, 31:5, 31:11, 34:11, 34:22, 43:5, 43:7, 44:13
basic [2] - 6:17, 6:21
basis [1] - 21:10
become [1] - 31:14
began [1] - 31:20
beginning [2] - 34:24, 44:21
begins [1] - 25:22
behalf [2] - 2:10, 2:17
below [1] - 36:9
best [2] - 38:22, 46:1
bet [1] - 40:19
better [1] - 5:16
between [1] - 32:19
big [3] - 10:6, 10:24, 11:2
Bison [2] - 7:24, 8:9
bit [4] - 10:2, 18:23, 23:6, 23:7
black [1] - 12:10
blew [1] - 21:2
board [2] - 42:10, 43:16
boards [1] - 9:17
boring [3] - 23:9, 23:10, 35:8
borings [1] - 26:3
Boughey [12] - 1:15, 2:8, 3:4, 3:6, 4:19, 38:20, 38:24, 39:4, 40:4, 40:20, 43:23, 44:10
BOUGHEY [34] - 2:7, 4:19, 5:2, 8:13, 8:19, 8:24, 10:19, 11:19, 19:16, 19:24, 22:14, 24:20, 33:15, 33:16, 35:15, 36:12, 36:25, 37:7, 37:11, 41:22, 42:7, 43:20, 43:24, 44:12, 44:19, 45:10, 45:13, 45:15, 46:9, 48:23, 49:2, 49:4, 49:14, 49:17
Box [1] - 2:8
break [14] - 6:9, 20:5, 20:22, 22:2, 40:1, 40:9, 40:11, 40:22, 45:1, 46:10, 46:14, 48:13, 48:17
breaks [7] - 46:12, 46:16, 47:16, 47:17, 47:24, 48:6, 48:8
briefly [1] - 18:12
bring [1] - 43:12
brought [1] - 43:6
build [1] - 35:16
building [4] - 25:17, 29:22, 29:24, 32:12
buildings [4] - 32:18, 32:20, 33:7, 35:5
built [2] - 33:25, 35:2
bunch [1] - 12:9
BY [16] - 5:2, 8:24, 10:19, 11:19, 19:16, 19:24, 22:14, 24:20, 33:16, 35:15, 38:19, 42:7, 44:19, 45:10, 45:15, 46:9
Byron [1] - 2:15

C

carry [1] - 33:2
Case [1] - 1:4
case [1] - 5:16
cattle [1] - 27:17
certain [3] - 9:15, 15:19, 32:24
certainly [1] - 43:22
CERTIFICATE [1] - 50:1
Certificate [2] - 3:24, 3:25
certify [1] - 50:3
chance [2] - 34:4, 48:3
CHANGE [4] - 50:19, 50:21, 50:23, 50:25
charge [6] - 12:7, 12:11, 12:14, 13:1, 13:5, 22:22
choose [1] - 23:6
Civil [1] - 1:17
clarification [2] - 24:19, 46:8

clear [4] - 38:23, 41:12, 41:19, 42:8
client [1] - 8:12
clients [1] - 36:15
close [8] - 10:14, 20:23, 30:7, 31:16, 33:7, 35:4, 39:12, 49:5
closer [2] - 23:18, 29:7
collection [1] - 24:15
collector [1] - 26:5
coming [1] - 37:2
commenced [1] - 4:1
commencing [1] - 1:20
Commission [1] - 14:15
COMMISSION [1] - 1:2
commission [2] - 19:6, 23:14
commissioner [1] - 46:20
common [1] - 46:5
Complainant / Petitioner [2] - 2:22, 2:23
Complainants [1] - 1:5
Complainants / Petitioners [2] - 2:11, 4:24
complete [2] - 36:8, 50:6
concern [2] - 20:24, 25:21
concerns [1] - 19:5
concluded [1] - 49:22
concludes [1] - 37:20
conducted [1] - 25:16
confirm [3] - 31:11, 39:6, 39:20
conjunction [1] - 23:21
consent [1] - 4:10
constructed [1] - 32:14
construction [5] - 9:4, 9:6, 25:22, 31:20, 32:10
contacts [1] - 16:24
contest [2] - 19:13, 22:8
continue [1] - 49:10
continued [1] - 29:15
conversation [17] - 18:2, 18:4, 18:9, 21:15, 21:16, 22:5, 40:1, 40:8, 40:11, 40:21, 41:4, 41:8, 41:14, 44:22, 44:25, 45:2, 45:4
copy [2] - 43:14, 44:4
corner [2] - 29:4, 30:3
correct [14] - 7:9, 14:2, 14:8, 20:1, 21:21, 21:23, 23:1, 23:15, 25:17, 26:18, 27:5, 29:6, 41:16, 45:3
correction [3] - 35:6, 38:3, 50:9
corrections [2] - 38:5, 50:7
correctly [1] - 15:22
counsel [10] - 2:10, 2:17, 4:10, 4:18, 4:19, 41:22, 43:21, 45:14, 48:25, 49:8
counter [5] - 18:9, 19:20, 40:7, 41:2, 44:24
counting [1] - 28:8
County [1] - 1:18
couple [6] - 5:11, 5:18, 38:17, 39:3, 39:4, 41:19
course [1] - 9:25
Court [1] - 3:25
court [5] - 5:19, 7:8, 24:18, 37:25, 46:7
COURT [4] - 4:2, 37:5, 49:13, 49:16
courtroom [3] - 46:21, 46:23, 47:10
coy [1] - 6:23
create [1] - 14:2
created [1] - 44:13
creating [1] - 12:14
creation [2] - 13:9, 13:17
credit [6] - 15:3, 15:10, 34:3, 34:7, 34:14, 34:19
credits [8] - 15:4, 15:16, 15:19, 21:5, 33:24, 45:8, 45:18, 46:6
curious [1] - 33:25

D

D.J [1] - 2:13
DAKOTA [1] - 1:1
Dakota [3] - 1:16, 1:19, 2:9
Dan [2] - 43:5, 43:8
Dated [1] - 50:11
deadline [4] - 15:18, 15:21, 34:6, 34:7
deal [2] - 6:22, 44:17
dealings [2] - 24:1, 24:5
dealt [2] - 13:10, 13:12
Deanna [2] - 1:4, 17:18
DEANNA [1] - 2:22
December [2] - 31:18, 31:19
decide [1] - 37:17
decided [1] - 25:2
decision [2] - 9:12, 22:23
declare [1] - 4:8
demonstrate [1] - 18:9
Deponent [2] - 2:21, 3:24
DEPONENT [7] - 4:14, 19:22, 38:13, 45:22, 46:2, 49:21, 50:1
deponent [2] - 4:7, 50:2
depose [1] - 44:15
deposition [14] - 4:3, 4:4, 4:5, 5:8, 5:14, 6:16, 37:13, 37:21, 38:21, 44:21, 49:5, 50:3, 50:4, 50:7
DEPOSITION [1] - 1:13
des [1] - 24:8
describe [5] - 9:18, 18:10, 18:13, 24:8, 29:12
description [3] - 11:12, 20:21, 39:7
descriptions [1] - 39:21
design [5] - 22:21, 24:15, 26:5, 35:8
detail [1] - 27:10
detailed [3] - 20:24, 23:20, 23:23
details [2] - 23:18, 37:15
determine [3] - 11:16, 30:22, 33:6
developing [1] - 12:7
development [1] - 9:3
device [1] - 33:2
devices [1] - 32:24
diagrams [1] - 9:16
difficult [1] - 11:15
direct [1] - 6:13
discover [1] - 25:20
discovered [2] - 35:3, 35:10
discovery [9] - 5:13, 6:15, 18:1, 27:15, 27:25, 38:21, 39:1, 39:23, 41:3
discussion [8] - 17:21, 18:18, 18:19, 20:17, 21:7, 39:25, 48:20, 48:21
discussions [4] - 17:17, 48:10, 48:13, 48:16
display [2] - 43:4, 47:11
displayed [1] - 42:21
distance [6] - 20:7, 24:2, 32:19, 32:22, 33:11, 33:18
distances [1] - 32:25
division [1] - 1:8
documentation [1] - 14:17
documents [1] - 44:1
done [12] - 5:21, 7:19, 7:22, 14:18, 15:18, 16:4, 18:16, 24:4, 34:13, 34:16, 34:17, 35:23
dots [1] - 12:10
doubt [1] - 18:3
down [5] - 5:24, 6:1, 20:3, 29:15, 30:4
draw [1] - 28:23
drawing [1] - 23:18
drive [1] - 29:11
driving [1] - 30:13
drove [9] - 27:15, 27:21, 27:23, 28:6, 29:14, 30:3, 30:7, 30:9
Duluth [1] - 12:22
duly [1] - 4:25
during [21] - 17:20, 20:5, 20:22, 32:11, 32:15, 32:17, 40:9, 40:11, 42:13, 42:24, 46:10, 46:11, 46:12, 46:14, 46:16, 46:22, 47:17, 48:6, 48:8, 48:13, 48:17
duties [5] - 7:15, 16:24, 17:5, 22:17, 24:13

E

early [1] - 16:10
easements [1] - 16:25
east [4] - 11:10, 11:11, 28:20, 29:16
east-west [4] - 11:10, 11:11, 28:20, 29:16
educate [1] - 5:15
effect [1] - 20:14
either [6] - 8:23, 12:12, 20:12, 26:21, 29:11, 42:9
employed [1] - 26:18
end [6] - 15:22, 15:23, 15:24, 21:5, 33:24, 38:15
ends [1] - 49:12
engineer [7] - 7:17, 7:18, 8:7, 9:1, 24:9, 32:23, 33:10
engineering [5] - 9:4, 9:5, 22:21, 24:7, 26:5
enter [2] - 28:1, 28:2
entered [1] - 29:2
entering [1] - 29:9
entire [1] - 11:8
entirely [1] - 37:18
especially [1] - 5:24
evidence [5] - 21:14, 21:15, 40:7, 41:2, 44:24
exact [1] - 23:14
exactly [7] - 6:24, 9:13, 10:14, 16:12, 20:25, 28:10, 42:18
examination [1] - 50:5
EXAMINATION [3] - 5:1, 38:18, 42:6
Examination [3] - 3:4, 3:5, 3:6
examined [1] - 4:25
example [3] - 10:1, 14:21, 15:11
exhibit [3] - 43:11, 43:13, 43:15
exhibits [1] - 12:8
exists [1] - 44:10
experience [1] - 36:2
explain [2] - 6:4, 45:6
explanation [1] - 45:16
extension [1] - 44:16

F

F-r-e-u-d-e-n-r-i-c-h [1] - 7:12
FAA [1] - 26:6
fact [1] - 33:25
factor [1] - 16:3
facts [2] - 5:15, 38:22
fair [8] - 11:7, 11:12, 12:5, 12:24, 16:11, 33:13, 34:12, 34:14
familiarity [1] - 13:20
fantastic [1] - 8:5
far [4] - 28:4, 29:10, 29:12, 32:22
federal [2] - 15:8, 35:9
Federal [1] - 26:9
feet [11] - 11:3, 11:9, 14:19, 20:16, 23:10, 23:14, 30:8, 30:10, 33:22, 35:20
fence [7] - 27:18, 28:6, 28:11, 28:19, 28:20, 29:16, 30:4
fencing [5] - 24:16, 24:23, 24:24, 27:22, 30:15
few [1] - 49:14
field [1] - 33:3
figure [5] - 6:23, 17:16, 24:6, 37:14, 49:18
File [1] - 1:4
finalizing [1] - 24:15
financial [1] - 14:20
fine [8] - 6:3, 6:4, 6:10, 7:2, 15:14, 16:14, 36:24, 37:5
finish [1] - 34:2
Firm [1] - 2:8
first [11] - 4:24, 5:19, 7:7, 7:10, 16:8, 16:9, 28:25, 36:7, 36:11, 37:13, 39:4
focus [1] - 30:17
follow [2] - 38:17, 42:3
follow-ups [2] - 38:17, 42:3
following [5] - 22:15, 24:12, 25:7, 25:13, 39:7
follows [1] - 4:25
foregoing [1] - 50:3
forget [1] - 22:6
form [9] - 10:18, 11:18, 19:15, 19:23, 33:14, 35:14, 41:23, 45:9, 45:21
formation [1] - 13:17
Fort [1] - 50:11
foundation [10] - 26:4, 32:3, 32:8, 32:13, 35:2, 35:16, 35:20, 35:25, 36:3, 36:6
four [1] - 36:3
Fredrikson [1] - 2:15
FREUDENRICH [5] - 1:14, 2:21, 3:3, 4:22, 50:15
Freudenrich [10] - 4:14, 5:3, 7:12, 38:16, 39:13, 39:25, 41:7, 41:11, 41:18, 50:2
front [1] - 9:22
function [1] - 16:19

G

Gartner [7] - 12:17, 12:18, 14:8, 30:25, 31:2, 31:11, 44:13
gate [4] - 27:16, 27:17, 27:20, 28:1
given [1] - 43:11
goal [1] - 34:16
government [1] - 14:23
grade [1] - 36:10
great [2] - 14:10, 31:23
guard [1] - 27:17
guess [4] - 7:14, 17:15, 27:20, 44:16
guessing [1] - 27:16
guidelines [2] - 5:12, 5:18
guys [2] - 12:3, 43:12

H

hallway [1] - 46:15
hanging [1] - 48:7
Hauge [1] - 1:17
headquarters [1] - 12:24
hear [1] - 20:12
hearing [26] - 9:8, 10:4, 17:8, 17:21, 19:3, 19:7, 20:20, 21:18, 21:22, 21:24, 22:15, 24:4, 24:8, 24:13, 25:8, 27:4, 39:5, 40:12, 40:23, 42:13, 42:24, 43:10, 45:19, 46:12, 46:22, 47:21
help [1] - 14:11
helpful [1] - 44:8
helps [1] - 18:17
herein [2] - 1:23, 50:8
hit [3] - 8:13, 36:13, 37:1
hmm [2] - 6:5, 11:23
home [1] - 27:8
homes [1] - 20:8
honest [1] - 9:21
hope [1] - 37:13
house [3] - 24:2, 27:21, 27:24
hunter [1] - 32:24
hypothetical [1] - 35:1

I

idea [2] - 11:4, 25:12
imagery [2] - 11:22, 11:23
implementation [1] - 8:8
important [2] - 5:19, 6:8
Inc [1] - 1:9
incentives [2] - 14:23, 15:2
included [1] - 44:1
including [2] - 33:12, 42:11
indicate [1] - 4:12
indicated [2] - 17:25, 50:6
informal [1] - 22:4
information [1] - 46:5
informed [1] - 20:5
inquiries [1] - 43:23
inquiry [1] - 44:20
installed [1] - 36:4
instruct [1] - 45:25
intensive [1] - 14:16
interested [1] - 9:25
interrogatories [2] - 43:25, 44:6
involved [2] - 6:18, 22:20
Isaacson [1] - 16:15
issue [5] - 13:12, 21:2, 25:3, 29:19, 31:15
item [2] - 42:17, 47:8
items [5] - 9:18, 9:20, 18:1, 42:23, 47:3
itself [1] - 30:8

J

judge [3] - 43:11, 47:13, 47:14
July [6] - 32:3, 32:5, 32:12, 34:25, 35:10, 35:17
June [1] - 34:24

K

KEITH [1] - 2:21
Keith [3] - 1:4, 8:13, 17:17
KESSLER [2] - 2:22, 2:23
Kessler [5] - 1:4, 17:18, 28:12, 31:15
Kesslers [23] - 7:23, 17:25, 18:10, 18:15, 20:10, 20:13, 20:18, 21:7, 24:3, 24:12, 24:14, 26:21, 39:2, 39:7, 40:22, 41:2, 41:9, 44:22, 45:7, 45:17, 48:3, 48:11, 48:20
Kesslers' [3] - 22:9, 39:20, 40:8
kind [2] - 14:18, 45:3
knock [1] - 36:9
knowledge [2] - 31:10, 45:7
known [1] - 45:17

L

labor [1] - 14:16
labor-intensive [1] - 14:16
land [2] - 16:20, 16:21
landowners [6] - 9:19, 16:25, 17:12, 22:3, 23:18, 48:12
language [1] - 40:10
large [1] - 10:8
last [7] - 6:25, 7:10, 7:11, 24:21, 41:25, 44:20, 49:7
law [1] - 15:8
Law [5] - 1:15, 2:7, 2:8, 2:14
lawyer [1] - 6:13
least [1] - 20:16
leave [3] - 42:2, 49:8, 49:13
left [1] - 23:6
lengthy [1] - 18:23
letters [1] - 26:7
lieu [1] - 4:6
line [1] - 40:15
LINE [4] - 50:18, 50:20, 50:22, 50:24
lips [1] - 41:24
listed [1] - 42:25
listen [1] - 18:16
live [1] - 26:21
lived [1] - 30:19
locate [2] - 43:21, 44:3
located [7] - 12:21, 17:13, 17:23, 23:21, 42:13, 44:11, 47:9
location [10] - 10:1, 19:6, 19:11, 23:4, 23:8, 23:15, 27:9, 27:12, 27:13, 39:11
look [6] - 9:19, 14:19, 21:25, 29:18, 30:15, 32:18
looked [1] - 32:21
looking [6] - 11:6, 38:7, 42:11, 47:18, 47:24, 48:1
looks [2] - 31:24, 44:13
Lori [3] - 1:17, 37:4, 49:10
lose [1] - 34:3
loss [1] - 36:8
lost [1] - 28:25
lower [1] - 15:10
Lynn [5] - 1:15, 4:19, 5:7, 36:24, 46:2
LYNN [1] - 2:7

M

M-a-t-t-h-e-w [1] - 7:11
MAHLBERG [21] - 2:13, 4:17, 10:18, 11:18, 19:15, 19:21, 19:23, 22:12, 33:14, 35:14, 36:23, 38:14, 38:19, 41:17, 43:22, 44:9, 45:9, 45:21, 45:24, 49:1, 49:3
Mahlberg [3] - 3:5, 4:17, 43:21
main [1] - 26:3
management [1] - 34:10
manager [1] - 8:8
Mandan [1] - 2:8
manner [1] - 4:11
map [46] - 9:21, 9:23, 10:3, 10:6, 10:8, 10:11, 10:14, 10:17,

10:22, 11:1, 11:3, 11:14, 12:8, 12:12, 12:15, 13:10, 13:11, 14:2, 14:7, 19:10, 22:24, 22:25, 23:20, 28:23, 39:10, 39:13, 39:17, 39:21, 42:12, 42:25, 43:3, 43:10, 43:16, 43:18, 43:21, 44:3, 44:7, 46:24, 47:1, 47:8, 47:9, 47:18, 47:25, 48:1
maps [11] - 9:16, 13:18, 13:25, 17:12, 20:23, 23:23, 24:16, 24:22, 24:24, 39:5, 39:8
material [1] - 22:9
Matt [11] - 5:4, 7:6, 8:22, 21:2, 37:12, 42:4, 44:20, 45:25, 49:6, 49:20
matter [1] - 4:8
matters [2] - 44:17, 49:11
Matthew [3] - 4:14, 7:11, 50:2
MATTHEW [5] - 1:14, 2:21, 3:3, 4:22, 50:15
McCourtney [1] - 43:8
mean [5] - 10:7, 14:12, 23:3, 29:11, 34:1
meaning [1] - 11:9
meeting [7] - 9:7, 9:9, 9:11, 16:6, 16:7, 23:20, 46:21
mentioned [4] - 5:13, 7:4, 42:12, 45:19
message [1] - 8:11
might [9] - 5:18, 19:1, 22:4, 23:6, 24:11, 27:16, 33:23, 42:1, 43:15
miles [2] - 11:10, 11:11
mind [3] - 16:3, 39:19, 47:23
Minneapolis [1] - 2:16
Minnesota [30] - 1:8, 2:16, 4:15, 4:18, 7:15, 7:17, 12:19, 13:13, 13:22, 14:1, 14:6, 16:20, 18:15, 19:4, 20:4, 20:13, 25:1, 25:5, 26:10, 26:13, 30:23, 34:9, 34:25, 35:3, 45:18, 46:3, 46:13, 48:7, 48:11, 50:11
minute [1] - 6:11
minutes [2] - 36:21, 49:15
misspelled [1] - 38:3
mistake [1] - 21:20
misunderstood [1] - 27:24
modern [1] - 8:15
Mollie [1] - 49:18
MOLLIE [1] - 2:14
moment [3] - 8:10, 8:16, 36:15
Monday [1] - 1:20
monitoring [1] - 34:11
Monroe [2] - 17:1, 21:18
morning [3] - 39:14, 40:14, 40:24
most [2] - 5:19, 6:8
move [7] - 23:6, 23:9, 25:3, 25:25, 35:11, 35:19, 35:20
moved [1] - 36:6
moving [2] - 25:23, 41:24
MR [57] - 2:7, 2:13, 2:21, 4:17, 4:19, 5:2, 8:13, 8:19, 8:24, 10:18, 10:19, 11:18, 11:19, 19:15, 19:16, 19:21, 19:23, 19:24, 22:12, 22:14, 24:20, 33:14, 33:15, 33:16, 35:14, 35:15, 36:12, 36:23, 36:25, 37:7, 37:11, 38:14, 38:19, 41:17, 41:22, 42:7, 43:20, 43:22, 43:24, 44:9, 44:12, 44:19, 45:9, 45:10, 45:13, 45:15, 45:21, 45:24, 46:9, 48:23, 49:1, 49:2, 49:3, 49:4, 49:14, 49:17
MS [2] - 2:14, 2:22
mute [7] - 6:12, 8:14, 8:20, 36:13, 37:1, 41:25, 42:2

N

name [5] - 4:12, 7:10, 7:11, 7:21, 49:7
near [3] - 17:22, 26:21, 29:2
nearby [1] - 25:22
necessarily [1] - 41:12
need [13] - 6:9, 6:11, 6:23, 7:1, 7:7, 14:18, 21:4, 36:15, 38:9, 41:23, 44:4, 44:14, 44:15
new [5] - 8:23, 26:3, 35:8, 36:3, 36:7
newspaper [1] - 46:4
next [3] - 21:1, 33:1, 44:15
north [2] - 11:11, 28:19
NORTH [1] - 1:1
North [3] - 1:16, 1:19, 2:8
north-south [2] - 11:11, 28:19
northwest [3] - 29:4, 29:10, 30:4
Notary [1] - 1:18
noted [3] - 1:23, 45:14, 50:8
nothing [1] - 48:23
notice [1] - 1:16
Number [1] - 19:4
number [1] - 10:3
numbers [2] - 19:9, 39:9

O

OAH [1] - 1:4
oath [2] - 4:7, 5:17
object [8] - 10:18, 11:18, 19:15, 19:21, 33:14, 35:14, 45:9, 45:25
objection [4] - 22:12, 41:23, 45:14, 45:21
objections [1] - 4:11
observe [1] - 32:19
observing [1] - 47:24
obtain [1] - 15:19
obviously [1] - 27:3
occasion [1] - 24:25
occupied [2] - 30:22, 31:12
occur [1] - 26:23
occurred [3] - 21:17, 25:4, 27:5
October [3] - 1:20, 32:9, 32:14
OF [3] - 1:1, 1:13, 50:1
offline [1] - 37:2
old [1] - 36:5
on-site [9] - 23:5, 26:20, 27:8, 29:24, 31:2, 31:6, 32:11, 33:6, 33:18
on-site--and [1] - 25:20
on-site--Minnesota [1] - 25:19
once [3] - 23:5, 35:16, 44:3
one [21] - 8:10, 10:11, 12:2, 12:8, 12:17, 13:2, 13:5, 15:15, 16:9, 23:11, 29:1, 29:24, 31:22, 33:1, 36:7, 36:11, 42:17, 42:25, 43:5, 47:8
opportunity [2] - 38:2, 38:8
opposite [1] - 29:3
option [2] - 25:23, 26:2
options [1] - 16:25
oral [1] - 50:5
order [1] - 15:19
otherwise [1] - 6:6
outbuildings [1] - 30:6
outside [1] - 4:17
oversaw [1] - 9:4
own [1] - 24:3

P

P.A [1] - 2:15
P.O [1] - 2:8
PAGE [4] - 50:18, 50:20, 50:22, 50:24
Page [5] - 3:4, 3:5, 3:6, 3:24, 3:25
pages [1] - 50:4
paralleled [1] - 28:19
paraphrase [1] - 40:5
part [1] - 22:21
participating [1] - 4:3
particular [5] - 13:18, 14:7, 31:21, 35:11, 43:17
parties [1] - 4:9
Pat [3] - 4:17, 40:15, 45:22
Patrick [2] - 36:19, 49:18
PATRICK [1] - 2:13
pay [1] - 15:11
penalty [1] - 4:9
people [9] - 13:2, 16:9, 47:3, 47:12, 47:17, 47:18, 47:20, 48:1, 48:3
perhaps [1] - 9:17
perjury [1] - 4:9
permit [4] - 26:6, 26:8, 26:9, 35:9
perpendicular [1] - 28:20
person [4] - 4:7, 12:11, 14:5, 30:23
personally [1] - 26:15
Petitioners [1] - 1:6
phases [1] - 32:17
phone [1] - 8:11
phrase [1] - 23:4
phrased [1] - 21:20
physically [3] - 4:4, 27:11, 46:22
place [7] - 22:23, 32:10, 35:11, 40:1, 41:8, 41:15, 50:5
placed [3] - 9:16, 9:18, 47:2
placement [4] - 11:7, 22:18, 22:19, 25:2
plaintiffs [1] - 4:20
planning [2] - 13:8, 14:14
point [7] - 6:9, 9:11, 19:10, 33:1, 35:18, 39:10
points [1] - 41:19
portion [1] - 37:20
position [3] - 13:25, 39:19, 41:8
positively [1] - 45:2
possible [3] - 35:18, 38:23, 43:20
power [1] - 14:24
Power [29] - 1:8, 4:15, 4:18, 7:15, 7:17, 12:19, 13:13, 13:22, 14:2, 14:6, 16:20, 18:15, 19:4, 20:5, 20:13, 25:1, 25:5, 25:20, 26:11, 26:13, 30:23, 34:9, 34:25, 35:3, 45:18, 46:3, 46:13, 48:7, 48:11
precisely [3] - 11:16, 23:21, 39:16
present [4] - 4:4, 8:18, 23:19, 37:10
presented [3] - 10:3, 42:23, 43:11
president [1] - 13:8
press [1] - 48:12
pretty [3] - 11:15, 16:10, 46:5
previous [1] - 36:2
previously [1] -

22:20
primary [1] - 16:24
problem [5] - 5:23, 6:14, 10:21, 35:4, 35:12
Procedure [1] - 1:17
proceedings [4] - 4:1, 8:17, 37:9, 49:22
process [11] - 6:18, 6:19, 6:24, 13:20, 13:21, 14:16, 25:24, 26:11, 26:14, 26:17, 35:7
production [4] - 15:3, 44:1, 44:6, 46:5
proj [1] - 14:16
project [27] - 6:19, 7:20, 7:22, 8:2, 8:6, 8:8, 9:2, 9:3, 9:8, 10:7, 11:6, 11:8, 12:4, 12:10, 12:16, 13:6, 13:19, 14:7, 15:5, 15:9, 15:17, 15:18, 16:4, 16:8, 16:17, 17:3, 24:10
Project [1] - 7:24
projects [2] - 14:12, 14:24
pronounce [1] - 49:7
proper [1] - 35:21
property [8] - 28:2, 28:5, 28:12, 29:3, 29:5, 29:9, 29:10, 29:15
provide [1] - 18:8
provided [5] - 18:15, 23:23, 39:2, 42:8, 44:4
provides [1] - 14:23
providing [1] - 23:17
PSC [4] - 6:20, 18:2, 40:11, 40:23
PU-20-194 [1] - 1:4
public [16] - 9:8, 10:4, 16:7, 19:3, 19:7, 23:20, 23:24, 24:8, 27:4, 42:11, 42:13, 42:24, 46:12, 46:22, 47:2
PUBLIC [1] - 1:2
Public [2] - 1:18, 14:14
pulled [1] - 14:1
purpose [1] - 30:13
pursuant [2] - 1:16
push [1] - 34:13
put [5] - 13:11, 32:7, 32:9, 35:17, 37:24

Q

qualify [1] - 35:21
questions [9] - 6:16, 6:20, 24:10, 36:16, 37:16, 37:18, 38:24, 39:3, 40:21
quick [1] - 42:3
quickly [1] - 32:25
quote [4] - 21:3, 21:5, 39:8, 39:12
quoted [1] - 22:9

R

raise [1] - 19:5
raised [1] - 21:1
ramifications [1] - 34:18
ran [1] - 28:20
rather [2] - 10:8, 10:11
re [2] - 18:25, 40:9
read [10] - 14:12, 19:20, 20:22, 22:10, 37:22, 38:15, 39:4, 46:4, 49:3, 50:3
reading [3] - 18:14, 18:19, 18:25
realize [1] - 6:17
realized [1] - 34:25
really [2] - 6:17, 37:14
REASON [4] - 50:18, 50:20, 50:22, 50:24
reason [7] - 18:3, 18:7, 19:12, 21:10, 22:8, 34:2, 50:8
received [1] - 8:11
recessed [2] - 8:17, 37:9
recollection [3] - 18:14, 18:25, 21:8
reconvened [2] - 8:18, 37:10
record [10] - 4:13, 7:9, 7:21, 8:16, 8:20, 36:14, 37:3, 37:11, 37:24, 49:5
redo [1] - 38:6
reference [3] - 15:10, 18:4, 27:15
referring [1] - 8:2
refresh [1] - 21:8
refreshes [1] - 18:13
regarding [2] - 24:11, 39:5
regards [14] - 8:6, 9:5, 13:6, 13:9, 13:17, 15:17, 16:4, 16:15, 16:17, 17:2, 23:17, 24:2, 25:7, 26:18
related [3] - 24:14, 30:18, 38:25
relates [2] - 7:22, 12:15
relating [9] - 7:19, 16:7, 16:17, 17:21, 22:17, 24:11, 25:16, 35:12, 45:4
relatively [1] - 10:12
remember [3] - 18:18, 19:1, 21:15
remembered [1] - 48:21
remotely [2] - 4:6, 5:24
repeat [1] - 40:10
rephrase [2] - 7:2, 19:18
reported [2] - 13:7, 41:9
reporter [5] - 5:19, 7:8, 24:18, 37:25, 46:7
Reporter [1] - 3:25
REPORTER [4] - 4:2, 37:5, 49:13, 49:16
reporting [2] - 4:5, 4:11
represent [1] - 4:13
representing [1] - 4:15
requested [2] - 24:18, 46:7
requests [2] - 44:1, 44:6
required [3] - 20:7, 33:12, 33:18
residence [15] - 17:21, 20:16, 25:21, 28:18, 29:18, 29:25, 30:8, 30:9, 30:18, 30:19, 30:22, 31:12, 31:15, 33:19
residences [10] - 10:15, 10:16, 10:17, 10:23, 10:25, 12:4, 12:9, 12:15, 13:19, 33:13
Respondent [2] - 1:10, 2:18
response [1] - 39:24
responses [2] - 39:1, 41:3
responsibility [2] - 30:21, 30:24
restate [4] - 13:14, 40:17, 40:18, 45:12
restroom [1] - 46:18
result [2] - 18:19, 18:25
reuse [1] - 36:10
review [3] - 38:2, 45:3, 47:2
Ripley [1] - 50:11
road [1] - 24:15
roads [3] - 26:5, 31:24, 32:12
role [5] - 7:15, 7:19, 8:7, 9:1, 16:19
room [5] - 4:4, 23:5, 42:14, 46:15, 46:21
roughly [2] - 23:10, 36:2
Rules [1] - 1:17

S

saw [1] - 41:24
scheduling [2] - 44:17, 49:11
Scott [4] - 17:1, 21:2, 21:18, 22:7
second [1] - 31:22
Section [12] - 21:1, 23:22, 24:3, 26:21, 27:10, 27:13, 28:1, 28:16, 30:14, 32:18, 33:8, 35:5
see [12] - 10:13, 11:22, 16:8, 18:13, 23:12, 29:22, 36:15, 36:19, 36:20, 37:7, 44:7
seem [1] - 6:21
senior [6] - 7:17, 7:18, 8:7, 8:25, 24:9, 33:10
sense [3] - 10:12, 13:2, 28:13
sent [1] - 18:1
sentences [2] - 19:14, 39:5
separate [1] - 17:10
separately [1] - 26:14
September [4] - 9:7, 9:12, 16:7, 22:16
Service [1] - 14:15
SERVICE [1] - 1:2
set [2] - 16:10, 23:8
setback [4] - 33:20, 33:21, 35:12, 35:22
sheet [2] - 21:25, 38:4
shit [1] - 21:3
show [2] - 10:23, 13:18
showing [3] - 10:8, 22:25, 23:20
shown [2] - 10:17, 11:21
shows [3] - 12:9, 28:24
side [3] - 27:18, 28:12, 29:4
sign [8] - 16:9, 16:25, 21:25, 36:20, 37:22, 38:15, 49:3
sign-in [1] - 21:25
simply [1] - 44:22
sit [1] - 39:20
site [10] - 23:5, 25:9, 26:20, 27:8, 29:24, 31:2, 31:6, 32:11, 33:6, 33:18
Sixth [1] - 2:15
size [3] - 11:4, 11:14, 44:4
slowly [1] - 10:21
small [1] - 10:12
SMITH [1] - 2:14
soil [4] - 23:9, 23:10, 26:3, 35:8
someone [1] - 46:3
something 's [1] - 38:2
sometime [2] - 26:24, 31:17
somewhere [1] - 9:17
sorry [5] - 8:22, 11:10, 16:1, 40:15, 47:5
sort [1] - 38:4
sound [1] - 27:18
South [1] - 2:15
south [7] - 11:11, 27:22, 28:7, 28:18, 28:19, 29:15, 30:4
specific [4] - 9:1, 10:1, 19:11, 39:11
specifically [1] - 38:25
specifics [1] - 15:13
spell [1] - 7:10
spelling [1] - 7:9
spring [2] - 25:14, 25:15
stand [3] - 42:14, 42:15, 42:16
standing [1] - 23:13
start [4] - 16:16, 28:15, 32:1, 46:13
started [3] - 25:9, 31:24, 35:2
starting [1] - 25:16
state [4] - 11:7, 20:4, 20:13, 34:12

STATE [1] - 1:1
State [1] - 1:19
statement [7] - 12:5, 12:24, 16:11, 20:9, 22:9, 33:13, 34:15
stating [2] - 4:12, 20:10
statute [1] - 20:15
statutory [1] - 20:7
step [1] - 36:14
steps [2] - 31:11, 33:5
still [6] - 8:14, 12:18, 24:6, 35:18, 41:25, 49:10
stood [1] - 41:20
stop [1] - 34:2
stopped [2] - 27:25, 28:21
strategy [1] - 13:7
Street [1] - 2:15
structures [1] - 30:2
Suite [1] - 2:16
summer [7] - 26:24, 27:4, 29:21, 31:3, 34:1, 34:23
supplemented [1] - 44:7
supported [1] - 9:3
supposed [3] - 12:3, 21:21, 38:6
sworn [1] - 4:25

T

taped [1] - 42:9
tasks [1] - 13:3
tax [14] - 15:3, 15:4, 15:10, 15:16, 15:19, 21:4, 33:24, 34:3, 34:7, 34:14, 34:19, 45:7, 45:17, 46:5
taxes [1] - 15:10
technology [3] - 8:15, 8:23, 42:1
ten [1] - 36:21
testified [1] - 4:25
testify [1] - 17:7
testifying [1] - 40:2
testimony [9] - 4:8, 17:11, 19:19, 38:7, 40:8, 40:13, 40:23, 41:5, 41:11
THE [10] - 4:2, 4:14, 19:22, 37:5, 38:13, 45:22, 46:2, 49:13, 49:16, 49:21
thoughts [1] - 36:16
three [1] - 36:2
throughout [1] - 12:10
title [2] - 7:14, 7:16
today [6] - 13:25, 18:8, 19:19, 39:20, 45:4, 47:23
together [2] - 13:11, 14:1
took [3] - 31:11, 40:1, 41:8
totally [1] - 38:6
towards [1] - 28:16
transcript [1] - 50:7
traveled [1] - 28:18
tried [1] - 21:8
tripod [1] - 42:16
true [1] - 29:25
try [5] - 28:9, 28:25, 43:21, 49:7, 49:18
trying [8] - 5:14, 24:6, 27:21, 30:15, 37:14, 38:21, 38:22, 42:16
turbine [13] - 20:6, 20:25, 23:15, 25:2, 25:3, 31:21, 32:2, 32:7, 33:19, 35:11, 35:17, 36:1
Turbine [11] - 9:13, 17:22, 19:6, 22:17, 24:12, 25:17, 26:18, 28:11, 28:13, 28:24, 31:20
turbines [4] - 10:9, 11:8, 19:9, 39:9
two [6] - 19:14, 24:21, 42:3, 42:4, 43:6, 44:15
type [6] - 12:4, 15:17, 20:9, 30:18, 33:2, 36:1
types [2] - 14:23, 37:25
typewritten [1] - 50:4
typically [1] - 9:22
typos [1] - 38:7

U

unclear [1] - 6:7
under [2] - 4:9, 5:17
understood [2] - 33:20, 49:4
unfortunately [1] - 41:24
unless [3] - 45:8, 45:18, 45:25
up [22] - 14:18, 16:11, 20:23, 21:2, 25:3, 27:16, 27:21, 27:23, 28:19, 32:7, 32:9, 34:3, 35:17, 37:18, 37:25, 41:19, 42:9, 47:13, 47:14, 47:18, 49:13
update [4] - 26:4, 26:6, 35:8
upper [1] - 34:9
ups [2] - 38:17, 42:3

V

vague [2] - 19:11, 39:11
various [1] - 10:9
vehicle [1] - 29:18
verbally [1] - 4:8
via [3] - 1:19, 2:9, 2:16
VIA [1] - 2:20
vice [1] - 13:8
VIDEOCONFERENCE [2] - 1:13, 2:20
videoconference [3] - 1:19, 2:9, 2:17
view [1] - 21:10
viewing [1] - 39:13
visit [1] - 6:10
visiting [1] - 17:11
visualize [1] - 42:16
vs [1] - 1:7

W

Wade [5] - 16:15, 17:6, 21:22, 21:24, 22:7
wait [1] - 5:20
waive [2] - 4:10, 38:9
walk [3] - 10:2, 10:20, 27:15
walked [1] - 27:16
wall [2] - 9:17, 42:10
wants [1] - 38:10
weather [1] - 29:21
weeks [2] - 36:3, 44:15
welcome [1] - 5:7
west [5] - 11:10, 11:11, 28:12, 28:20, 29:16
whole [1] - 12:9
whoops [1] - 35:18
wife [1] - 17:18
wiggle [1] - 23:5
Williams [1] - 1:18
wind [2] - 7:22, 14:24
Wind [1] - 7:24
witness [1] - 4:23
word [6] - 6:1, 8:1, 38:1, 43:17
words [5] - 20:14, 21:6, 24:21, 27:5, 35:6
workers [1] - 40:16
works [2] - 6:24, 15:12
worry [1] - 20:15
written [3] - 39:1, 39:23, 41:2

Y

yards [1] - 29:11
year [2] - 15:11, 25:12

Z

ZOOM [2] - 1:13, 2:20
Zoom [3] - 1:19, 2:9, 2:17

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler,	:	
	:	
Complainants/Petitioners,	:	
	:	
-vs-	:	Case No. PU-20-194
Minnesota Power, a division of ALLETE, Inc.,	:	
	:	
Respondent.	:	

TRANSCRIPT OF

ZOOM VIDEOCONFERENCE DEPOSITION OF BARRY GARTNER

Taken Via
Zoom Videoconference
October 14, 2020

(APPEARANCES AS NOTED HEREIN)

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MS. DEANNA KESSLER, (Appearing Via Zoom.)

