

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler, Complainants/ Petitioners, v. Minnesota Power, a division of ALLETE, Inc., Respondent.	Case No. PU-20-194 OAH File No. 20200211 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
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Appearances

Commissioners Julie Fedorchak, Randy Christmann, and Brian Kroshus.

Lynn Boughey, Boughey Law Firm, P.O. Box 1202, Mandan, ND 58554-1202, on behalf of Complainants/Petitioners Keith and Deanna Kessler.

Patrick D.J. Mahlberg and Mollie M. Smith, Fredrikson & Byron, P.A., 200 South 6th Street, Suite 4000, Minneapolis, MN 55402, on behalf of the Respondent, Minnesota Power, a division of ALLETE, Inc.

Brian Johnson, Special Assistant Attorney General, North Dakota Public Service Commission.

Timothy L. Dawson, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street – Suite 303, Bismarck, ND 58503, as Procedural Hearing Officer.

Procedural History

On April 23, 2020, Petitioners Keith and Deanna Kessler (the Kesslers) filed a complaint concerning the siting of Bison 4 Wind Project (Project) Turbine 441 relative to a structure owned by the Kesslers in Section 15, Township 141 North, Range 87 West, in Oliver County (the Section 15 structure). The Kesslers alleged that, among other things, the Section 15 structure should have been identified as an “occupied residence” and that Turbine 441 was located in violation of the 1,400 foot setback from “occupied residences” requirement. The Kesslers filed a revised complaint on April 27, 2020.

On May 20, 2020, the Commission received the response to the complaint by Minnesota Power. On May 27, 2020, the Commission approved a motion finding the Kesslers' complaint stated a *prima facie* case and directing that the complaint be served on Minnesota Power. On June 29, 2020, the Kesslers filed a Second Revised Complaint.

On July 20, 2020, Minnesota Power filed an Answer to the Second Revised Complaint.

On July 20, 2020, Minnesota Power also filed a Motion for Partial Dismissal with supporting brief. On August 3, 2020, the Kesslers filed a Brief in Response to the Motion for Partial Dismissal of the Second Revised Complaint. On August 10, 2020, Minnesota Power filed a Reply Brief in support of its Motion for Partial Dismissal of Revised Complaint.

On September 23, 2020, the Commission issued an Order on Motion for Partial Dismissal, dismissing the following four claims for relief as outside the scope of authority of the Commission:

1. Have the [Commission] conduct a survey of other landowners to determine if Minnesota Power has a pattern of misconduct relating to North Dakota landowners;
2. Prohibit Minnesota Power from any further operations in North Dakota;
3. Reimbursement for damages incurred for damage to Section 15, devaluation of Section 15, as well as personal damages for inconvenience, nuisance, and emotional distress; and
4. Order Minnesota Power to reimburse all attorney fees incurred by the Kesslers relating to the prosecution of this action.

The Order was served on the parties via certified mail on September 24, 2020.

On November 13, 2020, Minnesota Power filed a Notice of Motion and Motion for Partial Summary Judgement, Brief in Support of Motion, and supporting documents. On January 4, 2021, the Kesslers filed a Brief in Response to Minnesota Power's Second Motion for Partial Dismissal of Revised Complaint, with exhibits. On January 14, 2021, Minnesota Power filed a Reply Brief in Support of Motion for Partial Summary Judgment. On January 20, 2021, the Commission issued an Order on Motion to Dismiss, denying Minnesota Power's Motion for Partial Summary Judgment.

On February 3, 2021, the Commission issued a Notice of Hearing. In the Notice of Hearing, the Commission identified three issues to be considered at and following the evidentiary hearing:

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

On March 8, 2021, Minnesota Power filed witness and exhibits lists and the prefiled testimony and exhibits of the following witnesses: Matthew Freudenrich, Barry Gartner, Wade Isaacson, Scott Monroe, and Todd Simmons.

