

March 22, 2021

VIA E-MAIL & FEDERAL EXPRESS

Mr. Steven Kahl, Executive Secretary
North Dakota Public Service Commission
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”), is a Prehearing Brief. A Certificate of Service is also attached.

The original and ten copies of this letter and the Certificate of Service are being sent today to the Commission via Federal Express.

If you have any questions, please let me know.

Sincerely,



Mollie M. Smith
Attorney at Law

Direct Dial: 612.492.7270

Email: msmith@fredlaw.com

MMS/72464783
Enclosures

cc: ALJ Timothy J. Dawson (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.)

71 PU-20-194 Filed 03/22/2021 Pages: 7
Prehearing Brief
Allete, Inc.
Mollie Smith, Fredrikson&Byron, P.A.

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 MINNESOTA POWER’S PREHEARING BRIEF
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INTRODUCTION

Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”), submits this brief to outline the evidence and arguments it will present at the evidentiary hearing before the North Dakota Public Service Commission (“Commission”), scheduled for March 25-26, 2013. In the Notice of Hearing, issued February 3, 2021, the Commission identified three issues to be considered at the evidentiary hearing:

1. Whether the Section 15 structure was an occupied residence at the time the Commission issued its Order Granting a Certificate of Site Compatibility for the Project (Order).
2. If the Section 15 structure was an occupied residence at the time the Commission’s Order was issued, does placement of turbine number 441 violate the Commission’s Order; if so, what remedies are appropriate.
3. At the public hearing, did Minnesota Power withhold information relating to the Section 15 structure from the Commission that Minnesota Power should have communicated to the Commission; if so, what remedies are appropriate.

At the evidentiary hearing, Minnesota Power will show that (1) the structure owned by Keith and Deanna Kessler (“Kesslers”) in Section 15, Township 141 North, Range 87 West, Oliver County,

North Dakota (“Section 15 Structure”) **was not** an occupied residence at the time the Commission issued its September 25, 2013 Order granting a Certificate of Site Compatibility (“Order”) to Minnesota Power for the Bison 4 Wind Project (“Project”); and (2) Minnesota Power **did not** withhold information regarding the Section 15 Structure that it should have communicated to the Commission. As a result, Minnesota Power did not violate the Order and remedies are not warranted.

ARGUMENT

I. THE EVIDENCE WILL DEMONSTRATE THAT THE SECTION 15 STRUCTURE WAS NOT AN “OCCUPIED RESIDENCE” WHEN THE COMMISSION ISSUED ITS ORDER.

The key issue in this case is whether the Section 15 Structure was an “occupied residence” at the time the Commission issued its Order. At the time the Order was issued, the Commission’s only residence setback was an “avoidance area” requirement of 500 feet from an inhabited rural residence. NDCC § 49-22-05.1 (2013). The evidence will show that Commission Staff asked Minnesota Power to apply a voluntary setback of 1,400 feet from “occupied residences,” and Minnesota Power agreed to voluntarily apply that setback.

It is undisputed that the phrase “occupied residence” is not defined by statute, rule, or prior Commission orders. Minnesota Power – the one who made the commitment – asserts that the phrase “occupied residence” should be given its ordinary meaning. *See, e.g. Great W. Bank v. Willmar Poultry Co.*, 2010 ND 50, ¶ 7, 780 N.W.2d 437 (“Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears.”). Dictionary definitions provide a useful starting point for determining the meaning of words not previously defined. *Wilkins v. Westby*, 2019 ND 186, ¶ 8, 931 N.W.2d 229. Applying this principle, Minnesota Power will assert that the ordinary meaning of “occupied residence” is the place where someone lives. *See, e.g. Merriam-Webster’s Online Dictionary*

(defining “occupy” as “to reside in as an owner or tenant”¹ and “residence” as “the place where one actually lives as distinguished from one’s domicile or a place of temporary sojourn”²).

Applying this definition, Minnesota Power will demonstrate that the Section 15 Structure was not an “occupied residence” at the time the Order was issued. Specifically, the evidence will show that in 2013, use of the Section 15 Structure was limited to: Kesslers’ son spending some nights and/or weekends there in the summer of 2013, when he didn’t want to drive to his parents’ house (where he lived); up to three weekends a year and a few other times for hunting; and a place for lunches while working cattle and conducting other agricultural activities. In other words, the evidence will demonstrate that no one lived at the Section 15 Structure at the time the Order was issued, and anyone who stayed at the Section 15 Structure had their permanent residence somewhere else. As a result, the construction of Turbine 441 in the location approved by the Commission did not violate the voluntary setback requirement to which Minnesota Power had agreed.

II. THE EVIDENCE WILL DEMONSTRATE THAT MINNESOTA POWER DID NOT WITHHOLD INFORMATION REGARDING THE SECTION 15 STRUCTURE FROM THE COMMISSION.

Minnesota Power will also present evidence demonstrating that it did not withhold information regarding the Section 15 Structure from the Commission at the September 13, 2013 public hearing or prior to issuance of the Order. Consistent with their prefiled direct testimony, Minnesota Power’s witnesses will testify that the Kesslers did not discuss future plans for the Section 15 Structure or raise a concern regarding the proximity of Turbine 441 (or any other

¹ Available at: <https://www.merriam-webster.com/dictionary/occupied> (last visited March 17, 2021).

² Available at: <https://www.merriam-webster.com/dictionary/residence> (last visited March 17, 2021).

turbine) to the Section 15 Structure prior to issuance of the Order. Further, consistent with their prefiled direct testimony, Minnesota Power's witnesses will testify that Minnesota Power first learned the Kesslers had a concern regarding the proximity of Turbine 441 to the Section 15 Structure in February 2017. Thus, the evidence will show that Minnesota Power did not have information that should have been disclosed to the Commission prior to issuance of the Order.

CONCLUSION

As discussed above, Minnesota Power will present evidence that the Section 15 Structure was not occupied at the time the Commission issued its Order, and Minnesota Power did not have information regarding the Section 15 Structure that should have been disclosed to the Commission prior to issuance of the Order. Accordingly, the evidence will demonstrate that Minnesota Power did not violate the Order and no remedies are warranted.

Dated this 22nd day of March, 2021.

FREDRIKSON & BYRON, P.A.

By 
MOLLIE M. SMITH, ND Bar #06714
PATRICK D.J. MAHLBERG, ND Bar #06659
*Attorneys for Minnesota Power, a division of
ALLETE, Inc.*
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7270
msmith@fredlaw.com
pmahlberg@fredlaw.com

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

Roxanne Gangl, being first duly sworn, does depose and state that on March 22, 2021, this Certificate of Service and a true and correct copy Minnesota Power's Prehearing Brief were sent by electronic mail and/or mailed via Federal Express (as indicated below) to:

Steven Kahl
Executive Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov
(Via E-Mail and via FedEx)

ALJ Timothy J. Dawson
Administrative Law Judge
Office of Administrative Hearings
2911 N. 14th Street, Suite 303
Bismarck, ND 58503
tjdawson@nd.gov
(Via E-Mail)

Brian Johnson
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck ND 58505
brljohnson@nd.gov
(Via E-Mail)

Lynn Boughey
Boughey Law Firm
PO Box 1202
Mandan, ND 58554-1202
lynnboughey@midconetwork.com
bougheyfirm@midconetwork.com
(Via E-Mail)

/s/ Roxanne Gangl

Roxanne Gangl