C O N T E N T S

DEPOSITION OF BARRY GARTNER Page

Examination by Mr. Boughey..... 6

CERTIFICATE OF DEPONENT..... 62

CERTIFICATE OF COURT REPORTER..... 63

4

(Pursuant to Notice of Taking Deposition of **BARRY GARTNER** in the above-entitled cause, the following examination came on for taking before Stephanie A. Smith, a Registered Professional Reporter and a Notary Public in and for the State of North Dakota, via Zoom Videoconference, on the 14th day of October, 2020, commencing at 1:16 p.m., counsel appearing on behalf of the respective parties as hereinbefore indicated:)

(The following proceedings were had and made of record:)

MR. BOUGHEY: Mr. Gartner, we have to go through a little litany to allow us to use Zoom today, so I have to put something on the record. It's only going to take a moment and then we will be able to have you sworn in and get some -- whatever information you might have for us today.

My name is Lynn Boughey. I'm obviously the attorney for the Kesslers, and Mr. Mahlberg will, of course, be jumping in if there's anytime he needs to jump in in regards to Minnesota Power. So at this time I'm just going to very briefly describe the litany we have to go through and then we'll move on.

5

I note for the record that the parties have stipulated as to these depositions, that we are allowed to take these by Zoom and not in person due to the coronavirus pandemic. I also note for the record that both parties have stipulated to allow the court reporter to take these not in person but by Zoom and also be in a position and authorized to swear in the witnesses regardless of what state they're in and regardless of -- by the fact that the person is not physically present with the court reporter.

We so stipulate and I so stipulate on behalf of the Kesslers. And I now need to inquire if opposing counsel agrees. And you're on mute, sir.

MR. MAHLBERG: Agreed.

MR. BOUGHEY: Thank you. You were so low I wasn't sure if you left us.

MR. MAHLBERG: I'll sit up then.

MR. BOUGHEY: All right. Let's go on the record if we haven't done that already.

BARRY GARTNER,

being first duly sworn, was examined and testified as follows:

6

EXAMINATION

BY MR. BOUGHEY:

Q. All right. Mr. Gartner, I've already identified myself as Lynn Boughey, the attorney for the Kesslers. As you will find out in the next few minutes, I'm pretty relaxed and informal, and if it's all right with you, might I call you Barry instead of Mr. Gartner and then you may feel free to call me Lynn?

A. Yes.

Q. Fantastic. Have you ever had your deposition taken before?

A. Yes.

Q. Okay. And how many times, just so I know if you're an old pro or whether it was just one of those things? And I don't need to know why you had your deposition taken, but how many times?

A. One.

Q. All right. And because you've only had one done once before, I am going to very quickly go over tentative rules that apply as to our expectations and the protocols we use in regards to depositions. And then once I've done that, I will be able to get to the questions, if that's okay.

So as I'm sure you're aware, the purpose

7

of a deposition is for both sides to find out what the facts are that relate to the case at hand. It's not a trial. And I hate to admit it, but it's not much like what you see on TV. It's rather slow and methodical and, frankly, usually pretty boring, but we have to get to the facts and this is how we do it. I'm going to calmly and carefully ask you specific questions about the facts of the case, your knowledge of those facts and what you remember. If you don't remember, just say so. That's fine.

I'm not going to in any way try to trick you or berate you or anything like that, just so you know. We're going to very carefully and methodically find out the facts that happen to apply to you or that you know and that'll be that and then we'll be done.

So there's kind of six general rules that I try to mention at the beginning of depositions, and so I'll just very briefly describe what those are so that we can get a good record and that this process goes quickly and I hope easily.

The first is I need you to listen carefully to the question. And if you don't understand it, say so and I'll rephrase.

8

Second, I need you to answer the questions out loud and with clear answers. Some people tend to taper off at the end of their answers and things like that. The court reporter is trying her best to get every word you say, and so it needs to be loud enough so that she can hear it. That also means the nodding of your head won't work or anything like "mm-hmm" isn't going to do the trick. So I need it to be audible and in words that answer the question.

Third, I need you to wait for the question to be asked and I'll do my very best to wait for you to finish your answer so that we don't talk over each other at the same time.

Number four, if at any time you need a break, just say so, we'll take a break. Doesn't matter what the reason is. If it's because you want to talk to your lawyer, that's fine too. You can take a break anytime. That's not a problem.

Number five, if your lawyer starts talking, you need to stop talking immediately so that both of you aren't talking at the same time. And that's very important because if he's making an objection, he needs to get that on the record preferably before you blurt out an answer. So if

9

he starts talking, stop and then he will direct you when to proceed. So that's how we'll handle that so it's fair to everybody.

And, again, if you're both talking at the same time, the court reporter won't be able to get it down.

And then six, the last one, in regards to all the questions, I -- instead of listing the entire name of whatever project this is, whether it's Minnesota Power Bison 4 wind project or Phase 1 or whatever it is, I'm just going to use the word "project." But before I can do that, I have to make sure we're all in agreement of what the project is. So I can tell you my understanding is that Minnesota Power under that name or several other names that the company may have, or subdivision, built a wind project in North Dakota that included the Kesslers' property, and so that whole project is what we're talking about.

So if I use the word "project" for the rest of this deposition and not repeat the litany of the whole name, are we all on the same page as to what project that is? Are we okay with that?

A. Well --

Q. And if I need -- tell me if I need to

10

narrow it down, if you want me to use Bison 4 wind project, if that's easier for you, I will do it.

A. I -- I do have a question.

Q. Sure. Go ahead.

A. And that is so the Bison wind facility was built in several phases over several years. Are you referring -- when you say "the project," are you referring to the phase that was -- was permitted in 2013 and built, constructed in -- through 2014 --

Q. Absolutely.

A. -- or are you referring to all of the years of phases?

Q. I understand your question, and I'm going to put something on the screen. Now, this is a document we're going to be looking at, and I'm going to zoom in so that you see what we're looking at and then we'll make sure we're on the same page. Now, I note that all these letters I put on myself, so -- but it's from a document that I understand you created, and -- and, you know, we're not on the record yet as far as you being under oath -- we're on the record, but the -- this is the project I'm talking about that was constructed from 2013 to 2014 by Minnesota Power or whatever other name it

11

might have used. And so that's what I'm referring to as the project and no other phases of it. Does now it make sense or do we have more issues?

A. No, that makes sense.

Q. Okay. Good. Thank you for telling me that we had to clarify that because I definitely want to make this right.

All right. And we'll get to that exhibit in a little bit. So -- all right. Now we're ready to begin. Did you have any other questions, sir?

A. No.

Q. Okay. Would you state your name for the record.

A. Barry Gartner.

Q. Okay. And where are you employed?

A. Minnesota Power.

Q. How long have you been employed there?

A. Since January 2013.

Q. All right. And so what is your -- from January 2013 for the next two years, all through 2013 and 2014, what was your -- your duties or what was your function?

A. I was a project developer.

Q. Okay. And if you would, tell me generally what does a project developer do? And if you need

12

to be specific as to this project, that's fine.
A. A project developer evaluates project opportunities and does the research and development, you know, investigating what might work for the company or not. In particular, energy generation projects for me. And then we'll develop concepts into actual projects.
Q. Now, I imagine in many ways it's kind of like 3D chess. I mean, you're having to figure out every place it can go, what the wind is. I mean, are you actually an engineer that's doing this as part of an engineering process or something else?
A. I am an engineer.
Q. And what type of engineer? I understand there's several types.
A. I am a mechanical engineer.
Q. Okay. And you obviously used that background in trying to plan out this particular project; would that be a fair statement?
A. Yes.
Q. All right. And in regards to this project, was this the first major project you worked on for the company?
A. Yes.
Q. Okay. And it appears to me that the

13

application I think was submitted, I'm guessing, sometime in May and there was a hearing in -- on September 13, 2013. Does that sound about right?
A. Yes.
Q. Okay. And I don't have my -- my notes with me as to who was all at the hearing. Did you attend the hearing on September 13, 2013, in Oliver County?
A. Yes.
Q. Okay. And I thought you were listed there and that's fine. All right. So let's talk about -- did you have anything to do with the application that was prepared and submitted to the Public Service Commission?
A. I provided project information that was used in the application.
Q. Okay. And just generally again, I'm -- my questions are going to go more specifically to that map that was created and we'll find out if you're the one who created it. But just generally -- I mean, the application is huge. Just generally tell me what your role was in regard to assisting in the application that was submitted to the Public Service Commission.
A. I provided the project design input,

14

project layout, and information specific to wind turbines.
Q. Okay. All right. And did you have anything to do with the development of this map that I'm going to go back to now. I apologize. I might have -- should have just left it up, I guess. Now, again, I have put those letters on. Do you need me to show you the original map or do you recognize this as just the same map but we've added letters and dots? The dots are yours.
A. I recognize -- I recognize the map.
Q. Okay. Very good. And it is the map -- other than those letters and the little number 441 there, that was the same map that was, I guess, shown at the public hearing; is that correct?
A. Yes.
Q. And just so you can see, on the very bottom -- I've got to move this over -- just so you know, we received this from Minnesota Power and it's MP407 is the document number that they're using, and I just wanted you to -- to be aware that this -- this map we received from Minnesota Power and then I added in the letters. All right. So let's -- let's go through this.
First of all, I understand that one of the

15

things you have to advise the Public Service Commission is an indication of any exclusion or avoidance areas, and -- is that correct?
A. Yes.
Q. Okay. And what was your role, if any, in regards to preparation of this particular Exhibit 2 that was presented at the hearing and I think it's part of the application?
A. I provided project design information that was used for the creation of this map.
Q. Okay. Now, does that mean your focus was where to put the turbines and the interrelated connections that the turbines had? Is it limited to that or does it extend beyond that?
A. I also provided input on the occupied residences that are shown on the map.
Q. Okay. So let's talk about that. Somebody had to figure out where those occupied residences were and put those dots on there. So my first question is before the dot was put on the original map, how did Minnesota Power gather the information as to where there were structures that they had to look into to see if they need to be put on this map?
A. We -- we used three sources. They include

16

information from the previous Bison projects in the area, information from the 2011 -- excuse me, from the Oliver County plat book, and also satellite imagery.

Q. Okay. Now, where are you physically located now? Are you at the main headquarters in Duluth?

A. I'm at home now, but my --

Q. I apologize. Where are you normally -- normally located when we're not in the middle of a pandemic?

A. Yes, at Minnesota -- Minnesota Power's headquarters in Duluth.

Q. All right. Fantastic. And from when you began in 2013 through 2014, were you stationed at that same location that whole time?

A. Yes.

Q. And did you at any time go to North Dakota during the planning -- before the application was submitted in May of 2013, did you have any reason for those first five months in 2013 to go to North Dakota in reference to fulfilling your job?

A. Yes.

Q. Okay. And how often were you in North Dakota between, I guess, when you started working

17

up to I think May 6 is when the application was submitted -- up to the time the application was submitted? Do you have any idea how many times you were in North Dakota?

A. I don't recall specifically. I --

Q. Well, then let me work it this way: Was there anytime where you had to stay there for an extended period, for anything more than two or three days?

A. No.

Q. Okay. So if you did go to North Dakota, why would you go there for these quick in-and-out trips for the first five months of 2013?

A. To meet with our operations team there and land agents as well as to view the site.

Q. Okay. Now, I asked you a while ago if one of the things you're designing is the actual location of the turbines, and I'm not sure I let you finish that. So did you have anything to do with deciding where the turbines would be shown on the application presented to the Public Service Commission?

A. I'm not -- please repeat the question.

Q. No problem. We had someone named Matt who's an engineer who told us that one of the

18

things he did was figure out where all these -- I believe he said he was the one -- his team was the one figuring out where the turbines would actually be placed. My only question to you is were you involved in actually selecting the location of the turbines as to this project?

A. Yes.

Q. And what was your involvement in that regard?

A. I worked with a consultant to develop the initial layouts, turbine layouts to the project.

Q. Okay. And then did you do anything after that besides those initial layouts relating to the placement or location of the turbines?

A. Yes, I was also -- so we took the initial layouts and then was also involved in the micrositing effort that was performed.

Q. What is a micrositing?

A. Micrositing is taking a layout that's developed I'll say on the desktop and using maps and satellite imagery and other information, and you develop an initial layout. And then you take -- micrositing is taking that layout and actually physically going to the site -- site to look at the location that you've identified and

19

determine if there are reasons -- or whether that location should be changed.

You're looking to optimize the design of the project. You're looking to avoid items such as cultural or environmental, et cetera. So you're -- you're physically looking at the site for things that -- to make sure that you've -- to improve the design.

Q. Sure. It's my understanding that this Exhibit 2, without my letters, was one of the things submitted in the application in May of 2013 to the PSC. Does that make sense? Would that be the case?

A. That makes sense.

Q. Okay. And then as I understand it, the initial layout --

A. Excuse me. Can we go back a second?

Q. Sure.

A. In May it would not -- the May application would not have had the exact turbine locations on it.

Q. Okay.

A. I don't believe.

Q. All right. When we take a break, I'm going to go back and look at the application

20

because it -- the index -- I'm looking at the index right now, and I see that instead of maps, it says Table 3-1, exclusion areas; Table 3-2, avoidance areas. So is it possible that instead of a -- no, I'll take that back. Under the exhibits, Exhibit 4 shows exclusion and avoidance area map. So what I'm going to do is when we take our break, I'm going to find that in the application itself and show it to you. And, again, I'm not trying to be tricky. We'll just figure out if the map was actually presented as part of the application or not.

So we'll move on for a minute from there, and then let's go back -- so you do an initial layout which is kind of like a rough draft in my mind, if I have it right?

A. Could you --

Q. Excuse me?

A. Could you repeat that, please?

Q. Yes. You do the initial layout, which is in my mind kind of like a rough draft of what your plan is. Would that be a fair description?

A. Yes.

Q. And then you do what you called micrositing where you attempt to turn that draft

21

into a final document by taking the steps necessary to see whether or not this is going to work from both a cost benefit analysis and I assume compliance with any regulations, such as avoidance areas, those type of things. Would that be a fair statement?

A. Yes.

Q. Okay. And you mentioned that you physically go there and -- and look around and see if you have any problems. Are you the person who physically goes there to check this out or does somebody else go on your behalf?

A. There are a team of people that go there, and that -- that included me.

Q. And how big of a team would that have been about?

A. Ten people or so.

Q. Fine. And, again, I'm not going to hold you to anything real, real specific. I'm just trying to get a general idea because I don't know anything about this process.

All right. So, now, the application was submitted in May, and did you say you began there in February?

A. January.

22

Q. January. All right. Fine.

So in January -- so from January until the application was presented, did -- was that the time in which your team would go on-site and physically do this micrositing?

A. We -- yeah, we did the micrositing trip in May.

Q. Very good. Do you happen to recall how long you were on-site?

A. Four days.

Q. And do you have any recollection of what were the days in May?

A. I believe they were May 14 through 17.

Q. Now, assuming the application was submitted to the PSC and is dated May 3, 2013, would it be -- assuming that's the case -- now I'm looking at the document so I'm pretty sure it is -- would it be fair to state that whatever map that you submitted initially, if a map was submitted, it would be what you and I would call a draft and it would be subject to making changes once you finished your micrositing? Is that a fair statement how this process as to this project worked?

A. Yes.

23

Q. Okay. And then at some point the final map was pulled together before September 13, 2013, because that's when we had the hearing. So now I want to talk about what occurred first at the micrositing when you were there approximately four days. What steps did you take to determine which buildings or structures should be listed on Exhibit 2, exclusion and avoidance areas? So what did you do to make this map come to fruition?

A. Are you -- I would just like to clarify. Are you asking about the turbine layout or about the structures?

Q. Well, I mean, let me backtrack because apparently there's a distinction. By the time you did the micrositing, was it already decided where the turbines would go or did you have to -- was that still in flux?

A. That was still in flux. We had -- we were considering several layouts.

Q. All right. And before I go into what you did with the micrositing, once the micrositing was done, did you come back and finalize which layout you wanted? Is that fair?

A. That happened after the micrositing, yes.

Q. And I would think it would have to;

24

otherwise, you don't have the information.
All right. Now, let's talk about the micrositing. You were there for three or four days. So what steps were taken by the team to determine the location of any structures that might need to show up on the exclusion and avoidance area map?
A. So the team would go to each prospective turbine site and assess it for the various criteria we look at, whether it's constructability, environmental, archeological, whatever. As part of that, it would also look at whether there were structures nearby.
Q. Okay. And do you recall how many of the proposed turbine sites you physically went and looked at during those four days, you personally?
A. 83.
Q. And how did you guys get from site to site? Did you just have a -- you know, you've got ten people. Do you have several cars, do you have a bus? How did you do that?
A. We had cars and we also had some small -- I don't know what they'd call it, Rangers or -- I don't know what the term is for them, but small four-wheeled vehicles that you could fit, you know,

25

two or three people in.
Q. Okay. And while you were there those four days, North Dakota has been known to still have snow on the ground on occasion. Do you recall what the -- what the weather was like and what your ability was to see the ground?
A. The ground was clear. There was no snow. I think temperature was good.
Q. All right. Now, so you went to 83 sites. I'm going to zoom in on the one where Turbine 441 is located and then we'll see if -- if you recall being at that particular site. And if -- again, if you went to 83 sites, I understand if that's something you can't tell me for sure, but I have to ask whether or not you recall being at that site. So let me find it for you.
Are you able to see on my screen the number 441 somewhere near the center?
A. Yes.
Q. All right. And I know I've zoomed in, but are you familiar with where we're at generally?
A. Yes.
Q. All right. Do you happen to recall actually visiting 441 during that four-day micrositing trip?

26

A. I know that I went to every site. I do not specifically recall 4 -- the 441 site.
Q. I understand. If you went to 83, I understand totally.
When you go on-site, physically on-site, what is your focus in regards to any structures that are nearby?
A. Distance from the turbine and whether or not they are occupied.
Q. Okay. Now, when -- since you don't recall 441 specifically, I'll just ask you generically as to how you did this. Was there something on the ground indicating that 441 or a turbine is going to go here so you knew where the center point was to look around?
A. We had portable GPS units, so -- so we had initial coordinates, you know, from the rough draft is the term you used. We had initial coordinates, so we'd use a portable GPS to go to that location and then make the determination whether we needed to adjust that location.
Q. All right. Do you by chance know how accurate that GPS -- mobile GPS was in regards to, I guess, its accuracy by feet? So, in other words, some GPSs, they can tell you, well, we're good

27

within 5 feet, we're good within 50 feet. Do you happen to know, when you used that mobile device and you thought you were on the exact spot where the turbine would go, did you have any knowledge as to the -- the wiggle room that the GPS could be off by so many feet?
A. I do not recall what the accuracy of the GPS unit was. I do know we had a surveyor with us that was then taking coordinates and I --
Q. Okay.
A. -- I believe he had accurate equipment.
Q. And so in your mind when you were told this is where this particular turbine is going, did you feel comfortable that you were within, say, 10 feet of where it really was going?
A. Yes.
Q. Fantastic. Now, in regards to once you're standing -- did you actually stand at the location where the turbine was going and look around or did you just drive by it? Tell me what you did.
A. No. Physically -- physically stand there, yes.
Q. And while standing there, obviously you're looking around to see if there's any structures. Once you observe a structure, what distance are you

28

worried about in regards to how -- how close the structure is to where you're standing?

A. Well, one of the requirements for siting is to -- to -- the words for it -- keep the noise level below 50 dba from the structure. So for the turbines we're looking at, it's a quarter mile or so. So we -- we were looking at -- I don't have a specific -- when we were looking, we didn't have a specific distance, but we would judge if it's in that -- you know, in range like that.

Q. All right. And a quarter mile would be somewhere around 1300 feet, if my math is right?

A. 1320.

Q. Okay. Perfect. And then are you familiar with any setback rules that might relate to this project in regards to any residence near a turbine?

A. There were no -- the state did not have a specific distance requirement from a structure and Oliver County did not either.

Q. In regards to trying to decide what structures that you were going to put on the map, did you have then in your mind an idea of the distance that you needed to be worried about? If so, what was that distance?

A. I know on the map we used 1400 feet.

29

Q. Okay. And is it your best recollection that while on-site, you were also looking at 1400 feet as what you were concerned with or would it be some other number?

A. It would be -- again, we didn't measure the distance, but it would be something like that with that in mind.

Q. Okay. Now, I'm not a hunter, but I understand from my friends that there's certain devices that you can get that will give you the distance from where you're standing to whatever you're pointing at, whether it be a building or a rock or maybe even a deer. I don't know how accurate they are. Are you familiar with any of those type of devices?

A. I have heard of them.

Q. And on the four days that you were in North Dakota and were going from each of the possible or probable turbine sites, did anyone in your party happen to have with them such a device so that they could quickly and easily determine the distance between where you stood and any structures that are nearby?

A. Not that I know of.

Q. Then how were you in a position to

30

determine if the building was within 1320 for noise or 1400 for what you eventually used in the map? How -- how would you know that then when you're on-site?

A. Well, we knew before we got on-site from satellite imagery what that -- what those distances were.

Q. Okay. Now, it's my understanding that some of the structures on Section 15, the Kesslers' property, are within a thousand to 200 feet from what ended up being Turbine 441. And so my question that relates to that is assuming that -- strike that.

Did you already have with you when you went to 441 those particular satellite imagery so that you could look down and see where you're at and what you're looking at?

A. I did not have satellite imagery photos with me. I had -- we had a map.

Q. Okay. Was it just a plat map or something more detailed?

A. There was a -- a map with the turbines -- the -- the initial turbine locations on it.

Q. Was it the size of an 8-and-a-half-by-11 piece of paper or was it something more substantial

31

than that?

A. No, it would have been -- well, several -- a few 8-and-a-half-by-11 pieces of paper. It was spread across several pages.

Q. Okay. So the entire project area was on -- the map you had was maybe three or four pages, did I hear that right, of 8-and-a-half-by-11 --

A. I don't remember the exact number of pages, but --

Q. All right. But it wasn't some large 2-foot-by-4-foot map; correct?

A. Correct.

Q. All right. So I'm back to you're on the site, such as 441. You don't have the satellite photo imageries with you. You have a map. Did the map include the structures already on it or just the layout of where the turbines are going?

A. I don't recall.

Q. Okay. Do you know where that map or those pages of maps are located now? Do you still have them?

A. I -- I don't know. I don't recall if I have them. I --

MR. BOUGHEY: Counsel, I would like to --

32

I would like to find out if you guys do have those and then have those as part of the requests for production when we get to that. Okay?

Q. (MR. BOUGHEY CONTINUING) So you're on-site. You've told me that there's three sources to determine where there might be a structure you have to be concerned about at the beginning of our conversation. You said the previous project -- was that Basin project? I don't know what that stood for.

A. I'm sorry. Bison.

Q. Bison. Okay. So previous Bison projects. To your knowledge, did any of the previous Bison projects in any way relate to Section 15 close to where 441 is at?

A. No.

Q. All right. So we don't have to worry about that as a factor. Then you had the Oliver County plat book. You looked at that; correct?

A. Yes.

Q. And I'm just very briefly going to pull that up -- or attempt to. All right.

Okay. This is what I understand is the plat map for Oliver County. Does that -- again, I'm not -- not trying to trick you here, but does

33

that look like the type of thing you would have been using when you refer to the 2011 Oliver County plat map or plat book?

A. It's the type of -- of plat book but not the specific one.

Q. Do you still retain the specific one that was used when you were on-site in 2013?

A. Yes.

Q. And where is that located? At your office?

A. Yes.

Q. Okay. And it looks like you might have it right there.

A. Yes.

Q. Just -- I'm curious, I'm trying to find what year this one is and I don't have the cover of it. I only have the front. In any event, so you use the plat book and you use satellite imaging. Did you -- and those were the three things you looked at ahead of time before you got there is what I thought you said initially; is that correct?

A. Yes.

Q. And then once you got there, you did the physical on-site yourself and the team. And other than standing on-site and looking around, did you

34

take any additional steps while in North Dakota for those four days to determine the status of any of the structures that were within, say, 1400 feet of where your preliminary spot is for the turbines?

A. We would have -- my recollection is we would have looked at -- looked at those properties and --

Q. Okay. Sorry. You weren't done. Go ahead, sir.

A. My recollection is we looked at -- at structures that were close.

Q. Right. You were physically there. And my question was did you take any other additional steps while in North Dakota those four days to find out anything more about the structures that you could see from where the turbines were going to go?

A. Let's see.

Q. I'm sorry. I didn't hear an answer.

A. I'm thinking.

Q. Oh, no problem. Take your time.

A. Excuse me. I -- I recall looking at some -- you know, looking at some structures for, you know, overall condition, for indications of -- of somebody living there.

Q. Okay. Do you recall specifically looking

35

at the structures to the northwest of Turbine 441 which is the northwest quarter of Section 15?

A. I don't recall specifically, no.

Q. Okay. My question a moment ago was whether you made or took any other steps to determine the -- you know, the -- the details relating to the structures, and I'll be more specific. Is your testimony just now that sometimes you actually would walk up to the structure and look at it?

A. There were times, yes.

Q. Okay. Have you by chance in preparation for today's deposition taken a look at any of the photos of the structure at issue that is owned by the Kesslers?

A. Yes.

Q. When you looked at those photos, did that in any way refresh your recollection as to whether or not you did indeed walk over to that structure and look at it?

A. It did not refresh my memory. I -- I've seen the structures. You know, I just don't recall whether it was during the micrositing visit or -- or afterwards.

Q. Okay. Well, then between the microsite

36

visit and the hearing on September 13, 2013, do you have any specific recollection during that time period, from your microsite visit to the date of the hearing, going to look at that particular structure?

A. I -- up close, no, I do not recall specifically. I know that when we went -- when we were micrositing, we were traveling in a caravan, following each other from site to site. I know that Matt Freudenrich has said that we went through the yard there for the --

Q. During the micrositing?

A. During the micrositing. I don't remember that specifically, but -- but I just -- but I know I was at the turbine site with him. Again, we were caravaning, following each other, but I just -- I just do not recall the specifics of that.

Q. And as I understand it, correct me if I -- if you have any reason to counter this, but I believe Matt said that they just drove by and they didn't get out and they were maybe within, I think he said, 50 feet. Does that sound right to you?

A. Yes.

Q. Okay. So there wasn't any -- other than a drive-by, there wasn't any close examination of

37

that house as far as you know, correct, at the micrositing -- date of the micrositing?

A. We did not -- I did not walk around, you know, close to immediate -- you know, around the house or look in windows or anything, no.

Q. And just so I'm sure on this, from the date of the micrositing to the hearing, did you have any occasion to go on-site, walk around and look at the house?

A. No.

Q. Okay. Now, you mentioned you -- your group was the ops team. The land agents were with you?

A. No. No. No.

Q. I apologize. You're right. Strike that. I just realized I'm too high up on my notes.

Prior to coming to the micrositing, you used information from the ops team, the land agents and then you'd go and review the site. That's correct; right?

A. Yes.

Q. I apologize. Were the land agents with you during the micrositing?

A. No.

Q. Okay. And I figured based on your

38

reaction then that I screwed up and that's -- that's what you're trying to tell me. I got it.

Now, would it be fair to state that the -- the land agents -- is that the same thing as the right-of-way people? I just want to make sure I have the same people.

A. Yes.

Q. Okay. And would it be fair to state that these land agents are the ones that have more direct contact with the landowners than -- than probably -- before construction begins than anybody else in the planning phase?

MR. MAHLBERG: Objection to foundation.

Q. (MR. BOUGHEY CONTINUING) Go ahead and answer, if you can.

A. Yes.

Q. Okay. And how do the land agents -- before you show up to do the micrositing, how do they relay to you anything that you need to know as to avoidance areas and residences? What do they do? Do they call you? Do they email you? How do you get any information from them?

MR. MAHLBERG: Objection. Compound question.

Q. (MR. BOUGHEY CONTINUING) Do you

39

understand the question?

A. Please repeat the question.

Q. Certainly. Do you receive from land agents prior to doing the micrositing any information relating to residences or avoidance areas within the project?

A. I don't recall receiving any information specifically from the land agents specific to residences.

Q. Specific to what?

A. Residences.

Q. All right. Now, I have to assume that you would agree that one of your jobs in reference to this project was to try to make sure that this Exhibit 2 was accurate and included all the things it should include. Is that fair?

A. Yes.

Q. Okay. And in order to make sure that you have put everything in there that you need to put in, did you at any time request from the land agents who were working on this project to relay to you any information they have in regards to structures, residences or any other avoidance areas? Did you ever do that?

A. I don't recall.

40

Q. Okay. I'm going back to the question that was objected to because it was compound and now I'm going to do a nice simple one. If the land agents wanted to provide you information relating to structures, residences or avoidance areas, how would they get that information to you normally?

A. Phone call or email.

Q. Do you recall any phone call or emails from any of the land agents relating to structures, residences or avoidance areas as to this project?

A. I don't recall any -- anything specific at this time.

Q. Okay. And now I'm going to be more specific in my question. Do you recall anytime from your beginning work in January of 2013 for Minnesota Power up to the point when you finalized Exhibit 2 relating to the residence and avoidance areas -- do you recall receiving any information relating to the Kesslers' specific structure on Section 15?

A. I did not receive any information relating -- specific information relating to a structure on Section 15.

Q. And I want to make sure I got this right earlier. By the same token, you did not send out a

41

request to all the land agents to give you that information relating to structures or residences; is that a fair statement?

A. Yes.

MR. MAHLBERG: Lynn, sorry, we've been going about an hour, and I'm out of coffee.

MR. BOUGHEY: Oh, that's a crisis. Let's go off the record.

(Recessed at 2:13 p.m. and reconvened at 2:27 p.m.)

Q. (MR. BOUGHEY CONTINUING) All right. Barry, we're back on the record, and I'm not positive of exactly where we were, but I'll try to catch up to exactly where we were at. I had already asked you about whether you had asked the land agents to send you information, and I believe you said that wasn't something you did on this project. Is that -- that was correct; right?

A. I did not ask them to send me information specific to residences.

Q. Okay. And did you take any steps at any time to contact landowners and inquire of them, "Do you have any structures that you're using as residence or might use as residences"?

A. I did not.

42

Q. Okay. Now, one of the land agents -- two of them, actually, have suggested or told me that while they were working this in 2013, that they had a nice spreadsheet that had everybody's -- all the landowners' name, address, all the information they needed on one spreadsheet. Did you have access to that particular spreadsheet?

MR. MAHLBERG: Objection. Misstates the testimony. Mr. Gartner, go ahead and answer.

THE WITNESS: I'm not --

Q. (MR. BOUGHEY CONTINUING) I'll -- I'll reask it. I apologize. Let's just find out. What information did you have in regards to the landowners other than the plat map that gives their names? Were you provided by anyone a listing of landowners and any of their contact information?

A. I have been given -- had been given a list of landowners that were under option -- that had signed options with Minnesota Power. I don't recall if it had their addresses on or not, and I --

Q. Okay. Do you still retain or have available to you the document that you used in 2013 that listed the landowners who had options?

A. I don't believe so.

43

Q. Okay. Did you in 2013 while working on this map have access to the listing of those landowners who had an option -- or where you had an option?

A. Repeat that, please.

Q. Did you in 2013 when you were in the process of pulling together this map have access to the information relating to all the landowners who had received -- or received an option or you got an option from them? Did you have access to that information?

A. I had access to maps showing which lands were under option.

Q. Okay. And did you have access to anything that would indicate any of those landowners' addresses or phone numbers?

A. I don't recall seeing -- I don't recall --

Q. Okay.

A. -- whether addresses or phone numbers were included.

Q. In your preparation of this exhibit, did you at any time directly contact any landowner within the realm of this project to ask them about any of the structures to determine the use of those structures?

44

A. No.
Q. Is that something you would have had the option to do or were you for some reason prohibited from doing that?
A. Typically, we would make -- use the right-of-way agents for landowner contacts. They would be the channel.
Q. So if you had a question relating to any of the specific structures and the use of those structures, typically you would have contacted the land agent for the project and have that person check into it; is that correct?
A. Yes.
Q. Did you do that at any time in regards to any of the landowners relating to this project?
A. No.
Q. And it was a compound or I used the word "or," so I'm going to ask this question specifically. Were you in any way prohibited by the company from contacting the landowners directly to get any information you thought you needed?
A. I don't know of any policy. I know it was practice to go through the land agents.
Q. And just out of curiosity, why not have the land agents or somebody from Minnesota Power

45

contact each landowner to ask them about structures on their property that may be of concern?
MR. MAHLBERG: Objection to -- this question calls for speculation. Mr. Gartner, if you understand it, go ahead and answer.
THE WITNESS: The -- the siting requirement relates to sound levels to occupied structures. The structures that were of concern soundwise were judged to be not occupied and therefore I didn't have a question for them.
Q. (MR. BOUGHEY CONTINUING) So is it your testimony that your main focus was just a concern about sound levels and that's why you were looking at the distances between the structures and the turbine?
A. My concern was meeting the -- the siting requirements.
Q. Did the siting requirements involve anything beyond sound levels, to your knowledge, such as an avoidance area from any residence?
A. The requirement -- the state siting criteria speaks only to sound.
Q. Are you familiar with the phrase "setback"?
A. Yes.

46

Q. To your knowledge as relating to this project, was there any requirement that relates to this project relating -- or that -- that has a setback of somewhere around 1400 feet?
A. I know that we use a setback of 1400 feet and reference it, but I don't believe it's a requirement, a regulatory requirement at that time.
Q. In any event, you prepared Exhibit 2, which is entitled Exclusion and Avoidance Areas. Do you remember preparing that exhibit?
A. I did not prepare that exhibit, but I -- I -- I recall the exhibit. Yes.
Q. Who did prepare it if you didn't?
A. I believe Merjent prepared it.
Q. I'm sorry, could you say that name again? I didn't hear it.
A. I believe Merjent, M-e-r-j-e-n-t.
Q. What is Merjent, a person or an entity?
A. Merjent is a -- is a consultant or service provider that our environmental group used in preparation for the site application.
Q. And now I'm confused because I was under the impression you were the one who created this map. So --
A. No. Sorry.

