

June 14, 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., is a Post-Hearing Opening Brief. A Certificate of Service is also attached.

The original and ten copies of this letter and these documents 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*

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MMS/73162472v1

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.)

154 PU-20-194 Filed 06/14/2021 Pages: 35  
Post-Hearing Opening Brief  
Allete, Inc.  
Mollie Smith, Fredrikson&Byron, P.A.

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

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Keith and Deanna Kessler,  Complainants/ Petitioners,  v.  Minnesota Power, a division of ALLETE, Inc.,  Respondent.	Case No. PU-20-194 OAH File No. 20200211  <b>MINNESOTA POWER’S OPENING POST-HEARING BRIEF</b>
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**I.     INTRODUCTION**

Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”), respectfully submits this post-hearing opening brief in support of its position that the North Dakota Public Service Commission (the “Commission”) should find in Minnesota Power’s favor with respect to the Complaint filed by Petitioners Keith and Deanna Kessler (the “Kesslers”) concerning the siting of Bison 4 Wind Project (“Project”) Turbine 441 relative to a structure owned by the Kesslers in Section 15, Township 141 North, Range 87 West, in Oliver County (the “Section 15 structure”).

The Commission framed the matters to be decided as follows:

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.

For the reasons set forth below, the Commission should determine that the Section 15 structure was not an “occupied residence” when the Commission issued its Order. The Commission should also determine that Minnesota Power did not withhold any information relating to the Section 15 structure that Minnesota Power should have communicated to the Commission at the public hearing. The Commission should therefore find that no remedies are appropriate.

For the Project, Minnesota Power made a commitment to not place turbines within 1,400 feet of an “occupied residence.” The commitment was requested by Commission Staff, voluntarily agreed to by Minnesota Power, and incorporated into the Commission’s Order. Neither law nor the Commission’s Order provided a definition of “occupied residence.” Minnesota Power applied a plain meaning of the phrase when siting the Project: the place where someone lives. No one lived at the Section 15 structure when the Commission issued its Order and, as a result, by definition, it was not an “occupied residence” at that time. Indeed, the evidence at the hearing demonstrated that, in fact, the Section 15 structure had not been an “occupied residence” for many years before the Order was issued. Because Turbine 441 was sited in compliance with Minnesota Power’s commitment and the Order, the Commission should find in Minnesota Power’s favor with respect to issue #1. Further, because there was no violation of the Commission’s order, the Commission should find in Minnesota Power’s favor with respect to issue #2.

The evidence also demonstrated that Minnesota Power did not withhold information relating to the Section 15 structure from the Commission at the public hearing. It is fair to say that the Kesslers and Minnesota Power remember things quite differently. The Kesslers’ claims generally fit in two categories: (1) that, before the hearing, the Kesslers told an allegedly familiar, but now-unidentifiable, employee of Minnesota Power on many now-unidentifiable occasions that

the Kesslers' son planned to move into the Section 15 structure in the future; and (2) that, at the public hearing, Matt Freudenrich of Minnesota Power yelled at the Kesslers and thereby prevented the Kesslers from discussing the Section 15 structure at the hearing. While the Kesslers' testimony on these issues changed multiple times, every Minnesota Power representative denied the Kesslers' claims and provided specific reasons for those denials. Ultimately, if the Commission must determine the credibility of the testimony, Minnesota Power's testimony was more credible. At a minimum, the Kesslers' unsubstantiated testimony does not support a finding that the Kesslers have carried their burden of proof and should not form the basis for the Commission to find against Minnesota Power and order the drastic remedies the Kesslers seek.

In this case, given the specific commitment to set back turbines 1,400 feet from "occupied residences," the questions are not whether the Section 15 structure *could have been lived in* or whether Minnesota Power *could have* done things differently. Rather, the questions are whether Minnesota Power complied with the Order (it did) and whether Minnesota Power withheld any information from the Commission at the public hearing that it should have communicated to the Commission (it did not). Therefore, Minnesota Power respectfully requests that the Commission enter an order in Minnesota Power's favor.

## **II. FACTS**

### **A. THE PARTIES.**

#### **1. The Kesslers.**

The Kesslers "reside" in Glen Ullin. For many years, the Kesslers have owned other properties, including in Mercer County and in Oliver County. The Section 15 structure sits on one of the properties in Oliver County.

## 2. Minnesota Power.

Minnesota Power is a division of ALLETE, Inc.<sup>1</sup> It has been operating in North Dakota since 1977.<sup>2</sup> ALLETE has other divisions that operate in North Dakota, including ALLETE Clean Energies, BNI Coal, and ALLETE Renewable Resources.<sup>3</sup> ALLETE's active wind projects in North Dakota (Bison Wind Projects 1, 2, 3, and 4, and the Glen Ullin Energy Center) generate more than 600 megawatts ("MW"), in addition to the energy generated from the coal mined at BNI Coal's Center Mine. ALLETE and its divisions employ approximately 200 people (not including construction jobs) in North Dakota.<sup>4</sup>

### B. THE KESSLERS' USE OF THE SECTION 15 STRUCTURE.

The Kesslers lived in the Section 15 structure from 1989 until 1992.<sup>5</sup> The Kesslers have not resided at the Section 15 structure since then and, instead, have lived at their house in Glen Ullin since 1992.<sup>6</sup> Other family members lived at the house between 1993 and 2003.<sup>7</sup>

From 2003 until 2015, no one made the Section 15 structure their residence.<sup>8</sup> As set out below, the Section 15 structure was used occasionally by the Kesslers and occasionally stayed in overnight, but no one made the Section 15 structure their residence during the relevant period.<sup>9</sup>

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<sup>1</sup> Evid. Hrg. Tr. Vol. II, p. 773:22-25 (Simmons).

<sup>2</sup> *Id.* at p. 774:10-19 (Simmons).

<sup>3</sup> *Id.* at p. 773:22-774:4 (Simmons).

<sup>4</sup> *Id.* at p. 774:20-25 (Simmons).

<sup>5</sup> Kessler Ex. Dates-1; Evid. Hrg. Tr. Vol. I, p. 323:1-16 (D. Kessler).

<sup>6</sup> Evid. Hrg. Tr. Vol. I, p. 99:14-16 (K. Kessler); *id.* at p. 323:12-16 (D. Kessler).

<sup>7</sup> *Id.* at p. 100:2-10 (K. Kessler).

<sup>8</sup> *Id.* at p. 100:20-23 (K. Kessler); *id.* at pp. 323:17-324:7 (D. Kessler).

<sup>9</sup> *Id.* at p. 323:17-7 (D. Kessler).

During the period from 2003 until 2015, the Kesslers used the Section 15 structure on an intermittent basis, including when working cattle or haying.<sup>10</sup> In addition, once every few years, extended family stayed at the Section 15 structure for short periods and the Kesslers watched the Super Bowl at the Section 15 structure in 2007 and 2010.<sup>11</sup> Mr. Kessler and his sons would also stay overnight at the Section 15 structure during hunting season.<sup>12</sup> In the summer of 2013, one of the Kesslers' sons, Stephen Kessler, occasionally stayed at the house on weekends.<sup>13</sup>

The Kesslers did not maintain insurance on the house.<sup>14</sup> While the Kesslers had electric service at the property throughout the years, the records that the Kesslers produced show that the amount of electricity used at the Section 15 structure when the Project was sited and permitted (2013) and constructed (2013-2014) confirms the fact that no one resided at the Section 15 structure during those time periods:

Year	Annual kWh Usage
2019	7,305 kWh
2018	8,343 kWh
2017	8,432 kWh
2016	3,428 kWh
2015	270 kWh
2014	113 kWh
2013	118 kWh
2012	279 kWh
2011	1,064 kWh <sup>15</sup>

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<sup>10</sup> Kessler Ex. Dates-2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Evid. Hrg. Tr. Vol. I, p. 269:8-9 (S. Kessler); *id.* at p. 279:19-23 (S. Kessler).

