

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

<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">MINNESOTA POWER’S POST-HEARING REPLY BRIEF</p>
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I. INTRODUCTION.

Minnesota Power, a division of ALLETE, Inc. (“Minnesota Power”), respectfully submits this post-hearing reply brief (“Reply Brief”). For the reasons set forth herein, as well as in Minnesota Power’s Opening Post-Hearing Brief (“Minnesota Power’s Opening Brief”), and the files and proceedings herein, Minnesota Power respectfully submits that the North Dakota Public Service Commission (the “Commission”) should determine that Petitioners Keith and Deanna Kessler (the “Kesslers”) have not met their burden of proving their allegations and, therefore, enter an order in Minnesota Power’s favor.

The Kesslers’ post-hearing opening brief (the “Kesslers’ Opening Brief”) is emblematic of the approach taken throughout this case in that their arguments and requests do not align with the Commission’s jurisdiction, generally, and specifically ignore multiple Commission’s orders in this matter. This Reply Brief will not attempt to address the litany of matters addressed in the Kesslers’ Opening Brief that are not central to the issues framed by the Commission. Instead, Minnesota Power’s focus will remain on the Commission’s directive, the relevant evidence, and why the Commission should find in Minnesota Power’s favor.

As an initial matter, Minnesota Power reiterates the importance it has placed and will continue to place on developing and maintaining positive relationships with all affected project stakeholders, including landowners. Outside of this isolated matter, Minnesota Power has successfully worked through the sometimes difficult issues around siting energy infrastructure with hundreds of landowner-partners and—as testified to by other landowners—has set the standard for cooperative project development. Minnesota Power has earnestly engaged with the Kesslers to try to resolve this matter and remains hopeful that some amicable resolution is possible, regardless of the outcome of this case. This speaks directly to the credibility of Minnesota Power’s testimony in this proceeding.

With respect to the legal issues in this matter, the Commission has been clear—the issues are (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 (the “Order”), (2) whether, if the Section 15 structure was an occupied residence, the placement of Turbine 441 violates the Order and, if so, what remedies are appropriate, and (3) whether Minnesota Power withheld information relating to the Section 15 structure from the Commission that Minnesota Power should have communicated to the Commission and, if so, what remedies are appropriate.

The evidence on Issue #1 was also clear—the Section 15 structure was not an “occupied residence” at the time the Commission issued its Order. Accordingly, the Kesslers cannot prevail on Issues #1 or #2. The evidence on Issue #3 was less clear—the parties’ versions of events that took place eight years or longer ago differed. However, Minnesota Power has demonstrated that its testimony was more credible and that it did not withhold information from the Commission about the Section 15 structure at the public hearing.

II. RELEVANT FACTS AND ARGUMENT.

A. ISSUES #1 AND #2: THE SECTION 15 STRUCTURE WAS NOT AN “OCCUPIED RESIDENCE.”

Issue #1 is whether the Section 15 structure was an “occupied residence” at the time the Commission issued the Order. Issue #2—whether placement of Turbine 441 violates the Order—relates to Issue #1, in that if the Section 15 structure was not an “occupied residence,” then Minnesota Power could not have violated the Order.

The material facts relevant to Issue #1 are not genuinely in dispute,¹ and are as follows:

- At the request of Commission Staff, Minnesota Power voluntarily agreed to apply a 1,400 foot setback from turbines to “occupied residences” and the setback was incorporated into the Order;
- The phrase “occupied residence” was not defined by the North Dakota Century Code, the Administrative Code, or any other rules or regulations, and the Order did not define it either;
- In its siting efforts, Minnesota Power defined “occupied residence” as the place where someone was living, i.e., their home; and
- At the time the Order was issued (and for years leading up to it), while the Section 15 structure was *capable* of being used as a residence, was used from time to time in connection with farming and other activities, and occasionally stayed in overnight, the

¹ While the Kesslers’ Opening Brief dedicates many words to what Minnesota Power *could* or *should have done differently*, those hypothetical points do not affect the determination of Issues #1 or #2 and, therefore, they can be disregarded.

Section 15 structure was *not* the Kesslers', their sons', or anyone else's home.²

The Kesslers' Opening Brief does not dispute these facts or otherwise supply facts to support a conclusion that the Section 15 structure was an occupied residence when the Commission issued its Order. Instead, the Kesslers point to various, intermittent uses of the property and offer a conclusory, unsupported argument that the Section 15 structure was "at times used as a residence."³ There is no dispute, however, that no one was living at the Section 15 structure as of the Commission's September 13, 2013 public hearing or the issuance of the Commission's Order.⁴

² See, e.g., Kessler Ex. Dates-1 and Dates-2; Evid. Hrg. Tr. Vol. I, p. 323:12-24 (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. . . ."); *id.* at p. 324:5-7 (D. Kessler) (Q: "Anyone who stayed there lived somewhere else?" A: "Correct.").