On March 8, 2021, the Kesslers filed their Pretrial Information. The Kesslers did not submit pre-filed testimony. Also on March 8, 2021, the Kesslers issued subpoenas to the following witnesses: Jerry Lein, Jack Schuh, Todd Simmons, Scott Monroe, Wade Isaacson, Matt Freudenrich, and Barry Gartner. The Kesslers also issued a subpoena duces tecum to Minnesota Power. On March 9, 2021, Minnesota Power filed a Response to Subpoena Duces Tecum and, in response to the ALJ's response on March 10, 2021, filed a Follow-up Response to Subpoena Duces Tecum on March 15, 2021.

On March 17, 2021, the ALJ issued an Order on Subpoena Duces Tecum and Subpoena of Witnesses, ordering that any subpoena requiring appearance at the Commission Hearing Room is satisfied by virtual appearance, and ordering that certain documents identified in the Subpoena Duces Tecum be provided.

On March 11, 2021, Minnesota Power filed a Motion in Limine and Brief in Support of Motion. On March 19, 2021, the Kesslers filed a Brief in Response to Minnesota Power's Motion in Limine, with exhibits. On March 24, 2021, the ALJ issued an Order on Motion in Limine.

On March 18, 2021, the Kesslers filed a Motion for Reconsideration of Order Dismissing Attorney Fees and on March 22, 2021, the Kesslers filed a Second Motion for Reconsideration of Order Dismissing Claim for Damages. On March 23, 2021, Minnesota Power filed a Response in Opposition to the Kesslers' Motions for Reconsideration. On March 24, 2021, the Commission issued an Order on Motion for

Reconsideration and an Amended Order on Motions for Reconsideration, denying the Kesslers' March 18 and 22, 2021 Motions for Reconsideration.

The evidentiary hearing was held over two days—March 25 and April 22, 2021.

Each party submitted a post-hearing opening brief, reply brief, and proposed findings of fact, conclusions of law, and order.

Having allowed all parties an opportunity to be heard and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes its:

Findings of Fact

I. Procedural Findings and Citations.

1. The Procedural History set forth above is hereby incorporated by reference in its entirety in these Findings of Fact. The procedural findings set forth in the Procedural History are a substantially complete and accurate description of the material documents filed in this docket and the proceedings conducted and decisions rendered by the Commission in this matter.

2. Record citations supporting these Findings of Fact are set forth in the parties' briefs.

II. Parties.

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

4. The Kesslers reside in Glen Ullin. For many years, the Kesslers have owned other properties, including in Mercer County and in Oliver County. The Kesslers own the Section 15 structure, which is located in the NW1/4 of Section 15, Township 141 North, Range 87 West, in Oliver County. The Kesslers are participating landowners in the Project.

III. The Kesslers' Use of the Section 15 Structure.

5. The Kesslers lived in the Section 15 structure from 1989 until 1992. The Kesslers have not lived at the Section 15 structure since then and, instead, have lived at

their house in Glen Ullin since 1992. Other family members lived at the Section 15 structure between 1993 and 2003.

6. From 2003 until 2015, no one made the Section 15 structure their residence. During the period from 2003 until 2015, the Kesslers used the Section 15 structure on an intermittent basis, including when working cattle or haying. In addition, once every few years, extended family stayed at the Section 15 structure for short periods and the Kesslers watched the Super Bowl at the Section 15 structure in 2007 and 2010. Mr. Kessler and his sons would also stay overnight at the Section 15 structure during hunting season. In the summer of 2013, one of the Kesslers' sons, Stephen Kessler, occasionally stayed at the house on weekends.

7. The Kesslers did not maintain insurance on the house. While the Kesslers had electric service at the property throughout the years, the records that the Kesslers produced show that the electricity usage at the Section 15 structure for the years 2012, 2013, 2014, and 2015 was a fraction of the average North Dakota residential energy usage.

8. Hayden Kessler began moving into the Section 15 structure in late 2015, started living there in 2016, and his girlfriend (now wife) joined him in 2016—the first time anyone had resided at the home since 2003.