47

Q. That's all right. So let me -- let me backtrack. I'm going to show you -- okay. I went back to the application and I'm going to show you -- it's 316 pages long. It's dated May 6 -- well, May 3, 2013. For the record, it's document 5 with the PSC and was filed, I think, on May 6, 2013. It's my understanding that your testimony is that the -- when you went to do the micrositing, that the application -- that had occurred after May 3, 2013, sometime in May; is that correct?
A. Yes.
Q. Now, I'm going to draw back so you can see what this is. So I went too far back. But I can tell you that this is the application submitted to the PSC, and it's Exhibit 4, not 2 in the PSC thing, and I'm just now going to zoom in. And I see that there are different colors, obviously, but would you agree that it appears to be of the same topic -- and I'm going to scroll over. Do you see it says Exhibit 4, Exclusion and Avoidance Areas; right? And then we scroll back over and again there's a lot of yellow here that we don't have in the other one, but I'm trying to get it -- there we go.
So you can see on the top here -- and

48

we're just going to look at this half over -- the left half, and you'll see there's a residence listed -- occupied residence, you know, two on top, one coming down. Then we've got a group of four here and then one over on the left, two down below and three over on the center.

And so now I'm going to show you the other map. And now I'm going to draw it back and again -- oops -- and I'm not going to make you go over each one item by item, but I see the two on top, the dogleg going down the A --

MR. MAHLBERG: Lynn, I don't think we can see it.

MR. BOUGHEY: Oh, I didn't hit -- I apologize. Thank you for telling me. I've got to hit the right button. My bad. How do I do this? Now is it there?

MR. MAHLBERG: Voilà.

MR. BOUGHEY: Yes?

MR. MAHLBERG: Yes.

MR. BOUGHEY: Okay. All right.

Q. (MR. BOUGHEY CONTINUING) And now back to this one, we see the two on top, the dog leg to the left. We've got the C through -- the four there. We've got two way down below and then we've got the

49

three over here on the bottom right. And so it appears -- and I'm -- we might have to at some point figure this out, but -- well, it isn't letting me do that, the document I want. Now I can't find the one I had. Lovely. I had it up. And I suppose you can't see it now. Lovely. We'll try one more time. It's not -- now there's the other one.

So, again, if you need to change your testimony later by the corrections time, but I -- I want to tell you that this is page 310 of the application to the PSC and it appears, except for the coloring in yellow, to be pretty much -- and I don't see a lot of movement.

So let me ask you, number one -- well, if you get -- we would like you to look and see if the preliminary one that's part of the application ended up being identical -- strike that.

Do you recall whether this preliminary one that was part of the application on May 3, 2013, ended up being the same one used at the hearing, meaning that the same dots -- were any of those residences or dots moved to your knowledge?

MR. MAHLBERG: And, Barry, just hold on a second. As Mr. Boughey asks you that question,

50

he's asking you to compare two documents. And so to the extent that you need to, we all need you to actually view those documents if you're going to respond to that question. And so either pull those up and look at them side by side or ask Mr. Boughey to show them to you or I suppose Mr. Boughey can --

MR. BOUGHEY: Patrick?

MR. MAHLBERG: Yeah.

MR. BOUGHEY: I've got it. I'm going to make it simpler. I'm going to ask you and your lawyer to pull out page 310 of the PDF for the application and compare it to Exhibit 2, which was shown at the hearing on September 13, 2013, and if there are any differences, I want you to mention that in your correction sheet. Can we have that -- that's a quicker way to do it, don't you think, Patrick?

MR. MAHLBERG: Sure. I suppose, Lynn, in order to key that ask him the question and -- and get him to have a spot where we can correct, I guess.

MR. BOUGHEY: Well, I was getting to that. I was first asking you if that's okay if we did that.

MR. MAHLBERG: Yeah.

51

MR. BOUGHEY: So now I'm going to continue with my questioning.

Q. (MR. BOUGHEY CONTINUING) To the best of your knowledge, now that you've seen the application map, Exhibit 4, and you are, of course, familiar with Exhibit 2, which was done at the hearing, do you recall making any changes or adjustments from the application map, Exhibit 4, to the map presented at the hearing, Exhibit 2?

A. I -- I don't recall. I would need to compare.

Q. Yeah. And we would like you to do that as part of your process of reading the -- the process here, the -- reading your deposition.

Okay. I'm going to move on to a couple of other things here. So give me a moment to put on the screen what I need on the screen.

Okay. We're back. I was on minimized and you were a thumbnail. Now I've got you back. All right.

As to the dots on Exhibit 2, the exhibit in the exclusion area that was used at the hearing, I'm wondering if you could tell me whether -- I'm trying to get share on this now. Give me a moment. Do you see now the A through Q before you, sir?

52

A. Yes.
Q. Excellent. I'm going to focus on this area on the left, so A through L. If you're wondering about the method to my madness, the letters are all going from left to right on a straight north-south line. So A is over down here because it's the farthest left, and then the next one as we move east is B, et cetera. They may not be perfect, but they're as close as we can guess based on the size of the map.
So in regards to A through L, this whole area that you can see now, other than going to each of those sites, did you take -- and looking at the Google satellite -- maybe not Google -- the satellite photos and going to the other sites, did you do anything else to determine the use of the structures on any of this area of the project?
A. As I said, I used the Oliver County plat book, satellite imagery and information from previous Bison development projects.
Q. Right. But the -- okay. And did some of these involve previous Bison?
A. Yes.
Q. Okay. Thank you.
A. There were -- there was information from

53

them about the --
Q. All right.
A. -- previous projects, yes.
Q. Now I'm going to go to the plat map and show you two of the locations you have on here. Excuse me. And, again, I apologize. I'm used to doing this in person. What happens is every time I close out anything, I have to reopen a document again, and as you can see here it's driving me crazy. But I'm going to find the plat maps. Here we go.
Can you see the plat map now?
A. Yes.
Q. Excellent. And so I'm going to scroll down. This is the exact same plat map below, but we have scratched in some notes and they happen to be in my writing. And I'm scrolling down -- you can -- I'm going to zoom in a little here and I'm going to zoom in on 15, 22 and 27. Okay? So directly south of 15 -- so you see where 15 is? Are we acclimated so you can see that the turbine is probably about where that number 5 is for Section 15 and the structure that we're talking about is probably at the top of that number 1 or thereabouts? Does that get you acclimated as to

54

where we're at?
A. Yes.
Q. Excellent. And now I'm scrolling down and we have a Mary Winckler's property, number 22, which I believe it's one of the -- the items that you have listed. And what I'm wondering is if you have any knowledge as to that particular structure that you have listed on your map. And I'll try and pull up that map now. I have to reopen it every time. There's got to be a better way.
All right. So there's 441, and as we go straight south, J appears to be Winckler and then the next one will be K that we talk about. So I want to make sure you see that they were listed on the map.
So now we're going to try and go back to the plat map, if they'll give it to me. Somehow I've got to figure out how to make it so I can go directly back and forth and not have to reopen every time. That'll be another day.
All right. So now we're back to 15, there's 22 and again Mary Winckler. Did you have any knowledge as to that particular structure that you list as occupied, which is I believe J? Did you obtain any additional knowledge relating to

55

whether that was actually occupied?
A. Yeah, the -- I'd been given information from my predecessor, some work he had done previously that had indicated that residence was occupied and --
Q. And who was your predecessor?
A. Frank Frederickson.
Q. And how would he have reason to know that? Was this a different project of some --
A. Yes. Yes.
Q. And what was his last name again?
A. Frederickson.
Q. And did you take any steps to determine whether that information was now and currently correct?
A. No.
MR. MAHLBERG: Objection to form. He answered.
Q. (MR. BOUGHEY CONTINUING) Okay. Do you have any idea -- strike that.
The information you were given, did it have any timeline as to when that information was current?
A. December of 2010.
Q. And do you still have that information on

56

hand that you're able to review since you were able to give us that information now?
A. Yes.
Q. Okay. And if I were to ask your attorney to get that to us, what would that be called so I can tell him that's what I want? What do you call that dataset of information as to the Winckler property which is my number J?
A. I --
Q. Just what would I call it? If I wanted to get the information that you have from Frank, what would you call that so when I ask your lawyer to get it to me?
A. December 2010 map.
Q. Okay. And just out of curiosity, as to each of these letters, A through CC, did you keep a separate file as to each of these specific items that are listed as occupied residences?
A. No.
Q. If I were to ask you to go through each of them one by one and tell me what you know about them, how -- what do you have available to you to give me the answers to my questions about each one of these items listed, each of these residences?
MR. MAHLBERG: Objection to form, but go

57

ahead and answer, Mr. Gartner.
THE WITNESS: Again, the plat book and -- Oliver plat book and the previous Bison permit applications.
Q. (MR. BOUGHEY CONTINUING) All right. Are you able to tell me which of the letters A through CC relate to your previous Bison information that you have available?
A. I would -- not offhand I can't. I'd have to review the various --
Q. Okay. Let's talk about K, which is the Gregory Voegele item which is in Section 27. What information do you have in regards to that item which is listed as an occupied residence?
A. That shows up in the Oliver County plat map and was identified as an occupied residence in the Bison 3 site application.
Q. Was the other one also the Bison 3 site?
A. No. I -- I'm not sure. I would have to look.
Q. Okay. Would you be surprised to know that as to item J, nobody lived there from 2009 to 2014?
MR. MAHLBERG: Objection to relevance. Go ahead and answer the question, Mr. Gartner.
THE WITNESS: Perhaps. Perhaps. I --

58

it -- from identifying -- avoiding the area is limiting to the project design, you know, so --
Q. (MR. BOUGHEY CONTINUING) Well, and as to Section 27, would you be -- would you be surprised to find out as to item K, no one's lived there for over 20 years when this was built?
MR. MAHLBERG: Objection to relevance. Assumes facts not in evidence and calls for speculation. Go ahead, Mr. Gartner.
THE WITNESS: I -- again, I -- it didn't have impact on the project design, so I -- I'm not concerned about it.
Q. (MR. BOUGHEY CONTINUING) Okay. Are you concerned about providing information that is accurate to the Public Service Commission when you submit maps such as the ones that were created by Minnesota Power?
A. Yes, but I -- yes. And we try to stay consistent with information previously provided.
Q. And wouldn't it be a more accurate map if you actually contacted the landowners and asked them if they have any residences on their land to which an option has been purchased?
MR. MAHLBERG: Objection. Calls for speculation.

59

Q. (MR. BOUGHEY CONTINUING) Would you like the question reread, sir?
MR. MAHLBERG: Sorry, Mr. Gartner, I forgot to tell you to go ahead.
THE WITNESS: Yes. Please repeat the question.
MR. BOUGHEY: Stephanie, I'll let you repeat that one word for word, please.
(Record read as requested.)
THE WITNESS: Yes.
Q. (MR. BOUGHEY CONTINUING) And why didn't Minnesota Power do that in regards to this project?
A. It was not identified as a required task.
MR. BOUGHEY: All right. We're going to take a five-minute break here. I'm going to visit with my client to see if there's any other areas I need to delve into. And I believe the next one is scheduled at 3:30. So we should be right on time for that, Patrick.
MR. MAHLBERG: Yeah. That sounds fine. I believe Mr. Simmons is prepared to go as soon as we're all ready since the sooner we start, the sooner I promised him we're done, even though lawyers ruin that all the time.
MR. BOUGHEY: I got that. And I forgot to

say off the record, but we will now go off the record. Thank you.

(Recessed at 3:01 p.m. and reconvened at 3:10 p.m.)

MR. BOUGHEY: We'll go back on the record. We do not have any additional questions. Your attorney may have some additional questions for you at this time. Barry, I thank you very much for your time and your patience and dealing with my being from Paris, France, 1850s and not very good at technology. Thank you, sir.

THE WITNESS: Welcome.

MR. MAHLBERG: Mr. Gartner, I do not have any redirect examination questions for you. At this point I'm going to instruct you about your right to read and sign the deposition transcript. As you'll recall from the testimony today, there was even a particular issue where we've already committed to looking at and providing information about through that read and sign, and so I would ask whether you agree to take the opportunity to read and sign the deposition.

THE WITNESS: Yes.

MR. MAHLBERG: Thank you, Mr. Gartner.

MR. BOUGHEY: And thank you for your time,

sir. We're now off the record.

(Concluded at 3:11 p.m., the same day.)

CERTIFICATE OF DEPONENT

I, **BARRY GARTNER**, the deponent in the foregoing deposition,

DO HEREBY CERTIFY that I have read the foregoing and attached 61 typewritten pages, and that the same are, with changes or corrections, if any, set forth on the following correction sheets (setting forth the reason assigned for each change or correction, and duly signed by me), a full, true, accurate and correct transcript of my deposition on oral examination given at the time and place therein indicated.

Dated this _____ day of _____, 2020.

_____

BARRY GARTNER

CERTIFICATE OF COURT REPORTER AND NOTARY PUBLIC

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

BE IT KNOWN that I, Stephanie A. Smith, a Registered Professional Reporter, took the deposition herein pursuant to notice or agreement; that I was then and there a Notary Public in and for said County and State; that I exercised the power of that office in taking said deposition; that by virtue thereof, I was then and there authorized to administer an oath; that said witness, before testifying, was duly sworn to testify the truth, the whole truth and nothing but the truth relative to the cause specified therein;

That the said deposition, having been transcribed, was subsequently submitted by me to the said witness, who thereupon read the said deposition and made changes or corrections, if any, as appear noted therein, along with the reason for each thereof, and that the said deposition was thereupon subscribed to by the said witness; that the examination was conducted at the time and place therein specified on behalf of the respective parties as therein indicated; that the foregoing and attached typewritten pages contain a full, true, accurate and correct transcript of my shorthand notes, as they purport to contain, then and there taken;

That I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which said deposition is taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

WITNESS MY HAND AND SEAL this _____ day of _____, 2020.

_____
STEPHANIE A. SMITH
Court Reporter and Notary Public
My Commission expires: 6-19-22

1

1 [2] - 9:11, 53:24
10 [1] - 27:14
107 [1] - 2:4
1202 [1] - 2:4
13 [5] - 13:3, 13:7, 23:2, 36:1, 50:13
1300 [1] - 28:12
1320 [2] - 28:13, 30:1
14 [2] - 1:19, 22:13
1400 [6] - 28:25, 29:3, 30:2, 34:3, 46:4, 46:5
14th [1] - 4:7
15 [10] - 30:9, 32:14, 35:2, 40:20, 40:23, 53:19, 53:20, 53:23, 54:21
17 [1] - 22:13
1850s [1] - 60:10
1:16 [1] - 4:7

2

2 [11] - 15:6, 19:10, 23:8, 39:15, 40:17, 46:8, 47:15, 50:12, 51:6, 51:9, 51:21
2-foot-by-4-foot [1] - 31:12
20 [1] - 58:6
200 [2] - 2:12, 30:10
2009 [1] - 57:22
2010 [2] - 55:24, 56:14
2011 [2] - 16:2, 33:2
2013 [26] - 10:9, 10:24, 11:18, 11:20, 11:21, 13:3, 13:7, 16:15, 16:20, 16:21, 17:13, 19:11, 22:15, 23:2, 33:7, 36:1, 40:15, 42:3, 42:23, 43:1, 43:6, 47:5, 47:7, 47:10, 49:20, 50:13
2014 [5] - 10:10, 10:25, 11:21, 16:15, 57:22
2020 [4] - 1:19, 4:7, 62:16, 63:22
22 [3] - 53:19, 54:4, 54:22
27 [3] - 53:19, 57:12, 58:4
2:13 [1] - 41:9
2:27 [1] - 41:10

3

3 [6] - 22:15, 47:5, 47:10, 49:20, 57:17, 57:18
3-1 [1] - 20:3
3-2 [1] - 20:3
310 [2] - 49:11, 50:11
316 [1] - 47:4
3:01 [1] - 60:3
3:10 [1] - 60:4
3:11 [1] - 61:2
3:30 [1] - 59:18
3D [1] - 12:9

4

4 [8] - 9:10, 10:1, 20:5, 26:2, 47:15, 47:20, 51:5, 51:8
4000 [1] - 2:11
441 [13] - 14:13, 25:10, 25:18, 25:24, 26:2, 26:11, 26:13, 30:11, 30:15, 31:15, 32:15, 35:1, 54:11

5

5 [3] - 27:1, 47:5, 53:22
50 [3] - 27:1, 28:5, 36:22
55402-1425 [1] - 2:12
58554-1202 [1] - 2:5

6

6 [4] - 3:3, 17:1, 47:4, 47:6
6-19-22 [1] - 63:24
61 [1] - 62:7
62 [1] - 3:5
63 [1] - 3:6

8

8-and-a-half-by-11 [3] - 30:24, 31:3, 31:8
83 [4] - 24:17, 25:9, 25:13, 26:3

A

ability [1] - 25:6
able [7] - 4:17, 6:24, 9:5, 25:17, 56:1, 57:6
above-entitled [1] - 4:2
absolutely [1] - 10:11
access [6] - 42:6, 43:2, 43:7, 43:10, 43:12, 43:14
acclimated [2] - 53:21, 53:25
accuracy [2] - 26:24, 27:7
accurate [8] - 26:23, 27:11, 29:14, 39:15, 58:15, 58:20, 62:12, 63:16
action [2] - 63:19, 63:20
actual [2] - 12:7, 17:17
added [2] - 14:9, 14:23
additional [5] - 34:1, 34:13, 54:25, 60:6, 60:7
address [1] - 42:5
addresses [3] - 42:20, 43:16, 43:19
adjust [1] - 26:21
adjustments [1] - 51:8
administer [1] - 63:8
admit [1] - 7:3
advise [1] - 15:1
afterwards [1] - 35:24
agent [1] - 44:11
agents [18] - 17:15, 37:12, 37:18, 37:22, 38:4, 38:9, 38:17, 39:4, 39:8, 39:21, 40:3, 40:9, 41:1, 41:16, 42:1, 44:6, 44:23, 44:25
ago [2] - 17:16, 35:4
agree [3] - 39:13, 47:18, 60:21
agreed [1] - 5:16
agreement [2] - 9:13, 63:5
agrees [1] - 5:14
ahead [10] - 10:4, 33:20, 34:9, 38:14, 42:9, 45:5, 57:1, 57:24, 58:9, 59:4
ALLETE [1] - 1:8
allow [2] - 4:14, 5:6
allowed [1] - 5:3
ALSO [1] - 2:16
analysis [1] - 21:3
AND [2] - 63:1, 63:21
answer [10] - 8:1, 8:9, 8:13, 8:25, 34:18, 38:15, 42:9, 45:5, 57:1, 57:24
answered [1] - 55:18
answers [3] - 8:2, 8:3, 56:23
anytime [4] - 4:21, 8:19, 17:7, 40:14
apologize [7] - 14:5, 16:9, 37:15, 37:22, 42:12, 48:15, 53:6
appear [1] - 63:12
APPEARANCES [1] - 1:23
appearing [1] - 4:8
Appearing [4] - 2:7, 2:14, 2:17, 2:17
application [29] - 13:1, 13:13, 13:16, 13:21, 13:23, 15:8, 16:19, 17:1, 17:2, 17:21, 19:11, 19:19, 19:25, 20:8, 20:11, 21:22, 22:3, 22:14, 46:21, 47:3, 47:9, 47:14, 49:12, 49:17, 49:20, 50:12, 51:5, 51:8, 57:17
applications [1] - 57:4
apply [2] - 6:21, 7:16
archeological [1] - 24:11
area [10] - 16:2, 20:6, 24:6, 31:5, 45:20, 51:22, 52:3, 52:12, 52:17, 58:1
Areas [2] - 46:9, 47:20
areas [12] - 15:3, 20:3, 20:4, 21:5, 23:8, 38:20, 39:6, 39:24, 40:5, 40:10, 40:18, 59:16
AS [1] - 1:23
assess [1] - 24:9
assigned [1] - 62:10
assisting [1] - 13:22
assume [2] - 21:3, 39:12
assumes [1] - 58:8
assuming [3] - 22:14, 22:16, 30:12
attached [2] - 62:7, 63:15
attempt [2] - 20:25, 32:22
attend [1] - 13:7
attorney [6] - 4:20, 6:4, 56:4, 60:7, 63:18, 63:20
Attorneys [2] - 2:3, 2:11
audible [1] - 8:9
authorized [2] - 5:8, 63:8
available [3] - 42:23, 56:22, 57:8
Avenue [1] - 2:4
avoid [1] - 19:4
avoidance [13] - 15:3, 20:3, 20:6, 21:4, 23:8, 24:6, 38:20, 39:5, 39:23, 40:5, 40:10, 40:17, 45:20
Avoidance [2] - 46:9, 47:20
avoiding [1] - 58:1
aware [2] - 6:25, 14:21

B

background [1] - 12:18
backtrack [2] - 23:13, 47:2
bad [1] - 48:16
BARRY [6] - 1:14, 3:2, 4:2, 5:22, 62:4, 62:20
Barry [5] - 6:7, 11:14, 41:12, 49:24, 60:8
based [2] - 37:25, 52:10
Basin [1] - 32:9
BE [1] - 63:4
began [2] - 16:15, 21:23
begin [1] - 11:10
beginning [3] - 7:19, 32:7, 40:15
begins [1] - 38:11
behalf [4] - 4:8, 5:13, 21:12, 63:14
below [4] - 28:5, 48:5, 48:25, 53:15
benefit [1] - 21:3
berate [1] - 7:13
best [4] - 8:4, 8:12, 29:1, 51:3
better [1] - 54:10
between [4] - 16:25, 29:22,

35:25, 45:14
beyond [2] - 15:14, 45:19
big [1] - 21:15
Bison [14] - 9:10, 10:1, 10:5, 16:1, 32:11, 32:12, 32:13, 52:20, 52:22, 57:3, 57:7, 57:17, 57:18
bit [1] - 11:9
blurt [1] - 8:25
book [8] - 16:3, 32:19, 33:3, 33:4, 33:18, 52:19, 57:2, 57:3
boring [1] - 7:5
bottom [2] - 14:18, 49:1
BOUGHEY [33] - 2:2, 4:13, 5:17, 5:20, 6:2, 31:25, 32:4, 38:14, 38:25, 41:7, 41:11, 42:11, 45:11, 48:14, 48:19, 48:21, 48:22, 50:7, 50:9, 50:22, 51:1, 51:3, 55:19, 57:5, 58:3, 58:13, 59:1, 59:7, 59:11, 59:14, 59:25, 60:5, 60:25
Boughey [6] - 2:3, 4:19, 6:4, 49:25, 50:5, 50:6
Boughey..... [1] - 3:3
Box [1] - 2:4
break [6] - 8:16, 8:19, 19:24, 20:7, 59:15
briefly [3] - 4:23, 7:20, 32:21
building [2] - 29:12, 30:1
buildings [1] - 23:7
built [4] - 9:17, 10:6, 10:9, 58:6
BURLEIGH [1] - 63:3
bus [1] - 24:21
button [1] - 48:16
BY [1] - 6:2
Byron [1] - 2:10

C

calmly [1] - 7:7
caravan [1] - 36:8
caravaning [1] - 36:16
carefully [3] - 7:7, 7:14, 7:24
cars [2] - 24:20, 24:22
case [4] - 7:2, 7:8, 19:13, 22:16
Case [1] - 1:7
catch [1] - 41:14
CC [2] - 56:16, 57:7
center [3] - 25:18, 26:14, 48:6
certain [1] - 29:9
certainly [1] - 39:3
CERTIFICATE [4] - 3:5, 3:6, 62:1, 63:1
CERTIFY [1] - 62:6
cetera [2] - 19:5, 52:8
chance [2] - 26:22, 35:12
change [2] - 49:9, 62:10
changed [1] - 19:2
changes [4] - 22:21, 51:7, 62:8, 63:12
channel [1] - 44:7
check [2] - 21:11, 44:12
chess [1] - 12:9
clarify [2] - 11:6, 23:10
clear [2] - 8:2, 25:7
client [1] - 59:16
close [8] - 28:1, 32:14, 34:11, 36:6, 36:25, 37:4, 52:9, 53:8
coffee [1] - 41:6
coloring [1] - 49:13
colors [1] - 47:17
comfortable [1] - 27:14
coming [2] - 37:17, 48:4
commencing [1] - 4:7
Commission [6] - 13:14, 13:24, 15:2, 17:22, 58:15, 63:24
COMMISSION [1] - 1:3
committed [1] - 60:19
company [4] - 9:16, 12:5, 12:23, 44:20
compare [3] - 50:1, 50:12, 51:11
COMPLAINANTS [1] - 2:6
Complainants/Petitioners [1] - 1:6
compliance [1] - 21:4
compound [3] - 38:23, 40:2, 44:17
concepts [1] - 12:7
concern [4] - 45:2, 45:8, 45:12, 45:16
concerned [4] - 29:3, 32:7, 58:12, 58:14
Concluded [1] - 61:2
condition [1] - 34:23
conducted [1] - 63:14
confused [1] - 46:22
connections [1] - 15:13
considering [1] - 23:19
consistent [1] - 58:19
constructability [1] - 24:10
constructed [2] - 10:9, 10:24
construction [1] - 38:11
consultant [2] - 18:10, 46:19
contact [5] - 38:10, 41:22, 42:16, 43:22, 45:1
contacted [2] - 44:10, 58:21
contacting [1] - 44:20
contacts [1] - 44:6
contain [2] - 63:15, 63:16
continue [1] - 51:1
CONTINUING [14] - 32:4, 38:14, 38:25, 41:11, 42:11, 45:11, 48:22, 51:3, 55:19, 57:5, 58:3, 58:13, 59:1, 59:11
conversation [1] - 32:8
coordinates [3] - 26:17, 26:18, 27:9
coronavirus [1] - 5:4
correct [16] - 14:15, 15:3, 31:12, 31:13, 32:19, 33:21, 36:18, 37:1, 37:20, 41:18, 44:12, 47:10, 50:20, 55:15, 62:12, 63:16
correction [3] - 50:15, 62:9, 62:11
corrections [3] - 49:10, 62:8, 63:12
cost [1] - 21:3
counsel [5] - 4:8, 5:14, 31:25, 63:18, 63:20
counter [1] - 36:19
COUNTY [1] - 63:3
County [9] - 13:8, 16:3, 28:19, 32:19, 32:24, 33:2, 52:18, 57:15, 63:6
couple [1] - 51:15
course [2] - 4:21, 51:5
COURT [2] - 3:6, 63:1
Court [1] - 63:24
court [4] - 5:6, 5:11, 8:4, 9:5
cover [1] - 33:16
crazy [1] - 53:10
created [5] - 10:21, 13:19, 13:20, 46:23, 58:16
creation [1] - 15:10
crisis [1] - 41:7
criteria [2] - 24:9, 45:22
cultural [1] - 19:5
curiosity [2] - 44:24, 56:15
curious [1] - 33:15
current [1] - 55:23

D

D.J [1] - 2:9
DAKOTA [2] - 1:2, 63:2
Dakota [12] - 2:5, 4:6, 9:17, 16:18, 16:22, 16:25, 17:4, 17:11, 25:3, 29:18, 34:1, 34:14
dataset [1] - 56:7
date [3] - 36:3, 37:2, 37:7
dated [2] - 22:15, 47:4
Dated [1] - 62:15
days [10] - 17:9, 22:10, 22:12, 23:6, 24:4, 24:16, 25:3, 29:17, 34:2, 34:14
dba [1] - 28:5
dealing [1] - 60:9
Deanna [1] - 1:5
DEANNA [1] - 2:17
December [2] - 55:24, 56:14
decide [1] - 28:20
decided [1] - 23:15
deciding [1] - 17:20
deer [1] - 29:13
definitely [1] - 11:6
delve [1] - 59:17
deponent [1] - 62:4
DEPONENT [1] - 62:1
DEPONENT..... [1] - 3:5
deposition [16] - 6:12, 6:17, 7:1, 9:21, 35:13, 51:14, 60:16, 60:22, 62:5, 62:13, 63:5, 63:7, 63:10, 63:12, 63:13, 63:19
Deposition [1] - 4:1
DEPOSITION [2] - 1:14, 3:2
depositions [3] - 5:2, 6:23, 7:19
describe [2] - 4:24, 7:20
description [1] - 20:22
design [6] - 13:25, 15:9, 19:3, 19:8, 58:2, 58:11
designing [1] - 17:17
desktop [1] - 18:20
detailed [1] - 30:21
details [1] - 35:6
determination [1] - 26:20
determine [11] - 19:1, 23:6, 24:5, 29:21, 30:1, 32:6, 34:2, 35:6, 43:24, 52:16, 55:13
develop [3] - 12:6, 18:10, 18:22
developed [1] - 18:20
developer [3] - 11:23, 11:25, 12:2
development [3] - 12:4, 14:4, 52:20
device [2] - 27:2, 29:20
devices [2] - 29:10, 29:15
differences [1] - 50:14
different [2] - 47:17, 55:9
direct [2] - 9:1, 38:10
directly [4] - 43:22, 44:20, 53:20, 54:19
distance [9] - 26:8, 27:25, 28:9, 28:18, 28:23, 28:24, 29:6, 29:11, 29:22
distances [2] - 30:6, 45:14
distinction [1] - 23:14
division [1] - 1:7
DO [1] - 62:6
document [9] - 10:16, 10:20, 14:20, 21:1, 22:17, 42:23,

47:5, 49:4, 53:8
documents [2] - 50:1, 50:3
dog [1] - 48:23
dogleg [1] - 48:11
done [9] - 5:21, 6:20, 6:23, 7:17, 23:22, 34:8, 51:6, 55:3, 59:23
dot [1] - 15:20
dots [6] - 14:10, 15:19, 49:22, 49:23, 51:21
down [11] - 9:6, 10:1, 30:16, 48:4, 48:5, 48:11, 48:25, 52:6, 53:15, 53:17, 54:3
draft [5] - 20:15, 20:21, 20:25, 22:20, 26:17
draw [2] - 47:12, 48:8
drive [2] - 27:20, 36:25
drive-by [1] - 36:25
driving [1] - 53:9
drove [1] - 36:20
due [1] - 5:4
Duluth [2] - 16:7, 16:13
duly [3] - 5:23, 62:11, 63:8
during [8] - 16:19, 24:16, 25:24, 35:23, 36:2, 36:12, 36:13, 37:23
duties [1] - 11:21

E

easier [1] - 10:2
easily [2] - 7:22, 29:21
east [1] - 52:8
effort [1] - 18:17
either [2] - 28:19, 50:4
email [2] - 38:21, 40:7
emails [1] - 40:8
employed [4] - 11:15, 11:17, 63:18, 63:20
employee [1] - 63:19
end [1] - 8:3
ended [3] - 30:11, 49:18, 49:21
energy [1] - 12:5
engineer [5] - 12:11, 12:13, 12:14, 12:16, 17:25
engineering [1] - 12:12
entire [2] - 9:9, 31:5
entitled [2] - 4:2, 46:9
entity [1] - 46:18
environmental [3] - 19:5, 24:11, 46:20
equipment [1] - 27:11
et [2] - 19:5, 52:8
evaluates [1] - 12:2
event [2] - 33:17, 46:8
eventually [1] - 30:2
evidence [1] - 58:8
exact [4] - 19:20, 27:3, 31:9, 53:15
exactly [2] - 41:13, 41:14
Examination [1] - 3:3
EXAMINATION [1] - 6:1
examination [5] - 4:3, 36:25, 60:14, 62:13, 63:14
examined [1] - 5:23
excellent [3] - 52:2, 53:14, 54:3
except [1] - 49:12
exclusion [6] - 15:2, 20:3, 20:6, 23:8, 24:6, 51:22
Exclusion [2] - 46:9, 47:20
excuse [5] - 16:2, 19:17, 20:18, 34:21, 53:6
exercised [1] - 63:6
Exhibit [15] - 15:6, 19:10, 20:5, 23:8, 39:15, 40:17, 46:8, 47:15, 47:20, 50:12, 51:5, 51:6, 51:8, 51:9, 51:21
exhibit [6] - 11:8, 43:21, 46:10, 46:11, 46:12, 51:21
exhibits [1] - 20:5
expectations [1] - 6:22
expires [1] - 63:24
extend [1] - 15:14
extended [1] - 17:8
extent [1] - 50:2

F

facility [1] - 10:5
fact [1] - 5:10
factor [1] - 32:18
facts [6] - 7:2, 7:6, 7:8, 7:9, 7:15, 58:8
fair [11] - 9:3, 12:19, 20:22, 21:5, 22:18, 22:22, 23:23, 38:3, 38:8, 39:16, 41:3
familiar [5] - 25:21, 28:14, 29:14, 45:23, 51:6
fantastic [3] - 6:11, 16:14, 27:17
far [3] - 10:22, 37:1, 47:13
farthest [1] - 52:7
February [1] - 21:24
feet [13] - 26:24, 27:1, 27:6, 27:15, 28:12, 28:25, 29:3, 30:10, 34:3, 36:22, 46:4, 46:5
few [2] - 6:5, 31:3
figure [6] - 12:9, 15:18, 18:1, 20:10, 49:3, 54:18
figured [1] - 37:25
figuring [1] - 18:3
file [1] - 56:17
filed [1] - 47:6
final [2] - 21:1, 23:1
finalize [1] - 23:22
finalized [1] - 40:16
financially [1] - 63:20
fine [7] - 7:11, 8:18, 12:1, 13:11, 21:18, 22:1, 59:20
finish [2] - 8:13, 17:19
finished [1] - 22:22
Firm [1] - 2:3
first [9] - 5:23, 7:23, 12:22, 14:25, 15:19, 16:21, 17:13, 23:4, 50:23
First [1] - 2:4
fit [1] - 24:25
five [4] - 8:20, 16:21, 17:13, 59:15
five-minute [1] - 59:15
flux [2] - 23:17, 23:18
focus [4] - 15:11, 26:6, 45:12, 52:2
following [5] - 4:3, 4:11, 36:9, 36:16, 62:9
follows [1] - 5:24
FOR [2] - 2:6, 2:13
foregoing [3] - 62:5, 62:7, 63:15
forgot [2] - 59:4, 59:25
form [2] - 55:17, 56:25
forth [3] - 54:19, 62:9, 62:10
foundation [1] - 38:13
four [14] - 8:15, 22:10, 23:5, 24:3, 24:16, 24:25, 25:2, 25:24, 29:17, 31:6, 34:2, 34:14, 48:4, 48:24
four-day [1] - 25:24
four-wheeled [1] - 24:25
France [1] - 60:10
frank [1] - 55:7
Frank [1] - 56:11
frankly [1] - 7:5
Frederickson [2] - 55:7, 55:12
Fredrikson [1] - 2:10
free [1] - 6:8
Freudenrich [1] - 36:10
friends [1] - 29:9
front [1] - 33:17
fruition [1] - 23:9
fulfilling [1] - 16:22
full [2] - 62:11, 63:15
function [1] - 11:22

G

GARTNER [6] - 1:14, 3:2, 4:2, 5:22, 62:4, 62:20
Gartner [12] - 4:13, 6:3, 6:8, 11:14, 42:9, 45:4, 57:1, 57:24, 58:9, 59:3, 60:13, 60:24
gather [1] - 15:21
general [2] - 7:18, 21:20
generally [5] - 11:24, 13:17, 13:20, 13:21, 25:21
generation [1] - 12:6
generically [1] - 26:11
given [5] - 42:17, 55:2, 55:21, 62:13
Google [2] - 52:14
GPS [6] - 26:16, 26:19, 26:23, 27:5, 27:8
GPSs [1] - 26:25
Gregory [1] - 57:12
ground [4] - 25:4, 25:6, 25:7, 26:13
group [3] - 37:12, 46:20, 48:4
guess [6] - 14:6, 14:14, 16:25, 26:24, 50:21, 52:9
guessing [1] - 13:1
guys [2] - 24:18, 32:1

H

half [2] - 48:1, 48:2
hand [2] - 7:2, 56:1
HAND [1] - 63:21
handle [1] - 9:2
hate [1] - 7:3
head [1] - 8:7
headquarters [2] - 16:6, 16:13
hear [4] - 8:6, 31:7, 34:18, 46:16
heard [1] - 29:16
hearing [14] - 13:2, 13:6, 13:7, 14:15, 15:7, 23:3, 36:1, 36:4, 37:7, 49:21, 50:13, 51:7, 51:9, 51:22
HEREBY [1] - 62:6
HEREIN [1] - 1:23
herein [1] - 63:5
hereinbefore [1] - 4:9
hereto [1] - 63:20
high [1] - 37:16
hit [2] - 48:14, 48:16
hmm [1] - 8:8
hold [2] - 21:18, 49:24
home [1] - 16:8
hope [1] - 7:22
hour [1] - 41:6
house [3] - 37:1, 37:5, 37:9
huge [1] - 13:21
hunter [1] - 29:8