³ See Kesslers' Opening Brief, p. 19. In the complaints they filed, the Kesslers acknowledged that the house was not "occupied" during the Project, but instead was "used." See, e.g., Cplt. p. 2, ¶ 3 (alleging the Kesslers told Minnesota Power "that the residence *would be occupied* was and only temporar[il]y vacant") (emphasis added); *id.* at p. 27, ¶ 71 ("the house was there, used before and during the project, and occupied *on either side of* the actual construction of the Turbine 441.") (emphasis added); Revised Formal Cplt. p. 2, ¶ 2; *id.* at p. 27, ¶ 71; Second Revised Formal Cplt.; *id.* at p. 16, ¶ 16.2 (alleging that "[t]he company was repeatedly told by the Kesslers that the residence was merely *temporarily unoccupied*. . . .") (emphasis in original); *id.* at p. 20, ¶ 19.1; see Evid. Hrg. Tr. Vol. II, p. 412:14-16 (H. Kessler) (Hayden Kessler started living at the Section 15 structure in 2016).

⁴ See *id.*; see also Evid. Hrg. Tr. Vol. I, p. 100:11-23 (K. Kessler) (agreeing that, from 2003 until after the Project was built, the Section 15 structure was no one's primary residence). One of the Kesslers' sons testified that he stayed at the Section 15 structure "occasionally" during the summer of 2013. See Evid. Hrg. Tr. Vol. I, p. 269:7-9 (S. Kessler) ("So I've lived there full-time in 2020 and then occasionally on weekends throughout 2013, summer."); *id.* at 278:3-5 (S. Kessler) (" . . . that summer of 2013 when I stayed there on weekends. . . ."); *id.* at p. 280:18-25 (S. Kessler) (Stephen did not live at the Section 15 structure full-time, but spent some weekends there); *id.* at p. 282:19-23 (S. Kessler). Stephen testified that, even on nights when he stayed there, he would have been at the Section 15 structure during days "very briefly." *Id.* at p. 270:19-6 (S. Kessler). Stephen would have been back at college by the time of the public hearing. See *id.* at p. 272:1-5 (S. Kessler); see <https://www.ndsu.edu/fileadmin/registrar/dates/calendars.pdf>, p. 2 (North Dakota State University System 2013-2014 Academic Calendar – classes started at North Dakota State University on August 27, 2013).

Therefore, the Commission should find in Minnesota Power’s favor on Issue #1. Further, because Issue #2 depends on Issue #1, the Commission should find in Minnesota Power’s favor on Issue #2 as well.

B. THE KESSLERS’ REQUESTED AFTER-THE-FACT DEFINITION OF “OCCUPIED RESIDENCE” DEMONSTRATES WHY THE KESSLERS CANNOT PREVAIL.

The Kesslers’ argument that Minnesota Power failed to properly identify the Section 15 structure as an “occupied residence” depends upon the Commission imposing and enforcing a years-after-the-fact definition of “occupied residence” that is not consistent with its plain meaning. In Minnesota Power’s Opening Brief, Minnesota Power set forth the reasons why the Commission must, in interpreting its own Order, conclude that “occupied residence” means what it says—the place where someone lives. Nothing in the Kesslers’ Opening Brief persuasively explains why the Commission should (or can) disregard the words it used in the Order.

The Kesslers ask the Commission to define “occupied residence” to mean a “structure capable of being used as a residence” or, put differently, a “dwelling.”⁵ Under the Kesslers’ definition, it would not matter whether a structure was “occupied” or not, only whether it was occupiable or livable. The Kesslers’ requested definition is not consistent with the Order.

As Minnesota Power explained in its Opening Brief, if the Commission’s Order had said that the setback applied to “residences” or “dwellings” without regard to whether they were occupied, that would have been a different standard and would have required Minnesota Power to undertake a different analysis.⁶ At this point, it would be arbitrary for the Commission to

⁵ Kesslers’ Opening Brief, p. 22.

⁶ The Commission speaks through its written orders. *State v. Union Light, Heat & Power Co.*, 182 N.W. 539, 541 (N.D. 1921); N.D.C.C. § 49-01-07; *see also United States v. Morgan*, 313 U.S. 409, 422 (1941) (noting that it is immaterial what an agency decisionmaker may have said or thought in the process of arriving at his decision).

effectively revise its Order to say “occupiable dwelling” when that was not the commitment requested of or made by Minnesota Power. Essentially, the Kesslers are requesting a wholly different standard be applied simply to better fit the Kesslers’ narrative. While the Commission could engage in appropriate rule-making to establish definitions of “occupied residence” or other terms for use in future siting applications, and take input from interested parties to inform that decision, the Commission should reject the Kesslers’ invitation to engage in retroactive application of a new standard and retroactive rule-making here.⁷

C. FACTS RELEVANT TO ISSUE #3.

The third issue is whether, “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. . . .”