9. Glen Lennick, who owns the NE1/4 of Section 15, which is the property adjacent to where the Section 15 structure is located and on which Turbine 441 was built, testified about his knowledge of the use of the Section 15 structure. Mr. Lennick testified that, in his view, “nobody was living there” in 2013 and the Section 15 structure was “abandoned” and had been for several years before the Project came along.

IV. The Kesslers' Grants or Options and Easements for Wind Project Development on Their Properties in Oliver and Mercer Counties.

10. The record does not support the Kesslers' testimony suggesting that they never wanted to participate in any wind project. The Kesslers signed multiple options on the lands at issue (and large portions of their other property) with not just Minnesota Power, but also with another potential wind project developer, and subsequently signed easement agreements with Minnesota Power for the Project.

11. In 2008, the Kesslers optioned their Oliver County property to Florida Power & Light affiliate, Boulevard Associates, under an exclusive, five-year option.

12. In 2009, the Kesslers optioned lands in Mercer County to Minnesota Power. In May 2013, after the Boulevard Associates' option lapsed/terminated, the Kesslers optioned their Oliver County properties to Minnesota Power by amending their 2009 option agreement with Minnesota Power to include those lands.

13. The Kesslers alleged that they discussed the Section 15 property, including the Kesslers' son's future plans to live in the Section 15 structure, with Minnesota Power in connection with negotiation and execution of the 2009 option agreement. However, the Kesslers' property in Oliver County was under an exclusive option to Boulevard Associates from March 2008 until March 2013, and no evidence was presented identifying a reason for Minnesota Power and the Kesslers to have discussed the Section 15 property in connection with negotiation and execution of the 2009 option agreement. Mr. Kessler admitted at the hearing that he does not know whether the Section 15 property was discussed with Minnesota Power in 2009, and there are inconsistencies in the Kesslers' testimony about when and with whom they discussed future plans for the Section 15 structure.

14. Regarding the signing of the 2013 option amendment, the Kesslers allege that Mr. Monroe went to their house in Glen Ullin. However, Mr. Monroe testified that he has never been to the Kesslers' house and that he did not meet the Kesslers until a meeting at Minnesota Power's New Salem facility on October 23, 2013.

V. The Bison IV Project.

A. The 1,400-foot "Occupied Residence" Setback.

15. Minnesota Power filed its Application for a Certificate of Site Compatibility (Application) for the Project with the Commission on May 3, 2013.

16. When the Project was sited and the Application was filed, there were no requirements imposing a turbine setback from occupied residences in the North Dakota Century Code, the North Dakota Administrative Code, the Oliver County ordinances, or any other rules or regulations applicable to the Section 15 structure.

17. When the Application was filed, the Commission had a sound requirement limiting sound levels to 50 dBA within 100 feet of an inhabited residence or community building.

18. During the Application process, Minnesota Power also committed to designing the Project to comply with the Commission's recommendation of limiting shadow flicker at occupied residences to 30 hours or less per year.

19. Commission Staff requested that Minnesota Power voluntarily commit to a 1,400-foot turbine setback from "occupied residences" in its Application and Project design, and Minnesota Power did so.

20. Minnesota Power's commitment to apply a 1,400-foot turbine setback from "occupied residences" was included in the Commission's Order. The term "occupied residence" was not defined by the Order.

21. Minnesota Power presented testimony that it took a common sense and plain language approach to defining and applying the “occupied residence” setback, identifying “each residential structure where someone was living (i.e., their home) as an ‘occupied residence’.” The record shows that Minnesota Power’s approach is consistent with Commission Staff’s view, which was that an occupied residence was the place where someone lived. This definition is also consistent with dictionary definitions of “occupied” and “residence.” Accordingly, the record demonstrates that Minnesota Power’s definition of “occupied residence” is consistent with the plain language of the Order and Commission Staff’s view of “occupied residence.”

