

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler,) Case Nos. PU-20-194
) OAH File No. 20200211
Complainants/Petitioners,)
) **KESSLERS’**
v.) **POST-TRIAL BRIEF**
)
Minnesota Power, a division of ALLETE,)
Inc.,)
)
Respondent.)

Outline of Evidence Received

1. What steps did Minnesota Power take to investigate and fairly determine occupancy of any structures near or within the Project?
2. What steps did Minnesota Power take to provide information to landowners as to placement of roads and towers?
3. Is Minnesota Power obligated to provide accurate and complete information to the PSC regarding surrounding structures?
4. What is the location of Section 15 home and Turbine 441?
5. What are the effects of the placement of the tower too close to the home?
6. What are the facts relating to the use and condition of the home?
7. Is “unoccupied” residence defined, and if not what definition should be employed?
8. Where the application “voluntarily” contains a setback requirement and the PSC in approving the application orders such a setback, is the applicant required to comply with the setback?

9. What occurred at the public hearing, including and especially the Kesslers' raising concerns about the placement of Tower 441 near the existing structure?

10. If the applicant failed to comply with any of its obligations or duties relating to a) the landowner, b) the information supplied to the PSC, or c) the requirements placed on the applicant by the PSC, what remedy should apply?

1. What steps did Minnesota Power take to investigate and fairly determine occupancy of any structures near or within the Project?

Keith Kessler stated that they had told Minnesota Power that they were not interested in having any wind towers erected around our home facility nor Section 15, page 54-55.

Prior to the public hearing the Kesslers had discussions with representatives of Minnesota Power in regards to the Section 15 house and the plans as to who would be living in it, and these discussions occurred from day one, and they said they didn't want anything built around our homestead nor the Section 15 home, because eventually one of our sons was going to move into that facility, pages 69-70.

The Kesslers had repeatedly told Minnesota Power that their son was going to be moving in there, page 89.

At the Good Friday meeting on site with representatives of Minnesota Power and PSC staff Keith raised the problem with the turbine being too close, and Keith stated at the time that we told you over and over that her kids are going to live there when they get out of college, pages 92 and 95.

Commissioner Fedorchak reviewed on the record Keith's testimony at the public hearing as shown on MP 000118, and Keith specifically mentioned in his testimony the towers, where the towers are going to go, and they would have input on those things, and that didn't really take place, pages 164-165.

The Kesslers had repeatedly indicated to the company that there was an intent to occupy that residence on a full-time basis at some point, page 184.

Stephen Kessler doesn't recall ever seeing a note from the company inquiring whether this was an occupied residence, page 285.

Deanna Kessler remembers telling Minnesota Power that our children were going to live there, page 363.

Deanna stated that from where the turbine was being built when they were doing construction Minnesota Power knew there was a yard there, and the company never thought of going over there to check whether it was occupied, pages 371-372.

Barry Gartner, a design engineer for Minnesota Power, stated that Minnesota Power uses 3 sources to determine the residences are occupied or unoccupied, which in previous projects, the plat book, and satellite imagery, and the final information they obtained during the site visit, pages 444-445.

Barry Gartner stated he works out of Duluth and that the previous Bison projects did not involve Section 15 and therefore were not applicable, page 445.

Barry Gartner stated that they look at the plat book and satellite imagery before they did the site visit, and the plat book shows the Kesslers are the owners of Section 15, page 445-446.

Barry Gartner stated that the satellite imagery shows various structures on Section 15, but he does not recall receiving any additional information in regard to Section 15 from any of the people getting the easements or getting permission to be on the property, page 446.

Barry Gartner stated that the site visit occurred in May 2013, and they went to 83 sites, every location where they plan on putting a turbine, page 447.

Barry Gartner agreed that one of the purposes of the site visit is to look around and make sure that you don't have any avoidance areas and no structures there is too close, and that you are in compliance with all the items in your application, page 447.

Barry Gartner was aware that there were structures on Section 15, from the Google maps, satellite imagery, the plat book, and physically being there, page 448.

Barry Gartner confirmed that while on site they did not take any steps to gauge the distance between where they plan on putting the turbine and where the structures were on the Kesslers' property, but

he knew what the distances were from satellite imagery, and that it was a little over 1100 feet, page 449.

Barry Gartner confirmed that he was aware that the setback that applied was 1400 feet from an occupied residence, page 449.

Barry Gartner stated that while on-site he did not go into the yard or to the house, and did not use any device such as a rangefinder to determine the distance from the planned location of the turbine to the Kessler property, page 452.

Barry Gartner stated that the landmen are not there when they're doing the site visit, page 453.

Barry Gartner stated that they did not pick up the phone or contact the land agents and discuss with them what the structure was or how the Kesslers use it, page 453.

Barry Gartner was aware that the land agent has a document that lists all the landowners, their addresses, their phone numbers, and that all that information is readily available to him, page 454.

Barry Gartner admitted that they were not prohibited from contacting either the land agent or the landowners if they felt necessary to do so, and asked, what is the structure used for? and admits he could have done so, page 454.

Barry Gartner stated that there is no policy against contacting the landowner directly in finding out information, but that we stop the practice, pages 454-455. Barry Gartner admits that they did not contact or pursue contacting the landowner, page 456.

Barry Gartner stated that Minnesota Power was identifying occupied residences because of the requirement that the sound be limited to 50 dB within 100 feet of an inhabited residence, page 460.

Barry Gartner asserted that they would err on the side of being overinclusive, and that it was appropriate to be overinclusive in identifying occupied residences, pages 462-463.

Barry Gartner stated that the Oliver County plat book did not list the current residence, satellite imagery suggested there was no activity at the residence that you would associate with an occupied residence, during the site visits they didn't gather any information that indicated it being used as an occupied residence, page 464.

Barry Gartner was not aware of the Kesslers speaking to any Minnesota Power employees before, during or after the public hearing, page 466.

Barry Gartner was unaware of any concerns Kesslers had regarding the placement Turbine 441 in relation to Section 15 structure, page 466.

Barry Gartner stated that had they known about these concerns they could have adjusted the layout to address those concerns, and a change at that time would not have significantly affected the project schedule or increase cost to move Turbine 441 further back in 2013, page 467.