On this issue, the Kesslers’ position is three-fold. First, they argue that they told one or more Minnesota Power representatives at some point(s) prior to the public hearing that they were not interested in having any wind towers erected near their Glen Ullin residence or around the Section 15 structure, because the Kesslers’ child(ren) would move to the Section 15 structure in the future.⁸ Second, the Kesslers assert that, the day of the public hearing, they raised the issue of the proximity of turbines to the Section 15 structure, but they were yelled and swore at by a Minnesota Power employee, and told that there was not time to make any changes to the Project layout because of tax credits. Third, the Kesslers seem to contend that Minnesota Power, regardless of its communications about the Section 15 structure’s status with the Kesslers, should have identified the Section 15 structure as an occupied residence.

⁷ See N.D.C.C. § 28-32-02.

⁸ See, e.g., Kesslers’ Opening Brief, p. 2 (citing Evid. Hrg. Tr. Vol. I, p. 54-55) (K. Kessler); *id.* at p. 3 (citing Evid. Hrg. Tr. Vol. I, p. 363) (D. Kessler).

The testimony and evidence presented does not support the Kesslers' position. First, Minnesota Power's testimony consistently and credibly denied the allegation that the Kesslers raised issues about their future plans for the Section 15 structure (or any other concerns about the Section 15 structure) before or at the public hearing. Second, the Kesslers' contention that Minnesota Power should have determined that the Section 15 structure was an "occupied residence" and informed the Commission of that is also unsupported. First and foremost, as discussed above, the Section 15 structure was not anyone's home when the Commission issued the Order and, thus, was not an "occupied residence." To accept the Kesslers' contention, the Commission would have to arbitrarily change the standard from "occupied residence" to "occupiable dwelling" to fit the Kesslers' narrative.

1. The Kesslers' claims that they told Minnesota Power prior to the public hearing that the Kesslers did not want any turbines near the Section 15 structure are not supported by the evidence.

The Kesslers contend that they never really wanted to have any turbines on any of their property, that they specifically did not want turbines near the Section 15 property, and that they told Minnesota Power representatives that the Kesslers' child(ren) would move into the Section 15 structure in the future. The Kesslers' contentions are not supported by, and instead are often directly contradicted by, the evidence.

- A) The evidence demonstrates that the Kesslers willingly and repeatedly optioned their properties—including the property at issue—for wind energy project development.

First, the Kesslers' claims that they did not want to participate in the wind project at all,⁹ and that they were vocal about their concerns about the Section 15 structure, strain credibility. If the Kesslers did not want to participate in a wind project, then the fact that they signed up all of

⁹ Kesslers' Opening Brief, p. 2 (citing Evid. Hrg. Tr. Vol. I, pp. 54-55 (K. Kessler).)

their properties in Oliver and Morton Counties to two different developers in 2008 and 2009, and then re-signed their Oliver County properties – and specifically included their land with the Section 15 structure – in 2013, is utterly inexplicable.

In 2008, the Kesslers granted to Boulevard Associates an exclusive option for easements for the development, construction, and operation of wind energy facilities on their Oliver County properties, including on the Section 15 property where the Section 15 structure sits.¹⁰ The evidence thus contradicts the Kesslers' testimony.

Then, in 2009, the Kesslers optioned their Morton County properties to Minnesota Power for a wind energy project.¹¹ Here again, the evidence runs directly counter to the Kesslers' claims.

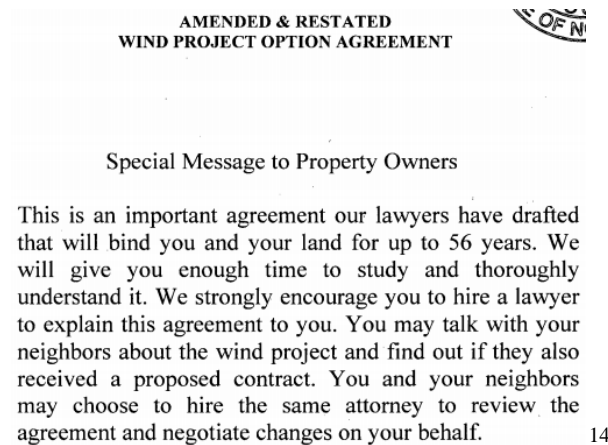
Perhaps, though, the Kesslers had a change of heart after granting those initial easements? No, that is not the case either. Instead, after the Boulevard Associates' option expired or was terminated in 2013, the Kesslers reiterated their desire to participate in wind energy development, including hosting facilities. In 2013, the Kesslers took all of the property that had been under option to Boulevard Associates—including the NW1/4 of Section 15 where the Section 15 structure sits and their nearby property in the SE1/4 of Section 15 (on which the Turbine 441 pad partially sits)—and optioned it to Minnesota Power.¹² Had the Kesslers genuinely had concerns regarding the placement of turbines near the Section 15 structure, they would have excluded their Section 15 property or, at a minimum, the NW1/4 of Section 15, from the option agreement. But