22. When Commission Staff considers recommendations on compliance with voluntary setback commitments, it looks at how the applicant has defined that setback when determining compliance.

B. Minnesota Power’s Turbine Siting Process.

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

24. With respect to identifying occupied residences, Minnesota Power’s first step was to conduct a desktop analysis. The desktop analysis that Minnesota Power conducted to identify “occupied residences” involved reviews of data gathered for the prior Bison Wind Projects 1-3, information from the Oliver County Plat Book, and review of satellite imagery. If a structure was identified as occupied in the Plat Book or from the prior Bison Wind Projects 1-3, it was identified as an “occupied residence” for purposes of the Project. Because there were no conflicts between the Project design and the occupied residences identified in this analysis, Minnesota Power did not further confirm the status of those residences.

25. The Section 15 structure was not previously analyzed as part of the Bison 1, 2, or 3 projects, so Minnesota Power did not have prior project data regarding the Section 15 structure. The Plat Book identified the Section 15 structure as a “livable structure,” but indicated that no one was occupying it as a residence; the satellite

imagery did not suggest that it was occupied; and the Project development team did not have other information that led Minnesota Power to believe the Section 15 structure was occupied. Thus, based on Minnesota Power's desktop analysis, the Section 15 structure was not identified as an "occupied residence."

26. Minnesota Power's siting process included micro-siting, which involved visiting each turbine site. In advance of the micro-siting effort, Minnesota Power's Project Implementation Manager for the Project, Matt Freudenrich testified that he drove across the Section 15 property near the Section 15 structure in the process of locating fence lines and potential access points for the micro-siting visit. Mr. Freudenrich testified as follows: "I drove through the farmyard near to the Section 15 Structure. I was looking to see if anyone was around so I could let them know I was on the property and why I was there. However, the house did not appear to be lived in, and no people were around. [. . .] I saw a two-track (vehicle tracks with vegetation in between) that ended before what appeared to have been a yard around an old farmhouse and some outbuildings. No vehicles were present. A stock tank was located near the farmhouse and it looked like the property was used for watering cattle." According to Mr. Freudenrich, the Section 15 structure "looked like it had not been lived in for many years." Mr. Freudenrich testified that, had he seen anything that made him question his opinion that the Section 15 structure was unoccupied, he would have followed up with others at Minnesota Power and further verified the status of the structure. Mr. Freudenrich testified that he had followed up internally on other siting issues, including confirming turbine setback compliance from the Aasmundstad residence.

27. Minnesota Power testified that it did not ask the Kesslers about the use or status of the Section 15 structure because nothing indicated the structure's status as unoccupied was in question.

28. The Kesslers' testified that, prior to and at the time of the public hearing, their son(s) planned to live in the Section 15 structure. The Kesslers also testified that Hayden Kessler started living there in 2016 and subsequently lived there with his wife and son until 2017. However, the record, including the Kesslers' testimony, demonstrates that no one was living at and considered the Section 15 structure their home or residence from 2003 until 2016, after the Order was issued and the Project was built and operational.

C. Minnesota Power's Pre-Hearing Communications to Landowners.

29. Minnesota Power filed supplemental materials with the Commission on August 7, 2013, including an updated Exclusion and Avoidance Areas map. The Section 15 structure was not identified on the map as an occupied residence.

30. On August 9, 2013, Minnesota Power sent a letter to participating landowners providing an update on the Project's status, informing them of the Commission's upcoming hearing, and inviting landowners to contact the right-of-way

agents with any questions or concerns. That letter also informed landowners that a Project layout map was available on the Commission's website. The Kesslers testified that they do not recall whether they received the letter.

D. The September 13, 2013 Public Hearing.

31. On September 13, 2013, the Commission held a public hearing on the Application at the Oliver County courthouse (Public Hearing).

32. The Kesslers claim that they raised a concern about the location of a turbine relative to the Section 15 structure with Minnesota Power at a break in the Public Hearing and, in response, they were yelled and swore at by Mr. Freudenrich, and told the Project "didn't have time for this" because of tax credit-related deadlines.