I

idea [4] - 17:3, 21:20, 28:22,

55:20
identical [1] - 49:18
identified [4] - 6:4, 18:25, 57:16, 59:13
identifying [1] - 58:1
imageries [1] - 31:16
imagery [6] - 16:4, 18:21, 30:6, 30:15, 30:18, 52:19
imagine [1] - 12:8
imaging [1] - 33:18
immediate [1] - 37:4
immediately [1] - 8:21
impact [1] - 58:11
important [1] - 8:23
impression [1] - 46:23
improve [1] - 19:7
in-and-out [1] - 17:12
Inc [1] - 1:8
include [3] - 15:25, 31:17, 39:16
included [4] - 9:18, 21:14, 39:15, 43:20
indeed [1] - 35:19
index [2] - 20:1
indicate [1] - 43:15
indicated [4] - 4:9, 55:4, 62:14, 63:15
indicating [1] - 26:13
indication [1] - 15:2
indications [1] - 34:23
informal [1] - 6:6
information [43] - 4:18, 13:15, 14:1, 15:9, 15:21, 16:1, 16:2, 18:21, 24:1, 37:18, 38:22, 39:5, 39:7, 39:22, 40:4, 40:6, 40:18, 40:21, 40:22, 41:2, 41:16, 41:19, 42:5, 42:13, 42:16, 43:8, 43:11, 44:21, 52:19, 52:25, 55:2, 55:14, 55:21, 55:22, 55:25, 56:2, 56:7, 56:11, 57:7, 57:13, 58:14, 58:19, 60:19
initial [10] - 18:11, 18:13, 18:15, 18:22, 19:16, 20:14, 20:20, 26:17, 26:18, 30:23
input [2] - 13:25, 15:15
inquire [2] - 5:13, 41:22
instead [4] - 6:8, 9:8, 20:2, 20:4
instruct [1] - 60:15
interested [1] - 63:20
interrelated [1] - 15:12
investigating [1] - 12:4
involve [2] - 45:18, 52:22
involved [2] - 18:5, 18:16
involvement [1] - 18:8
issue [2] - 35:14, 60:18
issues [1] - 11:3
IT [1] - 63:4
item [6] - 48:10, 57:12, 57:13, 57:22, 58:5
items [4] - 19:4, 54:5, 56:17, 56:24
itself [1] - 20:8

J

January [7] - 11:18, 11:20, 21:25, 22:1, 22:2, 40:15
job [1] - 16:22
jobs [1] - 39:13
judge [1] - 28:9
judged [1] - 45:9
jump [1] - 4:22
jumping [1] - 4:21

K

keep [2] - 28:4, 56:16
KEITH [1] - 2:17
Keith [1] - 1:5
KESSLER [2] - 2:17, 2:17
Kessler [1] - 1:5
Kesslers [4] - 4:20, 5:13, 6:5, 35:15
Kesslers' [3] - 9:18, 30:9, 40:19
key [1] - 50:19
kind [4] - 7:18, 12:8, 20:15, 20:21
knowledge [10] - 7:9, 27:4, 32:13, 45:19, 46:1, 49:23, 51:4, 54:7, 54:23, 54:25
known [1] - 25:3
KNOWN [1] - 63:4

L

land [19] - 17:15, 37:12, 37:18, 37:22, 38:4, 38:9, 38:17, 39:3, 39:8, 39:20, 40:3, 40:9, 41:1, 41:16, 42:1, 44:11, 44:23, 44:25, 58:22
landowner [3] - 43:22, 44:6, 45:1
landowners [11] - 38:10, 41:22, 42:14, 42:16, 42:18, 42:24, 43:3, 43:8, 44:15, 44:20, 58:21
landowners' [2] - 42:5, 43:15
lands [1] - 43:12
large [1] - 31:11
last [2] - 9:7, 55:11
Law [3] - 2:3, 2:3, 2:11
lawyer [4] - 8:18, 8:20, 50:11, 56:12
lawyers [1] - 59:24
layout [10] - 14:1, 18:19, 18:22, 18:23, 19:16, 20:15, 20:20, 23:11, 23:22, 31:18
layouts [5] - 18:11, 18:13, 18:16, 23:19
left [8] - 5:18, 14:6, 48:2, 48:5, 48:24, 52:3, 52:5, 52:7
leg [1] - 48:23
letters [9] - 10:19, 14:7, 14:10, 14:13, 14:23, 19:10, 52:5, 56:16, 57:6
letting [1] - 49:4
level [1] - 28:5
levels [3] - 45:7, 45:13, 45:19
limited [1] - 15:13
limiting [1] - 58:2
line [1] - 52:6
list [2] - 42:17, 54:24
listed [10] - 13:10, 23:7, 42:24, 48:3, 54:6, 54:8, 54:14, 56:18, 56:24, 57:14
listen [1] - 7:23
listing [3] - 9:8, 42:15, 43:2
litany [3] - 4:14, 4:24, 9:21
lived [2] - 57:22, 58:5
living [1] - 34:24
located [5] - 16:6, 16:10, 25:11, 31:21, 33:9
location [10] - 16:16, 17:18, 18:5, 18:14, 18:25, 19:2, 24:5, 26:19, 26:21, 27:18
locations [3] - 19:20, 30:23, 53:5
look [20] - 15:23, 18:25, 19:25, 21:9, 24:10, 24:12, 26:15, 27:19, 30:16, 33:1, 35:10, 35:13, 35:20, 36:4, 37:5, 37:9, 48:1, 49:16, 50:5, 57:20
looked [7] - 24:16, 32:19, 33:20, 34:6, 34:10, 35:17
looking [20] - 10:16, 10:17, 19:3, 19:4, 19:6, 20:1, 22:17, 27:24, 28:6, 28:7, 28:8, 29:2, 30:17, 33:25, 34:21, 34:22, 34:25, 45:13, 52:13, 60:19
looks [1] - 33:12
loud [2] - 8:2, 8:6
lovely [2] - 49:5, 49:6
low [1] - 5:17
LYNN [1] - 2:2
Lynn [6] - 4:19, 6:4, 6:9, 41:5, 48:12, 50:18

M

M-e-r-j-e-n-t [1] - 46:17
madness [1] - 52:4
MAHLBERG [24] - 2:9, 5:16, 5:19, 38:13, 38:23, 41:5, 42:8, 45:3, 48:12, 48:18, 48:20, 49:24, 50:8, 50:18, 50:25, 55:17, 56:25, 57:23, 58:7, 58:24, 59:3, 59:20, 60:13, 60:24
Mahlberg [1] - 4:20
main [2] - 16:6, 45:12
major [1] - 12:22
Mandan [1] - 2:5
map [51] - 13:19, 14:4, 14:8, 14:9, 14:11, 14:12, 14:14, 14:22, 15:10, 15:16, 15:21, 15:24, 20:6, 20:10, 22:18, 22:19, 23:2, 23:9, 24:7, 28:21, 28:25, 30:2, 30:19, 30:20, 30:22, 31:6, 31:12, 31:16, 31:17, 31:20, 32:24, 33:3, 42:14, 43:2, 43:7, 46:24, 48:8, 51:5, 51:8, 51:9, 52:10, 53:4, 53:12, 53:15, 54:8, 54:9, 54:15, 54:17, 56:14, 57:16, 58:20
maps [6] - 18:20, 20:2, 31:21, 43:12, 53:10, 58:16
Mary [2] - 54:4, 54:22
math [1] - 28:12
Matt [3] - 17:24, 36:10, 36:20
matter [1] - 8:17
mean [5] - 12:9, 12:10, 13:21, 15:11, 23:13
meaning [1] - 49:22
means [1] - 8:7
measure [1] - 29:5
mechanical [1] - 12:16
meet [1] - 17:14
meeting [1] - 45:16
memory [1] - 35:21
mention [2] - 7:19, 50:14
mentioned [2] - 21:8, 37:11
Merjent [4] - 46:14, 46:17, 46:18, 46:19
method [1] - 52:4
methodical [1] - 7:5
methodically [1] - 7:15
microsite [2] - 35:25, 36:3
micrositing [27] - 18:17, 18:18, 18:19, 18:23, 20:25, 22:5, 22:6, 22:22, 23:5, 23:15, 23:21, 23:24, 24:3, 25:25, 35:23, 36:8, 36:12, 36:13, 37:2, 37:7, 37:17, 37:23, 38:18, 39:4, 47:8
middle [1] - 16:10

might [11] - 4:18, 6:7, 11:1, 12:4, 14:6, 24:5, 28:15, 32:6, 33:12, 41:24, 49:2
mile [2] - 28:6, 28:11
mind [5] - 20:16, 20:21, 27:12, 28:22, 29:7
minimized [1] - 51:18
Minneapolis [1] - 2:12
Minnesota [17] - 1:7, 2:12, 4:22, 9:10, 9:15, 10:25, 11:16, 14:19, 14:22, 15:21, 16:12, 40:16, 42:19, 44:25, 58:17, 59:12
minute [2] - 20:13, 59:15
minutes [1] - 6:6
misstates [1] - 42:8
mobile [2] - 26:23, 27:2
MOLLIE [1] - 2:10
moment [4] - 4:16, 35:4, 51:16, 51:24
months [2] - 16:21, 17:13
move [5] - 4:25, 14:18, 20:13, 51:15, 52:8
moved [1] - 49:23
movement [1] - 49:14
MP407 [1] - 14:20
MR [58] - 2:2, 2:9, 2:17, 4:13, 5:16, 5:17, 5:19, 5:20, 6:2, 31:25, 32:4, 38:13, 38:14, 38:23, 38:25, 41:5, 41:7, 41:11, 42:8, 42:11, 45:3, 45:11, 48:12, 48:14, 48:18, 48:19, 48:20, 48:21, 48:22, 49:24, 50:7, 50:8, 50:9, 50:18, 50:22, 50:25, 51:1, 51:3, 55:17, 55:19, 56:25, 57:5, 57:23, 58:3, 58:7, 58:13, 58:24, 59:1, 59:3, 59:7, 59:11, 59:14, 59:20, 59:25, 60:5, 60:13, 60:24, 60:25
MS [2] - 2:10, 2:17
mute [1] - 5:14
MY [1] - 63:21

N

name [9] - 4:19, 9:9, 9:15, 9:22, 10:25, 11:12, 42:5, 46:15, 55:11
named [1] - 17:24
names [2] - 9:16, 42:15
narrow [1] - 10:1
near [2] - 25:18, 28:16
nearby [3] - 24:13, 26:7, 29:23
necessary [1] - 21:1
need [22] - 5:13, 6:16, 7:23, 8:1, 8:9, 8:11, 8:15, 8:21, 9:25, 11:25, 14:8, 15:23, 24:6, 38:19, 39:19, 49:9, 50:2, 51:10, 51:17, 59:17
needed [4] - 26:20, 28:23, 42:6, 44:21
needs [3] - 4:22, 8:5, 8:24
next [5] - 6:5, 11:20, 52:7, 54:13, 59:17
nice [2] - 40:3, 42:4
nobody [1] - 57:22
noise [2] - 28:4, 30:1
normally [3] - 16:9, 16:10, 40:6
NORTH [2] - 1:2, 63:2
north [1] - 52:6
North [12] - 2:5, 4:6, 9:17, 16:18, 16:21, 16:24, 17:4, 17:11, 25:3, 29:18, 34:1, 34:14
north-south [1] - 52:6
northwest [2] - 35:1, 35:2
Northwest [1] - 2:4
Notary [3] - 4:5, 63:6, 63:24
NOTARY [1] - 63:1
note [3] - 5:1, 5:4, 10:19
NOTED [1] - 1:23
noted [1] - 63:12
notes [4] - 13:5, 37:16, 53:16, 63:16
nothing [1] - 63:9
Notice [1] - 4:1
notice [1] - 63:5
number [12] - 8:15, 8:20, 14:13, 14:20, 25:18, 29:4, 31:9, 49:15, 53:22, 53:24, 54:4, 56:8
numbers [2] - 43:16, 43:19

O

oath [2] - 10:22, 63:8
objected [1] - 40:2
objection [10] - 8:24, 38:13, 38:23, 42:8, 45:3, 55:17, 56:25, 57:23, 58:7, 58:24
observe [1] - 27:25
obtain [1] - 54:25
obviously [4] - 4:19, 12:17, 27:23, 47:17
occasion [2] - 25:4, 37:8
occupied [12] - 15:15, 15:18, 26:9, 45:7, 45:9, 48:3, 54:24, 55:1, 55:5, 56:18, 57:14, 57:16
occurred [2] - 23:4, 47:9
October [2] - 1:19, 4:7
OF [10] - 1:2, 1:13, 1:14, 3:2, 3:5, 3:6, 62:1, 63:1, 63:2, 63:3
offhand [1] - 57:9
office [2] - 33:10, 63:7
often [1] - 16:24
old [1] - 6:15
Oliver [9] - 13:7, 16:3, 28:19, 32:18, 32:24, 33:2, 52:18, 57:3, 57:15
on-site [12] - 22:4, 22:9, 26:5, 29:2, 30:4, 30:5, 32:5, 33:7, 33:24, 33:25, 37:8
once [7] - 6:20, 6:23, 22:21, 23:21, 27:17, 27:25, 33:23
one [42] - 6:15, 6:18, 6:20, 9:7, 13:20, 14:25, 17:16, 17:25, 18:2, 18:3, 19:10, 25:10, 28:3, 33:5, 33:6, 33:16, 39:13, 40:3, 42:1, 42:6, 46:23, 47:23, 48:4, 48:5, 48:10, 48:23, 49:5, 49:7, 49:8, 49:15, 49:17, 49:19, 49:21, 52:8, 54:5, 54:13, 56:21, 56:23, 57:18, 59:8, 59:17
one's [1] - 58:5
ones [2] - 38:9, 58:16
oops [1] - 48:9
operations [1] - 17:14
opportunities [1] - 12:3
opportunity [1] - 60:21
opposing [1] - 5:14
ops [2] - 37:12, 37:18
optimize [1] - 19:3
option [8] - 42:18, 43:3, 43:4, 43:9, 43:10, 43:13, 44:3, 58:23
options [2] - 42:19, 42:24
oral [1] - 62:13
order [2] - 39:18, 50:19
original [2] - 14:8, 15:20
otherwise [1] - 24:1
overall [1] - 34:23
owned [1] - 35:14

P

P.A [1] - 2:10
p.m [6] - 4:7, 41:9, 41:10, 60:3, 60:4, 61:2
P.O [1] - 2:4
page [4] - 9:22, 10:18, 49:11, 50:11
Page [1] - 3:2
pages [7] - 31:4, 31:7, 31:10, 31:21, 47:4, 62:7, 63:15
pandemic [2] - 5:4, 16:11
paper [2] - 30:25, 31:3
Paris [1] - 60:10
part [8] - 12:12, 15:8, 20:11, 24:11, 32:2, 49:17, 49:20, 51:13
particular [11] - 12:5, 12:18, 15:6, 25:12, 27:13, 30:15, 36:4, 42:7, 54:7, 54:23, 60:18
parties [6] - 4:9, 5:1, 5:5, 63:15, 63:18, 63:20
party [1] - 29:20
patience [1] - 60:9
PATRICK [1] - 2:9
Patrick [3] - 50:7, 50:17, 59:19
PDF [1] - 50:11
people [7] - 8:2, 21:13, 21:17, 24:20, 25:1, 38:5, 38:6
perfect [2] - 28:14, 52:9
performed [1] - 18:17
perhaps [2] - 57:25
period [2] - 17:8, 36:3
permit [1] - 57:3
permitted [1] - 10:9
person [7] - 5:3, 5:7, 5:10, 21:10, 44:11, 46:18, 53:7
personally [1] - 24:16
PETITIONERS [1] - 2:7
Phase [1] - 9:10
phase [2] - 10:8, 38:12
phases [3] - 10:6, 10:13, 11:2
phone [4] - 40:7, 40:8, 43:16, 43:19
photo [1] - 31:16
photos [4] - 30:18, 35:14, 35:17, 52:15
phrase [1] - 45:23
physical [1] - 33:24
physically [12] - 5:10, 16:5, 18:24, 19:6, 21:9, 21:11, 22:4, 24:15, 26:5, 27:21, 34:12
piece [1] - 30:25
pieces [1] - 31:3
place [3] - 12:10, 62:14, 63:14
placed [1] - 18:4
placement [1] - 18:14
plan [2] - 12:18, 20:22
planning [2] - 16:19, 38:12
plat [18] - 16:3, 30:20, 32:19, 32:24, 33:3, 33:4, 33:18, 42:14, 52:18, 53:4, 53:10, 53:12, 53:15, 54:17, 57:2, 57:3, 57:15
point [5] - 23:1, 26:14, 40:16, 49:3, 60:15
pointing [1] - 29:12
policy [1] - 44:22
portable [2] - 26:16, 26:19

position [2] - 5:7, 29:25
positive [1] - 41:13
possible [2] - 20:4, 29:19
power [1] - 63:7
Power [14] - 1:7, 4:22, 9:10, 9:15, 10:25, 11:16, 14:19, 14:22, 15:21, 40:16, 42:19, 44:25, 58:17, 59:12
Power's [1] - 16:12
practice [1] - 44:23
predecessor [2] - 55:3, 55:6
preferably [1] - 8:25
preliminary [3] - 34:4, 49:17, 49:19
preparation [4] - 15:6, 35:12, 43:21, 46:21
prepare [2] - 46:11, 46:13
prepared [4] - 13:13, 46:8, 46:14, 59:21
preparing [1] - 46:10
PRESENT [1] - 2:16
present [1] - 5:10
presented [5] - 15:7, 17:21, 20:11, 22:3, 51:9
pretty [4] - 6:6, 7:5, 22:17, 49:13
previous [9] - 16:1, 32:8, 32:12, 32:13, 52:20, 52:22, 53:3, 57:3, 57:7
previously [2] - 55:4, 58:19
pro [1] - 6:15
probable [1] - 29:19
problem [3] - 8:19, 17:24, 34:20
problems [1] - 21:10
proceed [1] - 9:2
proceedings [1] - 4:11
process [7] - 7:22, 12:12, 21:21, 22:23, 43:7, 51:13
production [1] - 32:3
Professional [2] - 4:4, 63:5
prohibited [2] - 44:3, 44:19
project [47] - 9:9, 9:10, 9:12, 9:14, 9:17, 9:19, 9:20, 9:23, 10:2, 10:7, 10:23, 11:2, 11:23, 11:25, 12:1, 12:2, 12:19, 12:22, 13:15, 13:25, 14:1, 15:9, 18:6, 18:11, 19:4, 22:23, 28:16, 31:5, 32:8, 32:9, 39:6, 39:14, 39:21, 40:10, 41:18, 43:23, 44:11, 44:15, 46:2, 46:3, 52:17, 55:9, 58:2, 58:11, 59:12
projects [7] - 12:6, 12:7, 16:1, 32:12, 32:14, 52:20, 53:3
promised [1] - 59:23
properties [1] - 34:6
property [5] - 9:18, 30:10, 45:2, 54:4, 56:8
proposed [1] - 24:15
prospective [1] - 24:8
protocols [1] - 6:22
provide [1] - 40:4
provided [6] - 13:15, 13:25, 15:9, 15:15, 42:15, 58:19
provider [1] - 46:20
providing [2] - 58:14, 60:19
PSC [6] - 19:12, 22:15, 47:6, 47:15, 49:12
PU-20-194 [1] - 1:7
Public [8] - 4:5, 13:14, 13:23, 15:1, 17:21, 58:15, 63:6, 63:24
PUBLIC [2] - 1:3, 63:1
public [1] - 14:15
pull [4] - 32:21, 50:4, 50:11, 54:9
pulled [1] - 23:2
pulling [1] - 43:7
purchased [1] - 58:23
purport [1] - 63:16
purpose [1] - 6:25
Pursuant [1] - 4:1
pursuant [1] - 63:5
put [12] - 4:15, 10:15, 10:19, 14:7, 15:12, 15:19, 15:20, 15:23, 28:21, 39:19, 51:16

Q

quarter [3] - 28:6, 28:11, 35:2
questioning [1] - 51:2
questions [10] - 6:24, 7:8, 8:1, 9:8, 11:10, 13:18, 56:23, 60:6, 60:7, 60:14
quick [1] - 17:12
quicker [1] - 50:16
quickly [3] - 6:20, 7:22, 29:21

R

range [1] - 28:10
Rangers [1] - 24:23
rather [1] - 7:4
reaction [1] - 38:1
read [6] - 59:9, 60:16, 60:20, 60:22, 62:6, 63:11
reading [2] - 51:13, 51:14
ready [2] - 11:9, 59:22
real [2] - 21:19
realized [1] - 37:16
really [1] - 27:15
realm [1] - 43:23
reask [1] - 42:12
reason [7] - 8:17, 16:20, 36:19, 44:3, 55:8, 62:10, 63:12
reasons [1] - 19:1
receive [2] - 39:3, 40:21
received [4] - 14:19, 14:22, 43:9
receiving [2] - 39:7, 40:18
Recessed [2] - 41:9, 60:3
recognize [3] - 14:9, 14:11
recollection [6] - 22:11, 29:1, 34:5, 34:10, 35:18, 36:2
reconvened [2] - 41:9, 60:3
record [17] - 4:12, 4:15, 5:1, 5:5, 5:21, 7:21, 8:24, 10:22, 10:23, 11:13, 41:8, 41:12, 47:5, 60:1, 60:2, 60:5, 61:1
Record [1] - 59:9
redirect [1] - 60:14
refer [1] - 33:2
reference [3] - 16:22, 39:13, 46:6
referring [4] - 10:7, 10:8, 10:12, 11:1
refresh [2] - 35:18, 35:21
regard [2] - 13:22, 18:9
regardless [2] - 5:8, 5:9
regards [17] - 4:22, 6:22, 9:7, 12:21, 15:6, 26:6, 26:23, 27:17, 28:1, 28:16, 28:20, 39:22, 42:13, 44:14, 52:11, 57:13, 59:12
Registered [2] - 4:4, 63:5
regulations [1] - 21:4
regulatory [1] - 46:7
relate [4] - 7:2, 28:15, 32:14, 57:7
related [1] - 63:18
relates [3] - 30:12, 45:7, 46:2
relating [16] - 18:13, 35:7, 39:5, 40:4, 40:9, 40:17, 40:19, 40:22, 41:2, 43:8, 44:8, 44:15, 46:1, 46:3, 54:25
relative [2] - 63:9, 63:19
relaxed [1] - 6:6
relay [2] - 38:19, 39:21
relevance [2] - 57:23, 58:7
remember [5] - 7:10, 31:9, 36:13, 46:10
reopen [3] - 53:8, 54:9, 54:19
repeat [7] - 9:21, 17:23, 20:19, 39:2, 43:5, 59:5, 59:8
rephrase [1] - 7:25
Reporter [3] - 4:5, 63:5, 63:24
reporter [4] - 5:6, 5:11, 8:4, 9:5
REPORTER [1] - 63:1
REPORTER..... [1] - 3:6
request [2] - 39:20, 41:1
requested [1] - 59:9
requests [1] - 32:2
required [1] - 59:13
requirement [6] - 28:18, 45:7, 45:21, 46:2, 46:7
requirements [3] - 28:3, 45:17, 45:18
reread [1] - 59:2
research [1] - 12:3
residence [9] - 28:16, 40:17, 41:24, 45:20, 48:2, 48:3, 55:4, 57:14, 57:16
residences [16] - 15:16, 15:18, 38:20, 39:5, 39:9, 39:11, 39:23, 40:5, 40:10, 41:2, 41:20, 41:24, 49:23, 56:18, 56:24, 58:22
respective [2] - 4:8, 63:14
respond [1] - 50:4
RESPONDENT [1] - 2:13
Respondent [1] - 1:9
rest [1] - 9:21
retain [2] - 33:6, 42:22
review [3] - 37:19, 56:1, 57:10
right-of-way [2] - 38:5, 44:6
rock [1] - 29:13
role [2] - 13:22, 15:5
room [1] - 27:5
rough [3] - 20:15, 20:21, 26:17
ruin [1] - 59:24
rules [3] - 6:21, 7:18, 28:15

S

satellite [10] - 16:3, 18:21, 30:6, 30:15, 30:18, 31:15, 33:18, 52:14, 52:15, 52:19
scheduled [1] - 59:18
scratched [1] - 53:16
screen [4] - 10:15, 25:17, 51:17
screwed [1] - 38:1
scroll [3] - 47:19, 47:21, 53:14
scrolling [2] - 53:17, 54:3
SEAL [1] - 63:21
second [3] - 8:1, 19:17, 49:25
Section [8] - 30:9, 32:14, 35:2, 40:20, 40:23, 53:23, 57:12, 58:4
see [33] - 7:4, 10:17, 14:17,

15:23, 20:2, 21:2, 21:9, 25:6, 25:11, 25:17, 27:24, 30:16, 34:16, 34:17, 47:12, 47:17, 47:19, 47:25, 48:2, 48:10, 48:13, 48:23, 49:6, 49:14, 49:16, 51:25, 52:12, 53:9, 53:12, 53:20, 53:21, 54:14, 59:16
seeing [1] - 43:17
selecting [1] - 18:5
send [3] - 40:25, 41:16, 41:19
sense [4] - 11:3, 11:4, 19:12, 19:14
separate [1] - 56:17
September [5] - 13:3, 13:7, 23:2, 36:1, 50:13
Service [5] - 13:14, 13:24, 15:1, 17:21, 58:15
service [1] - 46:19
SERVICE [1] - 1:3
set [1] - 62:9
setback [4] - 28:15, 45:24, 46:4, 46:5
setting [1] - 62:10
several [8] - 9:15, 10:6, 12:15, 23:19, 24:20, 31:2, 31:4
share [1] - 51:24
sheet [1] - 50:15
sheets [1] - 62:9
shorthand [1] - 63:16
show [9] - 14:8, 20:9, 24:6, 38:18, 47:2, 47:3, 48:7, 50:6, 53:5
showing [1] - 43:12
shown [4] - 14:15, 15:16, 17:20, 50:13
shows [2] - 20:6, 57:15
side [2] - 50:5
sides [1] - 7:1
sign [3] - 60:16, 60:20, 60:22
signed [2] - 42:19, 62:11
Simmons [1] - 59:21
simple [1] - 40:3
simpler [1] - 50:10
sit [1] - 5:19
site [31] - 17:15, 18:24, 19:6, 22:4, 22:9, 24:9, 24:18, 24:19, 25:12, 25:15, 26:1, 26:2, 26:5, 29:2, 30:4, 30:5, 31:15, 32:5, 33:7, 33:24, 33:25, 36:9, 36:15, 37:8, 37:19, 46:21, 57:17, 57:18
sites [6] - 24:15, 25:9, 25:13, 29:19, 52:13, 52:15
siting [5] - 28:3, 45:6, 45:16, 45:18, 45:21
six [2] - 7:18, 9:7
Sixth [1] - 2:12
size [2] - 30:24, 52:10
slow [1] - 7:4
small [2] - 24:22, 24:24
SMITH [2] - 2:10, 63:23
Smith [2] - 4:4, 63:4
snow [2] - 25:4, 25:7
someone [1] - 17:24
sometime [2] - 13:2, 47:10
sometimes [1] - 35:9
somewhere [3] - 25:18, 28:12, 46:4
soon [1] - 59:21
sooner [2] - 59:22, 59:23
sorry [7] - 32:11, 34:8, 34:18, 41:5, 46:15, 46:25, 59:3
sound [6] - 13:3, 36:22, 45:7, 45:13, 45:19, 45:22
sounds [1] - 59:20
soundwise [1] - 45:9
sources [2] - 15:25, 32:5
South [1] - 2:12
south [3] - 52:6, 53:20, 54:12
speaks [1] - 45:22
specific [20] - 7:8, 12:1, 14:1, 21:19, 28:8, 28:9, 28:18, 33:5, 33:6, 35:8, 36:2, 39:8, 39:10, 40:11, 40:14, 40:19, 40:22, 41:20, 44:9, 56:17
specifically [10] - 13:18, 17:5, 26:2, 26:11, 34:25, 35:3, 36:7, 36:14, 39:8, 44:19
specifics [1] - 36:17
specified [2] - 63:9, 63:14
speculation [3] - 45:4, 58:9, 58:25
spot [3] - 27:3, 34:4, 50:20
spread [1] - 31:4
spreadsheet [3] - 42:4, 42:6, 42:7
ss [1] - 63:3
stand [2] - 27:18, 27:21
standing [5] - 27:18, 27:23, 28:2, 29:11, 33:25
start [1] - 59:22
started [1] - 16:25
starts [2] - 8:20, 9:1
STATE [2] - 1:2, 63:2
state [7] - 5:9, 11:12, 22:18, 28:17, 38:3, 38:8, 45:21
State [2] - 4:5, 63:6
statement [4] - 12:19, 21:6, 22:23, 41:3
stationed [1] - 16:15
status [1] - 34:2
stay [2] - 17:7, 58:18
STEPHANIE [1] - 63:23
Stephanie [3] - 4:4, 59:7, 63:4
steps [8] - 21:1, 23:6, 24:4, 34:1, 34:14, 35:5, 41:21, 55:13
still [7] - 23:17, 23:18, 25:3, 31:21, 33:6, 42:22, 55:25
stipulate [2] - 5:12
stipulated [2] - 5:2, 5:5
stood [2] - 29:22, 32:9
stop [2] - 8:21, 9:1
straight [2] - 52:6, 54:12
Street [1] - 2:12
strike [4] - 30:13, 37:15, 49:18, 55:20
structure [14] - 27:25, 28:2, 28:5, 28:18, 32:6, 35:10, 35:14, 35:19, 36:5, 40:19, 40:23, 53:23, 54:7, 54:23
structures [32] - 15:22, 23:7, 23:12, 24:5, 24:13, 26:6, 27:24, 28:21, 29:22, 30:9, 31:17, 34:3, 34:11, 34:15, 34:22, 35:1, 35:7, 35:22, 39:23, 40:5, 40:9, 41:2, 41:23, 43:24, 43:25, 44:9, 44:10, 45:1, 45:8, 45:14, 52:17
subdivision [1] - 9:17
subject [1] - 22:21
submit [1] - 58:16
submitted [13] - 13:1, 13:13, 13:23, 16:20, 17:2, 17:3, 19:11, 21:23, 22:15, 22:19, 47:14, 63:11
subscribed [1] - 63:13
subsequently [1] - 63:11
substantial [1] - 30:25
suggested [1] - 42:2
Suite [1] - 2:11
suppose [3] - 49:6, 50:6, 50:18
surprised [2] - 57:21, 58:4
surveyor [1] - 27:8
swear [1] - 5:8
sworn [3] - 4:17, 5:23, 63:8

T

Table [2] - 20:3
taper [1] - 8:3
task [1] - 59:13
team [10] - 17:14, 18:2, 21:13, 21:15, 22:4, 24:4, 24:8, 33:24, 37:12, 37:18
technology [1] - 60:11
temperature [1] - 25:8
ten [2] - 21:17, 24:20
tend [1] - 8:2
tentative [1] - 6:21
term [2] - 24:24, 26:18
testified [1] - 5:23
testify [1] - 63:9
testifying [1] - 63:8
testimony [6] - 35:8, 42:9, 45:12, 47:7, 49:10, 60:17
that'll [2] - 7:16, 54:20
THE [11] - 2:6, 2:13, 42:10, 45:6, 57:2, 57:25, 58:10, 59:5, 59:10, 60:12, 60:23
thereabouts [1] - 53:25
therefore [1] - 45:10
therein [5] - 62:14, 63:9, 63:12, 63:14, 63:15
thereof [2] - 63:7, 63:13
thereupon [2] - 63:11, 63:13
thinking [1] - 34:19
third [1] - 8:11
thousand [1] - 30:10
three [9] - 15:25, 17:9, 24:3, 25:1, 31:6, 32:5, 33:19, 48:6, 49:1
thumbnail [1] - 51:19
timeline [1] - 55:22
today [3] - 4:15, 4:18, 60:17
today's [1] - 35:13
together [2] - 23:2, 43:7
token [1] - 40:25
took [3] - 18:15, 35:5, 63:5
top [5] - 47:25, 48:3, 48:11, 48:23, 53:24
topic [1] - 47:19
totally [1] - 26:4
transcribed [1] - 63:11
transcript [3] - 60:16, 62:12, 63:16
TRANSCRIPT [1] - 1:13
traveling [1] - 36:8
trial [1] - 7:3
trick [3] - 7:12, 8:8, 32:25
tricky [1] - 20:10
trip [2] - 22:6, 25:25
trips [1] - 17:13
true [2] - 62:12, 63:16
truth [3] - 63:9, 63:9
try [8] - 7:12, 7:19, 39:14, 41:13, 49:7, 54:8, 54:16, 58:18
trying [10] - 8:4, 12:18, 20:9, 21:20, 28:20, 32:25, 33:15, 38:2, 47:23, 51:24
Turbine [3] - 25:10, 30:11, 35:1
turbine [16] - 18:11, 19:20, 23:11, 24:9, 24:15, 26:8, 26:13, 27:4, 27:13, 27:19, 28:16, 29:19, 30:23, 36:15, 45:15, 53:21

turbines [14] - 14:2, 15:12, 15:13, 17:18, 17:20, 18:3, 18:6, 18:14, 23:16, 28:6, 30:22, 31:18, 34:4, 34:16
turn [1] - 20:25
TV [1] - 7:4
two [11] - 11:20, 17:8, 25:1, 42:1, 48:3, 48:5, 48:10, 48:23, 48:25, 50:1, 53:5
type [5] - 12:14, 21:5, 29:15, 33:1, 33:4
types [1] - 12:15
typewritten [2] - 62:7, 63:15
typically [2] - 44:5, 44:10

U

under [6] - 9:15, 10:22, 20:5, 42:18, 43:13, 46:22
unit [1] - 27:8
units [1] - 26:16
up [20] - 5:19, 14:6, 17:1, 17:2, 24:6, 30:11, 32:22, 35:9, 36:6, 37:16, 38:1, 38:18, 40:16, 41:14, 49:5, 49:18, 49:21, 50:5, 54:9, 57:15

V

various [2] - 24:9, 57:10
vehicles [1] - 24:25
Via [5] - 1:18, 2:7, 2:14, 2:17, 2:17
via [1] - 4:6
VIDEOCONFERENCE [1] - 1:14
Videoconference [2] - 1:18, 4:6
view [2] - 17:15, 50:3
virtue [1] - 63:7
visit [4] - 35:23, 36:1, 36:3, 59:15
visiting [1] - 25:24
Voegele [1] - 57:12
voilà [1] - 48:18
vs [1] - 1:7

W

wait [2] - 8:11, 8:12
walk [4] - 35:9, 35:19, 37:3, 37:8
ways [1] - 12:8
weather [1] - 25:5
welcome [1] - 60:12
wheeled [1] - 24:25
whole [5] - 9:19, 9:22, 16:16, 52:11, 63:9
wiggle [1] - 27:5
Winckler [3] - 54:12, 54:22, 56:7
Winckler's [1] - 54:4
wind [6] - 9:10, 9:17, 10:1, 10:5, 12:10, 14:1
windows [1] - 37:5
WITNESS [10] - 42:10, 45:6, 57:2, 57:25, 58:10, 59:5, 59:10, 60:12, 60:23, 63:21
witness [3] - 63:8, 63:11, 63:13
witnesses [1] - 5:8
wondering [3] - 51:23, 52:4, 54:6
word [6] - 8:5, 9:11, 9:20, 44:17, 59:8
words [3] - 8:9, 26:24, 28:4
worried [2] - 28:1, 28:23
worry [1] - 32:17
writing [1] - 53:17

Y

yard [1] - 36:11
year [1] - 33:16
years [4] - 10:6, 10:13, 11:20, 58:6
yellow [2] - 47:22, 49:13
yourself [1] - 33:24

Z

zoom [5] - 10:17, 25:10, 47:16, 53:18, 53:19
ZOOM [1] - 1:14
Zoom [9] - 1:18, 2:7, 2:14, 2:17, 2:18, 4:6, 4:14, 5:3, 5:7
zoomed [1] - 25:20

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler,	:	
	:	
Complainants/Petitioners,	:	
	:	
-vs-	:	Case No. PU-20-194
Minnesota Power, a division of ALLETE, Inc.,	:	
	:	
Respondent.	:	

TRANSCRIPT OF

ZOOM VIDEOCONFERENCE DEPOSITION OF SCOTT MONROE

Taken Via
Zoom Videoconference
October 14, 2020

(APPEARANCES AS NOTED HEREIN)

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MS. DEANNA KESSLER, (Appearing Via Zoom.)

C O N T E N T S

DEPOSITION OF SCOTT MONROE Page

Examination by Mr. Boughey..... 5

Examination by Mr. Mahlberg..... 76

Further Examination by Mr. Boughey..... 77

CERTIFICATE OF DEPONENT..... 79

CERTIFICATE OF COURT REPORTER..... 80

4

(Pursuant to Notice of Taking Deposition of **SCOTT MONROE** in the above-entitled cause, the following examination came on for taking before Stephanie A. Smith, a Registered Professional Reporter and a Notary Public in and for the State of North Dakota, via Zoom Videoconference, on the 14th day of October, 2020, commencing at 9:05 a.m., counsel appearing on behalf of the respective parties as hereinbefore indicated:)

(The following proceedings were had and made of record:)

MR. BOUGHEY: At this time then, we'll go on the record. We have something I have to put on the record first. It's just a logistical matter, Mr. Monroe. I guess two things. The first one is that the parties -- because we're doing this by Zoom because of coronavirus and everything else, the parties have to stipulate to this being done not in person but by Zoom, and so we have to put on the record that we're fine with doing it by Zoom, first of all; and, secondly, we're fine with the court reporter swearing you in even though you're not there personally in front of her, and I don't even know what state you're in, but it doesn't

5

matter.