¹⁰ Memorandum of Easements, Ex. A (MP Ex. 4-4) (granting an exclusive option for turbine, access, collection, construction, wind-non-obstruction, noise, overhang, and met tower easement rights, and listing the easement property, including the “Northwest Quarter (NW ¼) of Section 15, Township 141 North, Range 87 West of the 5th P.M., Oliver County, North Dakota”).

¹¹ S. Monroe Pre-filed Direct Testimony, p. 3:66-83 (MP Ex. 4).

¹² Amended & Restated Wind Project Option Agreement, Attachment 1 (listing properties subject to the amended option) (MP Ex. 4-2).

they didn't. Instead, contrary to their testimony, the Kesslers specifically *included* their Section 15 property.¹³ Maybe the Kesslers did not have enough time to consider thoroughly what they were doing? No. Not only had the Kesslers optioned those same lands to another developer years earlier, but as stated on the face of their agreement with Minnesota Power in 2013, the Kesslers were given time to study and thoroughly understand the agreement and were encouraged to take it to a lawyer, too:



Under that option, not only did the Kesslers grant Minnesota Power the option to build the Project as it did, but the Kesslers granted Minnesota Power the option to place structures on the property that hosts the Section 15 structure itself (though Minnesota Power did not do so). Simply put, the objective evidence demonstrates that the Kesslers were willing wind energy development participants, on multiple occasions, and specifically included in their agreements the land that is the subject of their complaints.

¹³ *Id.* (listing NW1/4, N1/2SE1/4 and the SE1/4SE1/4 of Section 15).

¹⁴ Amended & Restated Wind Project Option Agreement, Attachment 1 (listing properties subject to the amended option) (MP Ex. 4-2).

- B) The Kesslers' claims that they told Minnesota Power they had concerns about the wind project because of their sons' future use of the property are not supported by the evidence.

The Kesslers assert that, before the Commission's public hearing, they repeatedly told Minnesota Power that one or more of their sons would use the Section 15 structure as a residence in the future. Minnesota Power denies that the Kesslers told Minnesota Power about the future plans of the Kesslers' children at any time during the negotiation of agreements, development, or construction of the Project. The evidence does not support the Kesslers' assertion.

On this assertion, the Commission is necessarily considering the credibility of the testimony. In doing so, the Commission must consider things like: the consistency within one witness's testimony, the consistency between witnesses' testimony, prior inconsistent statements, plausibility of the testimony, and the like. In this case, these considerations all undercut the Kesslers' position.

The Commission should consider that the Kesslers' allegations and testimony have changed, repeatedly, throughout the course of the proceedings. The Kesslers made repeated, unequivocal allegations that they later abandoned when their story could not hold together as originally told. For example, in their Complaint and revised Complaints, the Kesslers *repeatedly and unequivocally* claimed that they told Minnesota Power's Scott Monroe and Wade Isaacson that the Kesslers' children would move into the Section 15 structure in the future.¹⁵ By the time of the evidentiary hearing, *after* learning facts that contradicted their claims, the Kesslers changed their story, no longer claiming that they told Wade Isaacson anything before the public hearing

¹⁵ See, e.g., Cplt. p. 26 ¶ 66 ("The Kesslers prior to the public hearing told both Scott and Wade that [Section 15 structure] was not 'an abandoned building' but was a residence that had been recently used by other family members and was intended to be used by their son when he returned from college."); Revised Formal Cplt., p. 26 ¶ 66 (same); Second Revised Formal Cplt. p. 19, ¶ 18.3.

(because they came to learn they had not met him).¹⁶ Instead, the Kesslers seem to assert that they told either Paul Johnson or Scott Monroe. The facts do not support this either. With respect to Paul Johnson, at the evidentiary hearing, Mr. Kessler claimed when questioned by his counsel that they told Minnesota Power about the plans for the Section 15 property before they signed an option in 2009.¹⁷ Then, the story changed again when Mr. Kessler admitted that he does not know whether the Section 15 property was discussed with Minnesota Power in 2009.¹⁸ Further, it only makes sense that the Section 15 property in Oliver County would *not* have been discussed with Minnesota Power in 2009, because that property was under exclusive option to Boulevard Associates. Likewise, as to alleged interactions in 2013 at the Kesslers' home prior to the public hearing, those could not have been with Paul Johnson (who had retired¹⁹) and Mr. Monroe testified that he has never been to the Kesslers' house and did not meet the Kesslers until after the public hearing.²⁰

Second, the Kesslers alleged, specifically, that *prior* to the hearing they told Minnesota Power that they were concerned that Turbine 441 would be too close to the Section 15 structure.²¹

¹⁶ Evid. Hrg. Tr. Vol. I, pp. 329:25-330:24 (D. Kessler) (“[I]t wasn’t Wade.”); *id.* at 330:15-24 (D. Kessler) (cannot specifically say when the Kesslers allegedly talked to Scott).

