

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Keith and Deanna Kessler, :  
 :  
Complainants/Petitioners, :  
 :  
-vs- : Case No. PU-20-194  
 :  
Minnesota Power, a division :  
of ALLETE, Inc., :  
 :  
Respondent. :

TRANSCRIPT OF  
AUDIO RECORDING OF WORK SESSION

Taken At  
State Capitol  
Bismarck, North Dakota  
June 30, 2021

(APPEARANCES AS NOTED HEREIN)

A P P E A R A N C E S

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COMMISSIONERS PRESENT:

COMMISSIONER JULIE FEDORCHAK, Chair  
COMMISSIONER RANDY CHRISTMANN  
COMMISSIONER BRIAN KROSHUS

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MR. BRIAN L. JOHNSON  
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FOR THE PUBLIC SERVICE  
COMMISSION.

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1           (The following proceedings were had and  
2 made of record herein, commencing on the 30th day  
3 of June, 2021:)

4           COMMISSIONER FEDORCHAK: Okay. Good  
5 afternoon. I'm Julie Fedorchak with the North  
6 Dakota Public Service Commission. We are gathered  
7 for a work session on Case Number PU-20-194. This  
8 is the case of Keith and Deanna Kessler versus  
9 Minnesota Power.

10           We had several days of hearings on this  
11 case. We've got briefs from both of the parties  
12 that have been filed and a response brief and  
13 findings of fact.

14           So I guess this is our first chance to get  
15 together and talk to each other about where we're  
16 at with this case, what we -- what we're thinking,  
17 if we need -- you know, what -- how we want to  
18 proceed from here. We can have more than one work  
19 session. We can have one work session. We can do  
20 however we wish, but the case has been going on for  
21 quite some time. So my personal preference is that  
22 we try to -- try to wrap it up fairly quickly now  
23 that we have all the information from the parties.

24           So I think for -- for starters, I think it  
25 would be best to frame our discussion around the

1 issues that are laid out for this case, and Brian,  
2 I'm going to turn it over to you to kind of remind  
3 us what it is we are -- what the key issues are, as  
4 there are two or three of them, around which we're  
5 basing our decision, and then we can kind of  
6 proceed from -- from that.

7 MR. JOHNSON: Sure.

8 COMMISSIONER KROSHUS: And for the record,  
9 this would be Brian Johnson.

10 MR. JOHNSON: Yep.

11 COMMISSIONER FEDORCHAK: Oh, and I'm  
12 sorry, I didn't say that both my colleagues are  
13 here, Commissioner Randy Christmann and Brian  
14 Kroshus, and staff, Brian Johnson. And more  
15 formalities, I don't have any other opening  
16 comments. I was getting down to business. Do  
17 either of you?

18 COMMISSIONER CHRISTMANN: No.

19 COMMISSIONER KROSHUS: No.

20 COMMISSIONER FEDORCHAK: Okay. So we will  
21 now proceed. Sorry about that.

22 MR. JOHNSON: Sure. No problem.

23 So I printed out our notice of hearing.  
24 The issues in this matter are: Number 1, whether  
25 the Section 15 structure was an occupied residence

1 at the time the Commission issued its Order  
2 Granting a Certificate of Site Compatibility for  
3 the Project (Order), and that would have been the  
4 order.

5 Number 2 was if the Section 15 structure  
6 was an occupied residence at the time of the  
7 Commission's Order -- that the Commission's Order  
8 was issued, does placement of turbine number 441  
9 violate the Commission's Order; if so, what  
10 remedies are appropriate?

11 And the last issue, issue number 3, at the  
12 public hearing did Minnesota Power withhold  
13 information relating to the Section 15 structure  
14 from the Commission that Minnesota Power should  
15 have communicated to the Commission; and if so,  
16 what remedies are appropriate?

17 COMMISSIONER FEDORCHAK: Okay. Thank you,  
18 Brian.

19 All right. Well, we have pretty extensive  
20 record on this, and the -- the facts are -- I mean,  
21 there's a fair amount of facts. There's also  
22 verbal things that have been stated that aren't  
23 written down. And -- and so in those instances,  
24 it's he said/she said, and that's a kind of unique  
25 situation. I don't recall a case with so much of

1 that in my time here at the Commission.

2 So I think because of that, I think we  
3 really need to focus very strictly on these three  
4 issues and working kind of through them  
5 methodically, at least that's how I have approached  
6 this case myself. But -- and I have some thoughts,  
7 but I wanted to just open it up from my colleagues  
8 to share any impressions they have or anything that  
9 they'd like to get out on the table on the front  
10 end if they so desire. Randy?

11 COMMISSIONER CHRISTMANN: I don't know how  
12 much of -- how far you want to go, but I -- I'll --  
13 so I'll just lay out this first part. Ironically,  
14 I had a lot of the exact same thoughts. The amount  
15 of evidence -- I've got my stuff in my office -- it  
16 looks like a full-blown rate case.

17 COMMISSIONER FEDORCHAK: Yeah.

18 COMMISSIONER CHRISTMANN: So that's the  
19 volume of information that we have already.

20 And it wasn't until recent days when we --  
21 you know, you go through the process of collecting  
22 things and it seems like, yes, there's always  
23 back-and-forth, and it wasn't till I sat and with a  
24 little consultation with legal but a lot of  
25 contemplation by myself, I think pretty much came

1 to -- to where I'm at on the case. And it -- I  
2 finally hit that point by going back to the three  
3 things you had Brian discuss and -- and getting  
4 back to simplifying the matter.

5 And so I -- I'm not unpersuadable if  
6 someone has something that I'm missing, but I've  
7 kind of reached my resolution in exactly the way  
8 you laid it out.

9 COMMISSIONER FEDORCHAK: Okay. All right.  
10 Brian, any thoughts you want to share?

11 COMMISSIONER KROSHUS: No. I -- I think I  
12 would just be repeating.

13 COMMISSIONER FEDORCHAK: Okay.

14 COMMISSIONER KROSHUS: And in maybe my own  
15 words, so to speak --

16 COMMISSIONER FEDORCHAK: Sure.

17 COMMISSIONER KROSHUS: -- they're  
18 generally the same.

19 COMMISSIONER FEDORCHAK: Okay. So then I  
20 would kind of like to go in reverse order on the  
21 three issues because from my standpoint -- and  
22 maybe we'll just walk through them and -- and just  
23 share what thoughts we have in terms of what  
24 evidence exists for -- for each of them.

25 And that is did the company withhold

1 information that they had at the time of the  
2 hearing regarding -- well, how did that one read?  
3 Can you read it specifically?

4 MR. JOHNSON: Sure. Sure can. At the  
5 public hearing, did Minnesota Power withhold  
6 information relating to the Section 15 structure  
7 from the Commission that Minnesota Power should  
8 have communicated to the Commission; and if so,  
9 what remedies are appropriate?

10 COMMISSIONER FEDORCHAK: Okay. So on that  
11 one, I do not feel like I got any of that in the  
12 evidence to support that one during the hearing,  
13 that they had withheld information that they should  
14 have shared with us at the hearing.

15 Now, you can make a case that maybe there  
16 was information about the location of the turbine  
17 that should have been shared more widely, more  
18 specifically in advance, but that's not what that  
19 is. That's did they withhold information from us  
20 at the hearing --

21 MR. JOHNSON: Correct.

22 COMMISSIONER FEDORCHAK: -- regarding --

23 MR. JOHNSON: Just that structure.

24 COMMISSIONER FEDORCHAK: That structure.

25 MR. JOHNSON: Yeah.

1           COMMISSIONER FEDORCHAK: And so I guess I  
2 didn't -- I didn't feel like they did. I didn't  
3 get any evidence to that -- to support that. So --  
4 but thoughts from you guys or Brian on that fact,  
5 issue?