And so I note for the record that the Kesslers have stipulated to those two things and would ask counsel to confirm the same.

MR. MAHLBERG: Counsel for Minnesota Power confirms the same.

MR. BOUGHEY: Very good. All right. Mr. Monroe, have you -- I need to go over a couple of ground rules, please.

THE REPORTER: Lynn, should I swear the witness in, please?

MR. BOUGHEY: Yeah. Duh. I've been up for five hours getting ready. I guess I'm still a little tired.

(Witness sworn.)

MR. BOUGHEY: Fantastic. Thank you, Stephanie.

SCOTT MONROE,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BOUGHEY:

Q. Mr. Monroe, I'm wondering if it's okay if I call you Scott and, by the way, you can certainly call me Lynn, but it tends to make things go a

6

little easier. Would that be all right with you, sir?

A. Yes.

Q. Okay. And have you ever had your deposition taken before?

A. No.

Q. Okay. Then I need to go over some just basic ground rules or parameters so you understand what we're doing and why we're doing it. So the purpose of a deposition is for both sides to find out what the facts are that relate to the case at hand. It's not like a trial and it's not like what you see on TV.

I'm going to calmly and carefully ask you specific questions about the facts of this case and your knowledge about those facts and what you remember. I'm not going to be cute. I'm not going to try and trick you in any way. I'm just going to carefully and methodically find out what you know, all the facts that you happen to know and that'll be that and then we'll be done.

So I need to again tell you a couple six basic little things that we tell pretty much everybody during the deposition. The first is listen carefully to the questions, and if you don't

7

understand the question, say so and I'll rephrase it.

Second, I need you to answer the questions out loud with clear answers. That means nodding the head won't work and "mm-hmms" won't do the trick either.

Third, I need you to wait for the question to be asked and I'll do my level best to wait until I'm sure you have finished your answer. Talking over each other at the same time won't work. The court reporter is taking this down word for word and she doesn't do stereo. So she can only listen to one person at a time.

Number four, if at any time you need a break, just say so and it'll happen. It doesn't matter what the reason is. And that includes even if you want to ask your lawyer a question. That's absolutely fine.

Number five, if your lawyer starts talking, you need to stop talking immediately. If he's making an objection, we'll take care of it. He'll talk a while, I might talk a while, we'll figure it out, and at some point when we're ready for you to continue, your lawyer will tell you to proceed in whatever way he or she thinks is

8

appropriate under the circumstances. So just like you and I shouldn't be talking at the same time, you and your lawyer shouldn't be talking at the same time. So the bottom line is if he starts talking, you need to stop until you're told to continue. Okay?

And then last, number six, in regard to all my questions, if I ever use the term "project" today, I'm referring to the Minnesota Power Bison 4 wind project. Lord knows I don't want to say those seven words every time. I just want to use the word "project."

So do you understand everything I've just mentioned to you just now?

A. Yes.

Q. Fantastic. Thank you.

All right. Now, the other thing -- and we're all new to this Zoom so I'm going to try and bring something up on the screen, so I'm going to show you something. I know I've sent this to your lawyer, so I'm going to hit Share Screen. Host disabled participant?

THE REPORTER: Oh, hang on a second. I forgot to enable that.

MR. BOUGHEY: No problem. Give me the

9

power.

THE REPORTER: Okay. You should have it now, Lynn.

Q. (MR. BOUGHEY CONTINUING) Okay. I'll give it a try again. All right. Let me find it. All right. And I've tried to use really big and bold print. So, Scott, are you able to see something that shows nine phases on the screen right now?

A. Yes.

Q. Fantastic. I'm doing this because for the most part, people, juries, judges, they assimilate information better in a chronological order. It also is usually better for the witness because as we proceed in a chronological order, for the most part it just makes more sense and you'll remember things better.

If at any time we have to go back from one phase to another, then I need to know that. But I've organized myself today so that we're going to go through all the major nine phases that relate to this particular case. And so I'd like you just to take a moment. I know your lawyer just got them about a half hour ago. He may or may not have had a chance to look at them. So I would like you just to review these nine phases. When you're done,

10

tell me, and then I'll be able to start going through phase by phase. Okay?

A. Okay.

Q. Fantastic. Now, I want to make sure that the phases make sense to you, and so at some point when I say "assignment," when you were working for Minnesota Power, somebody gave you an assignment relating to the project and you started working on it and that went up to the -- when the signing of the option occurred, and I leave that date there so we have some dates.

Now, I know some of these phases you weren't involved in, and when we get to that phase, first thing I'm going to do is ask, like as to Phase 5, did you have anything to do with this during the time period. If you say no, I'll just jump to the next phase. So this hopefully will save us some time. But if, on the other hand, you were involved in all the phases, then we'll discuss each of them.

All right. So I guess the first thing I need to ask you to do is would you please state your name for the record?

A. Scott Monroe.

Q. And what is your occupation, sir?

11

A. Property and right-of-way agent II.

Q. For what company?

A. ALLETE Renewable Resources.

Q. I need you to speak up a little bit more.

A. Okay.

Q. I can hear you, but just barely. And Stephanie, more importantly, has to hear you, although I'm probably somewhere in the mix there.

So I couldn't quite hear. What is your title and position again?

A. My title is property and right-of-way agent II.

Q. All right. And for what company?

A. ALLETE Renewable Resources.

Q. From now on if I say the word "company" or "Minnesota Power," would that be okay to use that as a designation of the company that we're dealing with today?

A. Yes.

Q. Okay. Fantastic.

All right. And as to what you just described your title, what are your -- your responsibilities or duties in regards generally to fulfilling your role? Did you say as the right-of-way -- I'm sorry, I was --

12

A. Yes. It's a property and right-of-way agent.
Q. Describe just generally what do you do in that capacity to fulfill your roles for the company?
A. That would be procuring the option agreement and easement agreements for a project.
Q. All right. And in regards to the project at issue here, I assume that you were assigned to that project; is that correct?
A. Yes.
Q. Okay. And do you know about when you were assigned to that project, where you began work for the company on this project?
A. Can you repeat that?
Q. Certainly. When did you start on the project relating to the Bison 4?
A. We would have started end of 2012, beginning of 2013 to work on that project.
Q. And when did you personally get that assignment? Was that the same time period or some other time?
A. That would have been the same time period.
Q. Now, I thought you said 2012, but [indiscernible] --

13

THE REPORTER: I'm sorry, Lynn. You're cutting out a little bit. Could you repeat that?
MR. BOUGHEY: You know what, I just realized something. I'm on the wrong -- I'm using my hot spot. Let's go off the record. I'm going to sign back in on my 5G. That was my fault.
(Off the record.)
Q. (MR. BOUGHEY CONTINUING) Scott, I apologize for that. I need you to state again when the project began, what -- what was the year that it began? You said a year and I couldn't hear it.
A. 2012. End of 2012, beginning of 2013.
Q. All right. Did you have anything to do with the Phase 1, so I'll show you that again. I'll share again, if I can.
Okay. So did you have anything to do with this project from when the project was begun sometime around 2009 up to when the Kesslers signed their signing option? Did you have anything to do with this project during Phase 1?
MR. MAHLBERG: I'm not -- you're saying -- I'm sorry, Scott. I'm sorry. When you say with this project, earlier you defined that word project to be the Bison 4 project, but now you're saying Bison project Phase 1, and I'm getting confused

14

whether you're talking about Bison 1 or -- or Phase 1 on your -- on your document here.
MR. BOUGHEY: Okay. I'll make it clear.
Q. (MR. BOUGHEY CONTINUING) Each of these phases relate only to time periods which I have broken down as it relates to the Bison 4 and the Kesslers. Any other project I don't care about.
So it's my understanding -- and I have a document that the Kesslers signed in 2009. Up to the time when they signed that document during Phase 1, which is from whenever the project started to when they signed it, Scott, did you have anything to do with the project or the Kesslers during Phase 1?
MR. MAHLBERG: Object. Assumes facts not in evidence. Scott, go ahead and answer.
THE WITNESS: I did not.
Q. (MR. BOUGHEY CONTINUING) All right. Fine.
MR. BOUGHEY: And, again, counsel, if you want to -- we're going to go through the documents. Right now I'm just trying to figure out if he has any knowledge as to each of these time periods.
Q. (MR. BOUGHEY CONTINUING) All right. Now as to what I list as Phase 2, from June 2, 2009, to

15

September 13, 2013, I take it you had some sort of role in relation to this project; is that correct?
A. Yes.
Q. Okay. Now we're back to square one where when did you begin working on this project?
A. The end of 2012, beginning of 2013.
Q. Okay. And in regards to the project, did you have anyone who was a supervisor or immediately above you?
A. Yes.
Q. Who would that be?
A. Wade Isaacson.
Q. Okay. Now, in regards to the right-of-ways and what you did, when was your first contact or conversations with either of the Kesslers?
A. It would have been late 2013.
Q. And before we go through each of the conversations or contacts you had with them, are you able to give me a rough guess of how many times that you talked to the Kesslers either on the phone or in person?
A. Could you specify, like --
Q. Sure. I'm going to have to go through each one one by one, and I'm just curious if you

16

met with them only once or three or five times, and then I'm going to go slowly through each one. I'm just trying to get an idea right now -- let's start it this way then: About how many times do you recall being at their house?

A. Zero.

Q. Okay. Then was all contact with the Kesslers by phone?

A. No.

Q. Okay. What were the other locations where you had any contact or discussions with the Kesslers?

A. The Bison O&M building.

Q. Okay. So now let's just try and do it in chronological order and then you just tell me where you're at at the time. The first contact you had with the Kesslers, either one of them -- and from now on when I say "Kesslers," it's either one -- do you have any idea when that first contact took place?

A. Late 2013.

Q. And where did it take place?

A. On the phone.

Q. Okay. And what do you remember about that phone conversation, if anything?

17

A. I was to set them up to come into the office to talk about the easement agreement.

Q. Okay. Did you have any other discussions besides just setting that up --

A. No.

Q. -- at that time?

A. No.

Q. Okay. What was the next time then you had any contact with the Kesslers?

A. Late 2013 when they came to the O&M building.

Q. And if you would, please, describe what things you discussed at that meeting with them.

A. The two things for sure that I remember talking to them about was roads and fences.

Q. Did they relay any information or concerns to you at that time that you recall?

A. No.

Q. What was the next time you had any contact with the Kesslers?

A. It would have been a few months later.

Q. And where did that occur?

A. The Bison O&M building.

Q. And what occurred in that meeting?

A. The signing of another easement agreement.

18

Q. Now, you say "signing of another"?

A. Yes.

Q. So they -- they had one previously that -- very well.

And do you happen to know the -- because a document was signed, do you know the date of that meeting then because of that?

A. Not right offhand.

Q. Okay. And that would have been a second easement agreement?

A. I believe that actually would have been a third. On the first time I met with them, they signed two easement agreements.

Q. Got it. And at that meeting where they did the third easement agreement, did you have any discussions with the Kesslers as to any aspect of the project or their land, and if so, what was that discussion?

A. At that time there was no further discussion.

Q. Okay. When was the next time you met with them?

A. That would have been sometime summer of 2014.

Q. Okay. Then let's stop there for a moment.

19

Before the summer of 2014, were you present at a hearing on September 13, 2013, in which the PSC held a hearing in regards to this project?

A. I was not.

Q. Then the next time again, the fourth time you met with them -- I apologize -- it was sometime in 2014; is that correct?

A. Yes.

Q. And where did you meet for that one?

A. I believe that was a phone conversation.

Q. And do you recall anything relating to that phone conversation?

A. I believe it was to notify Mr. Kessler that some cattle of his got out of a pasture.

Q. Was that a call from the Kesslers to you?

A. No. That was from me to the Kesslers.

Q. So you're the one who discovered the cattle were out or you were responding to the fact that the cattle were out?

A. I was notified by somebody on our construction team that cattle had gotten out.

Q. And then what steps did you take following that notification? Obviously you called the Kesslers, I take it?

A. Yes. And he said that he would run out

20

and take care of it.
Q. Okay. And did you do any investigation or checking as to that issue relating to the cattle getting out?
A. I did not.
Q. What was the next time you visited with the Kesslers?
A. It would have been I believe to sign a land use permit, two of them, to walk a crane across his property.
Q. Have any idea when that was?
A. Late 2014.
Q. Where did that take place?
A. On the phone.
Q. So you were calling to discuss signing it or -- I thought you said you -- they were signing it. So the first -- that was just a phone call then to them about the crane --
A. It was a phone --
Q. Sorry. Go ahead.
A. It was a phone conversation to see if they would be willing to allow us to walk a crane across a pasture.
Q. All right. And did that occur as a result of the phone conversation at that time?

21

A. Yes.
Q. What was the next time you had any contact with the Kesslers?
A. It would have been for crop damages.
Q. And when was that?
A. Either late 2014 -- yep, probably late 2014.
Q. I'm going to stop there for now and I want to go back a little bit as to prior to that hearing. Before I do that, I might as well just check. After this crop damage item and conversations, have you had any other discussions with the Kesslers since then? And give me an idea how many more we'd have to walk through if we're going to go through every one.
A. Maybe four or five more.
Q. All right. Then I'm going to focus now from when you were assigned to work on this project and to deal with the Kesslers up to -- I'll just tell you up to the hearing date, the September 13, 2013. Even though you weren't at the hearing, I'm going to stop at that point because -- for several reasons.
So I assume that you became aware of the hearing and knew that the hearing occurred and were

22

advised at some point that the project was approved; is that a fair statement?
A. I heard that the project was approved, yes.
Q. Okay. So I'm now thinking and I want to have your head placed as everything prior to when you heard the project was approved, any conversations you had with the Kesslers prior to that hearing in September and the approval which I think also occurred sometime in -- in September or very quickly thereafter of 2013.
So did you have any conversations prior to the approval of this project with the Kesslers where they gave you any indication that they had concerns about any of the turbines being too close to any of their residences? Do you recall any discussions or comments from the Kesslers regarding that issue?
MR. MAHLBERG: Object as to form.
MR. BOUGHEY: All right.
MR. MAHLBERG: Go ahead and answer, Scott, if you --
MR. BOUGHEY: That's all right. I'll rephrase because I don't want to have to worry about it later. I actually had two questions in

23

one, so I'll make it into one.
Q. (MR. BOUGHEY CONTINUING) From the time you began working on the project until you found out it was approved sometime in late 2013, did the Kesslers ever advise you that they had concerns about any of the turbines being close to any of their residences?
A. No.
Q. Did you at any time in your discussions with the Kesslers -- again same time period -- did you relay to them that the company has flexibility as to the location of where the turbines are placed?
A. No.
Q. Can you tell me was there any flexibility during the time you were working this, before it was approved, as to a determination of where the turbines would be placed by the company?
MR. MAHLBERG: Objection. Foundation. Go ahead and answer the question, Scott.
THE WITNESS: Can you repeat the question again, please?
Q. (MR. BOUGHEY CONTINUING) Yeah. I'll rephrase. Were you familiar with the process of selecting the location of the turbines by this

24

company?
A. I was not a part of how the selection process goes.
Q. I understand that. Were you at any time advised prior to the approval of the project of the probable locations of the turbines?
A. I believe there is a map of proposed locations in various --
Q. And I have to assume that as a right-of-way person, the only way you're going to know which landowners to talk to is looking at the map as to where the proposed work was going to be done. Is that a fair statement?
MR. MAHLBERG: Object as to form.
Q. (MR. BOUGHEY CONTINUING) Go ahead and answer if you can.
A. Can you repeat that?
Q. All right. I'll rephrase. Were you provided at any time a list of the landowners that might be within the realm of this project?
A. As a right-of-way agent, we had documentation of all the landowners signed up for the project.
Q. Very good. Does that documentation still exist, if you know?

25

A. I would have to check with my supervisor.
Q. Okay. And was it just a simple couple-page list, these are all the landowners we need to talk to?
A. I believe it's a spreadsheet.
Q. All right. And that's what you used to determine which landowners to talk to; correct?
A. Yes.
Q. And did the spreadsheet -- obviously it had to have their names. Did it also have their addresses?
A. Yes.
Q. In regards to their addresses, was it a physical address or a legal description or both?
A. Both.
Q. Did it include their phone numbers?
A. Yes.
Q. To your knowledge, has that exhibit been provided to us through discovery?
A. I believe so.
MR. BOUGHEY: Counsel, I note that you objected to that. I do request that that document be provided. We can discuss the discovery issues later, but I'd just note that that's one item that I will need to get from you guys.

26

Q. (MR. BOUGHEY CONTINUING) Now, in regards to the landowners you talked to, I'm going back to Mr. Kessler and -- the Kesslers. At any time did you talk to the Kesslers about where the turbines would have to be in reference to any residences that are near the turbines?
A. No.
Q. Do you recall ever discussing a 14 -- backtrack. Strike that.
Are you aware that one of the statutory regulations -- strike that too.
Are you aware that there has to be a 1400-foot setback in reference to the turbines and a residence?
MR. MAHLBERG: Objection to the extent it's calling for a legal conclusion. Scott, you can answer the question if you understand it.
THE WITNESS: I was aware that there is a 1400-foot setback.
Q. (MR. BOUGHEY CONTINUING) And did you -- and I might have already asked this -- did you at any time discuss that with the Kesslers?
A. Not that I recall.
Q. Now, as I understand it, the Kesslers had a fair amount of activity on Section 21. Is that

27

your understanding as well?
MR. MAHLBERG: Objection. Vague. Go ahead, Scott.
THE WITNESS: I would have to look at a map to know which Section 21 -- what's in Section 21.
Q. (MR. BOUGHEY CONTINUING) Well, we'll go through that in a minute. Do you recall an issue relating to Section 15 relating to a residence on the Kesslers' Section 15?
A. Not until way after the project was completed.
Q. Okay. So it's your testimony that until the project was completed, Section 15 was never raised by the Kesslers to you; is that your testimony?
MR. MAHLBERG: Objection. Misstates the testimony and the question is vague. Go ahead and answer it, Scott, if you understand it.
THE WITNESS: Can you repeat the question again?
Q. (MR. BOUGHEY CONTINUING) Yeah. Did the Kesslers -- do you know where -- strike that.
Do you know where Section 15 of the Kesslers' property is at? Have you ever been

28

there?
A. Yes.
Q. Okay. In regards to that section, prior to the construction of Turbine 441 next or on Section 15, did the Kesslers ever discuss with you their concern about the residence or home or structure they have on Section 15?
A. No.
Q. Do you recall at any time the Kesslers telling you that they planned on using that house when their son returns from college? Do you recall that at any time prior to Turbine 41 -- 441 being constructed?
A. No.
Q. Now, is it fair to state that you would be the person who would be, I guess, getting the documents to the Kesslers and having them sign whatever was necessary so that this project could proceed across their property? Is that a fair statement?
A. Yes.
Q. Okay. All right. Do you see a plat on your screen right now, sir?
A. Yes.
Q. Fantastic. For the record, this is our

29

document part 1, page 1, and I'm going to zoom in on the Section 15 so we can talk a little bit about that. So let me find my zoom here.
All right. Is Section 15 big enough for you to read the names that are in that property or do I need to make it bigger?
A. No, I can read it.
Q. Okay. It's my understanding in reference to Section 15 that the Kesslers owned the southeast portion of that quarter, most of it, and they owned the -- there's the southeast -- and then they owned the northwest portion of that section as well. Is that your understanding?
A. Yes.
Q. Okay. It's my further understanding as we look at this document that on this number five where the vertical portion of the 15 on Section 15, that very close to that is where Turbine 441 ended up. Is that your understanding?
A. Yes, close to that area.
Q. So if we look at that center point, it would be slightly north and slightly east of the center point. Is that a fair statement, sir?
A. Yes.
Q. All right. It's my further understanding

30

that the Kessler structure that they're concerned with would be basically, if the number 1 is an arrow pointing upward, somewhere near the top of the number 1 of Section 15 on this plat map; is that correct, sir?
A. Close, yes.
Q. Okay. Now I'm looking to the left and down and we see Section 21. Do you see that, sir?
A. Yes.
Q. And would it be fair to state that there was construction for this project that went across Section 21, including portions of the Kesslers' land in Section 21? Is that correct, sir?
A. Yes.
Q. Do you recall providing the Kesslers any documents relating to and giving an easement to the northwest quarter of Section 15 where the house they're concerned about is located?
MR. MAHLBERG: Objection to form only -- when you said "documents" and "an easement."
MR. BOUGHEY: I should have said "or easement," so I appreciate that counsel. I'll try that question again.
Q. (MR. BOUGHEY CONTINUING) Scott, in regards to the northwest quarter of Section 15

31

where we just described that the house at issue is located there, did you obtain any easement relating to that northwest quarter of Section 15 of the Kesslers' property?
A. No, we do not have an easement on Section -- the northwest corner of Section 15.
Q. And do you have any agreement or -- that has been signed by the Kesslers and Minnesota Power that relates to the northwest quarter of Section 15?
A. I believe we have an option agreement.
Q. That specifically lists the northwest quarter of Section 15?
A. That'd be [indiscernible] --
Q. I'm sorry?
THE REPORTER: I'm sorry, I didn't hear that.
THE WITNESS: It's cutting out really bad. I'm getting like every third word on my end.
MR. BOUGHEY: Stephanie, let's go off the record.
(Discussion had off the record.)
MR. BOUGHEY: Back on the record.
Q. (MR. BOUGHEY CONTINUING) So in regards to the northwest quarter of Section 15, do you have

32

any documents or agreements which were executed by the Kesslers and Minnesota Power relating to that northwest quarter of Section 15?

A. An option agreement.

Q. Okay. Do you know the date of that agreement?

A. Not right offhand.

Q. Now, the option agreement, was that option ever exercised?

A. No.

Q. So in regards to any restrictions on that property, since it wasn't exercised, would it be a fair statement to say that you don't have any documents that are binding the northwest quarter of Section 15; is that correct?

MR. MAHLBERG: Objection to the extent it calls for a legal conclusion. Scott, go ahead and answer the question if you understand it.

THE WITNESS: I don't understand the question.

Q. (MR. BOUGHEY CONTINUING) All right. Very good. Since the option was not used, there is no agreement between the Kesslers and Minnesota Power as to restrictions or use of the northwest quarter of Section 15; correct?

33

A. That would be something more for our planning team or siting team.

Q. I'm now scrolling down to the second page of this. Did you have anything to do with -- I'm looking at Section -- there's 15. Can you see 15 and -- where Keith Kessler's property is and the little dot on 15 where it says 441? Can you see that, sir?

A. Yes.

Q. And I note for the record this is just some notes that I had on one of the documents, which we provided to your attorneys. I'm now scrolling down and you see Section 22 and there's a Mary Winckler or Winckler -- Mary Winckler on 22. Did you have any dealings with Mary Winckler in regards to obtaining any permission for the company to use her property?

A. I would have to go back and look at our information.

Q. All right. Did you ever go on to her land, to your knowledge, and view her property?

A. I did not.

Q. Okay. So you'd have no knowledge about any residence that might be listed there on an exhibit submitted by Minnesota Power? Would that

34

be a fair statement?

A. Not right offhand, no.

Q. Okay. Same thing with -- on Section 27, on the southeast quarter of Section 27, there's a Gregory Voegele -- I'm probably not pronouncing that right, but there's reference of a residence in the middle of that southeast quarter of Section 27. Did you ever go on to that property and visit with Gregory Voegele or anyone who represents that interest?

A. I don't recall.

Q. Okay. Do you recall ever being on-site and looking at the residence itself there?

A. No, I don't.

Q. Okay. Now I'm going to have to go to another document. One moment.

All right. Right now I'm just trying to put in dates and see if you had anything to do with these documents. And so the first one on --

MR. BOUGHEY: Counsel, on all my documents, this is page 3 of my documents, and we're looking at page 3 where there's a reference to June 2, 2009.

Q. (MR. BOUGHEY CONTINUING) And now I'm going to scroll down to page 7 and I see it's

35

signed by the Kesslers on page 6, and I don't see your signature. There's somebody else on here. Did you have anything to do with the getting or obtaining the signature of the Kesslers in regards to this document?

A. I did not.

Q. Now I'm going down to page 13. By the way, attached to this document there's reference to Section 12, Mercer County. Did the project involve Section 12 of Mercer County, if you know?

A. No, it did not.

MR. BOUGHEY: Now I'm going, counsel, to page 13.

Q. (MR. BOUGHEY CONTINUING) And, again, you said you didn't have anything to do apparently with this document. Let's go down to 16. I apologize, I'm just looking for the signature page. And, of course, it's on the next item. And I don't see any signature on this one, so we'll proceed on to 31.

Now, at some point in the early stages, there was an Exhibit A that showed a legal description and I think it was on the document that was not signed that we just looked at. I just want to know when you sign documents as the right-of-way person, do you usually have an exhibit that gives

36

the legal description of what they own?
MR. MAHLBERG: Objection. It assumes facts not in evidence. You excerpted one page and put it on the screen and represented that it's part of some other document.
MR. BOUGHEY: I didn't ask him a question about that, counsel. All I said is is it standard procedure when you're doing this -- I'm not talking about this particular document. So I'm going to state my question again, sir.
Q. (MR. BOUGHEY CONTINUING) Is it standard procedure when you are in the process of getting signed documents from landowners to include a reference to the legal description of the property at issue?
A. We include the legal description of what we are looking at to secure for the possible wind development.
Q. Understood. And is that referred to in the document itself or as an Exhibit A or some exhibit to the document, if you know?
A. It would be in Exhibit A.
Q. Okay. So the answer to the question I asked a moment ago is do you normally have an Exhibit A which describes the legal description of

37

the property that is at issue in which you are obtaining either an easement or some other rights? Is that correct?
A. Yes.
Q. Did you have anything to do with the application to the Public Service Commission for this project? And if so, what was your role in that regard?
A. I did not.
Q. One of the -- the application is signed by Bradley Oachs. Do you happen to know who he is other than he's the chief operating officer?
A. I do.
Q. Okay. And did he have anything to do with your role of getting right-of-ways or other documents from landowners?
A. No.
Q. Now I'm going back to that Phase 1 again. So you said --
MR. MAHLBERG: Hold on. You're talking -- you're talking Phase 1 of the timeline that -- your Phase 1?
MR. BOUGHEY: Counsel, Phase 1 will always only be the timeline. I don't know what phase you're confused with, but I'm not talking about any

38

other phases.
MR. MAHLBERG: Well, I don't think that was true, Lynn, because I think earlier you said a different phase of the project, and so I'm just trying to make sure that we're in the right frame. You've got a document that you're sharing on the screen that says 2013 and you're switching over to talk about Phase 1. If we say Phase 1 of the timeline, it's clear -- it's clear as day.
Q. (MR. BOUGHEY CONTINUING) Phase -- anytime I use the word "phase" relates to this timeline. Do you understand that, Mr. Monroe?
A. Yes.
Q. Are there any other phases that you're confused about?
A. There are four phases of the Bison project.
Q. All right. I'm not going to go into any of those four phases. I'm only going to focus on these time phases. I'm sorry now I used the word "phase." I could have used "segment." I could have used "period," but I was afraid every time I used the word "period," she would type the word "period" or have a period instead. That's why I selected the word "phases."

39

So I'm not going to discuss the four phases of the project at all. Right now I'm discussing these phases of the timeline. Okay. Are we on the same page literally? Correct?
A. Yes.
Q. In Phase 1 from the time somebody from Minnesota Power was assigned to get permission from landowners up to June of 2009, do you know who from Minnesota Power was working those issues relating to getting permission from landowners?
A. I do not.
Q. Okay. From June 2009 until the hearing date on September 13, 2013, do you know who from Minnesota Power was responsible in visiting with landowners to get permission to use their land for this project?
A. That would be myself or Mr. Wade Isaacson.
Q. And so the two of you were in charge of dealing with the landowners as to this project and getting permissions; is that correct?
A. Yes.
Q. And it was just the two of you; is that correct?
A. Yes.
Q. Okay.

40

THE WITNESS: Could we take like a 30-second break just so I can go get a refill on my drink?

MR. BOUGHEY: Oh, absolutely.

THE WITNESS: Okay. Be right back.

MR. BOUGHEY: We'll wait for you.

(Recessed at 9:58 a.m. and reconvened at 9:59 a.m.)

Q. (MR. BOUGHEY CONTINUING) All right. You've already told me in regards to what the Kesslers told you about any concerns they had, if they had actually discussed any of these concerns with you, and you said no, they hadn't. So now I'm going to ask you as to these same issues.

Did you become aware through Wade or anybody else from Minnesota Power prior to the hearing in September 2013 that the Kesslers had these issues? So I'm going to do this one by one. And, again, I just want to know prior to when this project was approved, did you have any indication from any source that the Kesslers were concerned about how close the turbines would be to any of their residences?

A. Not with me.

Q. Okay. I didn't -- that -- I understand it

41

wasn't with you. That wasn't my question, sir. You already told me not with you. Did you have any indication from anybody else in Minnesota Power that this was a concern the Kesslers had?

A. No.

Q. Did you have -- I might have asked this already, but did you have anything to do with the creation or any input as to Exhibit 2, which is the exhibit that shows the avoidance area and occupied residences?

MR. MAHLBERG: Objection, unless you're going to publish it for him, Lynn, to look at.

MR. BOUGHEY: Yeah, I will.

MR. MAHLBERG: Thank you.

MR. BOUGHEY: Do you -- that one has mine. One moment.

Q. (MR. BOUGHEY CONTINUING) Scott, are you able to see that exhibit?

A. There is nothing on my screen right now.

Q. All right. Then I have to -- I have to change the publishing on it. One moment, please. We're all getting used to this and I apologize. I'm trying to find one that doesn't have my notations on it, so give me one moment, please. All right. I have it up. Now I just have to

42

figure out how to share. There we go.

All right. Do you now see something on your screen, sir?

A. I do.

Q. All right. It is, for the record, MP407, and it's our understanding -- I know you weren't at the hearing, but it's our understanding that this was one of the exhibits shown at the hearing and was part of the application for the project. Do you have any reason to contest that's what this is?

A. I do not.

Q. Now, in regards to the creation of this exhibit, you'll see it's Exhibit 2, Exclusion and Avoidance Areas, and it has, as I can see, some yellow dots, which is apparently where the turbines are located, and then it has black dots where apparently there is the -- it lists it as occupied residence. Did you have anything to do with the creation or provide any input as to this exhibit that was submitted to the PSC?

A. I did not.

Q. Just to be sure, did you have any contact with the person who did create the exhibit?

A. I don't know who created the exhibit.

Q. Okay. That was going to be my next

43

question. Okay. Did you have any duties or responsibilities to relay to anyone in Minnesota Power information you had in regard to exclusion or avoidance areas?

A. Can you repeat that?

Q. Sure. Did you have any responsibility or duties in regards to telling somebody in Minnesota Power information you might have in regards to exclusion or avoidance areas?

MR. MAHLBERG: Objection to form. Go ahead and answer, Scott, if you understand the question.

THE WITNESS: I was not a part of the planning process.

Q. (MR. BOUGHEY CONTINUING) Okay. I understand you weren't part of the planning process, but did you have any responsibilities -- if you were given information that a turbine might be being placed too close to a residence, did you have any obligation to relay that information to anyone at Minnesota Power?

A. If I was given the information, yes.

Q. So if the Kesslers at any point had told you, "We have a concern about a tower being close to our residence," you would have been obligated to

44

relay that to the proper person in Minnesota Power; is that correct?

A. That --

MR. MAHLBERG: Objection to form.

Q. (MR. BOUGHEY CONTINUING) And what was your answer, sir?

A. That is correct.

Q. In regards to the Kesslers' property, did you relay to anybody any concerns that you or they had relating to the location of the turbines being too close to any of their residences?

A. I was not provided with any information.

Q. Now we're at Time Frame 3, which is the hearing itself. I believe you said you were not at the hearing; is that correct?

A. I was not at the hearing.

Q. Next time frame is -- well, I'm going to -- one moment, please. So now we're done with the hearing, Time Period 3. You mentioned after the hearing you did have discussions with the Kesslers; correct?

A. That is correct.

Q. And if my notes are correct, it appears that you had a 2014 phone call where you had notification relating to, I guess, cows in the

45

pasture?

A. Yes.

Q. We have -- then next we have the signed land use for the crane by phone sometime in late 2014; correct?

A. Correct.

Q. And something about crop damages late 2014; correct?

A. Correct.

Q. And then you said after that, you had four or five contacts. My question is at any of these contacts after September of 2013, so from 2014 forward, did the Kesslers ever raise to you in person or by phone to you personally any concerns about the location of Turbine 441 in Section 15?

MR. MAHLBERG: Objection. Vague. In the question you first referred to the time period after September 2013, then you jumped to 2014, and so it's not clear whether we're excluding in this question between the date of the hearing and the beginning of 2014 or not, Lynn.

MR. BOUGHEY: Well, I'll rephrase, but I don't think it was confusing, but I -- I mean, I'll rephrase.

Q. (MR. BOUGHEY CONTINUING) From -- from

46

September 2013 forward did the Kesslers ever relay to you by phone or in person a concern about the location of Turbine 441 as it relates to Section 15?

A. I do not recall.

Q. And I'm going to be real generic now. Do you recall any discussions with the Kesslers at any time relating to Section 15 and the proximity of the turbine to Section 15?

A. I do not.

Q. Now I need to go through a couple of documents. Give me a moment to put those up here.

All right. It's my understanding that sometime in September of 2013 work began on this project. Did you have anything to do with the work on the project once the project was started? If so, what was that?

MR. MAHLBERG: Objection to form.

Q. (MR. BOUGHEY CONTINUING) Do you understand the question, sir?

A. Are you asking what I was doing during the project?

Q. Did you have any role -- I'll try again.

Did you have any role in this project once it was begun sometime approximately September of

47

2013?

A. It was just to deal with landowners.

Q. All right. Thank you. And the discussions you had that you've already described in 2014 forward, what were the discussions you had with the Kesslers relating to anything to do with this project? So you've already mentioned -- I'll save you time. You've already mentioned 2014, the phone, regarding the pasture. Then you mentioned late 2014 something to do with the crane and getting the -- getting that signed so they said it was okay to use the -- to walk the crane across the property. Then you mentioned crop damages late 2014. So we've got those three.

If you would briefly describe to me what other conversations you had with the landowners, meaning the Kesslers, relating to this project from that time forward.

A. So we would have had a discussion about fences and fence places. There was an incident where we had discussed rocks. And then there was a -- in that same conversation would have been about some washouts, some rain events. And then there was another time about some weeds in an alfalfa field after planting and replanting.

48

Q. Anything come to mind besides those issues?
A. No.
Q. And the last one you mentioned is weeds. Have you had any discussions with the Kesslers after the discussion about the weeds in the alfalfa area?
A. Just about other reclaim issues.
Q. Okay. Other than reclamation issues, have you had any other discussions with the Kesslers that you haven't described yet?
A. The only other interaction I would have had with the Kesslers is when we started to meet about settlement offers after they had raised their complaint.
Q. And we're not going to go into the settlement offers for various reasons, but the bottom line is is that -- is it your understanding that the reclamation issue was eventually resolved between the parties? Is that your understanding, sir?
A. Yes.
Q. And is it your further understanding that the other issue relating to Turbine 441 has not yet been resolved? Is that your understanding?

49

A. Yes.
Q. And without going into details, did the negotiations or settlement discussions involve -- that you just mentioned a moment ago, also involve Turbine 441?
A. Yes.
MR. BOUGHEY: Very good. Thank you. All right. We have been going an hour and 15 minutes. We're going to -- with permission of counsel or acceptance of counsel, I'd like to take a -- let's just go -- it's 10:16. Let's maybe do a 9-minute break, come back at 10:25. I will have a chance to see if I have any other questions. Will that work for you, counsel?
MR. MAHLBERG: Yeah, that's just fine, Lynn. For the witness at 10:30, do you think I should prepare him to be going at 10:30 or let him -- let him know? I just -- I don't want people jumping into the Zoom and then having to jump out.
MR. BOUGHEY: Well, let me put it to you this way: If you're going to have a lot of questions, then tell him you're going to need to wait till about 10:45. If on the other hand -- I'll leave it to you. Just have the person available from 10:30 to 10:45 and then we'll tell

50

him at some point when to sign in. How does that sound?
MR. MAHLBERG: That sounds great.
MR. BOUGHEY: Is that okay with you, Stephanie?
THE REPORTER: Yeah, that's great.
MR. BOUGHEY: I apologize. We should have went off the record. We are now off the record for a nine- to eight-minute break.
(Recessed at 10:16 a.m. and reconvened at 10:28 a.m.)
MR. BOUGHEY: We'll go back on the record.
Q. (MR. BOUGHEY CONTINUING) Scott, are you able to hear me okay?
A. Yes.
Q. Good. All right. Just want to double-check that.
I have three areas I need to go into that I hadn't gone into well enough or at all relating to what we went over. And I went back and looked at the documents, and I see you notarized some documents, and so I realize you're the one I have to ask the questions to.
So right now I'll tell you ahead of time I'm going to go back to 2013 when you had

51

discussions with the Kesslers about their needing to sign the easement because the option was being exercised by the company. So that's 2013. Then in 2014 I'm going to go into some discussions you had about the crane walk and wanting them to agree to that. And then in 2017 we have what's called -- we're calling it the Good Friday meeting, which I understand you were at as well. So I'm just kind of giving you a quick overview that those are the three areas I'm going to go into and we'll start now back to 2013.
Sometime in 2013, once the PSC approved this project, it's my understanding that you had conversations with the Kesslers about the need for them to sign the easement because you're exercising the option. Do you recall any discussions with the Kesslers in the late fall, October, November, December, of 2013?
A. I do.
Q. Okay. And if you would, describe to me those discussions because I don't think we went into much detail on those previously.
A. So the Kesslers came into our Bison O&M building to go over the documents that were provided to them via mail. And we had gone

52

upstairs -- it would have been Mr. Kessler, Mrs. Kessler -- and kind of started to discuss what our plans were for the project and, you know, address any questions or concerns or anything that they had in regard to how their property was going to be used for the project.