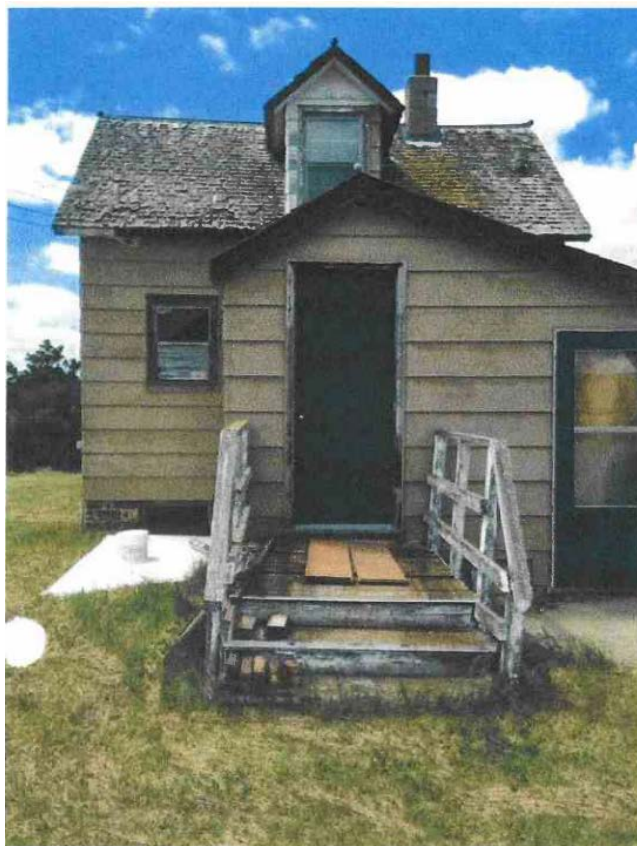
<sup>14</sup> *Id.* at pp. 177:23-178:4 (K. Kessler).

<sup>15</sup> Kessler Ex. 8-2 (Electric Meter Listing).

The electricity usage at the Section 15 structure for the years 2012, 2013, 2014, and 2015 was a fraction of the average energy that is consumed at an “occupied residence” in North Dakota:

Year	Avg. Annual ND Residential kWh Usage
2015	13,089 kWh
2014	14,875 kWh
2013	14,459 kWh
2012	13,092 kWh <sup>16</sup>

As of 2013, the home appeared as follows:



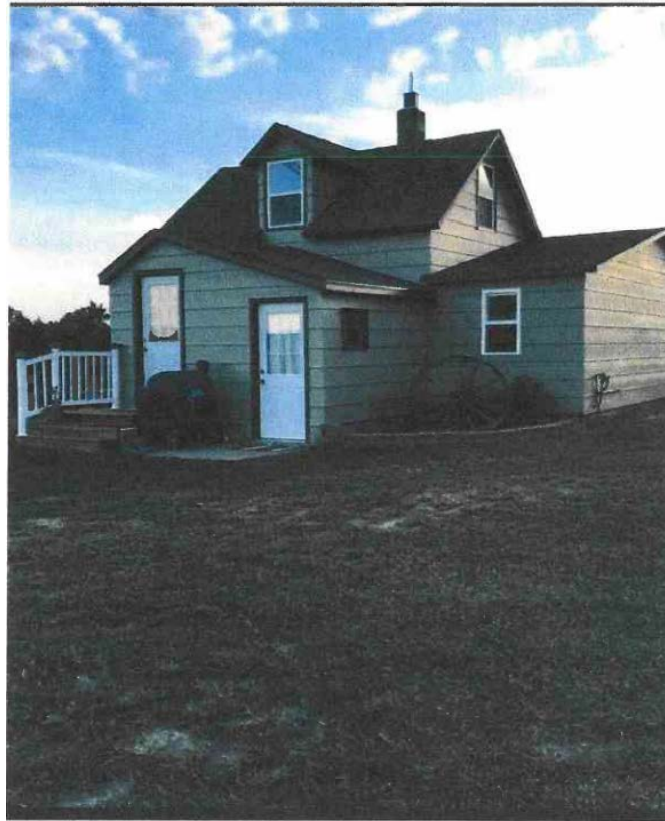
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<sup>16</sup> See [https://www.eia.gov/electricity/sales\\_revenue\\_price/](https://www.eia.gov/electricity/sales_revenue_price/); 1990–2019 Number of Retail Customers by State by Sector (EIA-861) [XLS](#); 1990–2019 Retail Sales of Electricity by State by Sector by Provider (EIA-861) [XLS](#). Average Annual Residential Usage (kWh) Formula: Step 1: [MWh sales to ultimate customers] / [number of customers] = [annual usage per household] MWh. Step 2: [annual usage per household] MWh → [annual usage per household] kWh.

<sup>17</sup> Kessler Photo Exhibit 4.

The Section 15 structure was later fixed up, as is shown in a picture from 2016:



Hayden Kessler and his girlfriend moved in to the Section 15 structure in 2016—the first time anyone had resided at the home in a dozen years.<sup>19</sup>

Glen Lennick, who owns the property adjacent to where the Section 15 structure is located and on which Turbine 441 was built, testified about his knowledge of the use of the Section 15 structure. Mr. Lennick testified about the apparently limited use of the Section 15 structure and that, in his view, “nobody was living there” in 2013.<sup>20</sup> Indeed, Mr. Lennick explained that, in his view, the Section 15 structure was not occupied, but was “abandoned” and had been for several

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<sup>18</sup> *Id.*

<sup>19</sup> Evid. Hrg. Tr. Vol. II, p. 412:14-19 (H. Kessler); Kessler Ex. Dates-2.

<sup>20</sup> Evid. Hrg. Tr. Vol. II, pp. 688:19-689:7 (Lennick); *id.* at p. 690:9-18 (Lennick).

years before the Project came along.<sup>21</sup> Mr. Lennick's testimony is notable not only for its content, but also because Mr. Lennick is a third-party witness with first-hand knowledge of the property's status.<sup>22</sup>

**C. HISTORY OF THE KESSLERS' GRANTS OF OPTIONS AND EASEMENTS FOR WIND PROJECT DEVELOPMENT ON THEIR PROPERTIES IN OLIVER AND MERCER COUNTIES.**

The Kesslers offered testimony suggesting that they never wanted to participate in any wind project. As set out below, however, the Kesslers signed multiple options on the lands at issue (and large portions of their other property) to not just Minnesota Power, but also to another potential wind project developer, and are participating landowners in the Project:

- 2008 – the Kesslers optioned their Oliver County property to Florida Power & Light affiliate, Boulevard Associates, under an exclusive, five-year option (expiring in March 2013);<sup>23</sup>
- 2009 – the Kesslers optioned lands in Mercer County to Minnesota Power;<sup>24</sup>
- 2013 – after the Boulevard Associates' option lapsed/terminated, the Kesslers optioned their Oliver County properties to Minnesota Power by an amendment adding those lands to their 2009 option agreement with Minnesota Power.<sup>25</sup>

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<sup>21</sup> Evid. Hrg. Tr. Vol. II, pp. 691:18-692:7 (Lennick); *id.* at p. 694:6-8 (Lennick).

<sup>22</sup> While Mr. Lennick was clear that the Section 15 structure was abandoned and that, in his opinion, it would be "foolish" to require Turbine 441 to be moved from where it was built, Mr. Lennick also indicated that he would, if need be, work with Minnesota Power to find a different location for the turbine, Evid. Hrg. Tr. Vol. II, p. 694:15-19 (Lennick), in order to continue hosting the turbine.

<sup>23</sup> Monroe Pre-Filed Direct Testimony p. 3:78-83 (MP Ex. 4); Kesslers' Memorandum of Easements, p. 1 (MP Ex. 4-4). The Kesslers signed the agreement in July 2007, but Boulevard Associates did not countersign until March 2008. *Id.* at pp. 3-4.