6           COMMISSIONER CHRISTMANN: In this --

7           COMMISSIONER KROSHUS: Go ahead.

8           COMMISSIONER CHRISTMANN: In this area  
9 now, I feel completely opposite of you.

10          COMMISSIONER FEDORCHAK: Okay.

11          COMMISSIONER CHRISTMANN: By the way,  
12 number 2 to me is almost a nonstarter. If number 1  
13 is yes --

14          COMMISSIONER FEDORCHAK: Yes.

15          COMMISSIONER CHRISTMANN: -- then with  
16 number 2 there's a clear violation --

17          COMMISSIONER FEDORCHAK: Right.

18          COMMISSIONER CHRISTMANN: -- if number one  
19 is yes.

20                 And with number 1 as far as occupied  
21 residence and -- I mean, that's what so much of  
22 this all revolves around, and -- and I asked Jack  
23 Schuh because our current law doesn't apply to this  
24 case but has to do when -- with inhabited  
25 residences and whether inhabited and occupied,

1 whether there's a distinction.

2 And he really didn't make one. Neither  
3 side challenged it. You can look around. There's  
4 the criminal code for occupied structure, but not  
5 necessarily residence. And there's just so many  
6 avenues which is why both sides are able to argue  
7 so much, I think.

8 And -- but to me this all comes down to  
9 number three. And the company was very precise  
10 when they wanted to be. When I reread the order  
11 that we did in '12 or '13 whenever we did the  
12 order --

13 COMMISSIONER FEDORCHAK: '13, the -- the  
14 permit.

15 COMMISSIONER CHRISTMANN: -- it -- I  
16 thought I brought a copy of that with.

17 COMMISSIONER FEDORCHAK: I think it's  
18 in -- did I see that in evidence?

19 COMMISSIONER CHRISTMANN: It was  
20 interesting that -- it said, "No turbines will be  
21 placed within 1400 feet of an occupied residence.  
22 The closest turbine to a participating occupied  
23 residence is approximately 1402 feet." So, I mean,  
24 they were down with the level of precision to  
25 clarifying between 1402 as opposed to 1399. Quite

1 precise when they wanted to be.

2 But then they included in -- in their  
3 evidence, and it was docket 35 back in that case,  
4 Exhibit 2, a map showing occupied residences, which  
5 includes multiple clearly abandoned residences  
6 which, you know, kind of indicated to me that they  
7 were erring on the side of caution and -- and  
8 making sure about these residences, that -- that if  
9 there was any doubt at all that they were included,  
10 and yet they chose not to include this one because  
11 this one could not be just moved a little farther  
12 away to -- you know, because the slope of the land  
13 goes downhill.

14 And company testimony indicated that the  
15 person who did the micro-siting didn't recall if he  
16 even ever visited that yard. And another person  
17 testified that they had no formal -- and these  
18 aren't necessarily quotes. These are my notes of  
19 their -- what they said, but -- so I stand to be  
20 corrected if I mischaracterize something in my  
21 notes, but I don't think I did.

22 There was no formal or routine process to  
23 double-check whether buildings might be occupied.  
24 Well, when you present yourself to a level of being  
25 within a couple feet on a turbine from an occupied

1 residence that you're acknowledging, but then you  
2 don't even double-check to see whether you included  
3 them all, to me that was not presenting the  
4 evidence that they ought to have been, and -- and  
5 therein is where I guess I come to the conclusion  
6 that this turbine is in violation of our order.

7 COMMISSIONER FEDORCHAK: So I come at it a  
8 little differently. I didn't -- I wasn't convinced  
9 that they withheld any information because they --  
10 they had included all those other residences that  
11 weren't occupied.

12 I think there's somebody on the phone that  
13 isn't on mute. If you could mute your phones if  
14 you're listening in, that would be helpful.

15 They were -- my notes -- that I recall one  
16 of the agents being out there seeing it, not  
17 thinking it was occupied, just being like it  
18 clearly wasn't. They had the plat -- the plat maps  
19 are what kind of get me because it showed -- what's  
20 the term they used in the plat maps, inhabited?

21 MR. JOHNSON: There was --

22 COMMISSIONER FEDORCHAK: The plat maps had  
23 a different term but suggested it was occupied, and  
24 then they made a determination that it wasn't.

25 But so -- and there -- to me there was no

1 reason why they would have not identified this and  
2 addressed it on the front end. Like I just don't  
3 see any motive for them not -- for them withholding  
4 information intentionally, for them doing any of  
5 that. I just don't see that in how they -- you  
6 know, their procedures or anything else, their  
7 history and what they've provided. So I don't  
8 think they held -- I don't feel like on number 3  
9 that they withheld anything.

10 But when you get to the definition of  
11 "occupied residence," that's where I feel like the  
12 company has failed in this case in that maybe by  
13 the normal or, you know, dictionary definition of  
14 occupied, that isn't -- it isn't -- it doesn't fit  
15 that strict term, but siting I think we have the  
16 ability to, you know, define what "occupied" is.

17 And in siting when you're talking about  
18 minimizing impact to the people in the area, which  
19 is the whole purpose of siting, it's to minimize  
20 the impact on the residents that are living there,  
21 on the environment and the biological and cultural  
22 resources. When you put a turbine up too close to  
23 a house that is occupied sometimes and used by the  
24 people who own it, that isn't minimal impact. And  
25 I feel like they should have consulted and need to

1 do a more careful job of consulting with the  
2 landowners, especially those who you have  
3 arrangements with on that very same project in  
4 different areas.

5 There is plenty of understanding about who  
6 owned it and how to get ahold of them. Just ask.  
7 That's not hard. And they didn't.

8 And so that's where I feel the answer to  
9 number 1 is that, you know, maybe not under the  
10 strict terms of "occupied," but under the -- a fair  
11 reading of the siting law, I think you could claim  
12 that this residence was occupied and -- and it  
13 should have been -- they should have consulted with  
14 the Kesslers and moved it and kept the turbine  
15 further away.

16 So I would say that, you know, 1 and 2,  
17 then, create a violation and not 3.

18 COMMISSIONER CHRISTMANN: I think both do,  
19 but in reference to your point on number 1, since I  
20 think -- unless Brian had some comments now on  
21 number 3, too, but in moving to 1 if --

22 COMMISSIONER KROSHUS: I've had comments  
23 for about five minutes, but I've been waiting for  
24 you two to conclude.

25 COMMISSIONER CHRISTMANN: Okay. If it's

1 not due some protection as an occupied structure,  
2 there are a whole lot of owners of lake homes,  
3 rural -- you know, for ag production homes as well  
4 as just urban homes around North Dakota that are  
5 owned by people that maybe have another winter home  
6 that they spend a great deal of their time in  
7 elsewhere that are -- that would then not qualify  
8 for the kind of protection that I think a lot of  
9 those people expect they get from us, so --

10 MR. JOHNSON: And when you guys are ready,  
11 I do have some definitions that I can toss out that  
12 may be helpful for it, but if -- if Commissioner  
13 Kroshus wants to go first --

14 COMMISSIONER FEDORCHAK: Yeah, let's hear  
15 from Brian.

16 COMMISSIONER KROSHUS: This Brian or that  
17 Brian?

18 COMMISSIONER FEDORCHAK: You.

19 COMMISSIONER KROSHUS: This record, if  
20 someone's just listening to the audio recording,  
21 will be very confusing some day if they go back to  
22 it.

23 On number 3 I was asked -- or the question  
24 was did the company withhold information? And when  
25 I was going through the notes earlier, I don't

1 think they necessarily withheld information, but  
2 the thing I wrote down and underscored was they  
3 failed in terms of due diligence.

4           And I -- again, to drive by a house and to  
5 assume it's not occupied -- and not to -- not to  
6 digress, but I think the term "occupied residence"  
7 is problematic. Is it an inhabitable residence?  
8 Because it can be a brand-new construction if it  
9 sat there for two years and no one has ever lived  
10 there. Say it's a brand-new house. Is it an  
11 occupied residence? No. Not if anyone -- if no  
12 one has ever lived there. Is it an inhabitable  
13 residence? And I think it was in 2012 the Kesslers  
14 painted that. You don't paint something that you  
15 intend to tear down or not use.

