

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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

The Kesslers hereby provide their response to the brief submitted by Minnesota Power.

As previously discussed in our primary brief, an occupied residence should not be defined as narrowly as Minnesota Power attempts to do in this situation, and indeed in our view the framing of the issues as to occupied residence when the commission issued its order is also incorrect. As shown by the testimony of the Kesslers and their sons, the structure was indeed occupied throughout the summer of 2013 and 2014. Minnesota Power mischaracterizes the testimony of the son as if he was only staying there on the weekends, instead of the entire summer of 2013 and 2014.

Minnesota Power ignores the fact it failed to properly investigate whether the residence was indeed being used. As repeatedly demonstrated during the hearing, Minnesota Power could have easily called the Kesslers and asked them about the structure and how it was being used. In addition, Minnesota Power fails to explain or justify leaving off the Kesslers' structure but putting other houses on the map that had been abandoned for years.

As to the electric usage shown on page 5 of Minnesota Powers brief, this was usage above and beyond the standard amount paid for automatically. The usage was explained in that Stephen spent most of his waking time at his parents having dinner or at his girlfriends, but he nonetheless was sleeping there every night throughout both summers. Obviously he didn't use much electricity when all he was doing was using it as a residence to sleep at. As to the average electric usage for the average North Dakota house shown at page 6, obviously the Kessler house is much smaller than any average North Dakota house and those numbers are meaningless.

The fact that the Kesslers didn't insure the house on Section 15 is totally irrelevant. They have right not to insure it if that is what they

want to do. If the structure burned down, they would just rebuild it.

That's their choice.

Minnesota Power attempts at pages 7-8 to use the testimony of Mr. Lennick as a basis for the house being empty, but he clearly did not have sufficient foundation or knowledge to reach such a conclusion, as shown by his testimony. In Mr. Lennick's testimony he indicated that he was rarely at that location, and more importantly when shown the listing that the Kesslers had relating to the use of the property he did not dispute any of those facts.

As to the Boulevard Associates 5-year option mentioned at page 8-9 (and 24), everybody knew prior to March 2013 that that project was not going to happen, as stated by Keith Kessler. But either way, the Kesslers told Minnesota Power about their concerns relating to any tower being near any of their homes, and this occurred in 2009 when the Mercer County lease, and continued throughout 2013 up to and including the public hearing.

At page 10 there is reference to Commission staff view that an "occupied residence" is a place "where someone lived," without any recognition as to duration or even temporary use. But the bottom line

is simple, someone did live in that residence, used it as a residence, most certainly for the entire summer 2013 and the entire summer of 2014 when construction was going on, and the only temporary aspect relating to the use of the house was the son was temporarily at college. In addition, the residence was used during haying and calving seasons, every year.

Minnesota Power argues in several different places that the issue of the placement of turbine 441 is a new issue, totally ignoring Keith Kessler's statement at the public hearing where he specifically refers to his concern about the placement of the towers. In addition, based on the Kesslers' testimony as well as the testimony of Jerry Lien, it is clear that some discussion did occur with the Kesslers and representatives of Minnesota Power at the public hearing during a break, and the Kesslers description should be taken as accurate, and at the very least indicative that there was a concern about the placement of the towers relayed by the Kesslers at that time (in addition to Keith's statement at the public hearing).

Minnesota Power repeatedly misstates the facts and ignores the testimony actually provided by the Kesslers and their family

members. For example, Minnesota Power at page 3 states that the Kesslers live in Glen Ulin when in fact they live 19 miles from Glen Ulin, and actually live directly to the west of the Section 15 residence, 3 and one-half miles from the other residence. We stand by our recitation of the facts contained in our original brief, with specific references to the transcript.

As to page 12 and Matt driving through the yard, his testimony clearly showed that he was focused only on access for the next day and was not focused on making any type of determination as to whether the structure was occupied. Nonetheless he stated the yard was kept up and was neat, which indicates usage.

At page 14 where Minnesota again tries to deny any discussion with the Kesslers, Jerry Lien's testimony confirmed that that was a discussion and a concern that was being raised by the Kesslers.