<sup>24</sup> Monroe Pre-Filed Direct Testimony, p. 3:66-70 (MP Ex. 4). The Kesslers' Oliver County properties could not be optioned to Minnesota Power at that time, because they were still under option with Boulevard Associates. *Id.* at p. 3:78-83.

<sup>25</sup> Memorandum of Easements, p. 1 (MP Ex. 4-4); Amended & Restated Wind Project Option Agreement, Attachment 1 (listing properties subject to the amended option) (MP Ex. 4-2). The Kesslers executed the amended option agreement on April 26, 2013, and Minnesota Power

Because the Kesslers' property in Oliver County was under an exclusive option to Boulevard Associates from March 2008 until March 2013, there would have been no reason for Minnesota Power and the Kesslers to talk about those properties, including the Kesslers' son's future plans as to the Section 15 property, in 2009.<sup>26</sup>

As to the process of signing the 2013 option amendment, the Kesslers allege that Mr. Monroe went to their house in Glen Ullin (not the Section 15 structure) in connection with the option.<sup>27</sup> However, Mr. Monroe testified that he has never been to the Kesslers' house<sup>28</sup> and that, in fact, he did not meet the Kesslers until a meeting at Minnesota Power's New Salem facility on October 23, 2013.<sup>29</sup>

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countersigned the agreement on May 8, 2013. *Id.* at p. 6. In July 2013, the Kesslers and Mr. Kessler's parents also granted Minnesota Power an option agreement on property the Kesslers were buying from Mr. Kessler's parents on a contract for deed. Wind Project Option Agreement (MP Ex. 4-3).

<sup>26</sup> Mr. Kessler admitted at the hearing that he does not know whether the Section 15 property was discussed with Minnesota Power in 2009. Evid. Hrg. Tr. Vol. I, p. 122:11-15 (K. Kessler) ("I don't know if it was 2009 or 2013."). Notably, the Kesslers' testimony about when and with whom they raised the Section 15 structure has changed over time. *Id.* at p. 124:2-125:4 (K. Kessler) (admitting that he previously testified that he had "specific recollections of meeting with Mr. Monroe back in 2008 or 2009," but that that testimony was incorrect); *id.* at p. 325:13-326:5 (D. Kessler). The Kesslers also repeatedly claimed in their complaints that they, "prior to the public hearing[,] told both Scott [Monroe] and Wade [Isaacson] about their concerns that Turbine 441 would be too close to the residence." It is undisputed that the Kesslers did not meet Mr. Isaacson until sometime after the public hearing. *Id.* at p. 329:2-330:24 (D. Kessler).

<sup>27</sup> Evid. Hrg. Tr. Vol. I, p. 128:8-14 (K. Kessler).

<sup>28</sup> Evid. Hrg. Tr. Vol. II, p. 721:3-9 (Monroe).

<sup>29</sup> *Id.* at pp. 718:23-719:3 (Monroe).

**D. THE BISON IV PROJECT AND THE 1,400 FOOT “OCCUPIED RESIDENCE” SETBACK.**

Minnesota Power filed its Siting Application for a Certificate of Site Compatibility for the Project with the Commission on May 3, 2013.<sup>30</sup> For purposes of this dispute, the following facts are relevant and not disputed:

- When the Project was sited and the Application was filed, there were no setback-from-occupied-residences requirements in the North Dakota Century Code, the North Dakota Administrative Code, the Oliver County ordinances, or any other rules or regulations applicable to the Section 15 structure;<sup>31</sup>
- Commission Staff requested that Minnesota Power voluntarily commit to a 1,400 foot setback from “occupied residences” in its Application and Project design, and Minnesota Power did so;<sup>32</sup>
- The term “occupied residence” was not defined. In the absence of a prescribed definition, Minnesota Power took a common sense and plain language approach, identifying “each residential structure where someone was living (i.e., their home) as an ‘occupied residence’”;<sup>33</sup>
- Minnesota Power’s approach is consistent with Commission Staff’s view, which was that an occupied residence was the place where someone lived,<sup>34</sup> and

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<sup>30</sup> Case No. PU-13-127 (Docket Item No. 5).

<sup>31</sup> B. Gartner Pre-filed Direct Testimony, p. 6:162-165 (MP Ex. 2). The Commission did have a sound requirement limiting sound levels to 50 dBA within 100 feet of an inhabited residence or community building. *Id.* at p. 6:165-167. In addition, Minnesota Power designed the Project to comply with the Commission’s recommended shadow flicker limit of 30 hours per year at occupied residences.

<sup>32</sup> B. Gartner Pre-filed Direct Testimony, p. 6:167-168 (MP Ex. 2); Evid. Hrg. Tr. Vol. I, pp. 218:24-219:2 (Lein); Bison 4 Wind Project – Application for a Certificate of Site Compatibility, p. 4-2 (Case No. PU-13-127) (Docket Item No. 5) (explaining that “staff asked Minnesota Power for a voluntary setback of 1,400 feet from occupied residences”). Minnesota Power also agreed to apply the setback voluntarily in Oliver County (which had no setbacks) and in Mercer County (which had a 1,000 foot setback). Bison 4 Wind Project – Application for a Certificate of Site Compatibility, p. 4-2 (Case No. PU-13-127) (Docket Item No. 5).

<sup>33</sup> B. Gartner Pre-filed Direct Testimony, p. 6:172-179 (MP Ex. 2).

<sup>34</sup> Evid. Hrg. Tr. Vol. I, p. 248:3-11 (Lein).

- When Commission Staff considers recommendations on compliance with voluntary setback commitments, it looks at how the applicant has defined that setback when determining compliance.<sup>35</sup>

#### **E. MINNESOTA POWER’S TURBINE SITING PROCESS.**

Mr. Gartner testified about the multi-step process used to develop the Project’s layout:

Our initial step was to identify preliminary layouts for the various turbine models under consideration that complied with applicable siting, engineering, and constructability requirements based on desktop analysis and available site-specific data. The next step was to conduct micro-siting to optimize the designs, confirm avoidance of sensitive resources, and ensure constructability. As part of the micro-siting process, a team of internal Minnesota Power personnel and external consultants (including Westwood, EAPC, Merjent, and Ulteig) visited each proposed turbine location to gather site-specific data. Additionally, wetland/waterbody and cultural resource field surveys were conducted (by WEST and Merjent). The site-specific data was then used to adjust the designs, as needed. Once the turbine model was selected, sound and shadow flicker modeling was conducted (by EAPC) to confirm compliance with the PSC’s sound requirement and shadow flicker recommendation.<sup>36</sup>

Minnesota Power’s first step to determine whether a structure should be identified as an “occupied residence” (as defined above) was a desktop analysis. The desktop analysis that Minnesota Power conducted to identify “occupied residences” involved reviews of data gathered for the prior Bison Wind Projects 1-3, information from the Oliver County Plat Book, and review of satellite imagery.<sup>37</sup> If a structure was identified as occupied in the Plat Book or from the prior Bison Wind Projects 1-3, it was identified as an “occupied residence” for purposes of the Project. Because there were no conflicts between the Project design and the occupied residences identified in this analysis, Minnesota Power did not further confirm the status of those residences.<sup>38</sup>

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<sup>35</sup> Evid. Hrg. Tr. Vol. I, pp. 256:22-257:2 (Lein).

<sup>36</sup> B. Gartner Pre-filed Direct Testimony, p. 3:67-80 (MP Ex. 2).

<sup>37</sup> *Id.* at p. 5:122-125.

<sup>38</sup> *Id.* at p. 5:131-137.