Q. Okay. And were there any discussions at that point where the Kesslers indicated that they did not want to proceed with going with any portion of the project or being part of any of the project? Do you remember any discussions like that?

A. I do not.

Q. Okay. I'm drawing up some documents now so I can look and see if you were involved with them, so one moment.

Do you recall anytime in discussions with the Kesslers informing them that if they did not sign the easement, that -- that Wade had indicated to you and you indicated to the Kesslers that they would have -- you would go and get a judge and make it be fine? Do you remember anything like that?

A. I do not.

Q. I'm trying to share one document and it's not coming up, so give me a moment, please. I'm so sorry. Going to be the life of me here. This is

53

why I wanted to do it in person, but, oh, well, we'll get to it.

If you're wondering what I did is I closed out every single screen so that now when I hit "share," I only have one option and it will go to the document I have up right now, I hope.

All right. I'm showing you --

MR. BOUGHEY: Counsel, it's page 92 on my system.

Q. (MR. BOUGHEY CONTINUING) Are you able to see that document, Scott?

A. Yes.

Q. Okay. Good. Now, there's a date on there, November 8, 2013, and the reason I have to ask you about this is I'm going to scroll down to 109, the signature page, and I need to find out if you had anything to do with this. Great, now we can't do 109. I'm hoping you can see me scroll. Are we still getting that or not?

A. Yes.

Q. Can you see 109 now?

A. Yes.

Q. Excellent. I have page 18 with the Kesslers' signature, the document I just showed you, and here's my confusion. It next goes to

54

page 21. So I don't have 19 and 20 and I suspect that's because that's -- they signed it, it was sent to the company to then sign secondly. And so now I'm just wondering whether or not you in regards to this particular document, whether you were the person that helped them or worked with them in doing this wind project easement agreement, November 8, 2013, if you remember?

A. I believe that was the third easement signed by the Kesslers.

Q. And were you part of that?

A. Yes.

Q. Okay. So if we locate those other two pages -- which, counsel, I'd like to try and find -- my guess is you'd probably have a notarization with your name on it and you signed on behalf of the company but we'd have to find a document. But that's a possibility; is that correct?

A. With the wind project easement agreement, those were not notarized.

Q. Okay.

A. The -- so this is like the long version that is just signed by the Kesslers. There should be a memorandum of easements which is notarized and

55

recorded.

Q. I got it. Okay. So now I'm going to go past those pages. I notice on Exhibit A there's only a reference to legal description of Section 21. Would you agree there's no reference to Section 15 on -- as to this document we're looking at?

A. Yes.

MR. BOUGHEY: Okay. Now I'm scrolling down to 114, counsel. I apologize, we'll just scroll down.

Q. (MR. BOUGHEY CONTINUING) So here's page 21, and apparently attached to this document are certain maps that show what's happening. So I'm going to reduce that so we can see it a little better. And I see here it says right across it Section 21, and then the next page also Section 21, which would be going over the Kesslers' property; correct?

A. Correct.

Q. Okay. And the next one is also Section 21, and I see it's Turbine 451 on the corner.

All right. To your knowledge, was the easement we're talking about -- any of the easements signed in -- or any of the documents

56

relating to use of this land signed in October, November or December 2013, it's my understanding they all relate to Section 21 and none of them relate to Section 15. Is that correct, if you know?

A. They were part of Section 21, but there also should have been an easement signed for a portion of Section 15.

Q. Okay. And would that have been south of 441?

A. Yes.

Q. So I want to be more precise. The Section 15 that might have been signed would have been the southeast quarter of Section 15; correct?

A. Yes.

Q. And the northwest quarter of Section 15 is where the residence is that we're talking about, the Kessler residence; is that -- is that correct?

A. Yes.

Q. Okay. So just to make sure I'm clear, nothing you had them sign related to the northwest quarter of Section 15; correct?

A. That is correct.

Q. And that I have to assume is because you were using -- you weren't using any portion of that

57

land. You were just putting a turbine near it; is that correct?

A. That is correct.

Q. All right. Now I'm looking and I can make this a little bigger for you. And, again, I just want to see if you were involved in this. I now have a memorandum of easements, November 8, 2013, is what's signed -- or filled in there, but I think when we get to the bottom we'll find out. The date they signed was October 23 of 2013, and it looks like your signature is on there as the notary. Is that correct?

A. That is correct.

Q. All right. When you came and had them sign that -- I apologize. Where was this signed, if you recall?

A. At the Bison O&M building.

Q. And do you remember any discussions relating -- I'll go up to the top so we know what we're talking about. As to this memorandum of easements, do you remember any discussions with the Kesslers at that time?

A. In regards to anything?

Q. I'll narrow it down. In regards to Section 15 and the residence at Section 15.

58

A. There was no discussion.

Q. Now, Exhibit A is attached, and here we see -- this is apparently the land that relates to the Kesslers that you're getting permission from, and I see the southeast quarter of Section 15 -- the southeast quarter -- I mean the north half of the southeast quarter of Section 15. We also have Section 16. And so it's fair to state that the listing here does not include the northwest quarter of Section 15 where the other residence that they're concerned about is located; is that correct, sir?

A. That is correct.

Q. Okay. Now, I'm looking at what I think -- and I'm going to make it smaller so we can have a better idea what we're dealing with here. It appears to me that this is Section 15 but the southeast quarter, so on the upper left corner, that would be the center point of Section 15. Have I got that right?

A. That is correct.

Q. And directly to the north of this little circle would be where Turbine 441 ended up being located; is that correct?

A. That is correct.

59

Q. And I'm scrolling down, and now this is Section 16, not 15. And my question for you is did you provide the Kesslers at any time in conjunction with any of the documents you had them sign any drawing like this that included the northwest quarter of Section 15?

A. No.

Q. And I assume on the north side of this, which would be the northeast quarter of Section 15, it's my understanding that's owned by somebody else; correct?

A. Correct.

Q. And you would not have provided that drawing to the Kesslers either; is that correct?

A. That is correct.

Q. Okay. All right. That handles the 2013 area I wanted to go into. Now, during the construction phase -- and I'll get out of this if I can figure out how to do that. There we go. One moment.

Okay. Now, during the construction phase that occurred in 2014, there were some discussions with the Kesslers regarding the crane walk. And so just briefly, why did you need to contact them regarding the crane walk? What was that about?

60

A. It was just to be able to walk the crane from one turbine site to another turbine site without having to break the crane down, load it on trucks, drive it around and put it back together.

Q. So the -- the plan or your request was instead of having to do all that stuff, you wanted to have the Kesslers agree to let the crane walk across their property; correct?

A. Yes.

Q. And do you recall how many times you had to contact the Kesslers in regards to that issue?

A. I do not.

Q. Is it possible that that was a major issue and you contacted him quite a bit by phone and by text, if you recall?

A. I believe that it was just to see if they had made a decision if they were going to allow us to do it or not.

Q. But you don't remember how often you contacted them?

A. I do not right offhand, no.

Q. Okay. I need to get another document up and then we'll be ready to go to the next one.

The next area of inquiry I'm going into, sir, is going to be relating to what we call the

61

Good Friday meeting on April 14, 2017. Do you recall being at any meeting on the Kesslers' property at any time?

A. Yes.

Q. So let's talk about that. Prior to the meeting -- and is the date -- did I have the date accurately if you -- you know, do you have any reason to contest April 14, 2017, is the date?

A. I don't recall what the date was.

Q. Okay. Do you recall whether it was Good Friday in 2017?

A. I believe that it was.

Q. Okay. So how did you find out about this particular meeting, who told you that you're going to have a meeting and what did they tell you?

A. I believe that it was set up through the PSC, Jerry Lein.

Q. Okay. And did he contact you or did somebody else and tell you about the meeting?

A. I believe he went through his contact at Minnesota Power.

Q. All right. Very good. And then were you told what the meeting was about or what its purpose was?

A. It was about the complaint that he had

62

filed with the PSC.

Q. And I can tell you right now I am not interested in spending our time going over the reclamation issues. I know that those were issues and that you talked about them. I would like to instead focus on the Section 15 Turbine 441 issues relating to the placement of the turbine. Do you understand I want to limit the questioning to that?

A. Yes.

Q. Okay. So, now, in regards to that issue, I know that you went to about three or four different places, including near a cattle gate near 441. Do you -- can you tell me prior to getting up to the cattle gate at 441, do you recall any discussion prior to that point of -- about 441 and its placement?

A. I believe that it was brought up and then we made our way in that direction after visiting a different site.

Q. Okay. And once you got to the cattle guard, would you be immediately south of 441 when that discussion took place or would you be over more towards the -- the west on the other section?

A. We would have been on the cattle guard right directly south of 441.

63

Q. Got it. All right. And does that cattle guard go east-west and you're looking at 441 when you -- as you're facing the cattle guard? Is that the right cattle guard?

A. Yes.

Q. Okay. All right. So you're at -- on the Kesslers' property south of 441. Describe the discussions you had at that time, everything you can recall.

A. The only thing I can recall is asking Mr. Kessler how he would want the cattle guard and the fence run across that turbine pad on his property line.

Q. Do you recall any discussion relating to the placement of 441 and their concerns about the placement of 441 being too close to the residence on Section 15?

A. I do not recall.

Q. Okay. Do you recall at any point moving from that location south of 441 onto the northwest quarter of Section 15 where the house is located?

A. I do.

Q. Okay. And prior to going up to the house, do you remember any discussion that maybe got a little heated? Do you remember anything about

64

that?
A. I do. I believe Mr. Kessler had cursed about some comment made by Wade Isaacson.
Q. Okay. All right. And do you remember what the comment was or any discussion prior to him getting upset?
A. It was just Mr. Kessler was stating that he had made mention to us several times about the proximity of the structure and Turbine 441.
Q. Okay. So he had stated that he had said to the representatives of Minnesota Power several times that he had concerns about the proximity of 441 to the -- to the house nearby. Is that what you just said?
A. That is what Mr. Kessler claims, yes.
Q. Right. I understand that. And did you in any way at that point confirm to Mr. Kessler that indeed you, Minnesota Power or representatives of Minnesota Power, had been told about that concern?
A. Can you repeat that question one more time?
Q. Certainly. I'll try. Did you in any way once Mr. Kessler made that statement confirm that representatives of Minnesota Power had indeed been told about that concern that the Kesslers had

65

previously made to Minnesota Power?
A. I did not.
Q. Okay. Did anyone with you representing Minnesota Power make any type of confirmation that indeed that had been told previously to Minnesota Power, that concern?
A. Not that I recall.
Q. Who was with you from Minnesota Power on that day?
A. It would have been myself, Mr. Wade Isaacson and Benjamin Reister.
Q. And just so I'm clear, did either Wade Isaacson or Benjamin Reister confirm in any way that the statement made by Mr. Kessler was correct, that Minnesota Power had been told previously about this concern of the Kesslers?
A. Not that I recall.
Q. Okay. I'm going to show you a couple of documents here.
All right. Do you see a file memorandum by Jerry Lein dated March 1, 2017?
A. Yes.
Q. Okay. Is it large enough for you to read?
A. Yes.
MR. BOUGHEY: Okay. Counsel, I'm going to

66

scroll down to the bottom where we have some discussions. I'm now showing you, sir, an addendum which is on the next page. For the record, it's page 317. And I apologize, this just relates to the decision to have a meeting. I'm actually looking now at 318, counsel.
Q. (MR. BOUGHEY CONTINUING) And this, I'll tell you, is a document prepared by the Kesslers that describes what they recalled at the time they wrote this what occurred on that day, April 14, 2017, Good Friday. And so now I'm scrolling down and I'd like you to read when it starts here, "Tower on 15."
A. Mm-hmm.
Q. All the way to the -- that whole paragraph and the paragraph that says, "Went to yard on 15." I would like you, sir, to read it. I'm going to highlight it briefly. Do you see a highlight there?
A. Yes.
Q. Okay. And so I would like you to read those two paragraphs, and then once you're done tell me and I'm going to ask you about what the Kesslers have written down. Okay?
A. Okay. "Tower on 15."

67

Q. Oh, no. I'm sorry. I'm sorry. I apologize. You don't need to read it out loud. That was my mistake. I should have been clear. I need you to just read it to yourself and tell me when you're done. Sorry about that.
A. Oh, okay. I'm finished.
Q. Fantastic. Now, I'm going to now highlight -- and we're going to go through this sentence by sentence, and I just want to know if you agree, disagree, have a different viewpoint, remember something differently.
So the Kesslers in their memorandum that they typed up for themselves, they said that -- the second sentence on Tower on 15 -- the second paragraph, it says, "Talked about how we were told that the tower was not going to bother our land."
Do you recall any prior discussions with the Kesslers and yourself about how the tower would not bother their land?
A. We did not talk about how the tower was not going to bother their land. We talked about how we would route the fence line that --
Q. I apologize. Scott, I apologize. I have to rephrase that -- I have to restate the question.
MR. MAHLBERG: Lynn, he gets to answer the

68

question.
MR. BOUGHEY: He's not answering the question I asked which is previous to this. Previous to this.
MR. MAHLBERG: Well, he was answering the question.
MR. BOUGHEY: No. He was talking about -- counsel, I'll rephrase then. I'll just start over.
Q. (MR. BOUGHEY CONTINUING) Right now, Scott, I'm not asking what was said that day. I'm -- I apologize. I'll break it into two so we don't have an objection.
Prior to this Good Friday meeting, do you recall any discussions with the Kesslers where you talked about or they were told that the tower was not going to bother their land? Any previous discussions?
A. No.
Q. All right. Thank you. And I apologize because I -- now on this day, on Good Friday, do you remember discussions right then by the cattle guard where the Kesslers asserted they were told that the tower was not going to bother our land? Do you remember them saying that?
A. I do not recall that comment.

69

Q. Now, the next sentence is, "Scott agreed that we did talk about it."
Would you please respond to the Kesslers' statement that Scott had agreed that we did talk about it.
A. We had talked about fencing across that turbine pad.
Q. All right. I guess did you at any time agree that they had talked previously about how the tower was not going to bother our land?
A. Can you repeat that one more time?
Q. I'll try. While you were south of 441 turbine on Good Friday 2017, do you recall any discussion about -- from the Kesslers about how they were told that the tower was not going to bother their land? Do you remember that discussion that day?
A. We had never said that the tower was not going to bother their property.
Q. Did you hear the Kesslers make a statement on Good Friday 2017 relating to their understanding that the tower was not going to bother their land?
A. I don't recall.
Q. And then do you believe or do you recall -- strike that.

70

Do you recall at any point agreeing with the Kesslers that they had previously been told that the tower was not going to bother their land?
A. I did not agree to that.
Q. Do you recall at any point Wade saying words to the effect, "Do you have that in writing?"
A. That, I don't recall.
Q. You already mentioned that you recalled Keith getting upset.
A. Yes.
Q. Do you recall him saying, "Goddammit, we had an agreement and I should not have to have it in writing," to Wade? Do you remember that statement being made by Keith?
A. I don't remember the exact statement. I remember Mr. Kessler got upset.
Q. And do you remember what he got upset about?
A. I do not right offhand.
Q. Now, there's reference to going to the yard on Section 15. You already testified that you recall going up to the yard, and so that's correct; right?
A. Correct.
Q. While there, were you anywhere close to

71

the structure or home that the Kesslers call a residence?
A. Yes.
Q. How close were you to that structure?
A. Maybe 50 feet.
Q. Did you ever go up any closer to -- to the house up on the steps or anywhere within 10 or 15 feet of it?
A. No.
Q. Did you observe the Kesslers and any of the PSC people going up right next to the house?
A. I don't recall.
Q. Do you recall any discussions while on that site where the house was located about the noise or how close the tower was to the house?
A. Mr. and Mrs. Kessler had stated that they had previously told us about the issue.
Q. And then the next sentence says, "Scott also agreed that we did tell him and Wade."
Did you make that statement on Good Friday 2017 at the site of the house?
A. I did not.
Q. Did you overhear either Jerry or John, the two people from the PSC, making any statements about whether they would want to live at that

72

location?
A. I do not recall.
MR. BOUGHEY: Counsel, I'm now going to 326, I hope.
Q. (MR. BOUGHEY CONTINUING) I'm now showing you page 326, which is another memo from the Lein -- from Jerry Lein referring to the April 14, 2017, meeting. And I -- I know you didn't write this, so I'm just going to ask if you disagree with anything on here, and I'm going to do the same thing where I highlight it, so give me a moment.
The final paragraph number 4 on page 326, I'd like you to read that on your own and I'm going to ask you some questions about it. Okay?
A. Okay.
Q. Okay. The first sentence now says that -- according to the memo from the PSC, that 441 is located approximately 1200 feet of a residence occupied by the Kesslers' son. Do you have any reason to dispute first that distance of about 1200 feet?
A. I don't know what the footage is that the house is set back from that turbine.
Q. Okay. Very good. Do you have any reason to dispute whether or not the Kessler's son was now

73

occupying that residence?
A. I have no idea if anybody was living in that structure.
Q. And, again, that's fine. I just have to find out if you do have any information that contradicts this. So I know it's boring and it's -- but we just have to go through it.
In regards to the shadow flicker and the noise, while you were on-site near the residence, however near you got to it, did you notice any noise from the turbine?
A. Yes.
Q. Were you between the turbine and the residence or on the other side of the residence?
A. Between the turbine and the residence.
Q. And, again, apparently you were -- did you say 50 feet away maybe from the residence?
A. I don't have an exact footage.
Q. Sure. All right. In regards to the shadow flicker, did you notice any shadow flicker that occurred while you were on the site of that portion of Section 15?
A. I do not recall if there was or not.
Q. Okay. Now, do you have any personal information as to whether or not the residence was

74

occupied when turbine -- when the project was in process of being constructed?
MR. MAHLBERG: I'm going to object or maybe just note for the record that yesterday during the depositions uses of the phrase "occupied" were -- resulted in an instruction from you, Mr. Boughey, to your clients to not answer the question, and I don't think it's -- I don't think turnabout is fair play to spend the next day trying to use those same words.
MR. BOUGHEY: Okay. I understand, counsel. I was just using words in the memo, but what I will do -- I understand your point, so I'll just rephrase.
Q. (MR. BOUGHEY CONTINUING) In regards to the structure on Section 15, do you have any personal knowledge of whether anyone was living there from 2013 to 2014?
A. I do not.
Q. The next sentence is, "There was a reference to the Kesslers stating they informed the right-of-way agents that they did not want the turbines near that structure because their son was planning to occupy it."
Do you recall as a right-of-way agent ever

75

being informed by the Kesslers of what is written here on 326?
A. They did not inform us of that.
Q. Well, I don't need "us." I need you. You don't know --
A. Oh, they did not inform me about it, no. Sorry.
Q. That's all right.
MR. BOUGHEY: Counsel, I'm going to 330.
MR. MAHLBERG: Lynn, just for planning purposes, I told the next witness about 11, and it's only 11:06. We're still about 11. But if -- if I need to tell him to go get an early lunch, we won't be going till noon or something like that, I'll do that.
MR. BOUGHEY: Counsel, I appreciate it. Actually, that was my last area of inquiry. I just did the three I had mentioned.
MR. MAHLBERG: Okay.
MR. BOUGHEY: And so I have nothing further of this witness. I assume you will advise him and then when you're done, we'll get the next witness on -- on board.
MR. MAHLBERG: Yep. I am going to advise him. I have one quick follow-up, Lynn, and I hope

76

it doesn't inspire a whole lot of questions. I'm just trying to get a clearer point on the record.

EXAMINATION

BY MR. MAHLBERG:

Q. Mr. Monroe, you were given a definition earlier in your testimony by Mr. Boughey of "project." Do you recall that?

A. Yes.

Q. And you recall that was specifically defined to be this Bison 4 project?

A. Yes.

Q. And there were then some questions about who was in charge of -- or dealing with getting land rights for the wind farm. Do you recall those questions?

A. Yes.

Q. Your response was that you and Mr. Isaacson were the two people responsible for that; right?

A. Correct.

Q. When you answered that, was your response limited only to acquisition for the Bison 4 phase of the Bison wind project?

A. No. We were in charge for getting it for all of the Bison project after we were on-boarded.

77

Q. And you were on-boarded in '12 or '13 -- late '12 or early '13 was your testimony?

A. I started with the company January 3 of 2012.

Q. Got it. So from that point forward, it was you and Mr. Isaacson. If there were efforts made before then, obviously it was someone else; right?

A. That is correct.

MR. MAHLBERG: Okay. I just wanted to make sure we were clear on that so that -- so that we were clear on that. I was left with a gap in my -- my thinking there. So thanks, Scott.

Mr. Boughey may have a follow-up question.

MR. BOUGHEY: Just a very short follow-up so I understand the distinction.

FURTHER EXAMINATION

BY MR. BOUGHEY:

Q. The other projects, were the Kesslers involved in any way with the other projects that you just described?

A. I do not believe they were.

MR. BOUGHEY: Okay. Then that answers my question. I have no further questions. Did you want to advise the witness regarding the reading and signing, sir?

78

MR. MAHLBERG: Yeah. So, Scott, you're going to have the opportunity if you would like to take it to read the draft of your deposition transcript that the court reporter will prepare and provide any, oh, edits, corrections, that sort of thing to it. We can talk about those issues at a later time. I would advise you to exercise your right to read and sign the deposition transcript. And would you agree to that?

THE WITNESS: Yes, I would.

MR. MAHLBERG: All right. We'll read and sign.

MR. BOUGHEY: Very good. That concludes this deposition. We're going to go off the record.

(Concluded at 11:09 a.m., the same day.)

79

CERTIFICATE OF DEPONENT

I, **SCOTT MONROE**, the deponent in the foregoing deposition,

DO HEREBY CERTIFY that I have read the foregoing and attached 78 typewritten pages, and that the same are, with changes or corrections, if any, set forth on the following correction sheets (setting forth the reason assigned for each change or correction, and duly signed by me), a full, true, accurate and correct transcript of my deposition on oral examination given at the time and place therein indicated.

Dated this _____ day of _____, 2020.

_____

SCOTT MONROE

CERTIFICATE OF COURT REPORTER AND NOTARY PUBLIC

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

BE IT KNOWN that I, Stephanie A. Smith, a Registered Professional Reporter, took the deposition herein pursuant to notice or agreement; that I was then and there a Notary Public in and for said County and State; that I exercised the power of that office in taking said deposition; that by virtue thereof, I was then and there authorized to administer an oath; that said witness, before testifying, was duly sworn to testify the truth, the whole truth and nothing but the truth relative to the cause specified therein;

That the said deposition, having been transcribed, was subsequently submitted by me to the said witness, who thereupon read the said deposition and made changes or corrections, if any, as appear noted therein, along with the reason for each thereof, and that the said deposition was thereupon subscribed to by the said witness; that the examination was conducted at the time and place therein specified on behalf of the respective parties as therein indicated; that the foregoing and attached typewritten pages contain a full, true, accurate and correct transcript of my shorthand notes, as they purport to contain, then and there taken;

That I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which said deposition is taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

WITNESS MY HAND AND SEAL this _____ day of _____, 2020.

_____
STEPHANIE A. SMITH
Court Reporter and Notary Public
My Commission expires: 6-19-22

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'12 [2] - 77:1, 77:2
'13 [2] - 77:1, 77:2

1

1 [19] - 13:14, 13:20, 13:25, 14:1, 14:2, 14:11, 14:14, 29:1, 30:2, 30:4, 37:18, 37:21, 37:22, 37:23, 38:8, 39:6, 65:21
10 [1] - 71:7
107 [1] - 2:4
109 [3] - 53:16, 53:18, 53:21
10:16 [2] - 49:11, 50:10
10:25 [1] - 49:12
10:28 [1] - 50:11
10:30 [3] - 49:16, 49:17, 49:25
10:45 [2] - 49:23, 49:25
11 [2] - 75:11, 75:12
114 [1] - 55:10
11:06 [1] - 75:12
11:09 [1] - 78:16
12 [2] - 35:9, 35:10
1200 [2] - 72:18, 72:21
1202 [1] - 2:4
13 [6] - 15:1, 19:2, 21:20, 35:7, 35:13, 39:13
14 [6] - 1:19, 26:8, 61:1, 61:8, 66:10, 72:7
1400-foot [2] - 26:13, 26:19
14th [1] - 4:7
15 [58] - 27:9, 27:10, 27:14, 27:24, 28:5, 28:7, 29:2, 29:4, 29:9, 29:17, 30:4, 30:17, 30:25, 31:3, 31:6, 31:10, 31:13, 31:25, 32:3, 32:15, 32:25, 33:5, 33:7, 45:15, 46:4, 46:8, 46:9, 49:8, 55:6, 56:4, 56:8, 56:13, 56:14, 56:16, 56:22, 57:25, 58:5, 58:7, 58:10, 58:17, 58:19, 59:2, 59:6, 59:9, 62:6, 63:17, 63:21, 66:13, 66:16, 66:25, 67:14, 70:21, 71:8, 73:22, 74:16
16 [3] - 35:16, 58:8, 59:2
18 [1] - 53:23
19 [1] - 54:1

2

2 [5] - 14:25, 34:23, 41:8, 42:13
20 [1] - 54:1
200 [1] - 2:12
2009 [6] - 13:18, 14:9, 14:25, 34:23, 39:8, 39:12
2012 [6] - 12:18, 12:24, 13:12, 15:6, 77:4
2013 [31] - 12:19, 13:12, 15:1, 15:6, 15:17, 16:21, 17:10, 19:2, 21:21, 22:11, 23:4, 38:7, 39:13, 40:17, 45:12, 45:18, 46:1, 46:14, 47:1, 50:25, 51:3, 51:11, 51:12, 51:18, 53:14, 54:8, 56:2, 57:7, 57:10, 59:16, 74:18
2014 [19] - 18:24, 19:1, 19:7, 20:12, 21:6, 21:7, 44:24, 45:5, 45:8, 45:12, 45:18, 45:21, 47:5, 47:8, 47:10, 47:14, 51:4, 59:22, 74:18
2017 [10] - 51:6, 61:1, 61:8, 61:11, 65:21, 66:11, 69:13, 69:21, 71:21, 72:8
2020 [4] - 1:19, 4:7, 79:16, 80:22
21 [14] - 26:25, 27:5, 27:6, 30:8, 30:12, 30:13, 54:1, 55:5, 55:13, 55:17, 55:22, 56:3, 56:6
22 [2] - 33:13, 33:14
23 [1] - 57:10
27 [3] - 34:3, 34:4, 34:7

3

3 [5] - 34:21, 34:22, 44:13, 44:19, 77:3
30-second [1] - 40:2
31 [1] - 35:19
317 [1] - 66:4
318 [1] - 66:6
326 [4] - 72:4, 72:6, 72:12, 75:2
330 [1] - 75:9

4

4 [7] - 8:9, 12:17, 13:24, 14:6, 72:12, 76:10, 76:22
4000 [1] - 2:11
41 [1] - 28:12
441 [25] - 28:4, 28:12, 29:18, 33:7, 45:15, 46:3, 48:24, 49:5, 56:10, 58:23, 62:6, 62:13, 62:14, 62:15, 62:21, 62:25, 63:2, 63:7, 63:15, 63:16, 63:20, 64:9, 64:13, 69:12, 72:17
451 [1] - 55:22

5

5 [2] - 3:3, 10:15
50 [2] - 71:5, 73:17
55402-1425 [1] - 2:12
58554-1202 [1] - 2:5
5G [1] - 13:6

6

6 [1] - 35:1
6-19-22 [1] - 80:24

7

7 [1] - 34:25
76 [1] - 3:4
77 [1] - 3:5
78 [1] - 79:7
79 [1] - 3:7

8

8 [3] - 53:14, 54:8, 57:7
80 [1] - 3:8

9

9-minute [1] - 49:11
92 [1] - 53:8
9:05 [1] - 4:7
9:58 [1] - 40:7
9:59 [1] - 40:8

A

a.m [6] - 4:7, 40:7, 40:8, 50:10, 50:11, 78:16
able [7] - 9:7, 10:1, 15:20, 41:18, 50:14, 53:10, 60:1
above-entitled [1] - 4:2
absolutely [2] - 7:18, 40:4
acceptance [1] - 49:10
according [1] - 72:17
accurate [2] - 79:12, 80:16
accurately [1] - 61:7
acquisition [1] - 76:22
action [2] - 80:19, 80:20
activity [1] - 26:25
addendum [1] - 66:2
address [2] - 25:14, 52:4
addresses [2] - 25:11, 25:13
administer [1] - 80:8
advise [5] - 23:5, 75:21, 75:24, 77:25, 78:8
advised [2] - 22:1, 24:5
afraid [1] - 38:22
agent [5] - 11:1, 11:12, 12:2, 24:21, 74:25
agents [1] - 74:22
ago [3] - 9:23, 36:24, 49:4
agree [7] - 51:5, 55:5, 60:7, 67:10, 69:9, 70:4, 78:10
agreed [3] - 69:1, 69:4, 71:19
agreeing [1] - 70:1
agreement [15] - 12:7, 17:2, 17:25, 18:10, 18:15, 31:7, 31:11, 32:4, 32:6, 32:8, 32:23, 54:7, 54:20, 70:12, 80:5
agreements [3] - 12:7, 18:13, 32:1
ahead [10] - 14:16, 20:20, 22:21, 23:20, 24:15, 27:3, 27:18, 32:17, 43:11, 50:24
alfalfa [2] - 47:25, 48:6
ALLETE [3] - 1:8, 11:3, 11:14
allow [2] - 20:22, 60:17
ALSO [1] - 2:16
amount [1] - 26:25
AND [2] - 80:1, 80:21
answer [14] - 7:3, 7:9, 14:16, 22:21, 23:20, 24:16, 26:17, 27:19, 32:18, 36:23, 43:11, 44:6, 67:25, 74:7
answered [1] - 76:21
answering [2] - 68:2, 68:5
answers [2] - 7:4, 77:23
anytime [2] - 38:10, 52:16
apologize [13] - 13:9, 19:6, 35:16, 41:22, 50:7, 55:10, 57:15, 66:4, 67:2, 67:23, 68:11, 68:19
appear [1] - 80:12
APPEARANCES [1] - 1:23
appearing [1] - 4:8
Appearing [4] - 2:7, 2:14, 2:17, 2:17
application [3] - 37:6, 37:10, 42:9
appreciate [2] - 30:22, 75:16
appropriate [1] - 8:1
approval [3] - 22:9, 22:13, 24:5
approved [7] - 22:2, 22:3, 22:7, 23:4, 23:17, 40:20, 51:12
April [4] - 61:1, 61:8, 66:10, 72:7
area [6] - 29:20, 41:9, 48:7, 59:17, 60:24, 75:17
Areas [1] - 42:14
areas [4] - 43:4, 43:9, 50:18, 51:10
arrow [1] - 30:3

AS [1] - 1:23
aspect [1] - 18:16
asserted [1] - 68:22
assigned [5] - 12:9, 12:13, 21:18, 39:7, 79:10
assignment [3] - 10:6, 10:7, 12:21
assimilate [1] - 9:11
assume [6] - 12:9, 21:24, 24:9, 56:24, 59:8, 75:21
assumes [2] - 14:15, 36:2
attached [5] - 35:8, 55:13, 58:2, 79:7, 80:15
attorney [2] - 80:18, 80:20
Attorneys [2] - 2:3, 2:11
attorneys [1] - 33:12
authorized [1] - 80:8
available [1] - 49:25
Avenue [1] - 2:4
avoidance [3] - 41:9, 43:4, 43:9
Avoidance [1] - 42:14
aware [5] - 21:24, 26:10, 26:12, 26:18, 40:15

B

backtrack [1] - 26:9
bad [1] - 31:18
barely [1] - 11:6
basic [2] - 6:8, 6:23
BE [1] - 80:4
became [1] - 21:24
become [1] - 40:15
began [5] - 12:13, 13:10, 13:11, 23:3, 46:14
begin [1] - 15:5
beginning [4] - 12:19, 13:12, 15:6, 45:21
begun [2] - 13:17, 46:25
behalf [3] - 4:8, 54:17, 80:14
Benjamin [2] - 65:11, 65:13
best [1] - 7:8
better [5] - 9:12, 9:13, 9:16, 55:16, 58:16
between [5] - 32:23, 45:20, 48:20, 73:13, 73:15
big [2] - 9:6, 29:4
bigger [2] - 29:6, 57:5
binding [1] - 32:14
Bison [15] - 8:9, 12:17, 13:24, 13:25, 14:1, 14:6, 16:13, 17:23, 38:16, 51:23, 57:17, 76:10, 76:22, 76:23, 76:25
bit [5] - 11:4, 13:2, 21:9, 29:2, 60:14
black [1] - 42:16
board [1] - 75:23
boarded [2] - 76:25, 77:1
bold [1] - 9:6
boring [1] - 73:6
bother [10] - 67:16, 67:19, 67:21, 68:16, 68:23, 69:10, 69:16, 69:19, 69:22, 70:3
bottom [4] - 8:4, 48:18, 57:9, 66:1
BOUGHEY [76] - 2:2, 4:13, 5:7, 5:12, 5:16, 5:22, 8:25, 9:4, 13:3, 13:8, 14:3, 14:4, 14:18, 14:20, 14:24, 22:20, 22:23, 23:2, 23:23, 24:15, 25:21, 26:1, 26:20, 27:7, 27:22, 30:21, 30:24, 31:20, 31:23, 31:24, 32:21, 34:20, 34:24, 35:12, 35:14, 36:6, 36:11, 37:23, 38:10, 40:4, 40:6, 40:9, 41:13, 41:15, 41:17, 43:15, 44:5, 45:22, 45:25, 46:19, 49:7, 49:20, 50:4, 50:7, 50:12, 50:13, 53:8, 53:10, 55:9, 55:12, 65:25, 66:7, 68:2, 68:7, 68:9, 72:3, 72:5, 74:11, 74:15, 75:9, 75:16, 75:20, 77:15, 77:18, 77:23, 78:14
Boughey [4] - 2:3, 74:7, 76:6, 77:14
Boughey..... [1] - 3:5
Boughey..... [1] - 3:3
Box [1] - 2:4
Bradley [1] - 37:11
break [6] - 7:15, 40:2, 49:12, 50:9, 60:3, 68:11
briefly [3] - 47:15, 59:24, 66:18
bring [1] - 8:19
broken [1] - 14:6
brought [1] - 62:17
building [5] - 16:13, 17:11, 17:23, 51:24, 57:17
BURLEIGH [1] - 80:3
BY [3] - 5:22, 76:4, 77:18
Byron [1] - 2:10

