

January 14, 2021

VIA E-MAIL & FEDERAL EXPRESS

North Dakota Public Service Commission
c/o Steven Kahl, Executive Secretary
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

Re: Kesslers v. Minnesota Power, a division of ALLETE, Inc.
Case No. PU-20-194

Dear Mr. Kahl:

Attached for filing on behalf of Minnesota Power, a division of ALLETE, Inc. ("Minnesota Power"), are electronic copies of the following documents:

- Minnesota Power's Reply Brief in Support of Motion for Partial Summary Judgment; and
- Certificate of Service.

The original and ten (10) copies of these documents are being sent today to the Commission via Federal Express. If you have any questions, please let me know.

Sincerely,



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Enclosures

cc: ALJ Timothy J. Dawson (via e-mail w/encls.)
John Schuh (via e-mail w/encls.)
Brian Johnson (via e-mail w/encls.)
Lynn Boughey (via e-mail w/encls.)
David Moeller (via e-mail w/encls.)

24 PU-20-194 Filed 01/14/2021 Pages: 15
Reply Brief in Support of Motion for Partial Summary Judgment
Allete, Inc.
Mollie Smith, Fredrikson&Byron, P.A.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

<p>Keith and Deanna Kessler,</p> <p style="text-align:center">Complainants/ Petitioners,</p> <p>v.</p> <p>Minnesota Power, a division of ALLETE, Inc.,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:right">Case No. PU-20-194 OAH File No. 20200211</p> <p style="text-align:center">MINNESOTA POWER’S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT</p>
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INTRODUCTION

[1] Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”) moved for partial summary judgment (the “Motion”) on two discrete issues. First, Minnesota Power moved for partial summary judgment on the Kesslers’ claim that the Section 15 Structure was an “occupied residence” when the Commission permitted and Minnesota Power then built the Bison IV Project (“Project”). Second, Minnesota Power moved for partial summary judgment on the Kesslers’ claims that a further sound study should be required at the Section 15 Structure.

[2] As to the first issue, the Section 15 Structure could not be considered an “occupied residence” because, per the Kesslers’ deposition testimony, no one resided at the Section 15 Structure from November 2003 to September 2015, after the Project was operational.

[3] As to the second issue, the sound avoidance area requirement is inapplicable because the Section 15 Structure was not an “occupied residence.” Further, even if the sound requirement applied, Minnesota Power has demonstrated compliance with the standard through updated modeling conducted by EAPC using the same methodology accepted by the Commission to demonstrate compliance when the Project was permitted.

[4] The Kesslers' response largely attempts to confuse the issues. The Kesslers first misrepresent the Motion and the applicable standard. Specifically, the Kesslers repeatedly incorrectly assert that Minnesota Power's Motion is a motion to dismiss and, the Kesslers argue, under that standard, the Commission must accept all of their allegations as true. The Motion, however, is for partial summary judgment and the Kesslers' allegations are not taken as true.

[5] Next, the Kesslers assert that the Commission should not provide a definition of "occupied residence" until *after* a full evidentiary hearing. The Kesslers offer no good reason to proceed in this fashion, as it simply does not make sense to determine the applicable *legal* standard based on facts presented at the hearing.

[6] Then, the Kesslers misrepresent Minnesota Power's plain language definition of "occupied residence." Rather than applying a plain language definition, the Kesslers offer several self-serving definitions of "occupied residence," none of which should be applied in this case.

[7] Next, the Kesslers blatantly misrepresent the testimony of long-time Commission analyst, Mr. Jerry Lein, as supporting the Kesslers' position, which it does not.

[8] Finally, the Kesslers assert that Minnesota Power's sound modeling is inadequate and actual testing should be required, but the Kesslers offer no evidence regarding sound levels at the Section 15 Structure or that Minnesota Power's modeling is in any way deficient.

[9] Based on the evidence presented, the Motion should be granted for the reasons set forth in Minnesota Power's opening brief and in this reply brief. By granting the Motion, the Commission will appropriately narrow the scope of the evidentiary hearing to those matters genuinely in dispute.