Based on the desktop analysis, the Section 15 structure was not identified as an “occupied residence.”<sup>39</sup> The Plat Book identified the Section 15 structure as a “livable structure,” but indicated that no one was occupying it as a residence; the satellite imagery did not suggest that it was occupied; and the Project development team did not have other information that led Minnesota Power to believe the Section 15 structure was occupied.<sup>40</sup>

Minnesota Power’s siting process also included micro-siting, which involved visiting each turbine site. In advance of the micro-siting effort, Minnesota Power’s Project Implementation Manager for the Project,<sup>41</sup> Matt Freudenrich, visited the Section 15 property. Mr. Freudenrich described what he saw:

I drove through the farmyard near to the Section 15 Structure. I was looking to see if anyone was around so I could let them know I was on the property and why I was there. However, the house did not appear to be lived in, and no people were around.

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I saw a two-track (vehicle tracks with vegetation in between) that ended before what appeared to have been a yard around an old farmhouse and some outbuildings. No vehicles were present. A stock tank was located near the farmhouse and it looked like the property was used for watering cattle.<sup>42</sup>

According to Mr. Freudenrich, the Section 15 structure “looked like it had not been lived in for many years.”<sup>43</sup> If, after looking at the site, Mr. Freudenrich had seen anything that made him

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<sup>39</sup> *Id.* at p. 5:139-142.

<sup>40</sup> *Id.* at p. 5:144-6:153.

<sup>41</sup> M. Freudenrich Pre-filed Direct Testimony, p. 2:46-51 (MP Ex. 1).

<sup>42</sup> *Id.* at p. 4:96-108.

<sup>43</sup> *Id.* at p. 4:110-112.

question his opinion that the Section 15 structure was unoccupied, he would have followed up and further verified the status of the structure,<sup>44</sup> just as he had done with similar issues.<sup>45</sup>

Minnesota Power did not have a reason to ask the Kesslers about the use of the Section 15 structure because nothing indicated someone was living at the Section 15 structure when Minnesota Power was permitting the Project. Further, based on the Kesslers' testimony, the fact is that no one was living at the Section 15 structure from 2003 until 2015.

#### **F. MINNESOTA POWER'S PRE-HEARING COMMUNICATIONS TO LANDOWNERS.**

Minnesota Power filed supplemental materials with the Commission on August 7, 2013, including an updated Exclusion and Avoidance Areas map.<sup>46</sup>

On August 9, 2013, Minnesota Power sent a letter to participating landowners, such as the Kesslers, providing an update on the Project's status, informing them of the Commission's upcoming hearing, and inviting landowners to contact the right-of-way agents with any questions or concerns.<sup>47</sup> That letter also informed landowners that a Project layout map was available on the Commission's website.<sup>48</sup>

#### **G. THE SEPTEMBER 13, 2013 PUBLIC HEARING.**

On September 13, 2013, the Commission held a public hearing on the Application at the Oliver County courthouse. The testimony about what took place at the hearing differs greatly.

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<sup>44</sup> *Id.* at p. 4:114-118.

<sup>45</sup> *Id.* at pp. 4:120-5:136.

<sup>46</sup> B. Gartner Pre-filed Direct Testimony, p. 4:100-103 (MP Ex. 2) (citing MP Ex. 2-3).

<sup>47</sup> B. Gartner Pre-filed Direct Testimony, p. 7:183-192 (MP Ex. 2); T. Simmons Pre-filed Direct Testimony, p. 5:140-150 (MP Ex. 5) (citing MP Exhibit 5-2).

<sup>48</sup> T. Simmons Pre-filed Direct Testimony (MP Ex. 5-2). The Kesslers alleged in their complaint that they requested a map from Minnesota Power, but that it was not provided. At the hearing, the Kesslers did not substantiate that allegation. *See, e.g.*, Evid. Hrg. Tr. Vol. I, p. 130:4-14 (K. Kessler); *id.* at pp. 326:12-327:24 (D. Kessler).

The Kesslers' claim is that they raised a question about the location of a turbine relative to the Section 15 structure with Minnesota Power at a break in the hearing<sup>49</sup> and, in response, they were yelled and swore at by Mr. Freudenrich because of tax credit-related deadlines.<sup>50</sup> The Kesslers' claims about this event were not supported by testimony from anyone else who attended the public hearing. They are, instead, undercut by the fact that shortly after this alleged event, Mr. Kessler spoke on the record and, instead of relaying anything about such an extraordinary exchange or noting any specific concern about the Section 15 structure, Mr. Kessler focused his comments on other issues (digging around/locating water lines, weed management, and road placement) and stated that "the communication has been pretty good with Minnesota Power so far."<sup>51</sup>

Minnesota Power categorically denies that the Kesslers raised any issues with Minnesota Power about the Section 15 structure at the public hearing or that they had any sort of exchange as the one the Kesslers described.<sup>52</sup>

#### **H. THE COMMISSION'S ORDER.**

The Commission issued an Order granting a Certificate of Site Compatibility (the "Order") to Minnesota Power for the Project on September 25, 2013.<sup>53</sup> The Order incorporated Minnesota Power's commitment to a 1,400 foot setback from occupied residences, but did not define

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<sup>49</sup> Evid. Hrg. Tr. Vol. I, p. 69:21-70:7 (K. Kessler).

<sup>50</sup> *Id.* at p. 135:11-20 (K. Kessler).

<sup>51</sup> Sept. 13, 2013 Public Hrg. Tr., p. 127:8-11 (MP Ex. 2-6).

<sup>52</sup> *See, e.g.*, Freudenrich Pre-filed Direct Testimony, p. 7:211-8:231 (MP Ex. 1).

<sup>53</sup> *See* Case No. PU-13-127, Certificate of Site Compatibility for Energy Conversion Facility, Certificate Number 34 (Sept. 25, 2013).

“occupied residences” or otherwise address how Minnesota Power should implement its commitment.<sup>54</sup>

### **I. POST-COMMISSION MEETINGS BETWEEN THE KESSLERS AND MINNESOTA POWER.**

Under the Commission’s notice, events that took place after the public hearing are not relevant, except to the extent that they relate back to what events did or did not happen leading up to or at the public hearing. As with events before and during the public hearing, the Kesslers and Minnesota Power do not agree on what happened after the public hearing either.

According to the Kesslers, there were between one and three meetings with Minnesota Power after the September 13, 2013 public hearing before they signed easements on October 23, 2013. The Kesslers testified that their first meeting was with Mr. Monroe and Mr. Isaacson at the Project’s O&M building after the public hearing to go over the easement documents, but they did not sign the easements until a later meeting with Mr. Monroe at the Kesslers’ home.<sup>55</sup> The Kesslers claim that they did not want to sign any easements for the Project, but that they did so because Mr. Isaacson told the Kesslers at one of the meetings at the Project’s offices that if they refused, then Minnesota Power would get a judge to sign it within 30 days.<sup>56</sup>

Mr. Monroe testified unequivocally that there were two meetings with the Kesslers after the public hearing (on October 23, 2013, and on November 22, 2013), that both meetings took place at Minnesota Power’s O&M building in New Salem, and that the Kesslers signed easements at each meeting.<sup>57</sup> Mr. Monroe testified in detail about the October 23, 2013 meeting. He

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<sup>54</sup> Case No. PU-13-127, Findings of Fact, Conclusions of Law, and Order, p. 7, ¶ 35 (Sept. 25, 2013).

<sup>55</sup> Evid. Hrg. Tr. Vol. I, pp. 342:11-345:8 (D. Kessler); *id.* at p. 139:12-22 (K. Kessler).

<sup>56</sup> *Id.* at p. 355:1-5 (D. Kessler).