¹⁷ *Compare* Evid. Hrg. Tr. Vol. I, p. 69:14-25 (K. Kessler).

¹⁸ Evid. Hrg. Tr. Vol. I, p. 122:11-15 (K. Kessler) (“I don’t know if it was 2009 or 2013.”); *id.* at pp. 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). *Cf.*

¹⁹ Evid. Hrg. Tr. Vol. II, p. 716:10-14 (Monroe).

²⁰ Evid. Hrg. Tr. Vol. II, p. 716:15-17 (Monroe); *id.* at 721:8-9 (Monroe).

²¹ *See, e.g.*, Cplt. p. 26, ¶ 65 (“The Kesslers prior to the public hearing told both Scott and Wade about their concerns that Turbine 441 would be too close to the residence.”); Second Revised Formal Cplt., p. 19, ¶ 18.2 (same); *id.* at p. 19, ¶ 18.3.

Their testimony, however, suggests a different story.²² Now, because the facts do not support their claim that they told Minnesota Power about their concerns about the Section 15 structure before the public hearing, they claim that at the public hearing was when they first had reason to be really concerned. The Kessler testified that when they saw the maps at the public hearing, they noted that the Section 15 structure was not identified as an occupied residence,²³ and they saw enough to voice their concerns to Minnesota Power that the turbine (later known as Turbine 441) was too close to their property. They further latch onto the vague comments made by Mr. Kessler about “turbines” during the public hearing as proof they shared their concerns with Minnesota Power, but at the same time they have alleged that Minnesota Power somehow prevented Mr. Kessler from raising his concerns at the public hearing.

In a case like this, where the Commission is tasked with determining the facts based on conflicting testimony, the fact that the Kesslers’ story was constantly changing to try to account for the actual facts is meaningful and detrimental to the Kesslers’ case. At the end of the day, the Kesslers’ testimony is essentially that they told *someone* from Minnesota Power *at some point in time* about their concerns. This is a significant retreat from the Kesslers’ repeated assertions and not the sort of vague statements that should be used to find that the Kesslers have met their burden of proof. The consistent thing about the Kesslers’ case is its inconsistency. On the other hand, Minnesota Power’s position and testimony have been consistent throughout the proceedings:

²² See Kesslers’ Opening Brief, p. 10 (citing K. Kessler testimony (Evid. Hrg. Tr. Vol. I, p. 175) that the Kesslers “had no clue” where the towers were going until they got to the hearing). Notably, Minnesota Power *did* send the Kesslers (and other landowners) a letter prior to the public hearing explaining how to access a map with turbine locations, but apparently the Kesslers did not do so. T. Simmons Pre-filed Direct Testimony (MP Ex. 5-2).

²³ Evid. Hrg. Tr. Vol. I, p. 334:12-22 (D. Kessler).

Minnesota Power was never told about the Kesslers' potential future use of the Section 15 structure. Accordingly, Minnesota Power did not withhold that information from the Commission.

2. The Kesslers' claims that, at the hearing, they told Minnesota Power about their concerns are not supported by the evidence.

The Kesslers' Opening Brief asserts that “[i]t 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.”²⁴ However, multiple Minnesota Power witnesses testified that the Kesslers did *not* raise any concerns regarding the Section 15 structure or the placement of turbines near that structure at the public hearing, while the Kesslers' testimony was internally inconsistent²⁵ and contradicted their own prior positions.²⁶

Moreover, the Kesslers' position is simply not plausible. At a high level, there is no reason that Minnesota Power would voluntarily agree to a setback, but then choose to violate that commitment instead. Not only does that not make any sense, but it is also inconsistent with the way that Minnesota Power values its relationships with landowners and the Commission. At a more granular level, the Kesslers' claim that they were yelled and swore at by an applicant in a small courtroom or adjacent hallway, but that *no one* else noticed, defies logic. Finally, the statement allegedly made by Mr. Freudenrich—that nothing could be moved because of tax credit

²⁴ Kesslers' Opening Brief, p. 28.

²⁵ Compare Evid. Hrg. Tr. Vol. I p. 135:11-24 (K. Kessler) *with id.* at pp. 338-16-339:8 (D. Kessler) (showing inconsistency as to where the alleged conversation/event took place the day of the hearing).