C

calmly [1] - 6:14
capacity [1] - 12:4
care [3] - 7:21, 14:7, 20:1
carefully [3] - 6:14, 6:19, 6:25
Case [1] - 1:7
case [3] - 6:11, 6:15, 9:21
cattle [14] - 19:14, 19:18, 19:19, 19:21, 20:3, 62:12, 62:14, 62:20, 62:24, 63:1, 63:3, 63:4, 63:11, 68:21
center [3] - 29:21, 29:23, 58:19
certain [1] - 55:14
certainly [3] - 5:24, 12:16, 64:22
CERTIFICATE [4] - 3:7, 3:8, 79:1, 80:1
CERTIFY [1] - 79:6
chance [2] - 9:24, 49:12
change [2] - 41:21, 79:10
changes [2] - 79:8, 80:12
charge [3] - 39:18, 76:13, 76:24
check [3] - 21:11, 25:1, 50:17
checking [1] - 20:3
chief [1] - 37:12
chronological [3] - 9:12, 9:14, 16:15
circle [1] - 58:23
circumstances [1] - 8:1
claims [1] - 64:15
clear [10] - 7:4, 14:3, 38:9, 45:19, 56:20, 65:12, 67:3, 77:11, 77:12
clearer [1] - 76:2
clients [1] - 74:7
close [13] - 22:15, 23:6, 29:18, 29:20, 30:6, 40:22, 43:19, 43:24, 44:11, 63:16, 70:25, 71:4, 71:15
closed [1] - 53:3
closer [1] - 71:6
college [1] - 28:11
coming [1] - 52:24
commencing [1] - 4:7
comment [3] - 64:3, 64:5, 68:25
comments [1] - 22:17
Commission [2] - 37:6, 80:24
COMMISSION [1] - 1:3
company [14] - 11:2, 11:13, 11:15, 11:17, 12:5, 12:14, 23:11, 23:18, 24:1, 33:16, 51:3, 54:3, 54:17, 77:3
COMPLAINANTS [1] - 2:6
Complainants/Petitioners [1] - 1:6
complaint [2] - 48:15, 61:25
completed [2] - 27:12, 27:14
concern [8] - 28:6, 41:4, 43:24, 46:2, 64:19, 64:25, 65:6, 65:16
concerned [4] - 30:1, 30:18, 40:21, 58:11
concerns [10] - 17:16, 22:15, 23:5, 40:11, 40:12, 44:9, 45:14, 52:4, 63:15, 64:12
Concluded [1] - 78:16
concludes [1] - 78:14
conclusion [2] - 26:16, 32:17
conducted [1] - 80:14
confirm [4] - 5:4, 64:17, 64:23, 65:13
confirmation [1] - 65:4
confirms [1] - 5:6
confused [3] - 13:25, 37:25, 38:15
confusing [1] - 45:23
confusion [1] - 53:25
conjunction [1] - 59:3
constructed [2] - 28:13, 74:2
construction [5] - 19:21, 28:4, 30:11, 59:18, 59:21
contact [13] - 15:15, 16:7, 16:11, 16:16, 16:19, 17:9, 17:19, 21:2, 42:22, 59:24, 60:11, 61:18, 61:20
contacted [2] - 60:14, 60:20
contacts [3] - 15:19, 45:11, 45:12
contain [2] - 80:15, 80:16
contest [2] - 42:10, 61:8
continue [2] - 7:24, 8:6
CONTINUING [32] - 9:4, 13:8, 14:4, 14:18, 14:24, 23:2, 23:23, 24:15, 26:1, 26:20, 27:7, 27:22, 30:24, 31:24, 32:21, 34:24, 35:14, 36:11, 38:10, 40:9, 41:17, 43:15, 44:5, 45:25, 46:19, 50:13, 53:10, 55:12, 66:7, 68:9, 72:5, 74:15
contradicts [1] - 73:6
conversation [6] - 16:25, 19:10, 19:12, 20:21, 20:25, 47:22
conversations [7] - 15:15, 15:19, 21:12, 22:8, 22:12, 47:16, 51:14
corner [3] - 31:6, 55:22, 58:18
coronavirus [1] - 4:18
correct [51] - 12:10, 15:2, 19:7, 25:7, 30:5, 30:13, 32:15, 32:25, 37:3, 39:4, 39:20, 39:23, 44:2, 44:7, 44:15, 44:21, 44:22, 44:23, 45:5, 45:6, 45:8, 45:9, 54:19, 55:19, 55:20, 56:4, 56:14, 56:18, 56:22, 56:23, 57:2, 57:3, 57:12, 57:13, 58:12, 58:13, 58:21, 58:24, 58:25, 59:11, 59:12, 59:14, 59:15, 60:8, 65:14, 70:22, 70:24, 76:20, 77:9, 79:12, 80:16
correction [2] - 79:9, 79:11
corrections [3] - 78:6, 79:8,

80:12
counsel [25] - 4:8, 5:4, 5:5, 14:20, 25:21, 30:22, 34:20, 35:12, 36:7, 37:23, 49:9, 49:10, 49:14, 53:8, 54:14, 55:10, 65:25, 66:6, 68:8, 72:3, 74:12, 75:9, 75:16, 80:18, 80:20
County [3] - 35:9, 35:10, 80:6
COUNTY [1] - 80:3
couple [5] - 5:8, 6:22, 25:3, 46:11, 65:18
couple-page [1] - 25:3
course [1] - 35:18
Court [1] - 80:24
court [3] - 4:23, 7:11, 78:5
COURT [2] - 3:8, 80:1
cows [1] - 44:25
crane [12] - 20:9, 20:18, 20:22, 45:4, 47:10, 47:12, 51:5, 59:23, 59:25, 60:1, 60:3, 60:7
create [1] - 42:23
created [1] - 42:24
creation [3] - 41:8, 42:12, 42:19
crop [4] - 21:4, 21:11, 45:7, 47:13
curious [1] - 15:25
cursed [1] - 64:2
cute [1] - 6:17
cutting [2] - 13:2, 31:18

D

D.J [1] - 2:9
DAKOTA [2] - 1:2, 80:2
Dakota [2] - 2:5, 4:6
damage [1] - 21:11
damages [3] - 21:4, 45:7, 47:13
date [12] - 10:10, 18:6, 21:20, 32:5, 39:13, 45:20, 53:13, 57:9, 61:6, 61:8, 61:9
dated [1] - 65:21
Dated [1] - 79:15
dates [2] - 10:11, 34:18
deal [2] - 21:19, 47:2
dealing [4] - 11:17, 39:19, 58:16, 76:13
dealings [1] - 33:15
Deanna [1] - 1:5
DEANNA [1] - 2:17
December [2] - 51:18, 56:2
decision [2] - 60:17, 66:5
defined [2] - 13:23, 76:10
definition [1] - 76:5
DEPONENT [1] - 79:1
deponent [1] - 79:4
DEPONENT..... [1] - 3:7
DEPOSITION [2] - 1:14, 3:2
Deposition [1] - 4:1
deposition [14] - 6:5, 6:10, 6:24, 78:4, 78:9, 78:15, 79:5, 79:13, 80:5, 80:7, 80:10, 80:12, 80:13, 80:19
depositions [1] - 74:5
describe [5] - 12:3, 17:12, 47:15, 51:20, 63:7
described [5] - 11:22, 31:1, 47:4, 48:11, 77:21
describes [2] - 36:25, 66:9
description [7] - 25:14, 35:22, 36:1, 36:14, 36:16, 36:25, 55:4
designation [1] - 11:17
detail [1] - 51:22
details [1] - 49:2
determination [1] - 23:17
determine [1] - 25:7
development [1] - 36:18
different [4] - 38:4, 62:12, 62:19, 67:10
differently [1] - 67:11
direction [1] - 62:18
directly [2] - 58:22, 62:25
disabled [1] - 8:22
disagree [2] - 67:10, 72:9
discovered [1] - 19:17
discovery [2] - 25:19, 25:23
discuss [7] - 10:19, 20:15, 25:23, 26:22, 28:5, 39:1, 52:2
discussed [3] - 17:13, 40:12, 47:21
discussing [2] - 26:8, 39:3
Discussion [1] - 31:22
discussion [12] - 18:18, 18:20, 47:19, 48:6, 58:1, 62:15, 62:22, 63:14, 63:24, 64:5, 69:14, 69:16
discussions [30] - 16:11, 17:3, 18:16, 21:12, 22:17, 23:9, 44:20, 46:7, 47:4, 47:5, 48:5, 48:10, 49:3, 51:1, 51:4, 51:16, 51:21, 52:7, 52:11, 52:16, 57:18, 57:21, 59:22, 63:8, 66:2, 67:17, 68:14, 68:17, 68:21, 71:13
dispute [2] - 72:20, 72:25
distance [1] - 72:20
distinction [1] - 77:16
division [1] - 1:7
DO [1] - 79:6
document [27] - 14:2, 14:9, 14:10, 18:6, 25:22, 29:1, 29:16, 34:16, 35:5, 35:8, 35:16, 35:22, 36:5, 36:9, 36:20, 36:21, 38:6, 52:23, 53:6, 53:11, 53:24, 54:5, 54:18, 55:6, 55:13, 60:22, 66:8
documentation [2] - 24:22, 24:24
documents [21] - 14:21, 28:17, 30:16, 30:20, 32:1, 32:14, 33:11, 34:19, 34:21, 35:24, 36:13, 37:16, 46:12, 50:21, 50:22, 51:24, 52:13, 55:25, 59:4, 65:19
done [8] - 4:19, 6:21, 9:25, 24:13, 44:18, 66:22, 67:5, 75:22
dot [1] - 33:7
dots [2] - 42:15, 42:16
double [1] - 50:17
double-check [1] - 50:17
down [17] - 7:11, 14:6, 30:8, 33:3, 33:13, 34:25, 35:7, 35:16, 53:15, 55:10, 55:11, 57:24, 59:1, 60:3, 66:1, 66:11, 66:24
draft [1] - 78:4
drawing [3] - 52:13, 59:5, 59:14
drink [1] - 40:3
drive [1] - 60:4
Duh [1] - 5:12
duly [3] - 5:19, 79:11, 80:8
during [10] - 6:24, 10:16, 13:20, 14:10, 14:14, 23:16, 46:21, 59:17, 59:21, 74:5
duties [3] - 11:23, 43:1, 43:7

E

early [3] - 35:20, 75:13, 77:2
easement [20] - 12:7, 17:2, 17:25, 18:10, 18:13, 18:15, 30:16, 30:20, 30:22, 31:2, 31:5, 37:2, 51:2, 51:15, 52:18, 54:7, 54:9, 54:20, 55:24, 56:7
easements [4] - 54:25, 55:25, 57:7, 57:21
easier [1] - 6:1
east [2] - 29:22, 63:2
east-west [1] - 63:2
edits [1] - 78:6
effect [1] - 70:6
efforts [1] - 77:6
eight [1] - 50:9
eight-minute [1] - 50:9
either [10] - 7:6, 15:15, 15:21, 16:17, 16:18, 21:6, 37:2, 59:14, 65:12, 71:23
employed [2] - 80:18, 80:20
employee [1] - 80:19
enable [1] - 8:24
end [4] - 12:18, 13:12, 15:6, 31:19
ended [2] - 29:18, 58:23
entitled [1] - 4:2
events [1] - 47:23
eventually [1] - 48:19
evidence [2] - 14:16, 36:3
exact [2] - 70:15, 73:18
EXAMINATION [3] - 5:21, 76:3, 77:17
Examination [3] - 3:3, 3:4, 3:5
examination [3] - 4:3, 79:13, 80:14
examined [1] - 5:19
excellent [1] - 53:23
excerpted [1] - 36:3
excluding [1] - 45:19
Exclusion [1] - 42:13
exclusion [2] - 43:3, 43:9
executed [1] - 32:1
exercise [1] - 78:8
exercised [4] - 32:9, 32:12, 51:3, 80:6
exercising [1] - 51:15
exhibit [10] - 25:18, 33:25, 35:25, 36:21, 41:9, 41:18, 42:13, 42:19, 42:23, 42:24
Exhibit [8] - 35:21, 36:20, 36:22, 36:25, 41:8, 42:13, 55:3, 58:2
exhibits [1] - 42:8
exist [1] - 24:25
expires [1] - 80:24
extent [2] - 26:15, 32:16

F

facing [1] - 63:3
fact [1] - 19:18
facts [6] - 6:11, 6:15, 6:16, 6:20, 14:15, 36:3
fair [11] - 22:2, 24:13, 26:25, 28:15, 28:19, 29:23, 30:10, 32:13, 34:1, 58:8, 74:9
fall [1] - 51:17
familiar [1] - 23:24
fantastic [7] - 5:16, 8:16, 9:10, 10:4, 11:20, 28:25, 67:7
farm [1] - 76:14
fault [1] - 13:6
feet [5] - 71:5, 71:8, 72:18, 72:21, 73:17
fence [3] - 47:20, 63:12,

67:22
fences [2] - 17:15, 47:20
fencing [1] - 69:6
few [1] - 17:21
field [1] - 47:25
figure [4] - 7:23, 14:22, 42:1, 59:19
file [1] - 65:20
filed [1] - 62:1
filled [1] - 57:8
final [1] - 72:12
financially [1] - 80:20
fine [7] - 4:21, 4:22, 7:18, 14:19, 49:15, 52:21, 73:4
finished [2] - 7:9, 67:6
Firm [1] - 2:3
first [16] - 4:15, 4:16, 4:22, 5:19, 6:24, 10:14, 10:21, 15:14, 16:16, 16:19, 18:12, 20:17, 34:19, 45:17, 72:16, 72:20
First [1] - 2:4
five [6] - 5:13, 7:19, 16:1, 21:16, 29:16, 45:11
flexibility [2] - 23:11, 23:15
flicker [3] - 73:8, 73:20
focus [3] - 21:17, 38:19, 62:6
follow [3] - 75:25, 77:14, 77:15
follow-up [3] - 75:25, 77:14, 77:15
following [4] - 4:3, 4:11, 19:22, 79:9
follows [1] - 5:20
footage [2] - 72:22, 73:18
FOR [2] - 2:6, 2:13
foregoing [3] - 79:5, 79:7, 80:15
forgot [1] - 8:24
form [6] - 22:19, 24:14, 30:19, 43:10, 44:4, 46:18
forth [2] - 79:9, 79:10
forward [5] - 45:13, 46:1, 47:5, 47:18, 77:5
foundation [1] - 23:19
four [7] - 7:14, 21:16, 38:16, 38:19, 39:1, 45:10, 62:11
fourth [1] - 19:5
frame [2] - 38:5, 44:17
Frame [1] - 44:13
Fredrikson [1] - 2:10
Friday [9] - 51:7, 61:1, 61:11, 66:11, 68:13, 68:20, 69:13, 69:21, 71:20
front [1] - 4:24
fulfill [1] - 12:4
fulfilling [1] - 11:24
full [2] - 79:11, 80:15
FURTHER [1] - 77:17

G

gap [1] - 77:12
gate [2] - 62:12, 62:14
generally [2] - 11:23, 12:3
generic [1] - 46:6
given [4] - 43:18, 43:22, 76:5, 79:13
Goddammit [1] - 70:11
great [3] - 50:3, 50:6, 53:17
Gregory [2] - 34:5, 34:9
ground [2] - 5:9, 6:8
guard [7] - 62:21, 62:24, 63:2, 63:3, 63:4, 63:11, 68:22
guess [8] - 4:16, 5:13, 10:21, 15:20, 28:16, 44:25, 54:15, 69:8
guys [1] - 25:25

H

half [2] - 9:23, 58:6
HAND [1] - 80:21
hand [3] - 6:12, 10:18, 49:23
handles [1] - 59:16
hang [1] - 8:23
head [2] - 7:5, 22:6
hear [7] - 11:6, 11:7, 11:9, 13:11, 31:16, 50:14, 69:20
heard [2] - 22:3, 22:7
hearing [18] - 19:2, 19:3, 21:10, 21:20, 21:21, 21:25, 22:9, 39:12, 40:17, 42:7, 42:8, 44:14, 44:15, 44:16, 44:19, 44:20, 45:20
heated [1] - 63:25
held [1] - 19:3
helped [1] - 54:6
HEREBY [1] - 79:6
HEREIN [1] - 1:23
herein [1] - 80:5
hereinbefore [1] - 4:9
hereto [1] - 80:20
highlight [4] - 66:18, 67:8, 72:11
hit [2] - 8:21, 53:4
hmm [1] - 66:14
hmms [1] - 7:5
hold [1] - 37:20
home [2] - 28:6, 71:1
hope [3] - 53:6, 72:4, 75:25
hopefully [1] - 10:17
hoping [1] - 53:18
host [1] - 8:21
hot [1] - 13:5
hour [2] - 9:23, 49:8
hours [1] - 5:13
house [13] - 16:5, 28:10, 30:17, 31:1, 63:21, 63:23, 64:13, 71:7, 71:11, 71:14, 71:15, 71:21, 72:23

I

idea [6] - 16:3, 16:19, 20:11, 21:13, 58:16, 73:2
II [2] - 11:1, 11:12
immediately [3] - 7:20, 15:8, 62:21
importantly [1] - 11:7
Inc [1] - 1:8
incident [1] - 47:20
include [4] - 25:16, 36:13, 36:16, 58:9
included [1] - 59:5
includes [1] - 7:16
including [2] - 30:12, 62:12
indeed [3] - 64:18, 64:24, 65:5
indicated [6] - 4:9, 52:8, 52:18, 52:19, 79:14, 80:15
indication [3] - 22:14, 40:20, 41:3
indiscernible [2] - 12:25, 31:14
inform [2] - 75:3, 75:6
information [11] - 9:12, 17:16, 33:19, 43:3, 43:8, 43:18, 43:20, 43:22, 44:12, 73:5, 73:25
informed [2] - 74:21, 75:1
informing [1] - 52:17
input [2] - 41:8, 42:19
inquiry [2] - 60:24, 75:17
inspire [1] - 76:1
instead [3] - 38:24, 60:6, 62:6
instruction [1] - 74:6
interaction [1] - 48:12
interest [1] - 34:10
interested [2] - 62:3, 80:20
investigation [1] - 20:2
involve [3] - 35:9, 49:3, 49:4
involved [5] - 10:13, 10:19, 52:14, 57:6, 77:20
Isaacson [7] - 15:12, 39:17, 64:3, 65:11, 65:13, 76:18, 77:6
issue [13] - 12:9, 20:3, 22:18, 27:8, 31:1, 36:15, 37:1, 48:19, 48:24, 60:11, 60:13, 62:10, 71:17
issues [11] - 25:23, 39:9, 40:14, 40:18, 48:2, 48:8, 48:9, 62:4, 62:6, 78:7
IT [1] - 80:4
it'll [1] - 7:15
item [3] - 21:11, 25:24, 35:18
itself [3] - 34:13, 36:20, 44:14

J

January [1] - 77:3
Jerry [4] - 61:17, 65:21, 71:23, 72:7
John [1] - 71:23
judge [1] - 52:20
judges [1] - 9:11
jump [2] - 10:17, 49:19
jumped [1] - 45:18
jumping [1] - 49:19
June [4] - 14:25, 34:23, 39:8, 39:12
juries [1] - 9:11

K

KEITH [1] - 2:17
Keith [4] - 1:5, 33:6, 70:9, 70:14
KESSLER [2] - 2:17, 2:17
Kessler [16] - 1:5, 19:13, 26:3, 30:1, 52:1, 52:2, 56:18, 63:11, 64:2, 64:7, 64:15, 64:17, 64:23, 65:14, 70:16, 71:16
Kessler's [2] - 33:6, 72:25
Kesslers [88] - 5:3, 13:18, 14:7, 14:9, 14:13, 15:16, 15:21, 16:8, 16:12, 16:17, 16:18, 17:9, 17:20, 18:16, 19:15, 19:16, 19:24, 20:7, 21:3, 21:13, 21:19, 22:8, 22:13, 22:17, 23:5, 23:10, 26:3, 26:4, 26:22, 26:24, 27:15, 27:23, 28:5, 28:9, 28:17, 29:9, 30:15, 31:8, 32:2, 32:23, 35:1, 35:4, 40:11, 40:17, 40:21, 41:4, 43:23, 44:21, 45:13, 46:1, 46:7, 47:6, 47:17, 48:5, 48:10, 48:13, 51:1, 51:14, 51:17, 51:23, 52:8, 52:17, 52:19, 54:10, 54:24, 57:22, 58:4, 59:3, 59:14, 59:23, 60:7, 60:11, 64:25, 65:16, 66:8, 66:24, 67:12, 67:18, 68:14, 68:22, 69:14, 69:20, 70:2, 71:1, 71:10, 74:21, 75:1, 77:19
Kesslers' [11] - 27:10, 27:25, 30:12, 31:4, 44:8, 53:24, 55:18, 61:2, 63:7, 69:3, 72:19

kind [2] - 51:8, 52:2
knowledge [7] - 6:16, 14:23, 25:18, 33:21, 33:23, 55:23, 74:17
KNOWN [1] - 80:4
knows [1] - 8:10

L

land [19] - 18:17, 20:9, 30:13, 33:21, 39:15, 45:4, 56:1, 57:1, 58:3, 67:16, 67:19, 67:21, 68:16, 68:23, 69:10, 69:16, 69:22, 70:3, 76:14
landowners [14] - 24:11, 24:19, 24:22, 25:3, 25:7, 26:2, 36:13, 37:16, 39:8, 39:10, 39:15, 39:19, 47:2, 47:16
large [1] - 65:23
last [3] - 8:7, 48:4, 75:17
late [13] - 15:17, 16:21, 17:10, 20:12, 21:6, 23:4, 45:4, 45:7, 47:10, 47:13, 51:17, 77:2
Law [3] - 2:3, 2:3, 2:11
lawyer [6] - 7:17, 7:19, 7:24, 8:3, 8:21, 9:22
leave [2] - 10:10, 49:24
left [3] - 30:7, 58:18, 77:12
legal [9] - 25:14, 26:16, 32:17, 35:21, 36:1, 36:14, 36:16, 36:25, 55:4
Lein [4] - 61:17, 65:21, 72:7
level [1] - 7:8
life [1] - 52:25
limit [1] - 62:8
limited [1] - 76:22
line [4] - 8:4, 48:18, 63:13, 67:22
list [3] - 14:25, 24:19, 25:3
listed [1] - 33:24
listen [2] - 6:25, 7:12
listing [1] - 58:9
lists [2] - 31:12, 42:17
literally [1] - 39:4
live [1] - 71:25
living [2] - 73:2, 74:17
load [1] - 60:3
locate [1] - 54:13
located [8] - 30:18, 31:2, 42:16, 58:11, 58:24, 63:21, 71:14, 72:18
location [7] - 23:12, 23:25, 44:10, 45:15, 46:3, 63:20, 72:1
locations [3] - 16:10, 24:6, 24:8
logistical [1] - 4:15
look [7] - 9:24, 27:4, 29:16, 29:21, 33:18, 41:12, 52:14
looked [2] - 35:23, 50:20
looking [12] - 24:11, 30:7, 33:5, 34:13, 34:22, 35:17, 36:17, 55:6, 57:4, 58:14, 63:2, 66:6
looks [1] - 57:10
lord [1] - 8:10
loud [2] - 7:4, 67:2
lunch [1] - 75:13
Lynn [11] - 5:10, 5:25, 9:3, 13:1, 38:3, 41:12, 45:21, 49:16, 67:25, 75:10, 75:25
LYNN [1] - 2:2

M

MAHLBERG [34] - 2:9, 5:5, 13:21, 14:15, 22:19, 22:21, 23:19, 24:14, 26:15, 27:2, 27:17, 30:19, 32:16, 36:2, 37:20, 38:2, 41:11, 41:14, 43:10, 44:4, 45:16, 46:18, 49:15, 50:3, 67:25, 68:5, 74:3, 75:10, 75:19, 75:24, 76:4, 77:10, 78:2, 78:12
Mahlberg..... [1] - 3:4
mail [1] - 51:25
major [2] - 9:20, 60:13
Mandan [1] - 2:5
map [4] - 24:7, 24:12, 27:5, 30:4
maps [1] - 55:14
March [1] - 65:21
Mary [3] - 33:14, 33:15
matter [3] - 4:15, 5:1, 7:16
mean [2] - 45:23, 58:6
meaning [1] - 47:17
means [1] - 7:4
meet [2] - 19:9, 48:13
meeting [15] - 17:13, 17:24, 18:7, 18:14, 51:7, 61:1, 61:2, 61:6, 61:14, 61:15, 61:19, 61:23, 66:5, 68:13, 72:8
memo [3] - 72:6, 72:17, 74:12
memorandum [5] - 54:25, 57:7, 57:20, 65:20, 67:12
mention [1] - 64:8
mentioned [10] - 8:14, 44:19, 47:7, 47:8, 47:9, 47:13, 48:4, 49:4, 70:8, 75:18
Mercer [2] - 35:9, 35:10
met [4] - 16:1, 18:12, 18:21, 19:6
methodically [1] - 6:19
middle [1] - 34:7
might [9] - 7:22, 21:10, 24:20, 26:21, 33:24, 41:6, 43:8, 43:18, 56:13
mind [1] - 48:1
mine [1] - 41:15
Minneapolis [1] - 2:12
Minnesota [29] - 1:7, 2:12, 5:5, 8:9, 10:7, 11:16, 31:8, 32:2, 32:23, 33:25, 39:7, 39:9, 39:14, 40:16, 41:3, 43:2, 43:7, 43:21, 44:1, 61:21, 64:11, 64:18, 64:19, 64:24, 65:1, 65:4, 65:5, 65:8, 65:15
minute [2] - 27:8, 50:9
minutes [1] - 49:8
misstates [1] - 27:17
mistake [1] - 67:3
mix [1] - 11:8
mm-hmms [1] - 7:5
MOLLIE [1] - 2:10
moment [14] - 9:22, 18:25, 34:16, 36:24, 41:16, 41:21, 41:24, 44:18, 46:12, 49:4, 52:15, 52:24, 59:20, 72:11
Monroe [6] - 4:16, 5:8, 5:23, 10:24, 38:12, 76:5
MONROE [6] - 1:14, 3:2, 4:2, 5:18, 79:4, 79:20
months [1] - 17:21
most [3] - 9:11, 9:14, 29:10
moving [1] - 63:19
MP407 [1] - 42:5
MR [111] - 2:2, 2:9, 2:17, 4:13, 5:5, 5:7, 5:12, 5:16, 5:22, 8:25, 9:4, 13:3, 13:8, 13:21, 14:3, 14:4, 14:15, 14:18, 14:20, 14:24, 22:19, 22:20, 22:21, 22:23, 23:2, 23:19, 23:23, 24:14, 24:15, 25:21, 26:1, 26:15, 26:20, 27:2, 27:7, 27:17, 27:22, 30:19, 30:21, 30:24, 31:20, 31:23, 31:24, 32:16, 32:21, 34:20, 34:24, 35:12, 35:14, 36:2, 36:6, 36:11, 37:20, 37:23, 38:2, 38:10, 40:4, 40:6, 40:9, 41:11, 41:13, 41:14, 41:15, 41:17, 43:10, 43:15, 44:4, 44:5, 45:16, 45:22, 45:25, 46:18, 46:19, 49:7, 49:15, 49:20, 50:3, 50:4, 50:7, 50:12, 50:13, 53:8, 53:10, 55:9, 55:12, 65:25, 66:7, 67:25, 68:2, 68:5, 68:7, 68:9, 72:3, 72:5, 74:3, 74:11, 74:15, 75:9, 75:10, 75:16, 75:19, 75:20, 75:24, 76:4, 77:10, 77:15, 77:18, 77:23, 78:2, 78:12, 78:14
MS [2] - 2:10, 2:17
MY [1] - 80:21

N

name [2] - 10:23, 54:16
names [2] - 25:10, 29:5
narrow [1] - 57:24
near [8] - 26:6, 30:3, 57:1, 62:12, 73:9, 73:10, 74:23
nearby [1] - 64:13
necessary [1] - 28:18
need [27] - 5:8, 6:7, 6:22, 7:3, 7:7, 7:14, 7:20, 8:5, 9:18, 10:22, 11:4, 13:9, 25:4, 25:25, 29:6, 46:11, 49:22, 50:18, 51:14, 53:16, 59:24, 60:22, 67:2, 67:4, 75:4, 75:13
needing [1] - 51:1
negotiations [1] - 49:3
never [2] - 27:14, 69:18
new [1] - 8:18
next [25] - 10:17, 17:8, 17:19, 18:21, 19:5, 20:6, 21:2, 28:4, 35:18, 42:25, 44:17, 45:3, 53:25, 55:17, 55:21, 60:23, 60:24, 66:3, 69:1, 71:11, 71:18, 74:9, 74:20, 75:11, 75:22
nine [4] - 9:8, 9:20, 9:25, 50:9
noise [3] - 71:15, 73:9, 73:11
none [1] - 56:3
noon [1] - 75:14
normally [1] - 36:24
NORTH [2] - 1:2, 80:2
north [4] - 29:22, 58:6, 58:22, 59:8
North [2] - 2:5, 4:6
northeast [1] - 59:9
northwest [16] - 29:12, 30:17, 30:25, 31:3, 31:6, 31:9, 31:12, 31:25, 32:3, 32:14, 32:24, 56:16, 56:21, 58:9, 59:5, 63:20
Northwest [1] - 2:4
notarization [1] - 54:16
notarized [3] - 50:21, 54:21, 54:25
Notary [3] - 4:5, 80:6, 80:24
NOTARY [1] - 80:1
notary [1] - 57:11
notations [1] - 41:24
note [5] - 5:2, 25:21, 25:24, 33:10, 74:4
NOTED [1] - 1:23
noted [1] - 80:12

notes [3] - 33:11, 44:23, 80:16
nothing [4] - 41:19, 56:21, 75:20, 80:9
Notice [1] - 4:1
notice [4] - 55:3, 73:10, 73:20, 80:5
notification [2] - 19:23, 44:25
notified [1] - 19:20
notify [1] - 19:13
November [5] - 51:17, 53:14, 54:8, 56:2, 57:7
number [7] - 7:14, 7:19, 8:7, 29:16, 30:2, 30:4, 72:12
numbers [1] - 25:16

O

O&M [5] - 16:13, 17:10, 17:23, 51:23, 57:17
Oachs [1] - 37:11
oath [1] - 80:8
object [4] - 14:15, 22:19, 24:14, 74:3
objected [1] - 25:22
objection [14] - 7:21, 23:19, 26:15, 27:2, 27:17, 30:19, 32:16, 36:2, 41:11, 43:10, 44:4, 45:16, 46:18, 68:12
obligated [1] - 43:25
obligation [1] - 43:20
observe [1] - 71:10
obtain [1] - 31:2
obtaining [3] - 33:16, 35:4, 37:2
obviously [3] - 19:23, 25:9, 77:7
occupation [1] - 10:25
occupied [5] - 41:9, 42:17, 72:19, 74:1, 74:6
occupy [1] - 74:24
occupying [1] - 73:1
occur [2] - 17:22, 20:24
occurred [7] - 10:10, 17:24, 21:25, 22:10, 59:22, 66:10, 73:21
October [5] - 1:19, 4:7, 51:17, 56:1, 57:10
OF [10] - 1:2, 1:13, 1:14, 3:2, 3:7, 3:8, 79:1, 80:1, 80:2, 80:3
offers [2] - 48:14, 48:17
offhand [5] - 18:8, 32:7, 34:2, 60:21, 70:19
office [2] - 17:2, 80:7
officer [1] - 37:12
often [1] - 60:19
on-boarded [2] - 76:25, 77:1
on-site [2] - 34:12, 73:9
once [7] - 16:1, 46:16, 46:24, 51:12, 62:20, 64:23, 66:22
one [45] - 4:16, 7:13, 9:17, 15:4, 15:25, 16:2, 16:17, 16:18, 18:3, 19:9, 19:17, 21:15, 23:1, 25:24, 26:10, 33:11, 34:16, 34:19, 35:19, 36:3, 37:10, 40:18, 41:15, 41:16, 41:21, 41:23, 41:24, 42:8, 44:18, 48:4, 50:22, 52:15, 52:23, 53:5, 55:21, 59:19, 60:2, 60:23, 64:20, 69:11, 75:25
operating [1] - 37:12
opportunity [1] - 78:3
option [11] - 10:10, 12:6, 13:19, 31:11, 32:4, 32:8, 32:22, 51:2, 51:16, 53:5
oral [1] - 79:13
order [3] - 9:12, 9:14, 16:15
organized [1] - 9:19
overhear [1] - 71:23
overview [1] - 51:9
own [2] - 36:1, 72:13
owned [4] - 29:9, 29:10, 29:11, 59:10

P

P.A [1] - 2:10
P.O [1] - 2:4
pad [2] - 63:12, 69:7
page [22] - 25:3, 29:1, 33:3, 34:21, 34:22, 34:25, 35:1, 35:7, 35:13, 35:17, 36:3, 39:4, 53:8, 53:16, 53:23, 54:1, 55:13, 55:17, 66:3, 66:4, 72:6, 72:12
Page [1] - 3:2
pages [4] - 54:14, 55:3, 79:7, 80:15
paragraph [4] - 66:15, 66:16, 67:15, 72:12
paragraphs [1] - 66:22
parameters [1] - 6:8
part [11] - 9:11, 9:15, 24:2, 29:1, 36:4, 42:9, 43:13, 43:16, 52:10, 54:11, 56:6
participant [1] - 8:22
particular [4] - 9:21, 36:9, 54:5, 61:14
parties [7] - 4:9, 4:17, 4:19, 48:20, 80:15, 80:18, 80:20
past [1] - 55:3
pasture [4] - 19:14, 20:23, 45:1, 47:9
PATRICK [1] - 2:9
people [5] - 9:11, 49:18, 71:11, 71:24, 76:18
Period [1] - 44:19
period [9] - 10:16, 12:21, 12:23, 23:10, 38:22, 38:23, 38:24, 45:17
periods [2] - 14:5, 14:23
permission [6] - 33:16, 39:7, 39:10, 39:15, 49:9, 58:4
permissions [1] - 39:20
permit [1] - 20:9
person [13] - 4:20, 7:13, 15:22, 24:10, 28:16, 35:25, 42:23, 44:1, 45:14, 46:2, 49:24, 53:1, 54:6
personal [2] - 73:24, 74:17
personally [3] - 4:24, 12:20, 45:14
PETITIONERS [1] - 2:7
Phase [15] - 10:15, 13:14, 13:20, 13:25, 14:1, 14:11, 14:14, 14:25, 37:18, 37:21, 37:22, 37:23, 38:8, 39:6
phase [13] - 9:18, 10:2, 10:13, 10:17, 37:24, 38:4, 38:10, 38:11, 38:21, 59:18, 59:21, 76:22
phases [15] - 9:8, 9:20, 9:25, 10:5, 10:12, 10:19, 14:5, 38:1, 38:14, 38:16, 38:19, 38:20, 38:25, 39:2, 39:3
phone [18] - 15:21, 16:8, 16:23, 16:25, 19:10, 19:12, 20:14, 20:17, 20:19, 20:21, 20:25, 25:16, 44:24, 45:4, 45:14, 46:2, 47:9, 60:14
phrase [1] - 74:5
physical [1] - 25:14
place [6] - 16:20, 16:22, 20:13, 62:22, 79:14, 80:14
placed [4] - 22:6, 23:13, 23:18, 43:19
placement [4] - 62:7, 62:16, 63:15, 63:16
places [2] - 47:20, 62:12
plan [1] - 60:5
planned [1] - 28:10
planning [5] - 33:2, 43:14, 43:16, 74:24, 75:10
plans [1] - 52:3
planting [1] - 47:25
plat [2] - 28:22, 30:4
play [1] - 74:9
point [19] - 7:23, 10:5, 21:22, 22:1, 29:21, 29:23, 35:20, 43:23, 50:1, 52:8, 58:19, 62:15, 63:19, 64:17, 70:1, 70:5, 74:13, 76:2, 77:5
pointing [1] - 30:3
portion [7] - 29:10, 29:12, 29:17, 52:9, 56:8, 56:25, 73:22
portions [1] - 30:12
position [1] - 11:10
possibility [1] - 54:18
possible [2] - 36:17, 60:13
Power [28] - 1:7, 5:5, 8:9, 10:7, 11:16, 31:8, 32:2, 32:23, 33:25, 39:7, 39:9, 39:14, 40:16, 41:3, 43:3, 43:8, 43:21, 44:1, 61:21, 64:11, 64:18, 64:19, 64:24, 65:1, 65:4, 65:6, 65:8, 65:15
power [2] - 9:1, 80:7
precise [1] - 56:12
prepare [2] - 49:17, 78:5
prepared [1] - 66:8
PRESENT [1] - 2:16
present [1] - 19:1
pretty [1] - 6:23
previous [3] - 68:3, 68:4, 68:16
previously [8] - 18:3, 51:22, 65:1, 65:5, 65:15, 69:9, 70:2, 71:17
print [1] - 9:7
probable [1] - 24:6
problem [1] - 8:25
procedure [2] - 36:8, 36:12
proceed [5] - 7:25, 9:14, 28:19, 35:19, 52:9
proceedings [1] - 4:11
process [6] - 23:24, 24:3, 36:12, 43:14, 43:17, 74:2
procuring [1] - 12:6
Professional [2] - 4:4, 80:5
project [68] - 8:8, 8:10, 8:12, 10:8, 12:7, 12:8, 12:10, 12:13, 12:14, 12:17, 12:19, 13:10, 13:17, 13:20, 13:23, 13:24, 13:25, 14:7, 14:11, 14:13, 15:2, 15:5, 15:7, 18:17, 19:3, 21:18, 22:1, 22:3, 22:7, 22:13, 23:3, 24:5, 24:20, 24:23, 27:11, 27:14, 28:18, 30:11, 35:9, 37:7, 38:4, 38:17, 39:2, 39:16, 39:19, 40:20, 42:9, 46:15, 46:16, 46:22, 46:24, 47:7, 47:17, 51:13, 52:3, 52:6, 52:10, 54:7, 54:20, 74:1, 76:7, 76:10, 76:23, 76:25
projects [2] - 77:19, 77:20
pronouncing [1] - 34:5
proper [1] - 44:1
property [24] - 11:1, 11:11, 12:1, 20:10, 27:25, 28:19, 29:5, 31:4, 32:12, 33:6, 33:17, 33:21, 34:8, 36:14,