<sup>57</sup> Evid. Hrg. Tr. Vol. II, pp. 720:2-721:9 (Monroe).

explained that the meeting began in the upstairs office area at the O&M building where he and the Kesslers went over the easements, including the sketches. Mr. Monroe further explained that the Kesslers raised issues about access roads, the turbine pad, and fencing that Mr. Monroe could not answer<sup>58</sup>, so he called Mr. Freudenrich over to join the meeting.<sup>59</sup> Mr. Freudenrich joined the meeting and answered the Kesslers' questions.<sup>60</sup> Although the Kesslers were aware of the location of Turbine 441,<sup>61</sup> they did not tell Minnesota Power that they had any concerns about Turbine 441's location or that one of their sons might someday move into the Section 15 structure.<sup>62</sup> The Kesslers signed the easement covering their land in the SW1/4 of Section 15 (and an easement on another property) before leaving on October 23, 2013.<sup>63</sup> They came back the second time—on November 22, 2013—to sign a third easement, which needed to be modified because the Kesslers had completed the purchase of the property, which had previously been subject to a contract for deed with Mr. Kesslers' parents.<sup>64</sup>

Minnesota Power also unequivocally denies that they told the Kesslers at any time that Minnesota Power would go to a judge or use eminent domain to obtain the easements if the Kesslers refused to sign them.<sup>65</sup> As Minnesota Power explained, such a statement would be

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<sup>58</sup> Evid. Hrg. Tr. Vol. II, pp. 721:23-722:19 (Monroe).

<sup>59</sup> *Id.* at pp. 722:20-723:3 (Monroe).

<sup>60</sup> Despite the alleged nature of the alleged encounter the Kesslers had with Mr. Freudenrich at the public hearing, the Kesslers did not raise that encounter or more generally any issues about Mr. Freudenrich's alleged behavior when he answered their questions at the October 23, 2013 meeting. *Id.* at p. 723:7-16 (Monroe).

<sup>61</sup> *Id.* at p. 726:3-15 (Monroe).

<sup>62</sup> *Id.* at pp. 723:17-724:1 (Monroe); *id.* at pp. 725:24-726:1 (Monroe).

<sup>63</sup> *Id.* at p. 724:8-12 (Monroe).

<sup>64</sup> *Id.* at pp. 724:8-725:15 (Monroe).

inconsistent with their approach to landowner relationships generally and that Minnesota Power had, in fact, made adjustments responsive to landowner concerns (including removing project infrastructure from the land of a person who had signed an option agreement but did not want to sign an easement).<sup>66</sup>

**J. THE PROJECT WAS BUILT AND PUT INTO OPERATION.**

The foundation for Turbine 441 was constructed in July 2014 and the turbine was erected in October 2014.<sup>67</sup> The Project began commercial operations in January 2015.<sup>68</sup>

The Kesslers did not raise any issues about the proximity of Turbine 441 relative to the Section 15 structure during construction.<sup>69</sup>

**K. FOR THE FIRST TIME, IN FEBRUARY 2017, THE KESSLERS RAISED AN ISSUE ABOUT THE LOCATION OF TURBINE 441 IN RELATION TO THE SECTION 15 STRUCTURE.**

Minnesota Power's testimony was consistent that the Kesslers did not raise an issue about the location of Turbine 441 until February 2017—more than two years after Turbine 441 was built.<sup>70</sup> At that time, Minnesota Power immediately investigated the issue raised by Mr. Kessler. That investigation determined that no Minnesota Power representative had been told about the Kesslers' concern prior to February 2017.<sup>71</sup>

Minnesota Power's testimony that the issue was first raised by the Kesslers in February 2017 is consistent with Mr. Lein's testimony and a March 1, 2017 memorandum he prepared

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<sup>67</sup> Freudenrich Pre-Filed Direct Testimony, p. 8:238-240 (MP Ex. 1).

<sup>68</sup> Gartner Pre-Filed Direct Testimony, p. 9:246-248 (MP Ex. 2).

<sup>69</sup> Evid. Hrg. Tr. Vol. I, p. 143:11-15 (K. Kessler).

<sup>70</sup> Evid. Hrg. Tr. Vol. II, pp. 782:14-783:1 (Simmons); *id.* at p. 596:15-25 (Isaacson)

<sup>71</sup> Evid. Hrg. Tr. Vol. II, p. 466:22-25 (B. Gartner); *id.* at p. 556:16-25 (Freudenrich); *id.* at pp. 596:15-597:18 (Isaacson); *id.* at p. 728:10-17 (Monroe); *id.* at p. 782:14-17 (Simmons).

regarding a “new issue” raised by the Kesslers concerning Turbine 441.<sup>72</sup> As noted in that memorandum, Mr. Lein determined that the Section 15 structure was not an occupied residence when Turbine 441 was permitted and constructed, “based on everything that [he] had experienced in his investigation with the case.”<sup>73</sup>

Minnesota Power’s testimony was also unfaltering that, if the Kesslers had raised the issue about a concern with the location of Turbine 441 relative to the Section 15 structure at any point prior to construction of Turbine 441, the issue would have been addressed by Minnesota Power.<sup>74</sup>

For their part, the Kesslers are not sure when, after construction, they raised an issue about Turbine 441’s proximity to the Section 15 structure, and, on this point, the Kesslers’ testimony does not contradict the testimony of Mr. Lein or Minnesota Power.<sup>75</sup>

### **III. BURDEN OF PROOF.**

In a complaint hearing, the burden of proof is on the complainant.<sup>76</sup> Therefore, the Kesslers bear the burden of proof in this action.

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<sup>72</sup> J. Lein March 1, 2017 Memorandum (MP Ex. 7).

<sup>73</sup> Evid. Hrg. Tr. Vol. I, p. 258:2-14 (J. Lein) (discussing May 15, 2017 Memorandum (Ex. 7)).

<sup>74</sup> *See, e.g.*, Evid. Hrg. Tr. Vol. II, p. 769:13-24 (Monroe).

<sup>75</sup> Evid. Hrg. Tr. Vol. I, p. 146:5-9 (K. Kessler).

<sup>76</sup> See North Dakota Office of Administrative Hearings website at: [Frequently Asked Questions | Administrative Hearings \(nd.gov\)](http://www.nd.gov/oha/frequently-asked-questions).

#### IV. ARGUMENT

##### A. THE COMMISSION SHOULD DECIDE ISSUES #1 AND #2 IN MINNESOTA POWER'S FAVOR BECAUSE THE SECTION 15 STRUCTURE WAS NOT AN "OCCUPIED RESIDENCE" AT THE TIME THE COMMISSION ISSUED ITS ORDER.

###### 1. Defining "Occupied Residence."

###### A) Applicable principles of construction.

Minnesota Power's commitment to apply a turbine setback of 1,400 feet from "occupied residences," which was included in the Commission's Order, should be interpreted in light of applicable rules of construction. In determining the plain, ordinary, or commonly understood meaning of words or phrases that have not been otherwise defined, dictionary definitions are a common starting point. *Wilkins v. Westby*, 2019 ND 186, ¶ 8, 931 N.W.2d 229. When a regulation is plain on its face, courts do not afford deference to an agency's attempt to interpret the regulation. *See, e.g., Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). When the wording of a statute, rule, or in this case an order is free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-01-05; *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.").

###### B) An "occupied residence" is the place where someone lives.

The phrase "occupied residence" was not defined in North Dakota law or otherwise by the Commission when Minnesota Power agreed to apply a turbine setback of 1,400 feet from "occupied residences" when siting the Project.<sup>77</sup> Accordingly, the dictionary is a useful starting point. In this case, it is also the appropriate ending point.

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<sup>77</sup> Evid. Hrg. Tr. Vol. I, pp. 218:12-219:9 (Lein).

“Occupy” means “to reside in as an owner or tenant.”<sup>78</sup> “Residence” means “the place where one actually lives as distinguished from one’s domicile or a place of temporary sojourn.”<sup>79</sup> Together, “occupied residence” means the place where one, as an owner or a tenant, actually lives.

When Commission Staff requested the setback requirement from “occupied residence,” Commission Staff did not apply a definition other than the place where someone lived.<sup>80</sup> When Minnesota Power agreed to voluntarily impose the requirement on the Project, it interpreted “occupied residence” as the place where someone lived. When the Commission incorporated the setback into the Order, the Commission did not provide a definition. Accordingly, not only is it appropriate to interpret “occupied residence” according to its plain meaning, but that is what actually occurred when the Project was sited, permitted, and constructed.