33. The Kesslers presented inconsistent testimony regarding the alleged conversation with Mr. Freudenrich, such as who participated in the conversation and where the conversation took place. The Kesslers' pleadings identified the Minnesota Power representatives present for the conversation as Mr. Freudenrich and Mr. Monroe; however, after the Kesslers learned in discovery that Mr. Monroe was not at the Public Hearing, they stated that it was Todd Simmons with Mr. Freudenrich. After learning in discovery that it was not Mr. Simmons, the Kesslers no longer asserted that he was present. During the evidentiary hearing, the Kesslers did not identify any particular person with Mr. Freudenrich, and testified that it was a known, yet unidentified, Minnesota Power representative.

34. The Kesslers' claims about the interaction with Mr. Freudenrich were not supported by testimony from anyone else who attended the Public Hearing. The Kesslers testified that they knew only Mr. Johnson, Mr. Monroe, and Mr. Simmons at the time of the hearing. However, Minnesota Power testified that Mr. Johnson had retired and was not at the Public Hearing, Mr. Monroe was meeting with other landowners executing easements and was not at the Public Hearing, and Mr. Simmons did not speak with the Kesslers about their alleged concerns.

35. Minnesota Power consistently testified that the Kesslers did not raise any issues with Minnesota Power about the Section 15 structure at the Public Hearing. Minnesota Power also consistently testified that no Minnesota Power representative(s) had an exchange like the one the Kesslers described, and that no Minnesota Power representative present at the Public Hearing had any substantive discussions with the Kesslers that day.

36. The Kesslers' claim is inconsistent with the testimony provided by Mr. Kessler on the record during the Public Hearing, which occurred shortly after the alleged interaction with Mr. Freudenrich. Mr. Kessler discussed a general concern regarding coordination on layout development, but his Public Hearing testimony focused primarily on digging around/locating water lines, weed management, and road placement. Mr.

Kessler further testified during the Public Hearing that “the communication has been pretty good with Minnesota Power so far.” Mr. Kessler did not testify regarding the alleged confrontational exchange with Minnesota Power or note any specific concern about the Section 15 structure or specific turbine locations.

37. The record does not support a finding that Minnesota Power knew of the Kesslers’ son’s future plans for the Section 15 structure. Further, the record does not support a finding that 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.

E. The Commission’s Order.

38. The Commission issued the Order (granting a Certificate of Site Compatibility to Minnesota Power for the Project) on September 25, 2013. The Order incorporated Minnesota Power’s commitment to a 1,400 foot turbine setback from occupied residences, but did not define “occupied residences” or otherwise address how Minnesota Power should implement its commitment.

39. Based on the record presented, and applying the definition of “occupied residence” used by Minnesota Power, the Section 15 structure was not an occupied residence at the time the Commission issued its Order.

40. Even if the Section 15 structure had been an “occupied residence” when the Commission issued its Order, the record shows that: (1) the Kesslers knew the Section 15 structure was not identified as an occupied residence at the Public Hearing, (2) the Kesslers did not raise a concern regarding specific turbine location(s) or the Section 15 structure at the Public Hearing, (3) the Kesslers executed an easement agreement with Minnesota Power after the Public Hearing that included an exhibit depicting temporary workspace for Turbine 441 located on the SE1/4 of Section 15 (and indicating Turbine 441’s location on the NE1/4 of Section 15 (on Lennick’s land)), and (4) the Kesslers did not raise a concern to the Commission or its Staff regarding the Section 15 structure or Turbine 441 until February 2017.

41. The record demonstrates that even if the Section 15 structure had been an “occupied residence” when the Commission issued its Order, the sound levels are at or below 50 dBA within 100 feet of the Section 15 structure; thus, the Project complies with the sound avoidance criteria in effect at the time the Order was issued.