Barry Gartner confirmed that it was primarily his responsibility to determine which residents were occupied or not, but all the team members (to the extent that the gathered information relevant) communicate that to him, page 479.

Barry Gartner stated that nothing prevented that structure from being further back from the Kessler property, page 480.

Barry Gartner stated that he does not know who puts together the plat book, and was unaware that the plat book itself states in the beginning that farmsteads with livable buildings are indicated with an asterisk in the name of the current residence is listed next to the*, but also states that the plat book was compiled and data procured in September 2011, page 481.

Barry Gartner stated that the plat book is one of a few sources, it's an easy starting point, but they used other data points to make the determination as to whether the building was unoccupied, page 482.

Barry Gartner stated there's a complete distinction between the land agents and the who people were developing the proposal, and it is their practice for the land agents to be the point of contact with the landowners, pages 483-484.

Barry Gartner stated that the land agents for this project were Wade Isaacson and Scott Monroe, and they were not part of the micro siding or on-site review, but they had weekly project team meetings and they would talk to them on phone regularly, pages 483-486.

Barry Gartner confirmed that there is a process for the land agents to get information to the designers, page 485.

Barry Gartner admitted to Commissioner Christmann that he does not know how often the plat books are done, or how often they're issued, page 497.

Barry Gartner stated to Commissioner Christmann that if someone built a new house in 2012 they would've identified it through satellite

imagery or through our site visits, but admitted he didn't know how often the satellite imagery is updated, page 498.

Barry Gartner stated to Commissioner Christmann that the purpose of the site visits is to gather intelligence that might not be showing up in the plat book or the satellite imagery, such as a new house being constructed, an old one being revitalized, or just being moved into, page 498-499.

Barry Gartner confirmed to Commissioner Christmann that the yard is visible from the turbine site, page 499.

Barry Gartner admitted to Commissioner Christmann that satellite imagery can be outdated, page 499.

Barry Gartner admitted to Commissioner Christmann that he checked the plat book that can be outdated, he checked satellite imagery that can be outdated, that you could see the farmstead in your on-site, but didn't make sure that either you or your land agents went over there and knocked on the door required of the owner to see for sure whether it was an occupied residence, page 500.

Commissioner Christmann noted his concern that Barry Gartner thought he could make a determination of occupancy from 1100 feet away, page 500.

In response to questioning from Commissioner Kroshus, Barry Gartner admitted there was an asterisk on the plat map that should've called the Kessler residence in question, page 508.

Barry Gartner confirmed his prior testimony that the company wanted to be overinclusive and try to err on the side of being over inclusive, page 511.

Barry Gartner stated that if you had called the landman and the landman told him that the Kesslers said, yes, we use this and are going to use it for our college son, he believes they would've moved Turbine 441 from where they put it – and the same would be true if he had spoken to the customers directly and had been given the information from the Kesslers, pages 519-520.

Barry Gartner admitted that in 2013 and 2014 moving the Turbine 441 would've been at a low cost, we had options, page 520.

Matt Freudenrich stated that the day before the site visit he, by himself, drove past the Kesslers' house on Section 15 trying to find access for the site visit the next day, pages 538-540.

Matt Freudenrich when he drove past the Kesslers' house at approximately 5 miles an hour did not get out of the car, was within 50 feet of the house, and didn't know if anyone lived there, page 541-544.

Matt Freudenrich stated that after the site visit he did not take any steps to contact the Kesslers to determine how they were using the structure, even though we had the option of contacting the landowners, knew their name because he knew it was property he was on, page 541.

Matt Freudenrich admitted that he could have had any of his landmen find out the Kesslers' phone number and given them a call, page 542.

Matt Freudenrich stated that they did not use any device to check the distance between where the placement was going to be in the structures on Section 15, page 542.

Matt Freudenrich stated that he did not leave a note, page 543.

Matt Freudenrich confirmed that it would've been a lot easier to take care of the term placement on the frontend than the backend, and that there were all kinds of options at that time, and it could have been moved without affecting the projects and service schedule or economics, page 548 and 553-554.

Matt Freudenrich stated that the property itself was in decent shape for an old farmyard, picked up, pages 558 and 563.

Matt Freudenrich admitted to Commissioner Fedorchak that when he was driving past the building it really wasn't even on his mind at that point to be considering occupied residences, that wasn't his goal that day, page 562.

Matt Freudenrich also admitted to Commissioner Christmann that the reason for driving through had to do with fences and access to this turbine string, page 565.

Matt Freudenrich also admitted to Commissioner Christmann that there is no formal process to make sure that the plat book and satellite view are missing a residence, page 566.

Matt Freudenrich admitted to Commissioner Kroshus that he has seen structures where individuals lived out of farmstead that were in worse condition than the Kesslers' home located on Section 15, page 569.

Matt Freudenrich stated that he drove by the Kesslers' home only that one time, page 577.

Wade Isaacson confirmed that Minnesota Power has a spreadsheet that had all the landowners names, addresses, legal descriptions and phone numbers, and this document was on his hard drive in electronic format as a spreadsheet that could have been forwarded to anyone who might've wanted to know that information, and it would have been easily sent to somebody who needs it within Minnesota Power, pages 586-587.

The plat map with the asterisk is Exhibit 2-4 of Minnesota Powers binder, page 432, page 674.

Scott Monroe stated that he was the person primarily responsible for working with the Kesslers on this project, page 715.

Scott Monroe testified in regards to the October 23, 2013 meeting with the Kesslers, that the majority of their questions related to the ways the roads were laid out and to turbine locations that were close to their property line and why they were overhanging onto their property, page 722.

Despite this the fact that his initial testimony (page 722) referred to raising issues about the location of 2 turbines, Scott Monroe a short time later denied at any point that the Kesslers suggested Turbine 441 was being placed too close to the Section 15 structure, page 725-726.

Scott Monroe confirmed that if anybody for Minnesota Power had called him from Duluth and asked him to find out what the structures are, who the landowner is and what's the phone number, he would've been able to provide that information, page 733.

Scott Monroe stated that he was never asked by anyone from Minnesota Power for any details relating to the structures on Section 15, page 733.