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<sup>78</sup> Available at: <https://www.merriam-webster.com/dictionary/occupied> (last visited June 11, 2021).

<sup>79</sup> Available at: <https://www.merriam-webster.com/dictionary/residence> (last visited June 11, 2021).

<sup>80</sup> Evid. Hrg. Tr. Vol. I, p. 248:3-11 (Lein).

## 2. Under the Plain Meaning of “Occupied Residence,” the Section 15 Structure was Not an “Occupied Residence.”

There is no real dispute that the Section 15 structure was not an “occupied residence” under that phrase’s plain meaning:

- The Kesslers acknowledge that no one had lived at that structure for many years before the Project was built, and anyone who visited the structure actually lived somewhere else.<sup>81</sup>
- Minnesota Power’s review did not determine that anyone lived at the Section 15 structure when the Project was sited and permitted.<sup>82</sup>
- Commission Staff’s review is consistent with the determination that the Section 15 structure was not an “occupied residence” because no one lived there during the relevant period.<sup>83</sup> It is also consistent with the fact that Commission Staff considers how an applicant has defined a commitment when asked to make recommendations on compliance.<sup>84</sup>

Because the Section 15 structure was not an “occupied residence” when the Project was sited, permitted, and constructed, the Commission should find in Minnesota Power’s favor on issues #1 and #2.<sup>85</sup>

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<sup>81</sup> See, e.g., Kessler Ex. Dates-1 and Dates-2; Evid. Hrg. Tr. Vol. I, pp. 323:12-324:7 (D. Kessler) (stating that “They [Kessler family members] stayed there occasionally [between 2003 until after the project was constructed], but it wasn’t like a permanent residence. . .,” and explaining that anyone who stayed at the Section 15 structure lived somewhere else).

<sup>82</sup> B. Gartner Pre-filed Direct Testimony, pp. 5:139-6:153 (MP Ex. 2).

<sup>83</sup> Mr. Lein determined that, in his opinion, the Section 15 structure “was not occupied when Bison 4 was sited and constructed.” Evid. Hrg. Tr. Vol. I, pp. 232:13-233:6 (Lein) (discussing Kessler Ex. Binder p. 334 (May 15, 2017 J. Lein Memo).) Mr. Lein’s determination was based on “everything that [he] had experienced in [his] investigation with the case:” (1) his understanding that nobody lived at the Section 15 structure when Turbine 441 was built; and (2) Mr. Lein’s first-hand impressions that, when he was on site, “it didn’t look like it was capable of having anybody live in it when I was there.” Evid. Hrg. Tr. Vol. I, p. 237:13-18 (Lein); *id.* at pp. 265:11-266:7 (Lein). Mr. Lein testified that he did not mean that the Section 15 structure “couldn’t be lived in” when he was on-site and that there was some rehabilitation work underway when Mr. Lein was on site. *Id.* at pp. 239:21-240:10.

<sup>84</sup> Evid. Hrg. Tr. Vol. I, pp. 256:22-257:2 (Lein).

<sup>85</sup> Notably, there was testimony about whether the Section 15 structure *could* have been used as a residence or was livable during the relevant period. That testimony demonstrates the

**B. MINNESOTA POWER DID NOT WITHHOLD INFORMATION FROM THE COMMISSION AT THE PUBLIC HEARING.**

The third issue noticed by the Commission for the hearing was whether Minnesota Power withheld information about the Section 15 structure that it should have told to the Commission at the public hearing. The Kesslers claimed they told Minnesota Power before and at the public hearing that their son(s) planned to live in the Section 15 structure in the future. Minnesota Power denied those allegations. The parties gave competing testimony about what actually took place. Minnesota Power's testimony was consistent and well supported. The Kesslers' testimony has changed over time and details remain elusive in their version of events. As set out below, Minnesota Power did not withhold information about the Section 15 structure from the Commission at the public hearing.

**1. There is Not Credible Evidence that the Kesslers Told Minnesota Power Anything About the Section 15 Structure Before the Commission's September 13, 2013 Public Hearing.**

In the several versions of the Complaint the Kesslers filed with the Commission, the Kesslers repeatedly alleged that, "[t]he Kesslers *prior to the public hearing* told *both Scott and Wade* about their concerns that Turbine 441 would be too close the residence."<sup>86</sup> The Kesslers' hearing testimony was different; at the hearing, the Kesslers' story was based on more general allegations that they told someone at some point about concerns regarding the project design in

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importance of the language of the Commission's Order. If the Order had required a setback from "livable residences" or "occupiable residences" or some other phrase that required Minnesota Power to analyze the *potential* use of a structure, then Minnesota Power would have been on notice and would have conducted an entirely different siting analysis. *See, e.g.*, Evid. Hrg. Tr. Vol. II, p. 465:1-8 (Gartner); *id.* at p. 501:5-17 (Gartner); *id.* at p. 502:10-19 (Gartner); *id.* at p. 510:2-12 (Gartner).

<sup>86</sup> Evid. Hrg. Tr. Vol. I, pp. 329:25-330:24 (D. Kessler) (emphasis added to quotation from Second Revised Cplt.).

relation to the Section 15 structure, but Minnesota Power withheld the information from the Commission during the hearing.

The evidence casts overwhelming doubt on any of the Kesslers’ versions of events in which they claim they told Minnesota Power about their sons’ future plans to occupy the Section 15 structure as a residence. There are many details of the Kesslers’ testimony that are demonstrably incorrect. Some of those are addressed in more detail below. However, there is an overarching issue that cannot be overlooked and about which the Kesslers have no response. Specifically, Minnesota Power has made clear that if the Kesslers had raised concerns about the location of Turbine 441 prior to construction, then even though the Section 15 structure was not an “occupied residence,” Minnesota Power would have been able to and would have, in fact, addressed the Kesslers’ concern. As Minnesota Power testified, it would have been far easier and their preference to have addressed the concern up front than to have an issue post-construction, and it is their practice to try to address landowner concerns.

Some examples of specific claims made by the Kesslers that were rebutted by credible, factual testimony are below:

Kesslers’ Claim/Allegation	Facts Based on Testimony
<p>The Kesslers repeatedly raised the location of the Section 15 structure relative to turbine locations beginning in 2009.</p>	<p>The Kesslers repeatedly and unequivocally testified in their depositions that they had “specific recollections” of talking with Mr. Monroe during the 2008 and 2009 timeframe; however, Mr. Monroe did not work for Minnesota Power in 2008 or 2009. When the Kesslers learned their testimony was incorrect, they changed it. In a case like this, where credibility matters, the fact that the Kesslers were so sure of their story until they learned it was inaccurate, then so quickly changed their story without a credible reason for doing so, is meaningful.</p>

<p>The Kesslers began raising the location of the Section 15 structure relative to turbine locations beginning in 2009 in connection with their first option to Minnesota Power.</p>	<p>In 2009, the Kesslers’ Oliver County properties were under an <i>exclusive</i> option to a different developer. Minnesota Power could not have optioned the Section 15 property from the Kesslers at that time. In fact, the Kesslers optioned only their Mercer County property to Minnesota Power in 2009. The suggestion that there were detailed discussions about structures and turbine locations on land Minnesota Power had not optioned (and located in a different County) does not withstand scrutiny. Perhaps the Kesslers did tell the <i>other wind developer</i> about the Section 15 structure in 2009, but that does not support their allegations against Minnesota Power.</p>
<p>The Kesslers told Wade Isaacson about their concerns repeatedly prior to the public hearing.</p>	<p>The Kesslers admitted they did not even meet Mr. Isaacson until <i>after</i> the public hearing.<sup>87</sup></p>
<p>Scott Monroe came to their house and the Kesslers told Scott Monroe about their concerns repeatedly prior to the public hearing.</p>	<p>Mr. Monroe testified that he has <i>never</i> been to the Kesslers’ residence<sup>88</sup> and did not talk to the Kesslers until after the public hearing.<sup>89</sup> Mrs. Kessler testified that she “can’t specifically say we told Scott [Monroe]” about the concerns prior to the public hearing.<sup>90</sup></p>
<p>The Kesslers told Minnesota Power about their concerns when signing an amended option agreement (to include Oliver County properties for the first time) in 2013.</p>	<p>Mr. Kessler testified that he is not sure who from Minnesota Power that he talked with in 2013, but he testified that he thinks it was Paul Johnson. Mr. Johnson, however, had retired in 2009.<sup>91</sup> Further, as Mr. Monroe testified, he did not have substantive discussions with the Kesslers before the public hearing.<sup>92</sup></p>

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<sup>87</sup> Evid. Hrg. Tr. Vol. I, p. 330:15-24 (D. Kessler).