²⁶ Compare Evid. Hrg. Tr. Vol. I, pp. 132:20-133:16 (K. Kessler) (admitting that the Kesslers repeatedly (in their Complaint, Revised Formal Complaint, and Second Revised Formal Complaint, and in discovery responses) alleged and/or swore under oath that Scott Monroe was with Matt Freudenrich when Mr. Freudenrich “blew up” at the Kesslers, but that those allegations and sworn answers were wrong) *with* Evid. Hrg. Tr. Vol. I, p. 335:6-20 (D. Kessler) (explaining that the Kesslers changed their story as to who was present after learning that their allegations and sworn testimony were not accurate).

implications—is incorrect factually, and Mr. Freudenrich would have had no reason to state such a thing. On top of these facts, there is also the fact that all of the Minnesota Power representatives testified consistently that what the Kesslers claimed happened at the hearing did not actually happen.

The Kesslers claim that Minnesota Power’s position is “very unlikely” for three reasons (not including their own testimony): (1) because Mr. Lein testified that he thinks he saw someone from Minnesota Power talking to the Kesslers that day; (2) “that the issue of roads in [sic] the placement of the towers was explicitly mentioned in Keith Kessler’s testimony at the public hearing”; and (3) because of what was allegedly said in a conversation between the Kesslers and Mr. Monroe in a meeting the month *after* the public hearing. Minnesota Power addresses each of these issues below.

The Kesslers’ Opening Brief argues that Mr. Lein’s testimony confirms the Kesslers’ version of events. The Kesslers vastly overstate what Mr. Lein said. Mr. Lein’s testimony was that he “kind of” remembers the Kesslers talking with someone from Minnesota Power, but that he was not part of the discussion.²⁷ Mr. Lein also testified, however, that he did not see anyone from Minnesota Power “blow up” at the Kesslers and that, if that had happened, Mr. Lein would have taken notice.²⁸ Thus, at best, Mr. Lein “thinks” he saw someone from Minnesota Power talking with the Kesslers about something, but most certainly did not testify that the Kesslers shared specific concerns about the Section 15 property or turbine placement with Minnesota Power.²⁹

²⁷ Evid. Hrg. Tr. Vol. I, p. 217:1-18 (Lein).

²⁸ *Id.* at p. 220:4-10 (Lein).

²⁹ Mr. Lein also testified that he thought Mr. Monroe was at the hearing, but evidence from Mr. Monroe demonstrated that was not accurate. *Compare id.* at p. 256:17-21 (Lein) *with* Evid. Hrg. Tr. Vol. II, p. 716:18-20 (Monroe); *id.* at p. 465:16-18 (B. Gartner); *id.* at pp. 550:23-8

Not only that, but the balance of Mr. Lein’s testimony cuts against the Kesslers’ claims. For example, Mr. Lein testified about his many interactions with Mr. Kessler during construction and after the Project, and that Mr. Kessler did not raise an issue with the location of a turbine relative to the Section 15 structure until February 2017.³⁰ Mr. Lein also testified about a meeting among the Kesslers and Minnesota Power, and relayed that what Mr. Kessler claimed about that meeting—that Minnesota Power admitted the Kesslers told Minnesota Power about their future plans for the Section 15 structure before the hearing—was false.³¹

The Kesslers also assert that Mr. Kessler’s statements on the record at the public hearing are evidence that Minnesota Power knew of the Kesslers’ concerns about turbines near to the Section 15 structure. In support of this, the Kesslers’ Opening Brief goes so far as to state that Commissioner Fedorchak noted that, in light of Mr. Kessler’s comments, it is “not reasonable for the company to claim the first [it] heard about the turbine issue was in 2017.” The Kesslers’ characterization of Commissioner Fedorchak’s statements are misleading; Commissioner Fedorchak asked Mr. Lein whether it was reasonable to believe the issue came up for the first time for Minnesota Power in 2017. Mr. Lein could not say whether it was reasonable or not. However, Mr. Lein did testify that he had multiple interactions with Mr. Kessler throughout 2015-2016, but Mr. Kessler did not raise the Section 15 structure / Turbine 441 issue until February 2017, which aligns with Minnesota Power’s testimony.

(Freudenrich); and MP Exs. 13, 14, and 15 (memoranda of easements signed by Mr. Monroe on September 13, 2013, showing Mr. Monroe was in the field notarizing signatures the day of the hearing).

³⁰ *Id.* at pp. 222:4-223:21 (Lein).

³¹ Evid. Hrg. Tr. Vol. I, p. 224:8-16.

The Kesslers' characterization of what Mr. Kessler said on the record on that day is further misleading. The reality is that Mr. Kessler did not testify about any concerns regarding the proximity of any turbines to the Section 15 structure at the public hearing. Rather, Mr. Kessler testified, in a general sense, about coordination with landowners on layout development and, more specifically, unrelated concerns, but that he thought the communications with Minnesota Power were pretty good. It would not be appropriate to read deeper into or give more weight to what Mr. Kessler said that day.