Scott Monroe stated that during construction he'd been out at the site near Turbine 441 about 3 to 5 times, and it never occurred to him that there was a structure about a thousand feet away, page 741.

When questioned by Commissioner Fedorchak, Scott Monroe again reverted back to a statement that in the meeting with the Kesslers there was some discussion about the turbines being kind of close to the land but not on their land, and that discussion specifically concerned Turbine 441, pages 742 and 744.

Scott Simmons in his discussion with Commissioner Fedorchak admitted that more could be done [in determining if the residence is occupied], and starting fresh now, it merits contact with the landowner page 794-795.

Analysis: It is clear that Minnesota Power did not take sufficient steps to determine whether the structure was occupied, used by the Kesslers, or intended to be used by the Kesslers. Instead of contacting the owners, Minnesota Power decided to use a plat book that could have been outdated, satellite photos that could have been outdated, and the site visit in which no one raised the issue that the structure that was in sight from where the tower was to be placed was within 1400 feet, and indeed approximately 1150 feet. Despite the fact that the company had full access to the landowner's name, address, and phone number, Minnesota Power took no steps to contact the landowner and inquire if the home was occupied or used in any manner that would make placement of Turbine 441 inappropriate. Had Minnesota power taken any of the steps, it would have been easy and relatively inexpensive to move Turbine 441 away from the structure.

As noted repeatedly by Commissioner Fedorchak, Keith Kessler at the public hearing specifically mentioned his concern about the roads and the towers, and as such the company had the obligation to look into this issue, particularly given Commissioner Kalk's specific instructions about figuring this out and working with the landowner. In addition, in a moment of honesty Scott Monroe stated that the Kesslers, when they came in after the public hearing, had raised the issue of the towers being too close, then denied this fact when asked about it by his attorney, but then again admitted when asked by Commissioner Fedorchak what he previously said.

Based on Keith's testimony at the public hearing, Commissioner Kalk's statements, and the Kesslers discussion raising the issue with Scott Monroe after the public hearing, it is inappropriate for Minnesota Power to claim it first became aware of this issue only in 2017. And even if the Kesslers had not raised these issues, Minnesota power was obligated to take reasonable steps to determine the use of

any structures that existed at the time of construction within 1400 feet of the planned placement of a turbine, and at the very least should have contacted the landowner and determined if the landowner had any concern about the placement of the turbine close to any of the structures existing on the property of the landowner.

2. What steps did Minnesota Power take to provide information to landowners as to placement of roads and towers?

Keith Kessler stated that they were told they would be given a plan showing where the roads and towers will be, and if you object, there is wiggle room, page 55.

In January 2012 Scott Monroe indicated the project was going to proceed and gave them a copy of the easement, but they never showed them anything where tower was going to go, pages 57-58.

Minnesota Power did not at any time provide them a map or design showing where they were planning to put any of the turbines, nor did they verbally fight any information up to the date of the hearing, page 59.

They attended the hearing and signed in on the sign-in sheet, went into the courtroom and saw maps and looked at the maps at some point, pages 60-61.

The first time they saw map was at the public hearing, they had no clue where the towers were going to be until they got to the hearing, page 175.

Commissioner Fedorchak questioned whether it was a good practice for the maps to first become available at the public hearing, and **Jerry Lein** agreed that it would be better to have them out sooner, page 243.

Jerry Lein confirmed that it looked like the PSC received the maps on August 7, 2013, so little over a month before the hearing, pages 255-256.

Deanna Kessler stated that when they told the company they didn't want to sign Wade Isaacson said they get a judge in 30 days and will have it signed, they were feeling pressure, and they signed the easement based on the belief that Turbine 441 would be at least 1400 feet from the house, page 375-376.

Scott Monroe confirmed that it would've been almost impossible to figure out from the map they were using exactly where Turbine 441 was in reference to the structure, page 737.

Analysis: It is clear that Minnesota Power failed to provide sufficient information to the landowners as to the design of the project and the location of the turbines. The maps provided at the public hearing were woefully inadequate and were not large enough to determine the proximity of the turbine to the property. Even more problematic is the fact that the exhibit provided to the PSC and disclosed at the public hearing failed to include the Kesslers home as an occupied structure, despite the fact that the exhibit showed 3 occupied structures which were in fact not occupied because the owners no longer lived on the property or were deceased. Despite the companies assertion that it was attempting to be overinclusive in regards to pointing out occupied residences, the truth of the matter is that they were underinclusive. Moreover, at the very least the time of the site review someone from the company should have questioned whether or not the Kessler structure was used and taken appropriate steps to raise the issue with the landowner.

3. Is Minnesota Power obligated to provide accurate and complete information to the PSC regarding surrounding structures?

M-23, Exhibit 2 at the hearing, shows exclusion and avoidance areas, page 35.

John Schuh stated that when they get a map that shows residences are occupied and unoccupied, we rely on the information as provided by the company and the company has the burden – and are also under oath – when they provide the testimony that the information is accurate, and the company needs to be sure that the conclusions are accurate and make sure that they are telling us the truth, page 298-299.

John Schuh stated that the PSC relies on the company to provide accurate information, including avoidance areas and residences that

may or may not be occupied which could be considered occupied, page 304.

Deanna Kessler read from the letter from the company dated January 4, 2014, where the company claimed that it shares the commitment to integrity, honesty and responsibility and unfair business practice, page 390-391.

Analysis: It is clear that Minnesota Power has an obligation to provide accurate and complete information to the PSC in conjunction with its application and if there was any question as to any of the structures near or within 1400 feet of a turbine, then that concern should have been raised in an appropriate manner to the information supplied to the PSC, particularly since the PSC does not do its own investigation and relies on the company to provide accurate information, particularly in regards to avoidance areas and residences that may or may not be occupied.

4. What is the location of Section 15 home and Turbine 441?

Turbine 441 is not on their property but is a next-door neighbor's property, the Glenn Lennick family, pages 26-27.

Plat map page P-2, shows the residence at issue, page 27.

The farmyard is located at the top of the number one showing Section 15, and Turbine 441 is located on the top of the 5 showing Section 15, page 28.

Turbine 441 is 57 yards from the property line, and is just under 1125 feet away from the residence, page 28.