42. The record shows that Minnesota Power designed the Project to comply with the Commission’s recommended shadow flicker limit of 30 hours per year at occupied residences. Further, Minnesota Power has committed on the record that it is willing to install shadow flicker technology to limit shadow flicker at the Section 15 structure to 30 hours per year.

VI. Post-Commission Events.

A. Meetings Between the Kesslers and Minnesota Power.

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

44. Mr. Monroe testified that there were only two meetings with the Kesslers after the Public Hearing (on October 23, 2013, and on November 22, 2013), that both meetings took place at Minnesota Power's O&M building in New Salem, and that the Kesslers signed easements at each meeting. Mr. Monroe testified in detail about the October 23, 2013 meeting. He explained that the meeting began in the upstairs office area at the O&M building where he and the Kesslers went over the easements, including the sketches. Mr. Monroe further explained that the Kesslers raised issues about access roads, turbine pads, and fencing that Mr. Monroe could not answer, so he called Mr. Freudenrich over to join the meeting. Mr. Freudenrich joined the meeting and answered the Kesslers' questions. Although the exhibit to the Kesslers' easement agreement for the SW1/4 of Section 15 depicted workspace Turbine 441, Mr. Monroe and Mr. Freudenrich testified that the Kesslers did not tell Minnesota Power that they had any concerns about Turbine 441's location or that one of their sons might someday move into the Section 15 structure. Mr. Monroe testified that the Kesslers signed the easement covering their land in the SW1/4 of Section 15 (and an easement on another property) before leaving on October 23, 2013. Mr. Monroe testified that the Kesslers came back the second time—on November 22, 2013—to sign a third easement that it was determined on October 23, 2013 needed to be modified because the Kesslers had completed the purchase of the property, which had previously been subject to a contract for deed with Mr. Kesslers' parents.

45. Minnesota Power consistently denied that they told the Kesslers at any time that Minnesota Power would go to a judge or use eminent domain to obtain the easements if the Kesslers refused to sign them. As Minnesota Power explained, such a statement would be inconsistent with their approach to landowner relationships generally and that Minnesota Power had, in fact, made adjustments responsive to landowner concerns (including removing Project infrastructure from the land of a person who had signed an option agreement but did not want to sign an easement).

B. The Project was Built and Put Into Operation.

46. The foundation for Turbine 441 was constructed in July 2014 and the turbine was erected in October 2014. The Project began commercial operations in January 2015.

47. The record demonstrates that the Kesslers did not raise any issues about the proximity of Turbine 441 relative to the Section 15 structure during construction.

C. February 2017 – Issue First Raised About the Location of Turbine 441 in Relation to the Section 15 Structure.

48. Minnesota Power provided consistent testimony that the Kesslers did not raise an issue about the location of Turbine 441 until February 2017—more than two years after Turbine 441 was built and the Project was operational. Minnesota Power provided testimony that when the issue was raised by Mr. Kessler, Minnesota Power immediately investigated the issue, and that investigation determined that no Minnesota Power representative had been told about the Kesslers' concern prior to February 2017.

49. Minnesota Power's testimony that the issue was first raised by the Kesslers in February 2017 is consistent with Mr. Lein's testimony and a March 1, 2017 memorandum he prepared regarding a "new issue" raised by the Kesslers concerning Turbine 441. As noted in that memorandum, Mr. Lein determined that the Section 15 structure was not an occupied residence when Turbine 441 was permitted and constructed, "based on everything that [he] had experienced in his investigation with the case." Mr. Lein testified that he had numerous conversations with Mr. Kessler during construction and into 2016, but that the Kesslers did not raise this issue until 2017.

50. Mr. Monroe testified that he had many conversations with Mr. Kessler during and after construction, primarily about reclamation issues. These conversations included in-person visits with Mr. Kessler at the Section 15 property. At no point in those conversations did Mr. Kessler raise an issue regarding the Section 15 structure's use or about the distance between that structure and Turbine 441.

51. Minnesota Power also provided testimony that, if the Kesslers had raised a concern with the location of Turbine 441 relative to the Section 15 structure at any point prior to construction of Turbine 441, the issue would have been addressed by Minnesota Power.