16           So, yeah, I think, again where I  
17 underlined did the company perform the level of due  
18 diligence it should have, and I would say you and I  
19 are on the same page. I think that's more of the  
20 issue and not whether -- I don't think there's  
21 anything in the record that was substantial enough  
22 for me to -- to believe without question that the  
23 company withheld. Whether they did or didn't, you  
24 know, I'm just going off of the testimony.

25           And there were claims that they did, but,

1 again, getting into the specifics, there were --  
2 there were bits and pieces that, yeah, I think they  
3 could have -- they should -- it -- it did feel like  
4 that structure was excluded, but I have not  
5 driven -- what is the footprint of that project,  
6 30,000 acres or -- it's a -- it's a big number. I  
7 haven't driven out there to see are there other  
8 houses that weren't on the list?

9 And I asked the question during the  
10 hearing were there other like structures that were  
11 considered, and the answer was yes. What I don't  
12 know is were there any others that they missed?  
13 And that was vague in terms of what we received  
14 back.

15 So -- but my big question for Brian and  
16 then you can share some definitions, wouldn't  
17 legislative intent be that an occupied residence  
18 would also be the same as an inhabitable residence?  
19 I can't believe a lawmaker would say, "Well, no  
20 one's ever lived there." Say it's brand new and no  
21 one has lived there in five years. It's never been  
22 occupied. By the strictest definition, that's an  
23 unoccupied structure.

24 But, again, from a lawmaker -- lawmaking  
25 perspective or from a lawmaker's perspective, they

1 would have never intended the law to -- to exclude  
2 that structure and, okay, that can be ignored  
3 because no one's ever spent a weekend there, they  
4 didn't go out for, you know, in this case deer  
5 hunting, never used it.

6           So I don't know if that is something we  
7 need to add to the list for the next legislative  
8 session to clean up that definition a little bit  
9 more because what if there was just a complete  
10 housing bust and someone built a brand-new  
11 development, you know, X number of homes, and that  
12 happened back in 2009, 2010 after the market  
13 crashed, not here so much, but I remember being in  
14 Arizona, there were complete developments,  
15 brand-new built, no one could afford to buy them.

16           So, anyway --

17           MR. JOHNSON: So I knew the definition  
18 thing obviously was going to be an issue here, so I  
19 started looking up some different definitions. So  
20 a few of them that I found. Definition of "occupy"  
21 means to live in or use a piece of land or property  
22 either as an owner, a tenant or illegally as a  
23 squatter. That's a whole other issue and  
24 fortunately we don't have a lot of that going on  
25 here.

1           And then the definition for "residence," I  
2     have a couple of them. First one is definition of  
3     "legal residence." The residence where you have  
4     your permanent home or principal establishment and  
5     to where, whenever you are absent, you intend to  
6     return. Every person is compelled to have one and  
7     only one domicile at a time. Domicile is different  
8     than residence.

9           The second definition I have --

10           COMMISSIONER FEDORCHAK: Brian, as you say  
11     these, can you say where they're coming from, like  
12     whose definitions they are?

13           MR. JOHNSON: Sure. I'd have to -- I  
14     pulled them off the internet. It was -- it was a  
15     legal -- a legal website. I would have to look it  
16     up again. I did not write that down.

17           COMMISSIONER FEDORCHAK: But they aren't  
18     in North Dakota law or --

19           MR. JOHNSON: No, they are not code.  
20     These are all -- these are all just definitions  
21     that I researched.

22           COMMISSIONER FEDORCHAK: Okay.

23           MR. JOHNSON: So -- and like Randy had  
24     done, I looked through North Dakota law, too, to  
25     find anything anywhere, and basically the most

1 detailed one is in Game and Fish, but that deals  
2 with residency --

3 COMMISSIONER FEDORCHAK: Yeah.

4 MR. JOHNSON: -- not a residence. It's  
5 mentioned in -- in our mining, but not defined  
6 there. I know Randy had found a definition in the  
7 criminal section, which is somewhat helpful, but  
8 more -- that's more, I think, for differentiating  
9 between residential and business for different  
10 types of laws and ordinances and things like that.

11 But the second one that I came -- that I  
12 found was, "The act or fact of living in a place,"  
13 and then 2.a. in that one is, "The place where one  
14 actually lives as distinguished from a domicile or  
15 place of temporary sojourn. A person can have more  
16 than one residence but only one domicile." So now  
17 we're starting to get a little bit into more of  
18 this. A residence doesn't have to be your primary  
19 home. A residence can be something that is  
20 temporarily used.

21 COMMISSIONER KROSHUS: Brian, can you  
22 repeat, please, the first one again?

23 MR. JOHNSON: The first one. Okay.  
24 Definitions of a legal residence: "The residence  
25 where you have your permanent home or principal

1 establishment and to where" -- "to wherever you  
2 are" -- "whenever you are absent, you intend to  
3 return. Every person is compelled to have one and  
4 only one domicile at a time."

5 So easiest way I think to explain part of  
6 where this definition goes to is if you want to  
7 look at snowbirds. They spend time in North  
8 Dakota; they spend time in Arizona. Now, they can  
9 either become residents of Arizona and that's  
10 considered their primary residence in their Arizona  
11 residence and then they come up and visit North  
12 Dakota, or you can maintain your residence here by  
13 paying taxes, income taxes, having a post office  
14 box, physical property, driver's license, voting,  
15 different things like that.

16 So some of these definitions of  
17 "residence" isn't maybe necessarily geared towards  
18 a house in -- and I do have a couple different  
19 definitions for "occupied residence" that'll get a  
20 lot more clear.

21 COMMISSIONER KROSHUS: Do you have this  
22 one, "Occupied residence means a house or other  
23 type of shelter that is intended or used for human  
24 occupancy. And for the purposes of this  
25 definition, intended or used for human

1 occupancy" -- "occupancy means running water and  
2 sanitation."

3 MR. JOHNSON: I do have that one. That  
4 would have been the first one that I would have  
5 read.

6 So in that one -- and I'm sure you were  
7 paraphrasing and -- and the only differences I  
8 have, "Means a house or other type of shelter that  
9 is intended or used for human occupancy and that  
10 has been occupied by humans for more than a total  
11 of six months in the last two years at that  
12 location." And then it says, "Intended use" -- or  
13 "intended use for human occupancy means running  
14 water and sanitation are provided within the  
15 residence."

16 So that -- that one's pretty fair, but, I  
17 mean, it's got the -- that definition has a  
18 six-month use, which is fairly broad. But I guess  
19 I look at it like I have my residence here, I have  
20 my lake cabin. I use that for -- I use it. I'm  
21 not there for six months total --

22 COMMISSIONER FEDORCHAK: Right.

23 MR. JOHNSON: -- but I use it for six  
24 months out of the year, and it is -- so the next  
25 definition I kind of like a little bit better.

1           "Occupied residence means a residence that  
2 is suitable for human occupancy 50 percent or more  
3 of the year and is currently occupied or has been  
4 occupied in the last five years." And then it  
5 says, "For the purposes of this definition,  
6 suitable for human occupancy means the residence  
7 provides for water and sanitation."

8           COMMISSIONER KROSHUS: Does the  
9 50 percent -- sorry, I'm not trying to hijack the  
10 conversation, but does the 50 percent -- is that --  
11 is that because of the seasons --

12           MR. JOHNSON: I believe the --

13           COMMISSIONER KROSHUS: -- or is that -- so  
14 it's not 50 percent of the days. It's --

15           MR. JOHNSON: No, it's --

16           COMMISSIONER KROSHUS: -- you can use it  
17 50 percent of the time, whether it's summer, you  
18 know, late spring, early fall.

19           MR. JOHNSON: Correct.

20           COMMISSIONER KROSHUS: But if it weren't  
21 insulated, for example, and then once it got cold,  
22 it wouldn't be as feasible.

23           MR. JOHNSON: Correct. Yep. I believe  
24 that one to be more inclusive of seasonal-type  
25 properties because, I mean, my lake cabin is

1 insulated, but it's not exactly the most habitable  
2 place when you get below 20 below in the winter. I  
3 can't heat it, but during the rest of the year it's  
4 very -- for six months out of the year, absolutely,  
5 it's very usable. I can have the water on and --  
6 and different things like that. So I think that  
7 one is a little bit more encompassing of -- of  
8 something that might not be lived in, you know,  
9 year around or capable of living in year around.