STANDARD APPLICABLE TO THE MOTION

[10] As an initial matter, the Kesslers have incorrectly identified the Motion as a motion to dismiss. (*See, e.g.*, Kessler Br. p. 1, ¶ 1 (“Minnesota Power has made a second motion to dismiss”); p. 2, ¶ 2 (“Because the motion made by Minnesota Power is a motion to dismiss. . . .”).

[11] The Kesslers further argue that, because the Motion is a motion to dismiss, all of the Kesslers’ allegations must be taken as true. (*See, e.g.*, Kessler Br. p. 2, ¶ 2 (“Because the motion made by Minnesota Power is a motion to dismiss . . . all facts alleged by the Kesslers contained in there [sic] Amended Complaint . . . must be taken as being true for purposes of the pending motion. . . .”) (emphasis in original); p. 9, ¶ 11 (“All of the allegations contained in the Revised Formal Complaint [] are taken as being true for purposes of the pending motion to dismiss.”) (Emphasis omitted); p. 16, ¶ 24 (“Under applicable North Dakota law, each of the facts alleged by the Kessler’s [sic] that are contained in their Second Amended Complaint. . . . must be taken as true in regards to any motion to dismiss.”).

[12] The Kesslers are wrong. As clearly identified in Minnesota Power’s Motion papers, the Motion is for partial summary judgment pursuant to N.D.R. Civ. P. 56. Under N.D.R. Civ. P. 56, the Commission must *not* merely accept the Kesslers’ allegations as true.

Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if resolving factual disputes will not alter the result. A party seeking summary judgment bears the initial burden of showing there is no genuine dispute regarding the existence of a material fact. ***When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading[.] Rather, the party resisting the motion must set forth specific facts by presenting competent, admissible evidence, whether by affidavit or by directing the court to relevant evidence in the record, demonstrating a genuine issue of material fact.***

Jordet v. Jordet, 2015 ND 76, ¶ 11, 861 N.W.2d 147 (emphasis added). Thus, the Kesslers were required to provide competent, admissible evidence demonstrating that there is a genuine issue of material fact, and mere allegations are insufficient to defend against a summary judgment motion. *Id.*

[13] After reviewing the “competent, admissible evidence” offered by the parties, and construing the reasonable inferences in the non-moving party’s favor, the Commission must determine whether a factual dispute exists. Even if a factual dispute exists, if resolving the dispute would not change the result, then summary judgment is proper. *Gratech Co., Ltd. v. Wold Eng’g, P.C.*, 2003 ND 200, ¶ 8, 672 N.W.2d 672; N.D.R. Civ. P. 56(c).

UNDISPUTED MATERIAL FACTS WITHIN SCOPE OF THE MOTION

[14] The Kesslers attempt to make the issue of whether the Section 15 Structure was an “occupied residence” seem complex; however, the relevant facts are straightforward and undisputed. Those facts are set forth in full on pages 2-4 of Minnesota Power’s opening brief. In short, those undisputed material facts are as follows:

- a. Minnesota Power filed its Application on May 3, 2013.
(Minnesota Power Br. p. 2, ¶ 1.)
- b. Commission staff requested Minnesota Power apply a voluntary setback of 1,400 feet from “occupied residences,” and Minnesota Power agreed. (*Id.* at p. 2, ¶ 2.)
- c. Minnesota Power did not determine that the Section 15 Structure was an “occupied residence.” (*id.* at p. 2, ¶ 3.)
- d. Turbine 441 was constructed in 2014. (*Id.* at p. 4, ¶ 13.)

- e. The Kesslers lived at the Section 15 Structure from 1989 until 1992 (*id.* at p. 3, ¶¶ 5-6), and various of the Kesslers' extended family lived there from 1993 until November 2003. (*Id.* at p. 3, ¶¶ 7-9)
- f. *No one* made the Section 15 Structure their residence between November 2003 and September 2015. (*Id.* at p. 3, ¶ 9).
- g. During that period, the Kesslers used the Section 15 Structure from time to time in connection with agricultural and livestock operations (e.g., for lunches), (*see id.* at pp. 3-4, ¶ 11), the Kesslers watched the Super Bowl there in 2007 and 2008 (*id.*), out of town guests stayed there in 2007 or 2008, 2010, and 2011, (*id.* at p. 4, ¶ 12), one of the Kesslers' sons spent some nights and weekends at the Section 15 Structure rather than returning to his parents' home in the summer of 2013, (*id.*), and the Kesslers occasionally use the Section 15 Structure in connection with hunting weekends. (*Id.*)
- h. The Kesslers son, Hayden, moved into the Section 15 Structure in September 2015. (*Id.* at p. 4, ¶ 14.)
- i. Minnesota Power performed an updated sound study, which shows that even if the sound level avoidance area (50 dBA within 100 feet of an inhabited residence) applied to the