Further, concluding that Mr. Kessler's public hearing testimony related to the Section 15 structure doesn't align with the Kesslers' own complaints. In those complaints, the Kesslers did *not* claim that Mr. Kessler raised the issue of the Section 15 structure and any nearby turbines at the public hearing; instead, the Kesslers claimed that they were dissuaded or prevented by Minnesota Power from raising those concerns.³² In their own words, repeated several times, "Keith did not raise this issue on the record. . . ."³³ It was not until the post-hearing brief, after the Commissioners wondered at the evidentiary hearing whether Mr. Kessler's comments related to the issue at hand, that the Kesslers latched on to what they apparently think may be a better story for them. The fact that the Kesslers did not allege that Mr. Kessler's testimony at the public hearing was specific to Turbine 441 or the Section 15 structure, and in fact alleged specifically that Mr.

³² See, e.g., Cplt., p. 2, ¶ 2 ("Minnesota Power took active steps to prevent the Kesslers from raising this issue at the public hearing. . . ."); *id.* at p. 13, ¶ 23 (alleging "Minnesota Power took positive steps to dissuade or prevent the Kesslers from raising this concern at the public hearing on September 13, 2013"); Second Revised Formal Cplt., p. 9, ¶ 9.3, p. 20, ¶ 20.3, p. 21, ¶ 20.8 (repeatedly alleging that Minnesota Power prevented the Kesslers from raising their concern about Turbine 441 relative to the Section 15 structure at the hearing "took active steps to dissuade the Kesslers from raising the issue at the hearing. . . .").

³³ See Cplt., p. 25, ¶ 54; Revised Formal Cplt., p. 25, ¶ 54; Second Revised Formal Cplt., p. 18, ¶ 16.4.

Kessler “did not raise this issue on the record,” is most telling. It is also yet another example of the Kesslers trying to change their story.

Finally, the Kesslers’ arguments that Mr. Monroe’s alleged comments *after* the hearing support the Kesslers’ claims are misplaced. First, Issue #3 relates to whether information was withheld from the Commission at the public hearing. Thus, unless the facts show that Mr. Monroe had knowledge of the Section 15 structure and Turbine 441 proximity issue before the public hearing (they do not), the evidence is irrelevant. Second, the Kesslers misrepresent Mr. Monroe’s testimony. Mr. Monroe testified unequivocally that turbine locations were discussed at their October 23, 2013 meeting, including that a fence on the quarter-section/boundary line between the NE1/4 (Lennick’s land) and the SE1/4 (Kesslers’ land) would need to be moved to accommodate Turbine 441’s pad, and that the Kesslers did not bring up any concerns about the Section 15 structure at that meeting.³⁴ Somehow, the Kesslers’ Opening Brief construes this testimony as a “moment of honesty” that somehow supports the Kesslers’ position. Far from it. While Mr. Monroe’s testimony was honest and credible, it does not support the Kesslers’ position. Rather, Mr. Monroe’s testimony was that, as of the October 23, 2013 meeting, the Kesslers knew where Turbine 441 was going, knew that their fencing would be impacted, and had an opportunity to raise any issues they had, but *did not* raise any concerns about the proximity between Turbine 441 and the Section 15 structure. In addition, Mr. Monroe’s further testimony that he talked with Mr. Kessler 25-30 times during construction, and met with him on site several times, too (including near to Turbine 441), but that the Kesslers *never* raised the issue of Turbine 441’s proximity to the Section 15 structure in any of those meetings, is meaningful. If this had been an issue for the Kesslers, then at some point over the course of a year of construction and two years of operation,

³⁴ Evid. Hrg. Tr. Vol. II, p. 744:6-18 (Monroe).

with dozens of conversations with Mr. Monroe regarding various issues the Kesslers had with the Project, surely, the Kesslers would have said something to Minnesota Power. The fact that they did not, and that Mr. Kessler likewise did not raise any issues with the Commission until February 2017, very much suggests that this issue was developed after the fact, just as has been demonstrated by Minnesota Power's testimony.

Ultimately, the Kesslers do little more than make conclusory statements and imply that something happened at the public hearing. The Kesslers offer their own testimony, which is internally inconsistent and contradictory to their own prior sworn testimony and filings, and vastly overstate Mr. Lein's testimony. The Kesslers simply did not meet their burden of proof on this issue. Moreover, Minnesota Power's consistent, credible testimony established that the Kesslers' version of events is not accurate.

3. The Kesslers' assertion that Minnesota Power withheld accurate information from the Commission about whether the Section 15 structure was an occupied residence is not supported by the evidence.