Exhibit M-3 shows Turbine 441 on the top right Section of the map, the 3rd tower off the gravel road, page 30-31.

On page 14, Turbine 441 is at the bottom left, and MZ-17 shows 441 only and the Kesslers' property, page 33.

M-22 is exhibit shown at the public hearing, with the number 441 added in, page 35.

As to the map shown at the public hearing Keith was unable to determine at that time whether that turbine was going to be too close to the property, page 36

The construction of Turbine 441 occurred sometime in 2014, mid-summer, or late-summer, page 52.

There was never any contract with them to put any type of Tower on Section 15, pages 56-57.

The distance of the turbine to the home on Section 15 is 1125 feet, page 74.

Construction on the project began sometime around November 2013, and the siting easement in November 2013, and prior to signing the easement they had discussions with Minnesota Power in regards Turbine 441 at their offices north of New Salem, pages 75-76.

They did not sign any easement as to the northwest quarter of Section 15 because the tower was adjacent and not on their property, page 78.

Construction in 2013 ended in December, and work began again on March 16, 2014, pages 79-80.

The backfilling foundations started to occur in July 2014 as to 441, page 80.

Keith did not consider doing any measurements when the construction was going on because he took the man's word that they were going to keep it back 1400 feet, page 81.

After Turbine 441 was constructed, Keith's son started stating, that thing isn't right, it's too close, he kept telling Keith, that thing is way too close, page 85.

The Kesslers finally figured out the distance relating to the residence and determine using a rangefinder, page 85

Tower 441 went up sometime in the middle of 2014, and they continued using the house in the same way, page 87-88.

Keith didn't raise an objection during construction because it's pretty difficult to tell the distance, he just took their word for it, and he would not walk on someone else's land, pages 182-183.

Deanna Kessler stated that there is no easement for the northwest quarter of Section 15, not even an overhang easement, page 315.

Deanna stated during construction it's hard to tell exactly where the tower is going to be set, and whether it is 1400 feet away from the house, page 352.

Deanna agreed with Commissioner Christmann's comment that some of the questions were kind of unfair to you today being asked

why he didn't object to something being 1125 feet instead of 1400 feet, page 306.

Deanna stated the company has never disputed their measurements, page 373.

Matt Freudenrich agreed that the Kesslers didn't sign any easements or anything relating to Section 15 because the tower wasn't going on Section 15, page 575.

Hayden Kessler knew it was too close and took measurements with the rangefinder and determined it was a little over 1100 feet from the house, pages 415-416.

Analysis: It is clear that the structure in question looks like a farmstead, was used as a farmstead, and constantly used, if not on a daily basis, on a regular basis. The structure could be seen from the location where the company planned on putting Turbine 441, and was approximately 1150 feet from where that turbine was to be placed. Simply put, Minnesota Power took no steps to determine whether the Kessler's were using the home and should have known throughout its planning stages that the structure was within 1400 feet of where the turbine was going to be placed.

"It is significant to note that in regards to the placement of the turbine within 1400 feet of the Amundsen property, this is another indication that Minnesota power did not take seriously, if at all, the interest or concerns of adjacent landowners. The Amundsen did not have any option or any easements relating to Minnesota power, so unlike the Kessler's they were not provided any knowledge of the project. This is just another example of Minnesota power not taking the rights or concerns of the landowners seriously."

5. What are the effects of the placement of the tower too close to the home?

Keith Kessler stated there are numerous problems with it being too close, noise, page 86.

As to the noise, they set up a decibel reader standing right on the front porch and it's been up to 90 decibels, page 86-87.

Other problems include shadow flicker, the cows on edge big time, page 87.

While visiting at the house in 2016 Keith noticed the noise and the shadow flickering, pages 88-89.

Jerry Lein confirmed that there's no statute or PSC rule governing shadow flicker, page 219.

Stephen Kessler stated that that place is not the same, ever since those towers have gone up it's constant noise, tremendous decibel, and the flicker, page 278-279.

Deanna Kessler stated that her concerns about the tower is that it's noisy, leaves a lot of flicker, and ruined that yard, page 317.

Hayden Kessler stated he and his family had problems with the noise and the distance the turbine was from the house, in the fall 2018 they had a child, and there was flicker from the shadow noise at night, his wife couldn't sleep very well, the shadow noise kept her up during the night, page 415.

Hayden stated that the child was unable to sleep very well at that house, page 416.

Barry Gartner testified that in regards to the shadow flicker, they had a company model the shadow flicker levels at Section 15, page 468.

Jay Haley testified as to the modeling he did in regards to the Kessler property which was submitted in September 2020, and confirmed he didn't actually go to the site to do any type of decibel readings or flicker readings, pages 627 and 629.

Commissioner Fedorchak asked Jay Haley why they didn't use any real data from the turbine for the 2020 study, or just take some readings on the actual site, and he stated he was not asked to go out and perform field measurements, but only to update the computer model, page 647.

Jay Haley stated that his company does not do field measurement, a different company does that, page 654.

Jay Haley confirmed that the amount of flickering allowed is 30 hours per year, and the flickering at the Kesslers' home show 66.3 hours, almost double that is allowed, page 655.

Jay Haley admitted to not taking actual readings to determine if his model was accurate as it relates to the Kesslers' property and that that could have been done, page 659.

Analysis: It is clear that the placement of the turbine 1150 feet from the structure has had a substantial detrimental effect on the use and enjoyment of the structure and the surrounding property. All the people who testified that had been in the home or lived in the home described the negative effects of Turbine 441. Instead of going on-site and determining the actual fact of the turbine in close proximity of the home, Minnesota Power instead merely hired a company to do modeling as to flickering and probable decibel readings.

6. What are the facts relating to the use and condition of the home?

Keith Kessler described all the structures at the farm site, including a pole barn, single garage-style little shop, a little storage building for feed, the house, and a small garage, page 33-34.

M-18 shows the farm site a little closer, page 34.

Photos of use of the house were provided, one showing their son Hayden in 2010, another showing the interior of the house in 2011, and a before and after photo showing the shingling in 2016, pages 46-47.

Exhibit showing use of the residence at Section 15 with reference to the dates with focus from 2003 to 2013 before the project was built, pages 49-50, Kessler Exhibits Dates-1 and Dates-2.