10 COMMISSIONER FEDORCHAK: Kind of curious  
11 why we would need to be specific about the time in  
12 which it's available to be occupied.

13 MR. JOHNSON: We might not have to be. I  
14 guess if -- if one of our concerns, though, is --  
15 and it's been brought up several times, lake cabins  
16 and things like that -- that might be helpful for  
17 some of those. I know the lake that I'm on --

18 COMMISSIONER FEDORCHAK: See, and I think  
19 it's less helpful because if it's -- say it's not  
20 insulated, you probably can't get six months out of  
21 a year in an uninsulated cabin --

22 MR. JOHNSON: Sure.

23 COMMISSIONER FEDORCHAK: -- because the  
24 freeze starts. You know, it's probably more like  
25 five months. Maybe it's five and a half or, you

1 know, depending on the year, it could be four. So  
2 people shut it down. Does that make -- mean it's  
3 less occupied when during the summer you're there  
4 every weekend? So to me the timing, like  
5 specifying the times, I'm not sure why -- what that  
6 gets us.

7 MR. JOHNSON: Well, and, I mean, this is  
8 kind of our definition to create. These are just  
9 examples. So working in language of seasonal you  
10 said would be just as effective and not restricted  
11 so much to a time period. Seasonal usage you might  
12 use it spring and summer or summer and fall or  
13 strictly winter, you know, so --

14 COMMISSIONER KROSHUS: So by the first  
15 definition, a total of six months in the last two  
16 years. In this instance if it were spring  
17 branding -- branding in the spring, they indicated  
18 it was used during deer hunting season and there's  
19 an occasional summer retreat. They probably used  
20 it in three different months each of the past two  
21 years.

22 MR. JOHNSON: Right. So were they living  
23 in it? No. But going back to the definition of  
24 "occupy," to live in or use a piece of land or  
25 property. They were using the -- the house. They

1 were using the property. So when you --

2 COMMISSIONER FEDORCHAK: And paying  
3 utilities.

4 MR. JOHNSON: Yes.

5 COMMISSIONER FEDORCHAK: I mean, to me  
6 it's not abandoned if you are paying utilities.  
7 That was the one piece of evidence that I felt was  
8 strongest for proving its occupancy.

9 COMMISSIONER KROSHUS: I -- I agree with  
10 that. Logically, it makes perfect sense because we  
11 live in a modern world, but can you live in a house  
12 and use candles to light it at night? It's hard to  
13 imagine these days. That's how it was done once  
14 upon a time. But can you live in a house when it's  
15 really cold without heat? And from a, you know,  
16 sanitation -- sanitary standpoint, the sanitation  
17 part would be -- well, running water and sanitation  
18 and actually -- I think one hard -- one difficulty  
19 in all of these things, I think it really depends  
20 on where you live and what part of the country when  
21 you're writing these definitions.

22 MR. JOHNSON: Correct.

23 COMMISSIONER KROSHUS: Because not  
24 everyone has North Dakota January cold. Of course,  
25 we also don't have oppressive heat in the summer

1 months like you might in southern states, so  
2 somewhere in between would be the Goldilocks, you  
3 know, just the right part which might be -- maybe  
4 it's Nebraska.

5 COMMISSIONER CHRISTMANN: Better wait till  
6 this weekend before you say that oppressive heat.

7 COMMISSIONER KROSHUS: Sure. That's going  
8 to be oppressive.

9 Well, we -- I think it was -- where I'm  
10 at, I think it's -- it's a usable, occupiable and  
11 habitable home, and the company didn't exercise the  
12 level of due diligence they should have. Even by  
13 their own admission, well, we drove by it and it  
14 just didn't seem like anyone lived there.

15 COMMISSIONER FEDORCHAK: Do we in doing  
16 this have to come up with a definition? Because I  
17 guess I had more in mind we would be pulling out  
18 the things from the record that showed us that it  
19 was an occupied residence. And -- and then, you  
20 know, maybe not just -- maybe that leads to a  
21 definition down the road, but I don't -- do we need  
22 to write one in this?

23 MR. JOHNSON: I don't think we have to  
24 write one. If we can avoid writing a definition at  
25 this point, I would be happy to do so. That's

1 ideal. I think, though, we -- whether we define it  
2 or use the facts and whatnot, I think we are kind  
3 of coming to a definition.

4 COMMISSIONER FEDORCHAK: Right. Which we  
5 should. But it's, you know, wordsmithing that, I  
6 guess I don't know that that's needed in this  
7 order. But I mean I guess I'm not going to be  
8 opposed to it if we want to, but it might go  
9 further than we need to go.

10 COMMISSIONER CHRISTMANN: I think it does  
11 go further than we need to go. It seems to me that  
12 actually writing a definition and trying to  
13 encompass, you know, other possibilities that could  
14 be questioned in future cases but aren't in  
15 question in this case, that's a whole separate  
16 process and should go either through the rulemaking  
17 or -- or legislature --

18 COMMISSIONER FEDORCHAK: Right.

19 COMMISSIONER CHRISTMANN: -- one of those  
20 two processes.

21 COMMISSIONER KROSHUS: Yeah.

22 COMMISSIONER CHRISTMANN: I think in this  
23 case we just need to make a determination.

24 COMMISSIONER KROSHUS: Yeah. Or, again --

25 COMMISSIONER FEDORCHAK: Based on facts.

1           COMMISSIONER KROSHUS: Yeah. And I -- we  
2 have to deal with the present, but like I said at  
3 the beginning, I think that's something we have to  
4 add to the list for the upcoming session and that  
5 is inhabitable residence or occupied residence.

6           I'm wondering if this might help, and this  
7 is a part of code under Housing Discrimination, and  
8 I would have to look again where I drew this from.  
9 It's 14-02.1-01, and I can't remember when I copied  
10 this if it was U.S. housing code or if it was out  
11 of state law, but it's one or the other, I believe,  
12 and it's under Housing Discrimination.

13          MR. JOHNSON: Can you give me that cite  
14 one more time?

15          COMMISSIONER KROSHUS: 14-02.5-01. Or --  
16 right. It's under -- it's the definitions of  
17 various things under Housing Discrimination, which  
18 is -- it was different, but it would give more  
19 backing. And when I go to the one point -- are you  
20 trying to find it, Brian?

21          MR. JOHNSON: I'm on it, yep.

22          COMMISSIONER KROSHUS: Is it --

23          MR. JOHNSON: That's North Dakota Century  
24 Code, 14-02.5.

25          COMMISSIONER KROSHUS: Okay. North Dakota

1 Century Code. So under number 8, "' Dwelling' means  
2 any structure or part of a structure that is  
3 occupied as, or designed or intended for occupancy  
4 as, a residence by one or more families," and then  
5 it goes, "or vacant land that is offered for sale,"  
6 but really I think that first part, doesn't that  
7 give us the backing in terms of definitions since  
8 it's already a part of North Dakota code? I mean,  
9 it's their definition of a dwelling.

10 MR. JOHNSON: Correct. But our language  
11 doesn't say "dwelling."

12 COMMISSIONER KROSHUS: Well, maybe that's  
13 again a way to tie in.

14 MR. JOHNSON: And I think that was  
15 probably maybe what the intent was. I have not had  
16 the opportunity yet to look at legislative intent  
17 on any of that. I don't know if that's something  
18 we'll find or not. But it's always helpful.

19 As far as -- let me see if I can pull this  
20 up real quick. Statutory interpretation does  
21 have -- as set forth in Century Code -- or I  
22 believe it's in Century Code. So Chapter 1-02,  
23 Rules of Interpretation -- so North Dakota Century  
24 Code 1-02-02, Words to be Understood in Their  
25 Ordinary Sense. And then 03 says, "Words and

1 phrases must be construed according to the context  
2 of the rules of grammar and the approved usage of  
3 language. Technical words and phrases and such  
4 others as have acquired a peculiar and appropriate  
5 meaning in law or as defined by statute must be  
6 construed according to such particular and  
7 appropriate meaning or definitions."