37:1, 44:8, 47:13, 52:5, 55:18, 60:8, 61:3, 63:7, 63:13, 69:19
proposed [2] - 24:7, 24:12
provide [3] - 42:19, 59:3, 78:6
provided [7] - 24:19, 25:19, 25:23, 33:12, 44:12, 51:25, 59:13
providing [1] - 30:15
proximity [3] - 46:8, 64:9, 64:12
PSC [8] - 19:2, 42:20, 51:12, 61:17, 62:1, 71:11, 71:24, 72:17
PU-20-194 [1] - 1:7
Public [4] - 4:5, 37:6, 80:6, 80:24
PUBLIC [2] - 1:3, 80:1
publish [1] - 41:12
publishing [1] - 41:21
purport [1] - 80:16
purpose [2] - 6:10, 61:23
purposes [1] - 75:11
Pursuant [1] - 4:1
pursuant [1] - 80:5
put [7] - 4:14, 4:20, 34:18, 36:4, 46:12, 49:20, 60:4
putting [1] - 57:1

Q

quarter [23] - 29:10, 30:17, 30:25, 31:3, 31:9, 31:13, 31:25, 32:3, 32:14, 32:24, 34:4, 34:7, 56:14, 56:16, 56:22, 58:5, 58:6, 58:7, 58:9, 58:18, 59:6, 59:9, 63:21
questioning [1] - 62:8
questions [14] - 6:15, 6:25, 7:3, 8:8, 22:25, 49:13, 49:22, 50:23, 52:4, 72:14, 76:1, 76:12, 76:15, 77:24
quick [2] - 51:9, 75:25
quickly [1] - 22:11
quite [2] - 11:9, 60:14

R

rain [1] - 47:23
raise [1] - 45:13
raised [2] - 27:15, 48:14
read [14] - 29:5, 29:7, 65:23, 66:12, 66:17, 66:21, 67:2, 67:4, 72:13, 78:4, 78:9, 78:12, 79:6, 80:11
reading [1] - 77:25
ready [3] - 5:13, 7:23, 60:23
real [1] - 46:6
realize [1] - 50:22
realized [1] - 13:4
really [2] - 9:6, 31:18
realm [1] - 24:20
reason [8] - 7:16, 42:10, 53:14, 61:8, 72:20, 72:24, 79:10, 80:12
reasons [2] - 21:23, 48:17
recalled [2] - 66:9, 70:8
Recessed [2] - 40:7, 50:10
reclaim [1] - 48:8
reclamation [3] - 48:9, 48:19, 62:4
reconvened [2] - 40:7, 50:10
record [21] - 4:12, 4:14, 4:15, 4:21, 5:2, 10:23, 13:5, 13:7, 28:25, 31:21, 31:22, 31:23, 33:10, 42:5, 50:8, 50:12, 66:3, 74:4, 76:2, 78:15
recorded [1] - 55:1
reduce [1] - 55:15
reference [11] - 26:5, 26:13, 29:8, 34:6, 34:22, 35:8, 36:14, 55:4, 55:5, 70:20, 74:21
referred [2] - 36:19, 45:17
referring [2] - 8:9, 72:7
refill [1] - 40:2
regard [4] - 8:7, 37:8, 43:3, 52:5
regarding [5] - 22:17, 47:9, 59:23, 59:25, 77:25
regards [26] - 11:23, 12:8, 15:7, 15:13, 19:3, 25:13, 26:1, 28:3, 30:25, 31:24, 32:11, 33:16, 35:4, 40:10, 42:12, 43:7, 43:8, 44:8, 54:5, 57:23, 57:24, 60:11, 62:10, 73:8, 73:19, 74:15
Registered [2] - 4:4, 80:5
regulations [1] - 26:11
Reister [2] - 65:11, 65:13
relate [5] - 6:11, 9:20, 14:5, 56:3, 56:4
related [2] - 56:21, 80:18
relates [6] - 14:6, 31:9, 38:11, 46:3, 58:3, 66:4
relating [23] - 10:8, 12:17, 19:11, 20:3, 27:9, 30:16, 31:2, 32:2, 39:9, 44:10, 44:25, 46:8, 47:6, 47:17, 48:24, 50:19, 56:1, 57:19, 60:25, 62:7, 63:14, 69:21
relation [1] - 15:2
relative [2] - 80:9, 80:19
relay [7] - 17:16, 23:11, 43:2, 43:20, 44:1, 44:9, 46:1
remember [21] - 6:17, 9:15, 16:24, 17:14, 52:11, 52:21, 54:8, 57:18, 57:21, 60:19, 63:24, 63:25, 64:4, 67:11, 68:21, 68:24, 69:16, 70:13, 70:15, 70:16, 70:17
Renewable [2] - 11:3, 11:14
repeat [8] - 12:15, 13:2, 23:21, 24:17, 27:20, 43:5, 64:20, 69:11
rephrase [9] - 7:1, 22:24, 23:24, 24:18, 45:22, 45:24, 67:24, 68:8, 74:14
replanting [1] - 47:25
reporter [3] - 4:23, 7:11, 78:5
Reporter [3] - 4:5, 80:5, 80:24
REPORTER [7] - 5:10, 8:23, 9:2, 13:1, 31:16, 50:6, 80:1
REPORTER..... [1] - 3:8
representatives [3] - 64:11, 64:18, 64:24
represented [1] - 36:4
representing [1] - 65:3
represents [1] - 34:9
request [2] - 25:22, 60:5
residence [23] - 26:14, 27:9, 28:6, 33:24, 34:6, 34:13, 42:18, 43:19, 43:25, 56:17, 56:18, 57:25, 58:10, 63:16, 71:2, 72:18, 73:1, 73:9, 73:14, 73:15, 73:17, 73:25
residences [6] - 22:16, 23:7, 26:5, 40:23, 41:10, 44:11
resolved [2] - 48:19, 48:25
Resources [2] - 11:3, 11:14
respective [2] - 4:8, 80:14
respond [1] - 69:3
Respondent [1] - 1:9
RESPONDENT [1] - 2:13
responding [1] - 19:18
response [2] - 76:17, 76:21
responsibilities [3] - 11:23, 43:2, 43:17
responsibility [1] - 43:6
responsible [2] - 39:14, 76:18
restate [1] - 67:24
restrictions [2] - 32:11, 32:24
result [1] - 20:24
resulted [1] - 74:6
returns [1] - 28:11
review [1] - 9:25
right-of-way [9] - 11:1, 11:11, 11:25, 12:1, 24:10, 24:21, 35:24, 74:22, 74:25
right-of-ways [2] - 15:14, 37:15
rights [2] - 37:2, 76:14
roads [1] - 17:15
rocks [1] - 47:21
role [6] - 11:24, 15:2, 37:7, 37:15, 46:23, 46:24
roles [1] - 12:4
rough [1] - 15:20
route [1] - 67:22
rules [2] - 5:9, 6:8
run [2] - 19:25, 63:12

S

save [2] - 10:18, 47:8
SCOTT [6] - 1:14, 3:2, 4:2, 5:18, 79:4, 79:20
Scott [25] - 5:24, 9:7, 10:24, 13:8, 13:22, 14:12, 14:16, 22:21, 23:20, 26:16, 27:3, 27:19, 30:24, 32:17, 41:17, 43:11, 50:13, 53:11, 67:23, 68:10, 69:1, 69:4, 71:18, 77:13, 78:2
screen [8] - 8:19, 9:8, 28:23, 36:4, 38:7, 41:19, 42:3, 53:4
Screen [1] - 8:21
scroll [5] - 34:25, 53:15, 53:18, 55:11, 66:1
scrolling [5] - 33:3, 33:13, 55:9, 59:1, 66:11
SEAL [1] - 80:21
second [6] - 7:3, 8:23, 18:9, 33:3, 67:14
secondly [2] - 4:22, 54:3
section [3] - 28:3, 29:12, 62:23
Section [69] - 26:25, 27:5, 27:9, 27:10, 27:14, 27:24, 28:5, 28:7, 29:2, 29:4, 29:9, 29:17, 30:4, 30:8, 30:12, 30:13, 30:17, 30:25, 31:3, 31:6, 31:9, 31:13, 31:25, 32:3, 32:15, 32:25, 33:5, 33:13, 34:3, 34:4, 34:7, 35:9, 35:10, 45:15, 46:3, 46:8, 46:9, 55:4, 55:6, 55:17, 55:21, 56:3, 56:4, 56:6, 56:8, 56:12, 56:14, 56:16, 56:22, 57:25, 58:5, 58:7, 58:8, 58:10, 58:17, 58:19, 59:2, 59:6, 59:9, 62:6, 63:17, 63:21, 70:21, 73:22, 74:16
secure [1] - 36:17
see [32] - 6:13, 9:7, 20:21, 28:22, 30:8, 33:5, 33:7, 33:13, 34:18, 34:25, 35:1, 35:18, 41:18, 42:2, 42:13,

42:14, 49:13, 50:21, 52:14, 53:11, 53:18, 53:21, 55:15, 55:16, 55:22, 57:6, 58:3, 58:5, 60:16, 65:20, 66:18
segment [1] - 38:21
selected [1] - 38:25
selecting [1] - 23:25
selection [1] - 24:2
sense [2] - 9:15, 10:5
sent [2] - 8:20, 54:3
sentence [7] - 67:9, 67:14, 69:1, 71:18, 72:16, 74:20
September [12] - 15:1, 19:2, 21:20, 22:9, 22:10, 39:13, 40:17, 45:12, 45:18, 46:1, 46:14, 46:25
SERVICE [1] - 1:3
Service [1] - 37:6
set [4] - 17:1, 61:16, 72:23, 79:9
setback [2] - 26:13, 26:19
setting [2] - 17:4, 79:10
settlement [3] - 48:14, 48:17, 49:3
seven [1] - 8:11
several [3] - 21:22, 64:8, 64:11
shadow [3] - 73:8, 73:20
Share [1] - 8:21
share [4] - 13:15, 42:1, 52:23, 53:5
sharing [1] - 38:6
sheets [1] - 79:9
short [1] - 77:15
shorthand [1] - 80:16
show [4] - 8:20, 13:14, 55:14, 65:18
showed [2] - 35:21, 53:24
showing [3] - 53:7, 66:2, 72:5
shown [1] - 42:8
shows [2] - 9:8, 41:9
side [2] - 59:8, 73:14
sides [1] - 6:10
sign [14] - 13:6, 20:8, 28:17, 35:24, 50:1, 51:2, 51:15, 52:18, 54:3, 56:21, 57:15, 59:4, 78:9, 78:13
signature [7] - 35:2, 35:4, 35:17, 35:19, 53:16, 53:24, 57:11
signed [26] - 13:18, 14:9, 14:10, 14:12, 18:6, 18:13, 24:22, 31:8, 35:1, 35:23, 36:13, 37:10, 45:3, 47:11, 54:2, 54:10, 54:16, 54:24, 55:25, 56:1, 56:7, 56:13, 57:8, 57:10, 57:15, 79:11
signing [7] - 10:9, 13:19, 17:25, 18:1, 20:15, 20:16, 78:1
simple [1] - 25:2
single [1] - 53:4
site [8] - 34:12, 60:2, 62:19, 71:14, 71:21, 73:9, 73:21
siting [1] - 33:2
six [2] - 6:22, 8:7
Sixth [1] - 2:12
slightly [2] - 29:22
slowly [1] - 16:2
smaller [1] - 58:15
SMITH [2] - 2:10, 80:23
Smith [2] - 4:4, 80:4
someone [1] - 77:7
sometime [9] - 13:18, 18:23, 19:6, 22:10, 23:4, 45:4, 46:14, 46:25, 51:12
somewhere [2] - 11:8, 30:3
son [4] - 28:11, 72:19, 72:25, 74:23
sorry [13] - 11:25, 13:1, 13:22, 20:20, 31:15, 31:16, 38:20, 52:25, 67:1, 67:5, 75:7
sort [2] - 15:1, 78:6
sound [1] - 50:2
sounds [1] - 50:3
source [1] - 40:21
south [6] - 56:9, 62:21, 62:25, 63:7, 63:20, 69:12
South [1] - 2:12
southeast [9] - 29:9, 29:11, 34:4, 34:7, 56:14, 58:5, 58:6, 58:7, 58:18
specific [1] - 6:15
specifically [2] - 31:12, 76:9
specified [2] - 80:9, 80:14
specify [1] - 15:23
spend [1] - 74:9
spending [1] - 62:3
spot [1] - 13:5
spreadsheet [2] - 25:5, 25:9
square [1] - 15:4
ss [1] - 80:3
stages [1] - 35:20
standard [2] - 36:7, 36:11
start [5] - 10:1, 12:16, 16:3, 51:10, 68:8
started [7] - 10:8, 12:18, 14:11, 46:16, 48:13, 52:2, 77:3
starts [3] - 7:19, 8:4, 66:12
state [7] - 4:25, 10:22, 13:9, 28:15, 30:10, 36:10, 58:8
State [2] - 4:5, 80:6
STATE [2] - 1:2, 80:2
statement [13] - 22:2, 24:13, 28:20, 29:23, 32:13, 34:1, 64:23, 65:14, 69:4, 69:20, 70:14, 70:15, 71:20
statements [1] - 71:24
stating [2] - 64:7, 74:21
statutory [1] - 26:10
Stephanie [6] - 4:4, 5:17, 11:7, 31:20, 50:5, 80:4
STEPHANIE [1] - 80:23
steps [2] - 19:22, 71:7
stereo [1] - 7:12
still [4] - 5:13, 24:24, 53:19, 75:12
stipulate [1] - 4:19
stipulated [1] - 5:3
stop [5] - 7:20, 8:5, 18:25, 21:8, 21:22
Street [1] - 2:12
strike [4] - 26:9, 26:11, 27:23, 69:25
structure [8] - 28:7, 30:1, 64:9, 71:1, 71:4, 73:3, 74:16, 74:23
stuff [1] - 60:6
submitted [3] - 33:25, 42:20, 80:11
subscribed [1] - 80:13
subsequently [1] - 80:11
Suite [1] - 2:11
summer [2] - 18:23, 19:1
supervisor [2] - 15:8, 25:1
suspect [1] - 54:1
swear [1] - 5:10
swearing [1] - 4:23
switching [1] - 38:7
sworn [3] - 5:15, 5:19, 80:8
system [1] - 53:9

T

team [3] - 19:21, 33:2
tends [1] - 5:25
term [1] - 8:8
testified [2] - 5:20, 70:21
testify [1] - 80:9
testifying [1] - 80:8
testimony [5] - 27:13, 27:16, 27:18, 76:6, 77:2
text [1] - 60:15
that'd [1] - 31:14
that'll [1] - 6:20
THE [19] - 2:6, 2:13, 5:10, 8:23, 9:2, 13:1, 14:17, 23:21, 26:18, 27:4, 27:20, 31:16, 31:18, 32:19, 40:1, 40:5, 43:13, 50:6, 78:11
themselves [1] - 67:13
thereafter [1] - 22:11
therein [5] - 79:14, 80:9, 80:12, 80:14, 80:15
thereof [2] - 80:7, 80:13
thereupon [2] - 80:11, 80:13
thinking [2] - 22:5, 77:13
thinks [1] - 7:25
third [5] - 7:7, 18:12, 18:15, 31:19, 54:9
three [6] - 16:1, 47:14, 50:18, 51:10, 62:11, 75:18
timeline [5] - 37:21, 37:24, 38:9, 38:11, 39:3
tired [1] - 5:14
title [3] - 11:10, 11:11, 11:22
today [3] - 8:9, 9:19, 11:18
together [1] - 60:4
took [3] - 16:19, 62:22, 80:5
top [2] - 30:3, 57:19
towards [1] - 62:23
tower [14] - 43:24, 66:13, 66:25, 67:16, 67:18, 67:20, 68:15, 68:23, 69:10, 69:15, 69:18, 69:22, 70:3, 71:15
Tower [1] - 67:14
transcribed [1] - 80:11
TRANSCRIPT [1] - 1:13
transcript [4] - 78:5, 78:9, 79:12, 80:16
trial [1] - 6:12
trick [2] - 6:18, 7:6
tried [1] - 9:6
trucks [1] - 60:4
true [3] - 38:3, 79:12, 80:16
truth [3] - 80:9, 80:9
try [9] - 6:18, 8:18, 9:5, 16:14, 30:22, 46:23, 54:14, 64:22, 69:12
trying [8] - 14:22, 16:3, 34:17, 38:5, 41:23, 52:23, 74:9, 76:2
Turbine [11] - 28:4, 28:12, 29:18, 45:15, 46:3, 48:24, 49:5, 55:22, 58:23, 62:6, 64:9
turbine [14] - 43:18, 46:9, 57:1, 60:2, 62:7, 63:12, 69:7, 69:13, 72:23, 73:11, 73:13, 73:15, 74:1
turbines [13] - 22:15, 23:6, 23:12, 23:18, 23:25, 24:6, 26:4, 26:6, 26:13, 40:22, 42:15, 44:10, 74:23
turnabout [1] - 74:9
TV [1] - 6:13
two [13] - 4:16, 5:3, 17:14, 18:13, 20:9, 22:25, 39:18, 39:22, 54:13, 66:22, 68:11, 71:24, 76:18
type [2] - 38:23, 65:4
typed [1] - 67:13
typewritten [2] - 79:7, 80:15

U

under [1] - 8:1
understood [1] - 36:19
unless [1] - 41:11
up [33] - 5:12, 8:19, 10:9, 11:4, 13:18, 14:9, 17:1, 17:4, 21:19, 21:20, 24:22, 29:19, 39:8, 41:25, 46:12, 52:13, 52:24, 53:6, 57:19, 58:23, 60:22, 61:16, 62:13, 62:17, 63:23, 67:13, 70:22, 71:6, 71:7, 71:11, 75:25, 77:14, 77:15
upper [1] - 58:18
upset [4] - 64:6, 70:9, 70:16, 70:17
upstairs [1] - 52:1
upward [1] - 30:3
uses [1] - 74:5

V

vague [3] - 27:2, 27:18, 45:16
various [2] - 24:8, 48:17
version [1] - 54:23
vertical [1] - 29:17
via [2] - 4:6, 51:25
Via [5] - 1:18, 2:7, 2:14, 2:17, 2:17
VIDEOCONFERENCE [1] - 1:14
Videoconference [2] - 1:18, 4:6
view [1] - 33:21
viewpoint [1] - 67:10
virtue [1] - 80:7
visit [1] - 34:8
visited [1] - 20:6
visiting [2] - 39:14, 62:18
Voegele [2] - 34:5, 34:9
vs [1] - 1:7

W

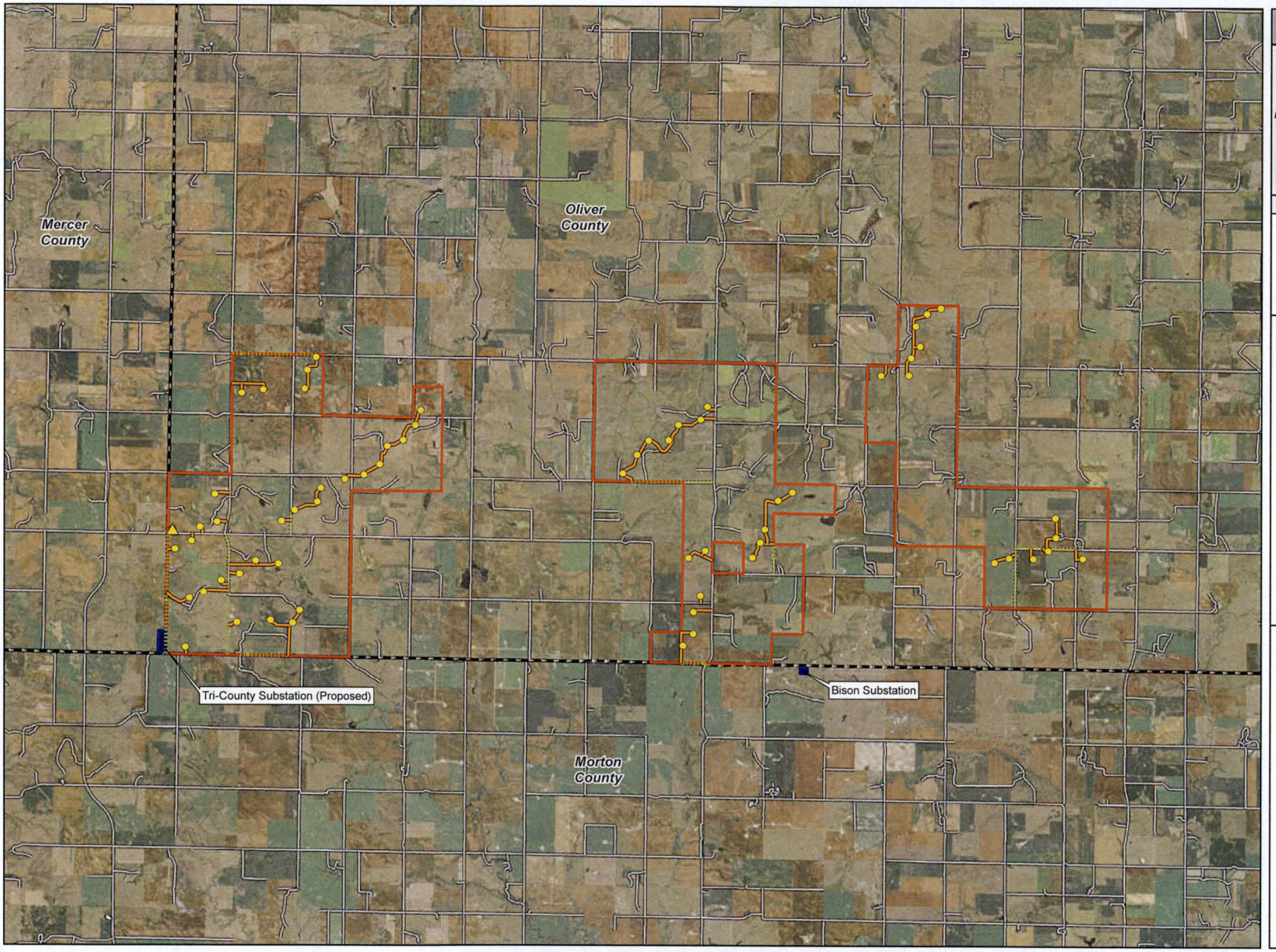
Wade [10] - 15:12, 39:17, 40:15, 52:18, 64:3, 65:10, 65:12, 70:5, 70:13, 71:19
wait [4] - 7:7, 7:8, 40:6, 49:23
walk [9] - 20:9, 20:22, 21:14, 47:12, 51:5, 59:23, 59:25, 60:1, 60:7
washouts [1] - 47:23
ways [2] - 15:14, 37:15
weeds [3] - 47:24, 48:4, 48:6
west [2] - 62:23, 63:2
whole [3] - 66:15, 76:1, 80:9
willing [1] - 20:22
Winckler [4] - 33:14, 33:15
wind [6] - 8:10, 36:17, 54:7, 54:20, 76:14, 76:23
witness [10] - 5:11, 9:13, 49:16, 75:11, 75:21, 75:23, 77:25, 80:8, 80:11, 80:13
WITNESS [12] - 14:17, 23:21, 26:18, 27:4, 27:20, 31:18, 32:19, 40:1, 40:5, 43:13, 78:11, 80:21
Witness [1] - 5:15
wondering [3] - 5:23, 53:3, 54:4
word [11] - 7:11, 8:12, 11:15, 13:23, 31:19, 38:11, 38:20, 38:23, 38:25
words [4] - 8:11, 70:6, 74:10, 74:12
worry [1] - 22:24
write [1] - 72:8
writing [2] - 70:6, 70:13
written [2] - 66:24, 75:1
wrote [1] - 66:10

Y

yard [3] - 66:16, 70:21, 70:22
year [2] - 13:10, 13:11
yellow [1] - 42:15
yesterday [1] - 74:4
yourself [2] - 67:4, 67:18

Z

zero [1] - 16:6
ZOOM [1] - 1:14
zoom [2] - 29:1, 29:3
Zoom [11] - 1:18, 2:7, 2:14, 2:17, 2:18, 4:6, 4:18, 4:20, 4:21, 8:18, 49:19





0 0.75 1.5 Miles

1 inch = 1.5 miles

N W E S

- Preliminary Project Boundary
- Turbine
- MET Tower
- Access Road
- County Road Upgrade
- Bison Sub Boundary
- County Boundary
- Road

Exhibit 1a
Project Location - 2010 Imagery

Minnesota Power
Bison 4 Wind Project

Oliver County, North Dakota

MP000406

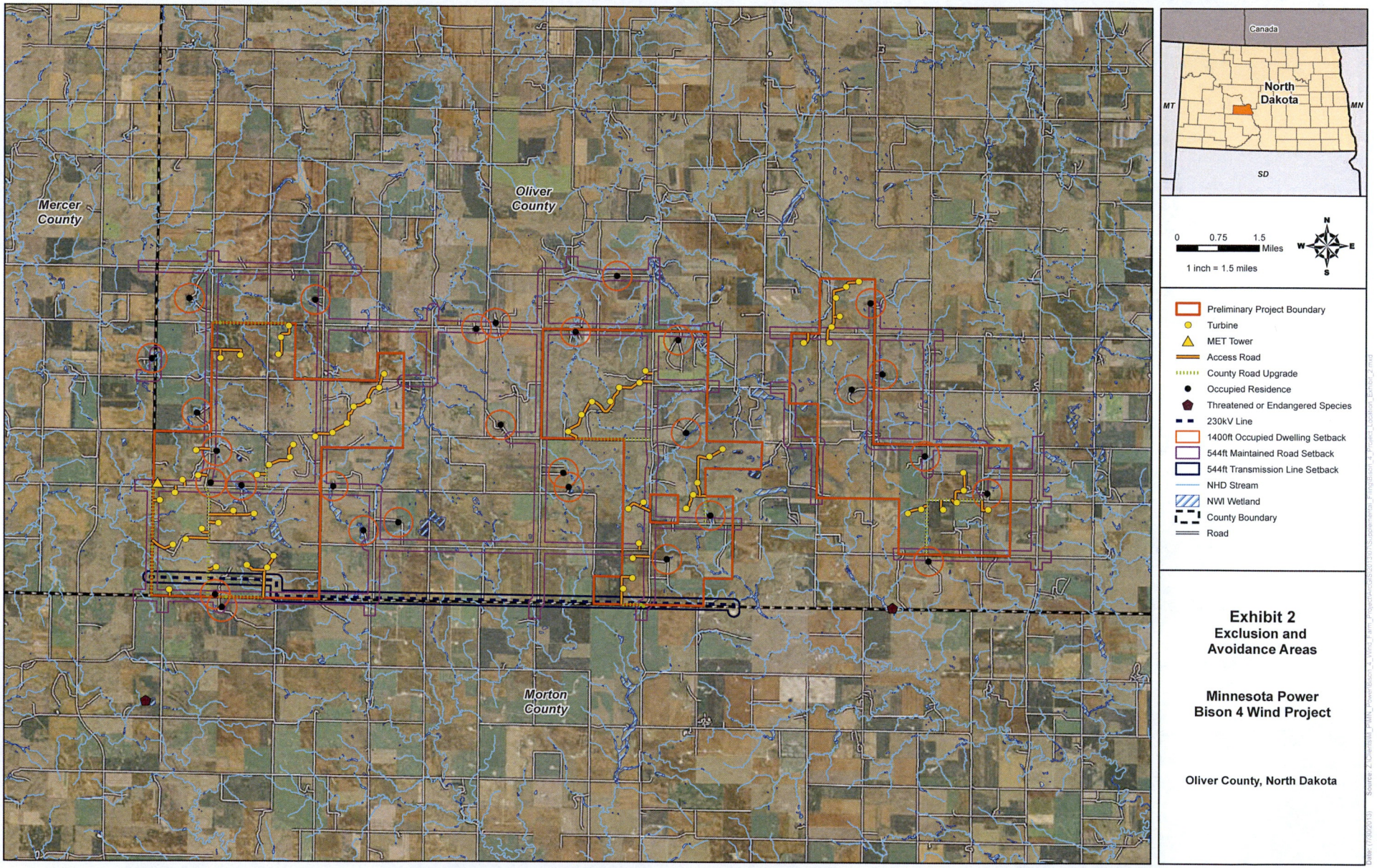
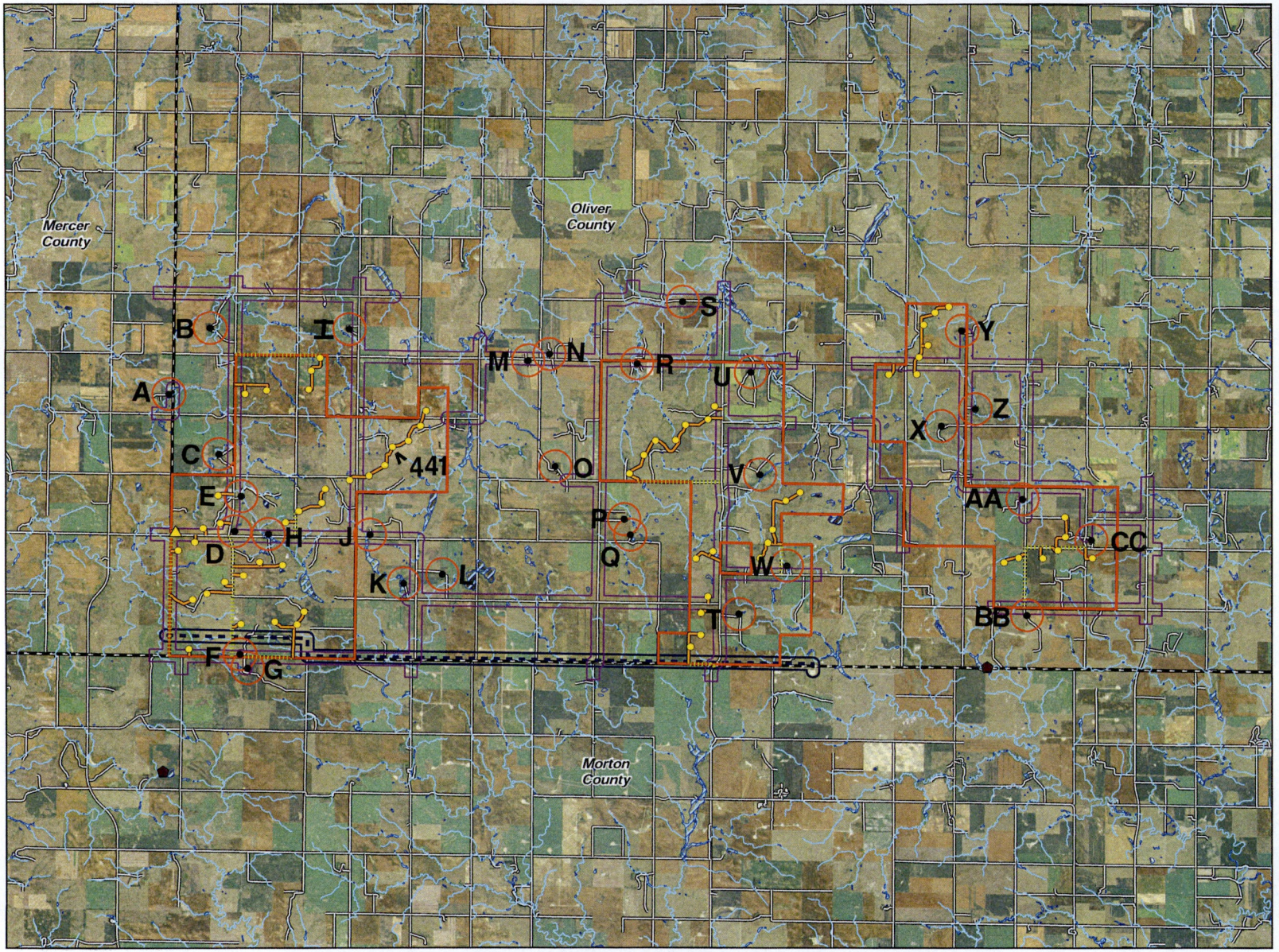


Exhibit 2
Exclusion and Avoidance Areas

Minnesota Power
Bison 4 Wind Project

Oliver County, North Dakota

MP000407





0 0.75 1.5 Miles

1 inch = 1.5 miles

N W E S

- Preliminary Project Boundary
- Turbine
- MET Tower
- Access Road
- County Road Upgrade
- Occupied Residence
- Threatened or Endangered Species
- 230kV Line
- 1400ft Occupied Dwelling Setback
- 544ft Maintained Road Setback
- 544ft Transmission Line Setback
- NHD Stream
- NWI Wetland
- County Boundary
- Road

Exhibit 2
Exclusion and Avoidance Areas

Minnesota Power
Bison 4 Wind Project

Oliver County, North Dakota

MP000407

KESSLER BRIEF EXHIBIT 4 – KESSLER Answer to Int. No. 2 9-8-20

2. Identify all facts that support the allegation in paragraph 16, subpart 2 of the Complaint that "[p]eople were living in [the Section 15 building] before, during and after the project development." This answer should identify the people who made the building their residence between 2009 and 2014 and the date(s) of such residency for each person.

ANSWER TO INTERROGATORY No. 2

1989-1992 Keith and Deanna Kessler

1993-1997 Paul Kessler

2001-2003 Angela Hutmacher and Joe

2004-2014 Stephen and Hayden would stay overnight during hunting season (with Keith)

2007 Paul and Heather stayed for a couple days in the summer

2007 Larry Flemmer and girls watch Super Bowl with US

2010 Watched super Bowl the Kessler family

2011 Bruce and Diane Kessler stayed there for a couple of days in the summer

2016-2019 Hayden and Megan Kessler and Gustav

2020 Stephen and Leah Kessler and kids stayed there for the summer

For 2003 till present worked cattle in the yard and ate lunch in the house or prepared food in house

People who helped work Cattle: Jim Erickson 701-4861

Shane Goetz 701-870-0471

Steve Goetz 701-880-8343

Perry Winkler

Kenny Unruh 701-891-2875

Rodney Miller 701-870-1731

When painting house Calvin and Jeannette helped. Calvin is now deceased and Jeannette 701-870-2061

KESSLER BRIEF EXHIBIT 11 - Jerry Lein Deposition Excerpts

Page 13

Q. Mr. Lein, do you have any recollection on the day of the hearing of observing Mr. or Mrs. Kessler speaking with anyone before the hearing, during a break or after the hearing was over?

A. Not specifically. Everybody was talking to everybody.

Q. Do you recall hearing from anyone else prior to when this complaint was filed that Mr. or Mrs. Kessler had an exchange with any representative of the project that day before the hearing, during a break in the hearing or after the hearing was over?

A. I remember a discussion that Minnesota Power -- somebody from Minnesota Power, I don't know who, but had wanted to talk with the Kesslers, and they were supposed to get together during a break or something or somewhere at some point and -- and have a discussion off the record.

Q. And, Mr. Lein, are you -- there are you

Page 14

describing an instruction or communication that was on the record that the Kesslers and the project should have a discussion?

A. I don't think it was on the record. I think they just said -- they just said, "Let's have this discussion," and I don't think the court reporter was taking down what they said when they said that.

Q. Do you recall where people were when that -- when that conversation you just referenced was had?

A. No. Generally just in the room. It was one big room and everybody was everywhere in there.

Q. Do you recall who from Minnesota Power it was that asked to speak with the Kesslers?

A. No.

Q. And was it a -- was it a representative of Minnesota Power that you observed directly asking the Kesslers for a conversation?

A. I think so.

Q. Do you remember anything else about that -- viewing that exchange, Mr. Lein?

A. No.

Q. Do you know whether Minnesota Power and the Kesslers did, in fact, talk on a break or after

Page 15

the hearing that day?

A. I believe they did. I don't remember specifically, but, yeah, I believe they did.
Q. And what is it that causes you to have a belief that they did?
A. Somehow or other in my memory, it's -- I feel like I can recall them going and talking.
Q. But you're not sure who it was or -- or where they went to talk or what they talked about; is that right?
A. That's right.

. . .

Page 78

Q. Okay. Let me review what you said earlier so I can go into that. I remember a discussion that someone from Minnesota Power wanted to talk to the Kesslers. They wanted to get together at some point and have a discussion off the record. Do you recall stating that earlier today?
A. Yes.
Q. Okay. So now that's what I'm focused on, is you recall the Kesslers talking to somebody from Minnesota Power during apparently -- was it during the break?
A. I don't remember when or where, but it was -- they wanted to -- they wanted to talk to him about what he was bringing up in his testimony.

Page 79

Q. Okay. And they said -- according to what you just described a while ago, they said that -- that they would want to talk to them later about that off the record; correct?
A. I don't know if it was later or if we had a break or what, but in my mind, it was an attempt from Minnesota Power to resolve any problems that he had rather than him bringing them up on the stand.
Q. And then what did you observe next? Did anybody -- did Mr. Kessler or the person from Minnesota Power that was talking to him, did they leave the area? Did they stay there? What did you observe?
A. I don't remember. All I remember is that they wanted to talk to them and I believe they did.
Q. Thus when you previously testified today that Minnesota Power was asking for a conversation and then you said -- when asked, "Did they have a conversation," you said, "I believe so." So that was the prior testimony today and that's still correct; right?
A. Yes.

KESSLER BRIEF EXHIBIT 12 – Kessler Residence