The house was used as a bathroom facility, cooking facility, hunting on weekends, overnight stays, Super Bowl parties, and the house had a TV, kitchen table, sink, stove, refrigerator, couch, bed, dishes, furnace, and running water, hot water heater, is also used for working cattle regularly, for meals, preparing meals, bathrooms, lunches, pages 50-51.

Exhibit showing house using 2013 for ranching purposes, a calf/cow List, page 51.

Use of that location both in 2013 and 2014, documentation of working cattle shows that, page 52, Kessler Exhibits Dates-3 and Dates-4.

Their son Hayden moved into the house in the fall 2015, with his girlfriend Megan, page 88.

Hayden and Megan married, lived there, the first child was born and lived there, and neither Megan nor their son could sleep, page 89.

Commissioner Fedorchak asked about electricity service at the house, and Keith advised her that there is electricity, water, sewer, and that he has electric bills for when he purchased the property in 1988 continuously to the present, no lapse in service, page 151.

The electric bills were requested by Commissioner Fedorchak, especially for the years in question, from 2009-2010 timeframe to the present or to 2016, pages 151-152.

Reference made to the new coat of paint administered on the outside in 2012, but there were parts that didn't get painted, pages 170-171.

Commissioner Christmann also requests that we see electric bills, page 176.

Keith stated that we will get the electric bills to them, there was never disconnection, never break in service, there are actually 2 electric bills, one relating to the house and the other relating to a well, page 177.

Jerry Lein had the impression that the house was not being lived in, but could have been wrong at the time, page 240.

Jerry Lein stated that his conclusion that the residence was not occupied was based on the information he received from the company that he did not receive any correspondence or information from anyone outside of the company, page 258.

Stephen Kessler testified he lived in the house in Section 15 previously, especially in the summer of 2013, mostly on weekends throughout 2013, and then full-time in 2020, and was there during the summer of 2013, at a time when he was working four tens Monday through Thursday, so he would get home very late usually, page 269.

Stephen went to NDSU in the fall 2013 and came back in the spring of 2014, and came back in the summer of 2014, page 272.

Stephen had a 1999 F-100 teal truck in the summer of 2014, and after July he had a 2014 F-150 vehicle which would be parked right outside the house, page 274.

Stephen stayed at the house during the summer of 2013 weekends primarily, and in July 2013 he was there more. He was there Friday, Saturday and Sunday to do haying, and would've been there most of the month simply because of the fact he was saying, page 282-283.

Stephen stated that the house had windows in 2013 all the way around, and in 2012, page 287.

Deanna Kessler stated that Stephen was in college from 2011 to 2015, but was back during the summers, including 2013, page 318.

Deanna stated it was our first home, we had our first son there, is just private, cozy, it's peaceful, pages 358 and 360.

Deanna stated the house was painted in 2012, it needed painting they were trying to preserve the building, page 371.

Hayden Kessler stated that Stephan had lived at the house during the summer of 2013 and 2014 and that he lived at the house at Section 15 for 2 years starting in 2016 with his girlfriend now wife Megan, pages 412-414.

Hayden stated prior to moving in, there was a bed in the house, couches, but they brought in the newer fridge, swap out the old stove with the new electric stove, pages 419-420.

Hayden also stated that he stayed there during hunting seasons and during working cattle and things like that, as well as being there during the summers when his brother was there, page 420.

Hayden stated that the house is heated with initially coal until 2015 they transitioned to propane, they have a 500 gallon tank, and before that the coal furnace was kept on over the winter over the years, pages 421-423.

Hayden stated that the renovation of the house in 2015 was mostly cosmetic, new flooring, new toilet, and that house was structurally sound, page 423.

Hayden stated the place also had electric heat, and previously there was a fridge, stove, and toilets during the time frame 2013-2014, pages 424-425.

Keith Kessler returned to the stand to provide exhibits 8-128-3, electrical billing requested at the previous hearing, that showed a connect date of September 11, 1989, and there has been electric services since September 7, 1989, page 428.

Keith also provided the separate billing relating to the well, page 430.

Keith stated that from 2009, and more specifically in 2013 and 2014, there was electrical service in the residence using electrical throughout the time., Page 432.

Keith again referred to the other uses of the house, including hunting and calving and working the cattle and other family events, as well as a shingling in 2016, page 432.

Keith confirmed that the house is capable of being used as a residence from 2009 all the way through 2016, page 433.

Keith confirmed that the well was used to provide water that was used in the house, page 438.

Keith explained under cross-examination that as to the well meters you pay monthly and you don't get billed for anything extra unless you go over the kilowatts that you've already paid for, page 439.

Neighbor **Glen Lennick** initially claimed that the structure on Section 15 was abandoned, page 691, but later had no objection to any of the factual data points provided by the Kesslers as to the use of the property and admitted that he didn't really know if anyone was living there and would have no reason to dispute whether Steven Kessler lived on site during the summers of 2013 and 2014, pages 702-703.

Analysis: It is clear that the home was used at times as a residence, and had electricity, heat, water, two working bathrooms, refrigerator, TV, and was furnished. At the time of the construction of the project in 2013 and 2014, which occurred in the summers of 2013 and 2014, one of the Kesslers' sons lived there while he was home from NDSU. In addition, during the summer of 2013 and 2014, the home was used while the family was haying or working cattle. In addition, the Kessler's repeatedly told representatives of Minnesota Power that they planned on using that home as a residence when her son returned from college.

7. Is “unoccupied” residence defined, and if not what definition should be employed?

Exhibit M-24 shows each occupied residences as black dots by letter designation, A through CC, page 36.

Keith Kessler goes over Exhibit M-25, gone over as to each of the structures listed on the exhibit, with A being the Kessler home, B occupied, page 37-38.

B, farmstead or people living in it regularly, page 40.

C is an older farmstead, the people moved to center in 2005, no one was living there, page 41.

D and E are farmsteads people lived in, page 42.

H is a house that was lived in, page 42.

J is a farmstead, they moved to town in 2009, no one was living there, page 43. J was the Winkler property, he passed away in 2010, moved out in 2009, page 43.