8 A lot of times with Century Code -- and  
9 I'll go back and look at that one -- so it says,  
10 "The definitions in Section 14-02.4-02 may be used  
11 to supplement these." Usually definitions are for  
12 that chapter only. They -- they do give guidance  
13 at times, but there's a certain hierarchy of  
14 where -- how things flow, and I think pulling one  
15 from that section would be a little bit lower than  
16 us just taking the plain meanings of a word.

17 COMMISSIONER KROSHUS: Okay.

18 MR. JOHNSON: And, again, because it's  
19 talking about dwelling instead of a residence.  
20 And, quite frankly, if we changed residence to  
21 dwelling, that might solve a lot of our problems as  
22 well.

23 COMMISSIONER KROSHUS: You're talking  
24 in -- in code?

25 MR. JOHNSON: In code. In our section.

1           COMMISSIONER KROSHUS:  Yeah.  I would  
2  agree.

3           MR. JOHNSON:  Because --

4           COMMISSIONER KROSHUS:  And forgive me.  
5  I'm going back to notes I had -- I had pulled this  
6  March 25 prior to the -- the hearing because that  
7  was the -- to me one of the most significant  
8  underlying aspects of the case --

9           MR. JOHNSON:  Mm-hmm.

10          COMMISSIONER KROSHUS:  -- how do you  
11  identify or define occupied residence.  That's  
12  really a shortcoming of sorts, but if we go back to  
13  legislative intent, maybe it's not as --

14          MR. JOHNSON:  So --

15          COMMISSIONER KROSHUS:  -- much of an  
16  issue.

17          MR. JOHNSON:  -- legislative intent is  
18  something that can be used, but it is fairly far  
19  down the list as well.  It is important and it  
20  gives guidance, but other times it's further down  
21  the list and doesn't help out as much as it  
22  normally would.  And I'd have to look at what  
23  legislative intent says in this one to see if  
24  it's -- if it's directly on point.  I think it  
25  leaves a lot more, but if we have to infer more out

1 of some of that, then we're really kind of out in  
2 the weeds.

3 COMMISSIONER FEDORCHAK: Can -- can we go  
4 to what factors in the record we believe speak to  
5 why it is -- I mean, why it is an occupied  
6 residence?

7 MR. JOHNSON: Absolutely.

8 COMMISSIONER FEDORCHAK: Is that where you  
9 were going, Randy?

10 COMMISSIONER CHRISTMANN: No.

11 COMMISSIONER FEDORCHAK: Do you want to  
12 say something else on this other topic before we  
13 start doing that?

14 COMMISSIONER CHRISTMANN: Well, I -- I  
15 just was going to take one more stab at where I  
16 continue to come from on this, although I'm willing  
17 to -- to work with you guys and continue to get  
18 into the weeds on -- on occupied residence  
19 definition.

20 But while I'm so frustrated oftentimes  
21 when there's some national or state level court  
22 case and I'm waiting for the court to lay this out  
23 and clarify how they interpret something and then  
24 they never go there. They -- there's some  
25 technical part of the case and they make a decision

1 on that and never get to the definition that we're  
2 all waiting for, and now I'm kind of doing that,  
3 too, in a way but not intentionally.

4 I just continue to think that, you know,  
5 if we were dealing with cultural resources and they  
6 went out and hit something that was really  
7 important and then we found out that they never  
8 hired a third-party contractor to go out and walk  
9 the area and stuff, they just drove by and didn't  
10 see anything so they determined there was nothing  
11 there, we would be wholly satisfied that they  
12 withheld information, not necessarily  
13 intentionally. They didn't like know something was  
14 there and choose not to tell us, but they didn't do  
15 a reasonably -- I think you said due diligence --  
16 they didn't do any kind of reasonable effort to go  
17 out and check to make sure there wasn't something  
18 there, and that is what happened here.

19 They -- they looked at the plat book  
20 that's published like once every five years or  
21 something by each county and it didn't show up on  
22 there. They had the good news and didn't tell us.

23 And -- and while it was hard for the  
24 resident -- for the Kesslers' son that was staying  
25 out there to, you know, get a real good perspective

1 of the distance, you know, from down in the valley  
2 to what's going on on top of the hill, it was darn  
3 sure easy when they were micrositing to look down  
4 from the top of that hill down into the valley at  
5 that house and see that there was something there,  
6 but they chose not to even drive down in the yard  
7 to take a look until later when they needed access  
8 and they were looking at fences and trails and  
9 stuff for a road.

10 But no policy on -- on a second look to --  
11 to make sure that they had provided us all the  
12 occupied residences. They just gave us a map that  
13 left us feeling like we had a thorough analysis by  
14 them and it clearly was unthorough, and I think  
15 that in itself is plenty to decide in this case.

16 COMMISSIONER KROSHUS: I used the term  
17 "due diligence" underscored. You said the same  
18 thing in a different way, but that they didn't -- I  
19 forget exactly how you phrased it, but they  
20 didn't --

21 COMMISSIONER FEDORCHAK: So did I.

22 COMMISSIONER KROSHUS: But it was --  
23 it's -- it's the same thing.

24 COMMISSIONER FEDORCHAK: Yeah. Well, I  
25 think he's -- you're speaking with specifically to

1 the third piece of did they withhold information at  
2 the hearing, and I don't think that's what we're  
3 getting at, did they do due diligence. What  
4 they're getting -- what that gets to is did they  
5 know it was an occupied residence and they tried to  
6 hide that from us, and I don't believe that they  
7 did.

8 COMMISSIONER CHRISTMANN: Well, I don't  
9 know that the company intentionally did at that  
10 level, but clearly they had people that were out  
11 there that knew something was down there and chose  
12 not to go find out.

13 COMMISSIONER KROSHUS: But that's  
14 different from withholding. They made a bad  
15 assumption.

16 COMMISSIONER FEDORCHAK: Yeah.

17 COMMISSIONER CHRISTMANN: I think it's  
18 withholding evidence.

19 COMMISSIONER FEDORCHAK: I -- yeah. I  
20 think that's -- I think it speaks more to them --  
21 they made a bad calculation whether it was occupied  
22 at the time, which is number 1.

23 And, I mean, quite honestly, there's --  
24 there's a fair number of holes in the Kesslers'  
25 accounts too. I mean, they -- they went -- they

1 mentioned it vaguely at the hearing, but they  
2 certainly didn't come down strong on that point.  
3 And -- and then proceeded to -- after being told by  
4 the judge to work out your differences, they went  
5 and met with the company on two occasions and  
6 signed easements with them. And in neither one of  
7 those meetings is there any evidence that there was  
8 a -- you know, any written -- not an email, not  
9 a -- not a letter, not a -- a signed anything,  
10 nothing added to the easements. Nothing about  
11 their concerns on this. And then it was 2017, two  
12 years later after it was constructed and they  
13 brought it forward.

14           So, I mean, I think if we're getting to,  
15 you know, weaknesses and -- there's weaknesses on  
16 both sides. That's where -- but I think ultimately  
17 the onus is on the company under the siting act to  
18 determine what's -- whether it's occupied or not,  
19 and they didn't go the extra mile to say -- simply  
20 call the people and ask them to confirm that it's  
21 not, and that's -- the companies have to do that.

22           There aren't that many structures out  
23 there to -- to clear in that way, especially one  
24 that is in the plat book as being inhabitable or --  
25 I can't find that evidence -- or that exhibit, but

1 the plat book showed that it was and they're -- you  
2 know, they're paying -- they're paying utilities  
3 on -- on it. And so I just think that there was  
4 ways of them -- that they missed to identify  
5 number 1.

6 And I'm not interested in getting into the  
7 weeds of saying what is an occupied residence in  
8 this, but I do think we need to be clear why we're  
9 determining, based on -- based on what, that it was  
10 occupied.

11 MR. JOHNSON: For section 3, we would have  
12 to show that it was something that they were  
13 required to tell us at the time and had knowledge  
14 of it and didn't. And basically part of the  
15 problem is is they determined that this was not an  
16 occupied residence so they didn't feel like they  
17 had to bring it forward to us. Whereas, if we look  
18 at it in number 1, we're not saying that they  
19 withheld it. It's just that they made the wrong  
20 determination.