In regards to the statements made at the public hearing, the only inconsistency in the Kesslers' testimony was not being sure who they spoke with at the hearing during the break. Keith testified that he was certain the person he spoke with was Matt, but was uncertain who the

other Minnesota Power individual was (who was part of the discussion).

As to the comment at page 17 relating to the landowner who was let out of the lease, that did not involve a wind tower but just underground collection line.

Minnesota Power argues at pages 19 through 21 that it would be inappropriate to apply some other definition of occupied residence retroactively. However, because there has been no definition, Minnesota Power had the responsibility to determine what the proper definition was before placing turbines near structures that are being or had been used as residences and had been used as residences previously.

As to page 21 and the references as to what Jerry Lien's impressions regarding the house – Jerry applied his own definition, but the definition has to be determined by the PSC. Moreover, Jerry's initial impression was based on the assumption that the information provided by Minnesota Power was accurate. The PSC and PSC staff relied on the company to provide accurate information. As to the real facts, the Kesslers provided the facts as to the use of the house over

the many years they have owned it, and these are the facts that should be employed by the PSC in making its determination, not impressions or assumptions derived from incorrect information supplied by the company.

At page 22 Minnesota Power did withhold information about the structure by failing to list it as a residence or even a potential residence, all the while including other structure on the map that had indeed been abandoned, or the people had moved into town or died.

At page 23 Minnesota Power blames the Kesslers for not raising the issue early in the project, but their testimony is clear: they did raise the issue, repeatedly. Before the hearing, and at the hearing. That is why Commissioner Kalk told the company to get this fixed; work with the landowner and deal with this concerns that Keith raised. It is the company that failed to do what it should have done.

At pages 25-26 Minnesota Power again ignores the testimony of Keith Kessler at the hearing where the location of the towers was a concern to him and his family.

At page 26 Minnesota Power again asserts that the tower issue wasn't raised until 2017, but it is a matter of record by Keith's

testimony at the public hearing in September of 2013 that the issue was raised.

At page 26 Minnesota Power asserts that the Kesslers have repeatedly changed their story as to who blew up, but that is not true; Keith has always asserted that it was MATT who blew up at them, and the only confusion was who the other Minnesota Power rep who was there.

As to where the discussion occurred during the hearing, at page 27 Minnesota Power tries to claim differences in their story, but the Kesslers have been consistent in stating that the discussion stated at the map in the room and moved out into the hallway. And, significantly, Jerry Lien confirmed this as well in his testimony.

At page 28, again Minnesota Power ignores that fact that Jerry Lien confirmed the Kesslers' testimony as to what occurred at the hearing.

At page 29 Minnesota Power tries to demonstrate it is held in high regard by two landowners, as if this proves that they treated the Kesslers in the same manner. The bottom line is that Minnesota Power was told by Commissioner Kalk to meet with the Kesslers and get this

fixed, and they didn't do so. Minnesota Power did not treat the Kesslers well and the facts demonstrate this. In addition, the Kesslers are not the only ones that Minnesota Power placed a tower too close to a residence; the Aasmundstads objected to the placement of a tower and reached a settlement with Minnesota Power in regards to that improper placement (the issue came up in regards to the noise complaint).

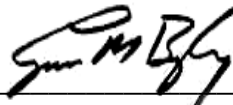
At page 30 there is reference to the burden of proof. We believe we have met that burden and the PSC's decision should favor the Kesslers.

Minnesota Power at page 31 objects to having to move the tower away from the Kessler property, despite the fact that Minnesota Power should've looked into how the structure was being used, and never should have placed that tower there in the first place. In addition, the testimony shows that the tower can be moved to another location on Mr. Lennick's property. That is precisely what should be done, and the Kessler's request that the tower be placed at least 2500 feet away from their property line.

As to the installation of some “shadow flicker technology” at page 32, that will do nothing about the noise.

As indicated in our original brief, the Kesslers want Turbine 441 removed – and nowhere near their home.

Dated this 24th day of June, 2021.



Lynn Boughey (#04046)
Attorney for Keith and Deanna
Kessler
lynnboughey@midconetwork.com
P.O. Box 1202
Mandan, ND 58554-1202
(701) 751-1485