K is a farmyard, they moved to town in 2010, nobody was living there, page 43. K relates to a bully, page M-28 has his obituary, page 44.

L another farmyard with the people lived at, page 43.

Discussion as to what constitutes an occupied residence, to Keith that is something that you use even if is not occupied day to day, is fully capable of being lived in, page 168-169.

Keith was never asked to identify occupied residences by the company, or given mass to circle or show or verified occupied residences, page 169.

The company never came to ask them about the home, page 169.

Discussion about the 3 residents that had been vacant since 2005, 2009, 2010, which were unoccupied structures that were on the map, but their structure wasn't listed on the map, pages 172-174.

Additional reference to the other 3 houses where no one was living in them, that were in similar condition, those are the 3 already mentioned where the people had left the homes in 2005, 2009, 2010, and the Kessler home was the only one not listed, pages 179-180.

Commissioner Kroshus provided a definition on dwellings, any structure or part of a structure that is occupied or designed or intended for occupancy as a residence by one or more families, page 184.

Commissioner Kroshus stated that 2 keys would be whether it has running water and sanitation, in other words a toilet, and Keith confirmed that it has 2 toilets, running water, and as always had that, page 184-185.

Keith stated that as to the 3 houses that were empty, they are letters C, J, and K, which were empty, and would be similar in appearance to their place in Section 15, page 188.

Jerry Lein stated that the word occupied or unoccupied residence is not defined by rule, regulation or statute, page 234.

Jerry Lein stated that he is unaware of any criteria used by the commission in determining occupied residence or not an occupied residence, page 248.

Jerry Lein stated that that is no criteria as to whether it's occupied or unoccupied house, just the common knowledge, and agreed one way to find out about whether house is used as a residence or might be used as a resident is for the company to actually ask the landowner, page 250.

Jerry Lein testified that he did not know prior to today that some of the other residences during the site construction were unoccupied, confirmed that the PSC does not go and verify the occupied and non-occupied residences, page 259.

Stephen Kessler does not think it would be possible to conclude that the house was not occupied prior to the updates, stating you have to step inside the house, and noting that there was electricity, water to the house, and you should not make that judgment off of appearances, page 282.

John Schuh, PSC legal counsel, stated that he is unaware of any definition employed by the PSC via statute, rule, regulation or practice provides the PSC with the definition as to occupied or unoccupied residence as it applies to wind projects, page 293.

John Schuh was unable to draw a distinction between inhabited as opposed to occupied, page 295-296.

Barry Gartner defined an occupied residence as a place where somebody was living, as their home, page 460.

Barry Gartner admitted to some of the structures that were identified as occupied residence were possibly unoccupied at that time, page 462.

Barry Gartner asserts Minnesota Power is still correct as nobody was living there at the residence at the time they resided in and did that project, page 464.

Barry Gartner asserted to Commissioner Christmann the livable structure is a structure that somebody could potentially live at some point time, and an occupied structure indicates that somebody is occupying that and living there as their home, page 501.

Barry Gartner admitted to Commissioner Fedorchak that the reason they decided it was an occupied residence even though the plat book had an asterisk because the definition they were using for occupied

residence was it had to be occupied, and the standard they were using wasn't livable structure, page 510.

Barry Gartner knew that the PSC has never adopted the definition for occupied residence, that there is not a definition in any of the statutes or other rules or regulations for occupied residence, page 511.

Barry Gartner admitted that they kind of came up with their own definition of what they thought an occupied residence was, page 511.

Barry Gartner admitted that there were 3 structures listed with an asterisk that they did not include in the map they presented to the PSC, page 515.

Barry Gartner insisted that if a building is listed with an asterisk that means it's a livable building, and that's not the standard that use for siting, standard is occupied residence, not livable structure, page 518-519.

Glenn Lennick stated that his definition of abandoned is if anybody was living there full-time, page 706.

Commissioner Fedorchak in her discussion with **Scott Simmons** noted that it strikes her that the "permanent residence" as the only legitimate criteria to use for occupied residence is not appropriate, pages 794-795.

Analysis: It is clear that there is no agreed-upon definition for occupied or unoccupied residence to which the setback and decibel regulations would apply. It is therefore appropriate for the PSC to choose what it considers an appropriate definition of unoccupied and occupied residence. In our view, if the structure is capable of being used as a residence, or phrased another way is a dwelling, then it should be considered for purposes of the application process to be an occupied residence. Minnesota Power repeatedly claimed it was trying to be overinclusive in regards to listing the structures that could be occupied residences, but clearly failed to do so. Instead of being overinclusive, Minnesota Power adopted a narrow definition that in practice is both unreasonable and detrimental to the rights of the landowners in regards to the placement of turbines. As indicated by one of the commissioners, two key elements relating to whether the structures occupied is whether it has water and electricity. This structure had both.

8. Where the application “voluntarily” contains a setback requirement and the PSC in approving the application orders such a setback, is the applicant required to comply with the setback?

Keith Kessler stated that they were informed by Minnesota Power that the setback would be 1400 feet, page 29.

Jerry Lein confirmed that the 1400 foot setback was due to a voluntary commitment by Minnesota Power, but because it’s mentioned in the order, he doesn’t know if that makes it voluntary anymore, page 219.

Jerry Lein stated that if a company agrees to setbacks in order, if they violate the setback, it could be interpreted that they violate the order, page 242.

Minnesota Power had agreed to a setback of 1400 feet from occupied residences, page 243.

Jerry Lein stated that if there is something in the order, it is not any less meaningful if it’s not part of the century code or an administrative rule, page 246.

Commissioner Kroshus noted that the 35th provision of the commission’s order of September 25, 2013, provides, no turbans will be placed within 1400 feet of an occupied residence, and that constitutes a condition of the order, page 257-258.

John Schuh stated that if a company agrees to have setbacks of 1400 feet than the company is obligated to follow that order, pages 293-94.

Deanna Kessler stated that the reason there is a 1400-foot setback is because ice can be swung up to 1400 feet, page 319.

Barry Gartner stated that they voluntarily applied a 1400-foot setback from occupied residences, page 460.