21 COMMISSIONER FEDORCHAK: Mm-hmm.

22 MR. JOHNSON: So I --

23 COMMISSIONER KROSHUS: I think you have  
24 to -- we have to send a message to all companies  
25 that you can't just assume.

1           COMMISSIONER CHRISTMANN: And you can't  
2 when it's inconvenient and just close your eyes to  
3 it and present us with a map that here's what's out  
4 there and have ignored other things that are out  
5 there.

6           COMMISSIONER KROSHUS: Is there enough in  
7 the record to -- I mean, I think we're on solid  
8 ground in terms of the company not exercising due  
9 diligence.

10          MR. JOHNSON: I -- I know from your guys'  
11 comments and even the company, their own testimony  
12 themselves, is they've admitted on the record  
13 during the hearing that there was more they could  
14 have done.

15          COMMISSIONER KROSHUS: Right.

16          MR. JOHNSON: So I don't even think that  
17 we have to make that assumption ourselves. They  
18 were asked the questions and they answered it --

19          COMMISSIONER KROSHUS: Correct.

20          MR. JOHNSON: -- in hindsight, yes, we  
21 could have done things differently.

22          COMMISSIONER KROSHUS: But proving that  
23 they withheld would be far more challenging;  
24 correct?

25          MR. JOHNSON: The -- I think that would be

1 more challenging. Looking at the record yesterday,  
2 and I wasn't able to read all of it, but what I did  
3 was tried to weed out a lot of the witnesses that  
4 really wouldn't have been required, but the  
5 Kesslers put their case forward the way they  
6 thought they needed to, basically ignoring the  
7 notice of hearing and all the noticed issues and  
8 threw the kitchen sink and -- and the neighbors'  
9 garage and everything at us. I guess we got so  
10 much information that it was just really maybe not  
11 all that helpful.

12 But what seemed to be really clear for me  
13 and undisputed was we had the hearing. Whether or  
14 not this shouting match, admonishment, quiet,  
15 however it was told to them that they needed to be  
16 quiet or whatever, both sides disagree on that, but  
17 both parties agreed that there was a meeting that  
18 happened after that. And that meeting happened at  
19 the O&M building north of -- of New Salem. The  
20 Kesslers were there. The Minnesota Power  
21 representatives admitted to being there. The  
22 Kesslers remembered them being there, who they  
23 talked to. There was very little dispute in that.

24 And what I kind of gleaned in on at that  
25 point was at that point the Kesslers were shown a

1 map that had all the turbine locations on it, and  
2 so whether or not they had a chance to at the  
3 hearing and whatever else, at that point the  
4 Kesslers were put on -- on notice of all the  
5 turbine locations and what was determined as  
6 occupied and unoccupied residence. I'd have to  
7 read it a little bit closer and, again, I was  
8 trying to get through a lot of information  
9 yesterday.

10 I guess I didn't ever really figure out or  
11 make a determination on whether or not it was  
12 brought to Minnesota Power's attention at that  
13 time. I think the Kesslers alleged that they said  
14 at that point again that their son was going to  
15 move in in the future or that they had use for it  
16 in the future. Minnesota Power says that they  
17 didn't.

18 But at that point I think it's very clear  
19 and it's agreed by both sides that at that point  
20 that tower location was known because I know that  
21 was kind of in dispute even at the hearing. They  
22 had said that the map wasn't adequate and all those  
23 other things, but that was just something that I  
24 picked up on and -- and felt like it was worth --  
25 worth writing down, and I think that was around

1 page 740 in the second transcript.

2 COMMISSIONER FEDORCHAK: Okay. Well, I  
3 guess from my standpoint, I think we're on the same  
4 page except for number 3. But we could certainly  
5 move forward on number 1 because we agree on that.  
6 So that brings us to number two, what's the remedy?  
7 And I think the remedy that they ask for is to move  
8 Turbine 441.

9 COMMISSIONER CHRISTMANN: There is no  
10 other remedy.

11 COMMISSIONER FEDORCHAK: Right. So I'm  
12 comfortable with that remedy.

13 COMMISSIONER KROSHUS: Is a potential  
14 remedy -- oh, it seems like a very, very long shot  
15 but -- because I think this has already been  
16 attempted between the company and the Kesslers --  
17 to come up with some type of an agreement?

18 COMMISSIONER CHRISTMANN: I don't feel so  
19 because they've had a lot of time to do that --

20 COMMISSIONER KROSHUS: That's correct.

21 COMMISSIONER CHRISTMANN: -- and haven't  
22 reached it. If we weigh in, it would just tip the  
23 scales is all and -- and I think they had time to  
24 reach a settlement of some type and it wasn't done.  
25 If we're finding it in violation, they need to move

1 it.

2 COMMISSIONER KROSHUS: No, and that --

3 COMMISSIONER CHRISTMANN: That's just the  
4 end of it.

5 COMMISSIONER KROSHUS: And that's a fair  
6 point. We certainly don't want to become a broker  
7 in -- in a negotiation between the company and --

8 COMMISSIONER FEDORCHAK: Right.

9 COMMISSIONER KROSHUS: -- and a landowner.  
10 I get that. It's a remedy, but it's beyond our  
11 scope of authority and where we should be weighing  
12 in. So move the turbine. Could we -- are they  
13 ordered correctly? Number 1 I think we're all on  
14 the same page. Number 2 would be the remedy.  
15 We're all on the same page, I believe. But would  
16 number 2 be -- I think it's highly defensible. I  
17 think the company failed to exercise the  
18 appropriate level of due diligence in the siting  
19 process.

20 MR. JOHNSON: Well, I -- I think that's  
21 exactly what finding on 1 says, that they --

22 COMMISSIONER KROSHUS: Well, that's true.

23 MR. JOHNSON: -- their methods for  
24 determining what an occupied residence was or  
25 wasn't wasn't inclusive enough and that they missed

1 a residence that, while maybe nobody was living in  
2 it at the time, was used and useful and -- and in  
3 use, and it wasn't -- and if we're going to -- the  
4 thing with -- with the conflicting he said/she said  
5 testimony is kind of as the finders of fact, we get  
6 to give weight to that evidence. We get to say  
7 what we believe and -- and from who.

8 So I guess when you have one side saying  
9 one thing and one side saying the other, it makes  
10 it easy because you can -- you know, you either  
11 believe them or you don't, so it works out.

12 COMMISSIONER FEDORCHAK: Well, I think to  
13 that point, though, on these -- I don't -- I can  
14 get to a decision without even considering a lot of  
15 that he said/she said stuff.

16 MR. JOHNSON: Sure. Absolutely.

17 COMMISSIONER CHRISTMANN: Yeah, I think  
18 there's more clear points like --

19 COMMISSIONER FEDORCHAK: Yes.

20 COMMISSIONER CHRISTMANN: -- the utility  
21 bills --

22 COMMISSIONER FEDORCHAK: Yep.

23 COMMISSIONER CHRISTMANN: -- you know.

24 COMMISSIONER FEDORCHAK: The utility  
25 bills, the plat map, the -- you know, the -- it was

1 mowed. It was, you know, tidy. They're in  
2 conversations with these people all the time. They  
3 could have asked.

4 MR. JOHNSON: Yeah.

5 COMMISSIONER KROSHUS: Recently -- well,  
6 it was --

7 COMMISSIONER FEDORCHAK: You know --

8 COMMISSIONER KROSHUS: -- recently  
9 painted, but --

10 MR. JOHNSON: Reliance on satellite  
11 imagery, too, is -- that stuff's only -- I mean,  
12 there's probably pictures of me mowing a yard from  
13 the satellite on a house I haven't owned for ten  
14 years. I mean that's not updated all that  
15 frequently.

16 COMMISSIONER FEDORCHAK: Right.

17 MR. JOHNSON: That's a -- I would say  
18 that's a pretty poor method of determining what --  
19 I mean, you can tell if there's structures there or  
20 not to take the next step and go look, but  
21 determining residency from that I don't think would  
22 be a very use -- useful tool, and that was one of  
23 the tools they used.