Section 15 Structure, the sound level is compliant. (*Id.* at pp. 4-5, ¶ 15.)

DISPUTED FACTS THAT ARE OUTSIDE THE SCOPE OF THE MOTION

[15] The Kesslers assert a variety of “facts” that they contend prevent summary judgment. (*See* Kessler Br. pp. 7-8).

[16] Many of those “facts” are instead legal arguments, and none of those “facts” are supported by any citation to admissible, competent evidence. *See* N.D.J.I. C-85.01 (“[T]he argument or other remarks of an attorney . . . must not be considered by [the fact-finder] as evidence.”).

[17] Further, those “facts” largely relate to claims that are *not* the subject of Minnesota Power’s motion. Minnesota Power is not seeking partial summary judgment on the allegation that, even though the Section 15 Structure was not an “occupied residence,” Minnesota Power knew it was going to become an occupied residence in the future. Minnesota Power recognizes there is a factual dispute on this allegation and specifically excluded it from this Motion.¹

¹ Minnesota Power clearly identified claims by the Kesslers that Minnesota Power knew the Section 15 Structure was *going to be an occupied residence in the future* as factually disputed based on the parties’ discovery and, therefore, outside the scope of Minnesota Power’s Motion. (Minnesota Power’s Brief, p. 2, n.1.)

ARGUMENT

I. THE COMMISSION SHOULD DETERMINE THAT THE SECTION 15 STRUCTURE WAS NOT AN “OCCUPIED RESIDENCE” AND EXCLUDE THOSE CLAIMS FROM THE HEARING.

A. Minnesota Power’s Definition of “Occupied Residence” is Reasonable and Should be Applied to the Undisputed Facts to Appropriately Narrow the Scope of the Evidentiary Hearing on the Rest of the Kesslers’ Claims.

[18] In the permitting proceeding for the Project, Minnesota Power committed to a voluntary setback from “occupied residences” at the request of Commission staff. (Minnesota Power Br. at p. 2, ¶ 2.) The phrase “occupied residence” was not defined in connection with that setback commitment, nor is it defined in statute or rule.

[19] As discussed in Minnesota Power’s opening Brief, a reasonable interpretation of “occupied residence,” based on the common usage dictionary definition, is “the place where someone lives.” (Minnesota Power Br. p. 6.) Given that Minnesota Power made the commitment and it is not otherwise defined, it stands to reason that Minnesota Power’s understanding of the phrase “occupied residence” based on common usage would be pertinent to determining its definition. Any other approach would result in establishing an after-the-fact definition without giving Minnesota Power adequate notice of the applicable standard.

[20] Rather than address Minnesota Power’s definition head on, the Kesslers set up and then attack a straw man argument. First, the Kesslers assert that it will be “necessary for the [Commission] at some point to adopt a proper definition of ‘occupied residence’” to resolve this case, but that the Commission should wait until after a hearing to let the parties know what that definition is. This approach, which asks the parties to present evidence to the Commission and argue the case before knowing the applicable legal standard, makes little sense.

[21] Second, the Kesslers falsely claim that “Minnesota Power is proposing that ‘unoccupied’ applies when the resident is not physically present.” (Kessler Br. p. 3, ¶ 5.) Then,

the Kesslers stretch even further to assert that Minnesota Power is arguing that someone's home is not an "occupied residence" when the resident is not physically present, such as when someone is out working the fields, at work, or on vacation. (*Id.*) These arguments badly misrepresent Minnesota Power's position. Minnesota Power stated in its opening brief that "the ordinary meaning of 'occupied residence' is the place where someone lives." (Minnesota Power Br. p. 6.) Minnesota Power's definition does *not* turn on whether someone is temporarily away from their house.