Barry Gartner informed Commissioner Kroshus that the company would treat the adjacent property owners that may have a residence within a setback that the company would still have to meet all the requirements, including the 1400-foot setback, 30 hours a shadow flicker standard, page 506.

Barry Gartner claimed that they have not violated the order of the PSC because the voluntary commitment was based on their definition

of the phrase occupied residence, and the structure on Section 15 was not an occupied residence at the time they cited and permitted the project, page 530.

In regards to **Wade Isaacson's** statement that they did not find anything to support the allegation that the Kesslers had been told the Turbine 441 would not be within 1400 feet of the Kessler home, Wade Isaacson admitted that the application dated May 2013 provided that no turbines will be placed within 1400 feet of occupied residences, pages 610-611.

Wade Isaacson confirmed that it was common knowledge amongst everybody working on the project that there was a 1400-foot setback requirement for the turbines, page 614-615.

Analysis: It is clear that the fact that the company “voluntarily” agreed to apply 1400-foot setback as to residences is irrelevant to its obligation to comply with the PSC’s Order and siting requirements. Nor does the fact that the company voluntarily agreed to this condition give it authority to develop and apply its own definition of occupied residence, to the detriment of the landowners.

9. What occurred at the public hearing, including and especially the Kesslers’ raising concerns about the placement of Tower 441 near the existing structure?

Keith Kessler stated that during one of the breaks they had discussions regarding concerns as is the placement of the towers, page 62.

They were looking at the map and trying to figure out where their property was and where the towers are going, page 63.

Once looking at the map and finding Section 15, they had concerns in regard to placement of Turbine 441, page 67.

Keith talked to one of the representatives of Minnesota Power during the break, the discussion started in the vicinity of the map, and that person grabbed Matt, and he said this is our property and that looks real close to our property into our yard, and the person from Minnesota Power kind of blew up and said we don’t have time for this shit, we don’t have time to move it, we got to get our credits in place and we have to move forward, and he stopped off, pages 67-69.

A representative from Minnesota Power said let's talk about this and we walked out in the hallway, and they said we will meet the following week at her office to discuss this, page 69.

The person from Minnesota Power said that they would talk about their concerns about placement of the tower next week, page 70.

Keith testified at the hearing as to his concerns, page 70.

The person from Minnesota Power told Keith that there was time to deal with this, he didn't know that this meeting was just a one and done, thought it was more of an informational meeting because that's the first time they saw map or any placement of any towers, page 71.

At the time of the hearing it was his understanding that if the turbine was someplace that was a problem, that there would be an option to move it, and that they would have input into the project, pages 71-72.

After the public hearing they met with Minnesota Power looked at the map and again pointed out that Turbine 441 looked really close to their property and is going to affect us, and they reassured us that it wouldn't, that the setback would apply, and were told, rest assured, that they will be setback 1400 feet, pages 72-73.

These discussions related to infringing on our property and our fence and the placement of the tower, and they were told it would be about 1400 feet, page 76.

They had been told about the setback right after the hearing, and at the time they signed the easement in November 2013, pages 76-77.

Discussion about the fact that there were more people at the hearing than had signed the sign-up sheet, pages 181-182.

Commissioner Kroshus discussed Commissioner Kalk's statement to the company that urge them to work with Mr. Kessler as this unfolds, keep the good faith with the local landowners, page 186.

Keith stated that he does not believe Minnesota Power complied with Commissioner Kalk's directives in regards with dealing with him, page 187.

Although Minnesota Power and all the discovery answers and depositions denied he had any conversations with Minnesota Power at the hearing, **Jerry Lein** of the PSC confirmed that there was a discussion between Keith and Minnesota Power, pages 190-191.

Jerry Lein testified that he recalls at some point during the hearing, either during a break or lunch, the Kesslers going up and talking to

somebody from Minnesota Power, and the Minnesota Power person walking out and the Kessler's going out to an area where he could see to continue the discussion, and confirms that the Kesslers did talk to somebody from Minnesota Power during one of the breaks or during the lunch hour, page 217.

Commissioner Fedorchak noted that Keith had made comments about the locations of roads and turbines, and specifically said towers, and as such is not reasonable for the company to claim the first I heard about the turbine issue was in 2017, page 245.

Jerry Lein confirmed that it's pretty common for people at the hearing not to sign in on the sign-up sheet, page 245.

Jerry Lein stated that he was aware there was a discrepancy or difference of opinion between the Kesslers and Minnesota Power because he knew there was going to be a meeting off the record occurring in the hallway, and that they were working out something, page 247.

Deanna Kessler confirmed speaking to somebody from Minnesota Power, a Minnesota Power representative, at the public hearing, who told them as they went out to the hallway, we'll take care of it later, we'll talk about this next week, we'll set up a meeting and will talk about that, pages 336-337, 338, 339.

Deanna stated that at the public hearing after seeing the maps, she said, these look awfully close to our land, almost like the one is going to be on our land, and the other one looks right on the fence line, and they said, don't worry about it, its setback, it's not on your property, page 362.

Barry Gartner knew that a meeting happened [between the company and the Kesslers] after the public meeting, but does not believe it was triggered by discussion at the hearing between the Kesslers and Minnesota Power, page 488.

Commissioner Fedorchak referred to Barry Gartner's pre-filed testimony where he states that tower placement was not discussed at the public hearing, and then directed his attention to pages 118 and 119 of the transcript of the hearing where Keith Kessler mentioned the placement of the turbines and related her concern that it is hard to understand how the company could hear that testimony and think that the landowner is comfortable with the tower locations, another company is worried about making proper investment should double

checking with this person to make sure they're comfortable with the tower locations, pages 489-490.

Commissioner Fedorchak quoted the exact language that Mr. Kessler said at the public hearing: "we were told that if and when it happens, they're going to come out, sit down with us and, you know, they'll have a lay of the land, how the roads are going to go and so forth, where the towers are going to be, and then we'll have input on those – those roads and things that are going to go on. Well that didn't take place." Page 491.

Commissioner Fedorchak went on to state that the judge stated that we need to work that out with the company, sit down and work things out, and that was promised and hasn't happened, page 492.

Barry Gartner had no explanation as to why everyone in Minnesota Power continues to deny that the Kesslers spoke with someone from Minnesota Power at a break during the public hearing even though the Kesslers testify to it and the fact that there was a discussion was observed by a PSC staff member, page 523.