24 COMMISSIONER KROSHUS: So under number 1,  
25 the two terms that -- running water and -- is it

1 running water and sanitation?

2 MR. JOHNSON: Yep.

3 COMMISSIONER KROSHUS: And not discounting  
4 the utility bill, but I think that's a little  
5 easier to pick on if --

6 COMMISSIONER FEDORCHAK: But it's a fact  
7 in this case.

8 MR. JOHNSON: Well --

9 COMMISSIONER FEDORCHAK: I mean, you're  
10 going to the next level of the definition, and I  
11 think we've got to stick at what the facts are  
12 here.

13 MR. JOHNSON: Here's the thing with --

14 COMMISSIONER KROSHUS: Well, here's my  
15 question.

16 MR. JOHNSON: -- well water, though,  
17 you're not going to get water --

18 COMMISSIONER FEDORCHAK: Yeah.

19 MR. JOHNSON: -- without electricity, so  
20 the electricity bill does show that -- and it shows  
21 that there was a well. One of those meter readings  
22 is a well, so that electrical bill does show that  
23 water is there. And that was in the testimony  
24 from -- from the Kesslers.

25 COMMISSIONER KROSHUS: I know. I just

1 haven't found a legal definition that declares  
2 electricity as necessary.

3 COMMISSIONER FEDORCHAK: We don't need to  
4 have a legal definition --

5 MR. JOHNSON: No.

6 COMMISSIONER FEDORCHAK: -- to go by.

7 MR. JOHNSON: The definitions I brought  
8 were to give us a basis and a starting point  
9 from --

10 COMMISSIONER FEDORCHAK: To think about.

11 MR. JOHNSON: -- to think about what  
12 "occupancy" means -- or "occupied" means and what  
13 "residence" means. I -- I don't bring them as an  
14 end-all/be-all. I bring them as a here's what's  
15 gone on. I mean, these definitions have come from  
16 other states, from other cases, for other reasons,  
17 and it just gives us a starting point for us to,  
18 you know, look at what our definition of it is in  
19 our section of code.

20 COMMISSIONER KROSHUS: Okay. But here's  
21 the question I'm trying to get to and I haven't  
22 gotten there yet. So I'm giving examples. If --  
23 say we listed five points why this is an occupiable  
24 or inhabitable residence or occupied residence, and  
25 one of the points isn't viewed universally as -- as

1 a requirement to support, do the other four still  
2 carry the day if one of them is -- or if -- if one  
3 falls, do the other four fall?

4 MR. JOHNSON: Well, if we had a definition  
5 that had all those things, then, yes, they might be  
6 inclusive. But what we have here is you guys will  
7 make a decision based on the facts and the record  
8 and de facto kind of be creating a definition, but  
9 that doesn't preclude us from defining it in the  
10 future, which I think would be easily done through  
11 probably rulemaking, to get a definition in our  
12 rules that -- that, yes, it's not in Century Code,  
13 but for our intents and purposes, everybody knows  
14 what we're looking at for that sort of definition.

15 But I -- I think we're looking at this as  
16 we don't have an "occupied residence" definition,  
17 but here are the reasons why we believe this is an  
18 occupied residence. We're not making a legal  
19 determination or anything like that. We're saying  
20 this is the record in front of us. This is the  
21 question. Here's the facts that support our  
22 decision to say we believe this was an occupied  
23 residence.

24 COMMISSIONER KROSHUS: Okay. So the  
25 order --

1           COMMISSIONER FEDORCHAK: And it ties to  
2 the siting act.

3           MR. JOHNSON: Correct.

4           COMMISSIONER KROSHUS: So the order would  
5 not be compromised?

6           MR. JOHNSON: No, I don't believe so.

7           COMMISSIONER KROSHUS: Okay.

8           MR. JOHNSON: It's -- it's this case, the  
9 facts, and -- and what we're looking at. I think  
10 that those should be harmonious with any sort of  
11 definition we come up with in the future, and I  
12 don't see that any of them -- you know, by us  
13 laying out the facts on this on why we think it's  
14 occupied, I don't think that would hinder us at all  
15 in the future as far as coming up with a definition  
16 or having a definition that would be contrary to  
17 this one instance either.

18           COMMISSIONER KROSHUS: Okay. Perfect.  
19 It's -- I think we have to ask the -- well, I just  
20 feel like -- I feel it's an important question to  
21 ask because if this is challenged, which there is a  
22 likelihood the decision will be challenged because  
23 it's a very expensive proposition to dismantle and  
24 take down a turbine.

25           MR. JOHNSON: Mm-hmm.

1           COMMISSIONER KROSHUS: Very expensive. So  
2 I don't want to make the same mistake by just  
3 assuming that -- that's why you're here to say, no,  
4 that's not a concern, you know, in terms of laying  
5 these things in.

6           COMMISSIONER CHRISTMANN: I -- I think  
7 this isn't the appropriate process for laying --  
8 for creating that definition. It's very sensitive.  
9 You can lay out several very obvious things that we  
10 think of as -- as real commonplace or normal for a  
11 residence, you know, maybe electricity, water,  
12 septic system, but then you could also find a very  
13 occupied residence that might be missing one of  
14 those --

15          MR. JOHNSON: Sure.

16          COMMISSIONER CHRISTMANN: -- for some  
17 reason that we're not thinking of. You know, they  
18 use a generator instead of an electric company  
19 because they're 40 miles from electricity or  
20 whatever the case may be, exceptions.

21                 But in this case what we do have is  
22 evidence that they did have electricity, that they  
23 did have water, that they did have a septic system,  
24 and -- and that there was maintenance going on  
25 there.

1           MR. JOHNSON:   And that's why in definition  
2           and in law you'll see -- you'll have lists a lot of  
3           times, and it will say, "To include, but not  
4           limited to, running water, septic, septic or" --  
5           you know, "or sewer or electricity," and different  
6           things like that.   So you -- you can create a  
7           definition within a nonexclusive list that includes  
8           a lot of the commonplace things that you think of,  
9           but it also would include commonsense things or --  
10          or other items that didn't get thought of at the  
11          time.

12          COMMISSIONER CHRISTMANN:   I think this  
13          order, though, should be limited to specifically  
14          things --

15          MR. JOHNSON:   Absolutely.   Yep.

16          COMMISSIONER CHRISTMANN:   -- that we know  
17          on this case.

18          COMMISSIONER FEDORCHAK:   Yeah.

19          MR. JOHNSON:   Yep, and it has to be.   You  
20          know, otherwise -- otherwise we're just, you know,  
21          throwing out arbitrary things that didn't exist at  
22          the time, and I -- it would be difficult for the  
23          company not to have -- have an issue with that  
24          because it's like, okay, we had an occupied  
25          structure, we didn't really have a set definition.

1 But, you know, looking at the facts and -- and  
2 things that they could have known or should have  
3 known at that time I think is a lot more -- is a  
4 very sensible approach to take.

5 COMMISSIONER FEDORCHAK: Well, and I  
6 think, you know, tying -- just again, I keep coming  
7 back to the siting act requires that we provide  
8 permits that minimize impact to people living  
9 around it and, you know, there's a lot of good  
10 language in the siting act itself, and one of the  
11 criteria is occupied residence and distance to  
12 occupied residence, and that was included in  
13 this -- in this order for this project.