<sup>88</sup> Evid. Hrg. Tr. Vol. II, p. 721:3-9 (Monroe).

<sup>89</sup> *Id.* at p. 718:23-719:8 (Monroe).

<sup>90</sup> Evid. Hrg. Tr. Vol. I, p. 330:15-24 (D. Kessler).

<sup>91</sup> *Id.* at p. 127:5-13 (K. Kessler).

<sup>92</sup> Evid Hrg. Tr. Vol. II, p. 718:23-719:8 (Monroe).

<p>The Kesslers told <i>someone</i> from Minnesota Power about their concerns before the public hearing at <i>some</i> point in time.<sup>93</sup></p>	<p>Every Minnesota Power witness testified that they were not aware of the Kesslers' concerns until February 2017.<sup>94</sup> Although Mr. Kessler had many communications with the Commission Staff and dozens with Minnesota Power during and after construction (before February 2017), Mr. Kessler did not mention a concern about Turbine 441's location or the Section 15 structure's status then.<sup>95</sup> Further, Minnesota Power's testimony aligns with the testimony of Commission Staff and Mr. Lein's March 1, 2017 memorandum.<sup>96</sup></p>
<p>Minnesota Power <i>admitted</i> in 2017 that the Kesslers had told Minnesota Power about the Kesslers' concerns before the public hearing.</p>	<p>Minnesota Power disputes that testimony<sup>97</sup> and Mr. Lein also rejected the Kesslers' version of events:</p> <p style="padding-left: 40px;">Q. And during that visit, the Kesslers asserted they had told Minnesota Power before the turbine was sited they didn't want turbines near the farmhouse on Section 15</p>

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<sup>93</sup> Mr. Kessler explained that he did not think there were any discussions about tower locations before the alleged conversation at the public hearing. Evid. Hrg. Tr. Vol. I, p. 58:2-24 (K. Kessler).

<sup>94</sup> *Id.* at 466:22-25 (B. Gartner); *id.* at p. 556:16-25 (Freudenrich); *id.* at pp. 596:15-597:18 (Isaacson); *id.* at p. 728:10-17 (Monroe); *id.* at p. 782:14-17 (Simmons).

<sup>95</sup> Evid. Hrg. Tr. Vol. I, p. 143:11-15 (K. Kessler).

<sup>96</sup> J. Lein March 1, 2017 Memorandum (MP Ex. 7); Evid. Hrg. Tr. Vol. I, p. 223:16-21 (J. Lein).

<sup>97</sup> Evid. Hrg. Tr. Vol. II, p. 598:20-599:11 (Isaacson).

	<p>because their son was planning to live there; correct?</p> <p>A. Yes.</p> <p>Q. Minnesota Power’s representatives did not agree with the Kesslers’ assertion, did they?</p> <p>A. No.<sup>98</sup></p> <p>Moreover, Mr. Lein explained that the first time the Kesslers raised the issue with Commission staff was in 2017.<sup>99</sup></p>
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As demonstrated above, the Kesslers have not sustained their burden of proof on their claim that Minnesota Power knew of the Kesslers’ future plans for the Section 15 structure before the public hearing and withheld that information from the Commission.

**2. There is Not Credible Evidence that Anyone from Minnesota Power Learned Information at the Public Hearing that it Should Have Communicated to, but Instead Withheld from, the Commission.**

**A) The Kesslers’ version of what happened at the public hearing has changed in material ways and remains incomplete.**

The Kesslers claim that someone from Minnesota Power “blew up” at them at the September 13, 2013 public hearing when the Kesslers tried to raise a question about the location of a turbine relative to the Section 15 structure. Their position on this point has not been consistent and continued to change from their filing of complaints in this action through the evidentiary hearing.

Although the event was allegedly “pretty unforgettable,” in the end, the Kesslers’ testimony is that they do not remember who participated in the conversation and Mr. and Mrs.

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<sup>98</sup> Evid. Hrg. Tr. Vol. I, pp. 224:8-19 (J. Lein).

<sup>99</sup> *Id.* at p. 223:16-21 (J. Lein).

Kesslers' testimony differs as to where the conversation took place. In their several versions of complaints to the Commission, the Kesslers repeatedly identified the Minnesota Power representatives present for the conversation as Mr. Freudenrich and Mr. Monroe, and stated that the event took place in the hallway.<sup>100</sup> The Kesslers reiterated their position in their sworn, written discovery responses.<sup>101</sup> After the Kesslers learned in discovery that Mr. Monroe was not at the public hearing, they changed their story and claimed that it was Todd Simmons, not Mr. Monroe, who was present for the event.<sup>102</sup> After learning that it was not Mr. Simmons, the Kesslers abandoned their claim that he was there.<sup>103</sup> Now, the Kesslers do not identify any particular person at all, but instead claim that it was some other known, yet unidentified, Minnesota Power representative.<sup>104</sup>

The Kesslers' testimony has also changed about where the event took place. In their complaints and in discovery, the Kesslers repeatedly claimed that it took place in the hallway. At the evidentiary hearing, Mr. Kessler testified unequivocally that it took place "right by the maps" in the courtroom and Mrs. Kessler testified that "it probably happened in the hallway."<sup>105</sup>

The Kesslers' testimony is chock full of inconsistencies and holes about critical, allegedly "pretty unforgettable" details. In a case like this, the fact that the Kesslers' position has changed in material ways is important and weighs heavily against a finding that the Kesslers have carried their burden of proof.

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<sup>100</sup> Evid. Hrg. Tr. Vol. I, pp. 132:20-133:3 (K. Kessler).

<sup>101</sup> *Id.* at p. 133:4-8 (K. Kessler).

<sup>102</sup> *Id.* at p. 134:12-16 (K. Kessler).

<sup>103</sup> *See id.* at p. 335:6-20 (D. Kessler).

<sup>104</sup> *Id.* at. 337:16-23 (D. Kessler).

<sup>105</sup> *Compare id.* at p. 135:11-24 (K. Kessler) *with id.* at pp. 338:16-339:8 (D. Kessler).

**B) Minnesota Power’s position has been consistent and is supported.**

Minnesota Power’s testimony has been consistent—Minnesota Power’s witnesses testified that the alleged event, in which Mr. Freudenrich “blew up,” “swore at,” and told the Kesslers that there was not time to move Turbine 441 because of tax credits, did not happen. Minnesota Power’s witnesses’ testimony demonstrates the following:

- Despite the fact that there were many people in a relatively small space, no one other than the Kesslers claims any knowledge about what would be (if it had happened) a very extraordinary event—a representative of a project developer “yelling” and swearing at a landowner in a courtroom during a break in a Commission public hearing;
- The “other person” the Kesslers most often alleged was part of the exchange—Mr. Monroe—was not at the hearing,<sup>106</sup> but was out working with other landowners that day, as further evidenced by the fact that he notarized other landowner agreements;<sup>107</sup>
- Despite suggestions that perhaps not everyone who attended the public hearing signed the sign-in sheet, there is no evidence that any Minnesota Power representative attended but did not sign in;<sup>108</sup>
- Mr. Freudenrich testified that the alleged interaction with the Kesslers at the public hearing did not occur, and that the allegations are inconsistent with his personal and professional approach to working with landowners;<sup>109</sup>
- Every Minnesota Power representative testified that the allegations are inconsistent with how Minnesota Power treats landowners;<sup>110</sup>

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<sup>106</sup> Monroe Pre-filed Direct Testimony, pp. 4:121-5:128 (MP Ex. 4).