52. The Kesslers testified that they are not sure when, after construction, they raised an issue about Turbine 441's proximity to the Section 15 structure. Thus, no testimony or evidence was presented contradicting the testimony of Mr. Lein and Minnesota Power that the Kesslers did not raise an issue about the location of Turbine 441 until February 2017.

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

1. The Commission has jurisdiction over this proceeding under North Dakota Century Code Chapters 28-32 and 49-22.
2. In a complaint hearing, the burden of proof is on the complainant. See *N. Cent. Good Samaritan Ctr. v. N.D. Dep't. of Human Servs.*, 2000 ND 96, ¶ 20, 611 N.W.2d 141, 145.
3. 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).
4. The Commission did not, in its Order, provide a definition of “occupied residence.”
5. Where a term has not been otherwise defined, such as by statute, rule, or order, and does not otherwise have an accepted technical meaning, it is appropriate to apply the plain, ordinary, or commonly understood meaning of the words. *Great W. Bank v. Willmar Poultry Co.*, 2010 ND 50, ¶ 7, 780 N.W.2d 437 (“Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears.”).
6. In determining the plain, ordinary, or commonly understood meaning of words or phrases, dictionary definitions provide guidance. *Wilkins v. Westby*, 2019 ND 186, ¶ 8, 931 N.W.2d 229.
7. When a regulation (or, in this case, a phrase in an order) is plain on its face, courts do not afford deference to an agency’s attempt to interpret the regulation (or phrase) in a manner inconsistent with its plain meaning. See, e.g., *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).
8. In applying its commitment to locate turbines at least 1,400 feet from occupied residences, the definition of “occupied residence” used by Minnesota Power—a residential structure where someone was living—was based on the plain language. That plain language is supported by dictionary definitions.
9. Adopting a definition of “occupied residence” that is something other than its plain meaning in this case would be inconsistent with the Order’s plain language and would deprive Minnesota Power of due process.

10. The Commission further concludes it is inappropriate to use something other than the Order's plain language in a case brought years after the Order's issuance and where the facts are disputed.

11. For the reasons set forth above, in applying its commitment to limit shadow flicker at occupied residences to 30 hours per year or less, Minnesota Power applied the plain meaning of "occupied residence."

12. The Section 15 structure was not an occupied residence at the time the Commission issued its Order.

13. In the alternative, even if the Commission believed it appropriate to adopt a definition of "occupied residence" different than the definition used by Minnesota Power, and even if the Kesslers showed under that definition that the Section 15 structure had been an "occupied residence" when the Commission issued its Order, it would be inappropriate to grant the remedies requested where the evidence established that the Kesslers knew where Turbine 441 was going to be built prior to and during construction, had repeated conversations with Minnesota Power and Commission Staff during construction, but waited until years after the Project was complete to raise a concern regarding the placement of Turbine 441 with Minnesota Power or Commission Staff.

14. Even if the Section 15 structure had been an "occupied residence" when the Commission issued its Order, the evidence presented demonstrates that the sound levels are at or below 50 dBA within 100 feet of the Section 15 structure; thus, the Project complies with the sound avoidance criteria in effect at the time the Order was issued.

15. Based on the totality of the evidence presented, the Kesslers failed to prove that Minnesota Power withheld information relating to the Section 15 structure from the Commission at the September 13, 2013 public hearing on Minnesota Power's Application for the Project that Minnesota Power should have communicated to the Commission.

16. Minnesota Power's placement of Turbine 441 does not violate the Commission's Order.

17. Minnesota Power did not otherwise violate the Commission's siting laws, rules, or orders.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

Order

The Commission orders:

1. The Kesslers' Complaint(s) in this matter is/are DISMISSED with prejudice.

PUBLIC SERVICE COMMISSION

Randy Christmann
Commissioner

Julie Fedorchak
Chair

Brian Kroshus
Commissioner

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