[22] The undisputed facts of this case establish that, throughout the relevant period, no one lived at the Section 15 Structure. Anyone who used the Section 15 Structure from November 2003 through September 2015 actually lived somewhere else. As a result, the Commission should grant the Motion and dismiss the Kesslers' claims that the Section 15 Structure was an "occupied residence" at the time the Project was permitted and constructed.

B. The Commission Should Reject the Kesslers' Proposed Definitions of "Occupied Residence."

[23] "Occupied residence" is not an ambiguous phrase. Yet, rather than attempting to interpret what "occupied residence" actually meant at the time it was used by Minnesota Power in the Project's siting proceeding, the Kesslers offer four potential definitions of "occupied residence," each more complex and contorted than the last. Each proposal disregards the plain language of "occupied residence" and adopting any of them would require improper, ad hoc rule-making.

[24] The Kesslers' Definition Options 1 and 2 would expand the phrase "occupied residence" far beyond its plain meaning. Rather than an "occupied residence" being "the place where someone lives," the Kesslers propose that "occupied residence" should also include a place where anyone has *ever* lived or *might ever intend to live*. (*See* Kessler Brief, p. 14.) Requiring an

applicant to apply a setback from any place someone has ever lived or may ever intend to live would be onerous and inconsistent with how siting requirements are applied. For the applicant to demonstrate compliance and the Commission to determine compliance, siting requirements have to be applied based on the facts that exist at the time of siting. Attempts to add historical actions or future intent to the plain meaning of “occupied residence” are inappropriate in the siting context and contrary to basic principles of interpretation.

[25] Likewise, the Kesslers’ Definition Options 3 and 4 are overt requests for the Commission to adopt new siting rules (*see* Kessler Br. pp. 15-16, ¶¶ 22-23), and then retroactively impose those new rules on the commitment Minnesota Power made years ago. The Kesslers’ Definition Options may be appropriate to consider as legislation or in a rule-making proceeding, but they should not be adopted and applied retroactively in a siting case.

II. SUMMARY JUDGMENT IS APPROPRIATE ON THE KESSLERS’ NOISE STUDY CLAIMS.

[26] As set forth above, the Section 15 Structure was not an “occupied residence.” For the same reasons, the Section 15 Structure also was not an “inhabited residence” for purposes of the sound level avoidance area requirement in NDAC § 69-06-08-01(4) (2013). Therefore, the Kesslers’ claim that the Commission should order a sound study fails as a matter of law.

[27] Even if the sound level avoidance area requirement were applied, however, Minnesota Power has performed appropriate modeling that demonstrates compliance. (Minnesota Power Br. pp. 4-5, ¶ 15.)

[28] The Kesslers do not offer any competent, admissible evidence to rebut the results of the modeling. Instead, the Kesslers resort to calling the modeling a “garbage in, garbage out” exercise, (Kessler Br. 19), and baldly state that summary judgment is inappropriate because the Kesslers have “alleged” that the decibel reading exceeds the standard.

[29] There are two problems with the Kesslers' position. First, the modeling conducted by EAPC applied the same methodology accepted by the Commission to issue a Certificate of Site Compatibility for the Project, and similar modeling has been accepted by the Commission in other wind siting dockets.²

[30] Second, merely alleging that decibel levels are too high, without offering any competent, admissible evidence to support the allegation, is not enough to avoid summary judgment.

III. THE KESSLERS' MISREPRESENTATION OF MR. LEIN'S TESTIMONY.

[31] The Kesslers boldly assert that Commission analyst, Mr. Jerry Lein, "has provided confirmation that it is the Kesslers who are telling the truth and not the representatives of Minnesota Power." (Kessler Brief, p. 11.) Although issues of credibility are not before the Commission in connection with the Motion, this false allegation that Minnesota Power representatives are lying to the Commission in connection with this proceeding must be addressed.