The Kesslers' Opening Brief makes the point that the Commission relies on applicants to provide the Commission with accurate and complete information about exclusion and avoidance areas. The Kesslers' Opening Brief suggests that Minnesota Power failed to do so, because it failed to identify the Section 15 structure as an "occupied residence." On this point, the Kesslers' argument falls flat.

Minnesota Power's Opening Brief discussed, in detail, Minnesota Power's siting process. Minnesota Power explained that it voluntarily agreed to apply the setback, applied the plain meaning definition to the phrase "occupied residence," and discussed the steps it took to identify the residences it treated as "occupied" and thus included on the "exclusion and avoidance area" map. So long as the Commission applies a fair, plain reading to the phrase "occupied residence,"

then it cannot determine that Minnesota Power “withheld” information from the Commission at the public hearing.

For their part, the Kesslers argue that, “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 [Commission]. . . .”³⁵ That is an important point, but it cuts against the Kesslers’ argument because there was no question for Minnesota Power about whether the Section 15 structure should be identified as an “occupied residence.” The evidence was clear that *if Minnesota Power* did have a question about the status of the Section 15 structure, or knowledge of the Kesslers’ alleged future plans, Minnesota Power would have been able to address the issue without any significant consequences for the Project. Minnesota Power knew that the Section 15 structure was livable, but had no information that it was, in fact, an “occupied residence.”³⁶ Further, the evidence has shown that Minnesota Power’s conclusion was correct because the Section 15 structure was not, in fact, an “occupied residence.”

III. THE KESSLERS’ REQUEST FOR REVOCATION OF A BOND OR IMPOSITION OF A FINE OR SANCTIONS IS INAPPROPRIATE.

The Kesslers have repeatedly asked the Commission to expand its jurisdiction and, in the event that the Kesslers prevail on their Complaint, award the Kesslers damages and attorney fees. The Commission has repeatedly denied the Kesslers’ requests. Despite this, in the Kesslers’ Opening Brief, the Kesslers again request that the Commission assume jurisdiction it does not have

³⁵ Kesslers’ Opening Brief, p. 12.

³⁶ This is a good example of why the words actually used in the Order matter. If the Commission had not included the word “occupied,” but instead either did not qualify “residence” at all or qualified it so that “livable” residences were to also be considered for the setback, then perhaps Minnesota Power could be faulted for knowing the residence existed but not inquiring further. For example, when Mr. Gartner saw that the structure was designated in the Plat Book as a “livable building,” he would have known the structure should be included for the setback requirement.

by requesting that, if the Kesslers prevail, the Commission revoke a bond and/or impose a fine or sanction of \$500,000, and then suspend that imposition if Minnesota Power agrees to pay the Kesslers their attorney fees and costs. The Commission’s prior decisions were correct—these forms of relief are not available, even if the Kesslers prevailed (they should not), and the request is inappropriate.³⁷

IV. CONCLUSION.

Again, this case is not about how, in hindsight, this dispute could have been avoided. Nor is this case about how, in the future, disputes like this will be avoided. Rather, this case is about whether the Section 15 structure was an “occupied residence” when the Commission issued its Order and whether Minnesota Power withheld information relating to the Section 15 structure from the Commission at the public hearing that Minnesota Power should have communicated to the Commission. On each of these issues, Minnesota Power prevails.

First, the Section 15 structure was not an “occupied residence” when the Commission issued its Order. Whether the Section 15 structure *could have* been lived in or was used is simply not the issue. If, in future proceedings, the Commission defines setbacks based on a structure’s purpose or potential uses, then applicants will apply those new standards. In this case, however, the application of those hypothetical standards have no role (and cannot have a role) in the Commission’s decision. Because the Section 15 structure was not an “occupied residence” when

³⁷ Minnesota Power notes the Kesslers are seeking the Commission issue relief that is akin to what would be available to the Kesslers if they filed and then prevailed in an inverse condemnation action. The Kesslers, however, chose to bring their dispute before the Commission and not commence a civil action. Even if the Kesslers’ arguments about the policy of allowing such remedies were persuasive (they are not), the Commission has never been delegated by the North Dakota Legislature jurisdiction to grant the remedies the Kesslers seek.

the Commission issued its Order, the Commission must find in Minnesota Power’s favor on Issues #1 and #2.

Second, the evidence shows that Minnesota Power did not withhold information that it should have told to the Commission at the public hearing about the Section 15 structure. The evidence has demonstrated that—under the reasonable, plain language definition used by Minnesota Power (and without anything in the Order suggesting a different definition should be employed)—the Section 15 structure was not an “occupied residence” and that Minnesota Power did not have information to suggest otherwise. Consequently, there was no information that Minnesota Power had about the Section 15 structure that was relevant to the applicable standard—whether it was an “occupied residence”—that Minnesota Power did not provide to the Commission at the hearing.

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