

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

¶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.

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

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

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 and 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;
- 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;
- 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 its 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 provided 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 in 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 CREDIBILITY.** 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, THE TESTIMONY OF

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

...

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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