[32] To set up this falsehood, the Kesslers claim they have repeatedly asserted that they told a "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" and imply that Minnesota Power asked them not to raise their concerns regarding the Section 15 Structure at the public hearing. (*Id.*) The Kesslers then state that the Minnesota Power representatives' deposition testimony does not align with the Kesslers' claims. (*Id.*)

² In addition to conducting sound modeling for the Project, EAPC has conducted sound modeling for other projects permitted by the Commission. *See, e.g., Lindahl Wind Project, LLC, Lindahl Wind Farm Project – Williams County, Siting Application* (Case No. PU-15-482); *Rolette Power Development, LLC, Rolette Wind Energy Project – Rolette County, Siting Application* (Case No. PU-15-124); *Minnesota Power, an Operating Division of ALLETE, Inc., Bison 3 Wind Project – Oliver/Morton Counties, Siting Application* (Case No. PU-11-162).

[33] Rather than acknowledging a factual dispute, the Kesslers attempt to borrow on Mr. Lein's credibility and his decades of service on siting (and other) matters before the Commission by asserting that Mr. Lein's testimony aligns with their own testimony and shows that some Minnesota Power person is lying. In reality, however, the excerpt from Mr. Lein's deposition testimony that the Kesslers cite does not support their allegation. Instead, in his testimony, Mr. Lein explained that he thinks that someone from Minnesota Power asked to talk to the Kesslers on the day of the hearing (which took place more than seven years ago) about what Mr. Kessler had brought up in testimony at the hearing (which did not include the Section 15 structure³), that he is not sure who it was, and that he is not sure what they talked about. (*See* Kessler Br. Ex. 11.)

[34] As a result, Mr. Lein's testimony – which suggests that an unidentified representative of Minnesota Power wanted to talk with the Kesslers on the day of the hearing *about Mr. Kessler's testimony*, and that Mr. Kessler *did not testify about the Section 15 Structure* – supports Minnesota Power's position that the Kesslers did not raise concerns about the Section 15 structure until after the Project was constructed. In fact, Mr. Lein testified that the *first* time he learned of an issue from Mr. Kessler about the proximity of Turbine 441 to the Section 15 Structure was in February 2017, years after Turbine 441 was built. (*See* Lein Depo. 24:4-23; March 1, 2017 Memorandum to File by Jerry Lein, File I-15-0195, filed March 1, 2017, p. 2 (describing February 2017 call with Mr. Kessler and stating: “Mr. Kessler raises a new issue with noise from a turbine that is too close to his son's residence.”).)

³ Mr. Kessler's testimony is available in the Electronic Record of Sept. 13, 2013 Hearing (Docket Item No. 31, beginning at 2:18:50) (Mr. Kessler testified about a number of things, but not the Section 15 Structure)) and Mr. Lein's review of that record is noted in the March 1, 2017 Memorandum to File by Jerry Lein, File I-15-0195, filed March 1, 2017, p. 2 (explaining that Mr. Lein reviewed the transcript and that Mr. Kessler “did not bring up the residence” in his testimony).

[35] The Kesslers' attempt to mislead the Commission with Mr. Lein's testimony is inappropriate and should be withdrawn. If the Kesslers will not withdraw the statements, then the Commission should disregard that argument, note its inconsistency with the actual testimony, and reserve credibility determinations for the evidentiary hearing.

CONCLUSION

[36] For the reasons set forth in Minnesota Power's opening brief and above, the Commission should grant the Motion. Doing so is warranted based on the applicable law and the undisputed facts. Moreover, granting the Motion would appropriately frame the issues remaining for an evidentiary hearing.

Dated this 14th day of January, 2021.

FREDRIKSON & BYRON, P.A.

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler, Complainants/ Petitioners, v. Minnesota Power, a division of ALLETE, Inc., Respondent.	Case No. PU-20-194 OAH File No. 20200211 CERTIFICATE OF SERVICE
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Roxanne Gangl, being first duly sworn, does depose and state that on January 14, 2021, this Certificate of Service and a true and correct copy of the following documents:

- Filing letter; and
- Minnesota Power’s Reply Brief in Support of Motion for Partial Summary Judgment

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

Steven Kahl
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