<sup>107</sup> Evid. Hrg. Tr. Vol. II, p. 718:3-6 (Monroe); *id.* MP Exs. 13, 14, and 15.

<sup>108</sup> B. Gartner Pre-filed Direct Testimony, p. 7:198-201 (MP Ex. 2) (citing MP Ex-2-5).

<sup>109</sup> Evid. Hrg. Tr. Vol. II, pp. 551:13-552:12 (Freudenrich).

<sup>110</sup> *Id.* at pp. 467:23-468:7 (B. Gartner); *id.* at pp. 731:1-732:16 (Monroe); *id.* at pp. 783:17-784:-3 (Simmons).

- Mr. Freudenrich testified that the Project did not have to construct Turbine 441 or any other turbines before the end of 2013 to qualify for production tax credits;<sup>111</sup>
- Multiple Minnesota Power representatives testified that, as of the public hearing, Minnesota Power could have and would have made adjustments to the location of Turbine 441 if they had learned of the Kesslers' concerns;<sup>112</sup> and
- Mr. Freudenrich and Mr. Simmons testified that, if Mr. Freudenrich had done what the Kesslers allege, Mr. Freudenrich would have been subject to adverse employment actions.<sup>113</sup>

Mr. Lein also testified that Minnesota Power is responsive to landowners.<sup>114</sup> Likewise, other landowners, Glenn Lennick and Lance Gartner, testified that Minnesota Power treats landowners well and is held in high regard in the community.<sup>115</sup>

In the end, neither the evidence nor common sense supports the Kesslers' allegations. Minnesota Power has a commitment to, and a reputation for, building partnerships with its landowners. Minnesota Power is known by Commission Staff as being responsive.<sup>116</sup> Minnesota Power has an extensive history and future of owning and operating infrastructure in North Dakota, and of bringing projects before the Commission. Indeed, even at the public hearing on the Project's application, Commissioner Christmann noted that he had "a lot of experience with ALLETE and Minnesota Power and the [Bison] 1, 2 and 3 projects . . ." Commissioner Christmann noted that, based on those experiences, his constituents were not complaining about Minnesota Power, and

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<sup>111</sup> *Id.* at p. 553:2-19 (Freudenrich).

<sup>112</sup> *Id.* at p. 467:5-22 (B. Gartner); *id.* at p. 784:4-10 (Simmons).

<sup>113</sup> *Id.* at pp. 552:18-553:1 (Freudenrich); *id.* at pp. 780:21-781:11 (Simmons).

<sup>114</sup> Evid. Hrg. Tr. Vol. I, p. 226:18-20 (Lein).

<sup>115</sup> *Id.* at p. 686:13-15 (G. Lennick) ("[Minnesota Power has] always been fair and honest and that's all I ask of anybody."); *id.* at pp. 672:24-673:19 (L. Gartner) ("[Minnesota Power] set the industry standard in our area.").

<sup>116</sup> Evid. Hrg. Tr. Vol. I, p. 226:18-20 (Lein).

“this company has been -- it seems like a player where I did not get very [many] complaints. And so, you know, that’s certainly a good thing.”<sup>117</sup>

More specifically, there is no good explanation as to why, despite the fact that Minnesota Power values landowners and addresses their concerns, and despite the fact that Minnesota Power could have and would have addressed the Kesslers’ concerns if timely raised, Minnesota Power would simply (and repeatedly, as the Kesslers claim) disregard the Kesslers’ concerns and choose this litigious path instead.<sup>118</sup>

**C) The passage of time does not excuse the inconsistencies in the Kesslers’ testimony or lessen their burden of proof.**

It is perhaps understandable, to a degree, that because the alleged events took place so long ago the Kesslers’ testimony has changed and remains uncertain. However, the inconsistencies in their testimony should not be ignored simply because of the passage of time. The Kesslers chose not to file a complaint until long after this Project was permitted and constructed, despite the fact that their alleged concerns (proximity, noise, and shadow flicker) would have been evident, if not from the maps they had seen, then as Turbine 441 was constructed and, at the latest, when the Project became operational in January 2015. The Commission should not give the Kesslers the benefit of their delay and excuse the inconsistencies in their testimony, particularly in light of the unchanged and unequivocal testimony that supports Minnesota Power’s position. In the end, the Kesslers have not sustained their burden of proof on their claim that Minnesota Power knew of the Kesslers’ future plans for the Section 15 structure before or at the public hearing and withheld that information from the Commission.

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<sup>117</sup> Sept. 13, 2013 Public Hrg. Tr., pp. 132:24-133:7 (MP Ex. 2-6).

<sup>118</sup> See, e.g., Evid. Hrg. Tr. Vol. II, pp. 781:18-782:13 (Simmons); *id.* at pp. 783:6-784:10 (Simmons).

**C. MINNESOTA POWER DID NOT VIOLATE THE COMMISSION'S ORDER OR WITHHOLD INFORMATION FROM THE COMMISSION; THEREFORE, REMEDIES ARE NOT WARRANTED.**

As discussed above, at the time the Project was permitted, Minnesota Power voluntarily committed to apply a 1,400 foot turbine setback from occupied residences, and “occupied residence” was not defined in statute, rule, or the Commission’s Order. As such, consistent with Mr. Lein’s testimony, Minnesota Power’s compliance with its voluntary commitment should be based on Minnesota Power’s understanding of the commitment at the time it was made. As set forth above, based on a plain meaning of “occupied residence,” the Section 15 structure was not an occupied residence at the time the Project was permitted. Therefore, the location of Turbine 441 does not violate the Commission’s Order. Likewise, Minnesota Power did not withhold information regarding the Section 15 structure from the Commission at the public hearing. Therefore, no remedies are warranted.

Even if the Commission determines that “occupied residence” should have been defined differently than the plain, common sense meaning applied by Minnesota Power, that new definition should not be retroactively applied to the Project. Doing so would be the equivalent of the Commission adopting new siting rules and then retroactively applying those rules to a project that has been permitted almost eight years and operational for over six years. Regulatory certainty is an essential component of permitting, and that certainty would be eroded by applying previously unknown standards years after a permit was issued to a project that was constructed in reliance on that permit.

Further, regardless of the definition of “occupied residence” applied, the extreme remedy of requiring Minnesota Power to remove Turbine 441 is not warranted in this case. Minnesota Power could not have intentionally violated a definition determined over eight years after the Project was permitted. Moreover, as constructed, the Project complies with the sound level


avoidance area requirement at the Section 15 structure, and Minnesota Power has committed on the record that it is willing to install shadow flicker technology to limit shadow flicker at the Section 15 structure to 30 hours per year. Requiring Minnesota Power to remove Turbine 441 under these circumstances is not justified and sets a precedent inviting long after-the-fact complaints to be filed in other cases.

**V. CONCLUSION**

With the benefit of hindsight, of course things could have been done differently, but that is not what this case is about. This case is about what actually happened. The facts have demonstrated that Minnesota Power appropriately sited Turbine 441 because the Section 15 structure was not an “occupied residence” during the relevant period, and that Minnesota Power did not withhold information from the Commission at the public hearing. As a result, the Commission should issue an order in Minnesota Power’s favor.

Dated this 14th day of June, 2021.

FREDRIKSON & BYRON, P.A.

By 

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**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

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<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"><b>CERTIFICATE OF SERVICE</b></p>
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Roxanne Gangl, being first duly sworn, does depose and state that on June 14, 2021, this Certificate of Service and true and correct copies of:

- Filing letter; and
- Minnesota Power's Post-Hearing Opening Brief

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

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*/s/ Roxanne Gangl*

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Roxanne Gangl