Matt Freudenrich denied that he blew up and cussed at the Kesslers at any point, during or after the public hearing, and claimed that he never spoke to the Kesslers at the hearing, page 551.

Matt Freudenrich asserted that before February 2017 he had no knowledge that the Kesslers had a concern regarding the proximity of Turbine 441 relative to the Section 15 structure, page 556.

Matt Freudenrich again asserted to Commissioner Kroshus that he did not have a conversation with the Kesslers at the hearing, page 566.

Wade Isaacson confirmed that he was not at the public hearing because he was out getting easements signed for the project, page 590.

Commissioner Christmann inquired as to Exhibit 17 and all the signatures he got on September 13, pages 605-606.

Scott Monroe stated he did not attend the public meeting on September 13, 2013, page 716.

Scott Monroe was able to show documentation, exhibits 13 to 17, which showed that Scott Monroe was out getting landowners' signatures on that date, page 2717-718.

Commissioner Fedorchak again referred to the discussion at the public hearing where Keith Kessler talked about the location where the towers were to go in expressing concerns about those issues, page 749.

Scott Monroe testified that following the public hearing the Kesslers came over to his office and listened to those concerns, page 749.

In regards to the easements obtained by Scott Monroe that were submitted for the purpose of showing he was not at the public hearing, Commissioner Christmann found it astounding that all of these landowners chose the same day to sign their easements, and that happened to be the day of the public hearing, which leaves me feeling suspicious like you didn't want these people at the hearing and so you arrange these easements signing on the very day of the hearing, page 759-760.

Analysis: It is clear that something happened at the public hearing in regards to the Kesslers relaying a concern about the placement of one of the towers near Section 15. Although Minnesota Power has repeatedly alleged that no such discussion occurred, this seems very unlikely given the fact that the Kesslers specifically remember the discussion in detail, that a member of the PSC staff observed a discussion between the Kessler's and a company representatives, that the issue of roads in the placement of the towers was explicitly mentioned in Keith Kessler's testimony at the public hearing, and that following the public hearing the Kesslers met with representatives of the company and according to that representative himself the Kesslers at that meeting raised the issue of the location of the towers in addition to other issues.

10. If the applicant failed to comply with any of its obligations or duties relating to a) the landowner, b) the information supplied to the PSC, or c) the requirements placed on the applicant by the PSC, what remedy should apply?

Deanna Kessler stated as to the tower, I want it gone, page 320.

Deanna stated that it was their intention to retire over there, stay there in the summer and go away for the winter, but now there's no way they would stay there, she gets sick just from the motion of it, page 320.

Deanna liked that house, it's nice and small, perfect, cozy, page 323.

Deanna stated she wants it completely torn down and gone, page 357.

Deanna taking away the tower probably isn't fair to her neighbor deriving income from the tower, it's not fair to them have to put up with something they're not getting paid for, page 357.

As to the cost of moving Turbine 441, **Barry Gartner** testified referring to MP Exhibit 8 that they would relocate the tower little bit over thousand feet north of Turbine 442, which should be 2000 feet from the Section 15 structure, at a cost in excess of \$1.2 million, page 471, pages 476-478.

Barry Gartner confirmed in his testimony that it is his understanding the landowner who presently has 441 is willing to have it moved to another location, page 522.

Glenn Lennick stated that he would be willing to work with Minnesota Power on a new location if it had to be, and he wouldn't have a problem if 441 ended up being moved to the north 2000 feet and he was still getting the income, pages 694-695.

Scott Simmons stated that Minnesota Power is able to move Turbine 441 to another more appropriate location, page 785.

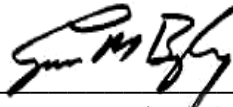
Analysis: It is clear that Minnesota Power failed to properly investigate or analyze the use of the Kesslers home on Section 15, resulting in the improper placement of Turbine 441. Instead of admitting its error and immediately agreeing to move Turbine 441 away from the structure, Minnesota Power instead responded with the claim that it did no wrong, that the structure was abandoned, and applied its own niggardly definition of an occupied residence. The profound effect of this turbine being too close to the Kessler home is described in detail by all the family members who have been in our lived in that home after Turbine 441 was placed within 1150 feet of that home. There's really only one solution, and that is to require Minnesota power to take down Turbine 441 and, if they choose to do so, place it far away from the Kessler home. Glenn Lennick has already testified that he is willing to have the Turbine moved to another location on his property, and Minnesota Power has confirmed that it has the ability to do precisely that. Not only will this remedy resolve the issue, but would also serve as a general deterrent to all wind power generation companies to take all reasonable steps to

determine the actual use of any structures within close proximity to a location where the company may plan on placing a wind turbine.

We note for the record that we had previously requested damages and attorney fees, and continue with our assertion that the remedy provided by the PSC should also include those remedies. In the area of inverse condemnation, landowners are allowed attorney fees, and in our view is more appropriate for such attorney fees to be in conjunction with a complaint brought to the PSC in regards to an improper placement of the wind tower; attorney fees are not granted, and most landowners will not be in a position to assert the rights before the commission and many injustices will occur. By the same token, by not allowing damages to be part of the PSC complaint process, a landowner's only option is to sue under inverse condemnation. We respectfully suggest that both of these remedies should have been allowed in this case.

We assume that the PSC has the authority to require a noncompliant company to relinquish its previous bond, or in the alternative fine or sanction the company in an appropriate amount. We suggest at the PSC should require Minnesota Power to relinquish the bond in the amount of \$500,000 or in the alternative be required to pay A fine in the amount of \$500,000, with such bond or fine being suspended in its entirety upon reaching an agreement with the Kessler's in regards to reimbursement of their attorney fees and costs associated with bringing this action.

Dated this 14th day of June, 2021.



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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

¶1 I hereby certify that the following document (s):

1. Kesslers’ Post Trial Brief.

were served upon the above-named Respondent by serving true and correct copies of the above-listed document on the 14th day of June, 2021, via email, and by regular mail where noted on June 14th to:

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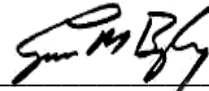
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