14 So, you know, with all that in mind,  
15 here's what we are looking at as why we think this  
16 is an occupied residence and -- and list all those  
17 things out. And, you know, that -- an occupied  
18 residence in view of the siting act might be a  
19 little bit different than an occupied residence in  
20 other things and other --

21 MR. JOHNSON: Absolutely.

22 COMMISSIONER FEDORCHAK: -- and other  
23 definitions in law. And so that's why I think  
24 it's -- it'll be helpful what we set out there, and  
25 I'm sure it will get challenged, and then the

1 courts will say whether it was reasonable or not  
2 for us to base it on those things --

3 MR. JOHNSON: Correct.

4 COMMISSIONER FEDORCHAK: -- and they'll  
5 probably define it.

6 MR. JOHNSON: They may.

7 COMMISSIONER FEDORCHAK: So --

8 MR. JOHNSON: Or they may send it --

9 COMMISSIONER FEDORCHAK: Kick it --

10 MR. JOHNSON: -- back to us.

11 COMMISSIONER FEDORCHAK: -- kick it to the  
12 legislature. Right.

13 MR. JOHNSON: No. Absolutely.

14 COMMISSIONER KROSHUS: Does it matter what  
15 the primary and secondary uses are of a utility  
16 bill and/or well?

17 MR. JOHNSON: I don't -- I don't think so.

18 COMMISSIONER KROSHUS: Okay.

19 MR. JOHNSON: I think -- I mean, I think  
20 we're really digging -- and it's easy to try to  
21 think ahead and try to get it exactly right, but,  
22 again, we have to look at the case in front of us,  
23 the facts of this case, and use those to get to our  
24 decision because we don't really have these other  
25 things that we all wish we had that would make it

1 easier. But we don't have them. And, you know,  
2 definitions and stuff in the future will ensure  
3 that we get what we need or, you know, they'll  
4 either be there or won't in the future, but for  
5 right now this is where we're at, so --

6 COMMISSIONER FEDORCHAK: Now on that  
7 question, I might think that the primary and  
8 secondary may be relevant, you know, but I think in  
9 this case it depended on the season what the  
10 primary and secondary to some extent uses of the  
11 utilities were. Sometimes it was more to support  
12 the cattle operation and sometimes it was to  
13 support people -- people inhabiting, but I -- I  
14 mean --

15 COMMISSIONER KROSHUS: But you said that's  
16 not a concern?

17 MR. JOHNSON: I don't think so because if  
18 we look at there was -- the utility bills were  
19 brought in. There was low usage years where there  
20 wasn't much power being used, and I think if we  
21 look back at the record, that's when it was being  
22 used for a day or two here and a day or two there,  
23 and it wasn't a lot of power usage. And then you  
24 see power usage increase when somebody started  
25 staying there more frequently or living there, I

1 think, is -- I think is when you saw the big jump  
2 is when the one son moved or they began to get it,  
3 you know, a little bit more ready for them to move  
4 in.

5 So I -- I think if we're -- if we're  
6 looking at, you know -- the reason you guys asked  
7 for those because you guys wanted to know, like,  
8 well, did they even have water there, did they have  
9 sewer there? So we asked for those things, and we  
10 were looking at it to see was this house even able  
11 to be lived in. And they said, "Yeah, we had power  
12 there and the power brings water and also" -- I  
13 can't remember if that was a heat source as well or  
14 if that was propane. I don't --

15 COMMISSIONER FEDORCHAK: Propane.

16 MR. JOHNSON: I can't remember if they  
17 said it was electric or propane. I'd have to go  
18 back in the record and --

19 COMMISSIONER KROSHUS: I think it was  
20 still a forced air.

21 MR. JOHNSON: Yep. So it was -- it was  
22 integral into maintaining the -- you know, even  
23 though if you're not there, you still have to heat  
24 it to -- to make sure your pipes don't freeze and  
25 other damage isn't caused either, so --

1           COMMISSIONER KROSHUS: Well, especially  
2 when you're living there. Seasonal homes, people  
3 do drain the lines.

4           MR. JOHNSON: Mm-hmm. You can when you're  
5 in the winter.

6           COMMISSIONER KROSHUS: Not that -- I don't  
7 know if that did or didn't occur. I don't think  
8 it's -- I don't think it's --

9           COMMISSIONER FEDORCHAK: Okay.

10          COMMISSIONER KROSHUS: -- an important or  
11 critical factor, but --

12          COMMISSIONER FEDORCHAK: So can we move  
13 forward with a drafting of an order?

14          MR. JOHNSON: Yep.

15          COMMISSIONER FEDORCHAK: And I'm -- I  
16 think Brian and I are on the same side on number 3,  
17 so I don't know how you want to deal with that  
18 particular piece of it, Randy, but maybe you could  
19 just take a peek at the order and go from there.  
20 Because right now I would see the order as saying:  
21 Was it an occupied residence at the time? Yes. If  
22 so, what are the remedies? Remove the turbine.  
23 Number 3, did they withhold information? No.

24          COMMISSIONER CHRISTMANN: And I will  
25 either provide -- I will provide commentary on

1 that. I don't know if it'll just be oral or if  
2 I'll write a separate concurring opinion --

3 COMMISSIONER FEDORCHAK: Sure.

4 COMMISSIONER CHRISTMANN: -- but --

5 COMMISSIONER KROSHUS: Well, do you have  
6 something specific that you can say here is why  
7 they withheld information?

8 COMMISSIONER CHRISTMANN: Well, I don't  
9 think I need to know why they withheld it, but  
10 they -- they didn't put it on the map. That's what  
11 I know.

12 MR. JOHNSON: So as a --

13 COMMISSIONER CHRISTMANN: That's what I  
14 know. You know, I have my suspicions of why, but I  
15 don't think it matters. They provided a map of  
16 occupied structures -- occupied residences.  
17 However, it also included some unoccupied  
18 residences. But this one was not on there. I  
19 don't think it matters why and I don't think it  
20 matters whether it was intentional or not. They  
21 did not provide it.

22 COMMISSIONER KROSHUS: I know where you're  
23 coming from. I'm not disagreeing with how you got  
24 there. I'm just trying to think of something  
25 that -- and that -- that is specific, but did they

1 fail to mark Turbine 441 on the exhibit map? And I  
2 think the answer is it was on the map.

3 MR. JOHNSON: I believe from testimony and  
4 the exhibits and everything I looked at yesterday,  
5 Turbine 441 was on the map. The Section 15  
6 farmyard/structure, whatever we want to call it,  
7 that was not on the map the day of the hearing. So  
8 for a violation of number 3 for where you're going,  
9 Randy, is we would have to find facts in the record  
10 to support that they should have known prior to  
11 that hearing that that was an occupied residence  
12 and that they didn't provide that to us.

13 COMMISSIONER CHRISTMANN: Or included it  
14 on the map like several other unoccupied ones and  
15 they could have pointed out this one -- here it is,  
16 but, you know, we don't think it's occupied so it's  
17 okay.

18 MR. JOHNSON: But those -- but those ones  
19 that were technically unoccupied were listed as  
20 occupied on the map. They were listed as an  
21 occupied residence. So that's the reason why this  
22 one didn't make the map is because it was  
23 determined to be an unoccupied residence. And,  
24 again, hindsight looking back, they even admitted  
25 that was maybe wrong, but through -- through the

1 methods that they described on how they were making  
2 these determinations, because that plat book didn't  
3 have that listed as anybody living there, I think  
4 it was just stated who owned it, but did not state  
5 in the plat book that it was lived in, that's where  
6 their -- that's where their chain cut off on why it  
7 didn't make it onto the map.

8 COMMISSIONER CHRISTMANN: Well, and the  
9 problem is, according to their testimony, there's  
10 no formal or routine process to double-check  
11 whether buildings are occupied.

12 MR. JOHNSON: Right.

13 COMMISSIONER CHRISTMANN: That was the  
14 whole problem.

15 COMMISSIONER KROSHUS: Well, withholding  
16 information, is that the same as saying they were  
17 dishonest, or not exercising due diligence just in  
18 layman terms? Is that -- I mean, they were just  
19 sloppy in how they went about that particular  
20 farmyard?

21 COMMISSIONER CHRISTMANN: I'm not labeling  
22 them one way or the other. I'm just saying it's  
23 not on the map.

24 COMMISSIONER KROSHUS: It kind of seems  
25 like you are, though.

1           COMMISSIONER FEDORCHAK: Well --

2           COMMISSIONER CHRISTMANN: They provided a  
3 map and it's not on there.

4           COMMISSIONER FEDORCHAK: And I think  
5 Brian's explanation is as clear as any about why it  
6 wasn't because they determined -- the ones that  
7 were on there had been determined as occupied  
8 residences, even though they were uninhabited.

9           COMMISSIONER KROSHUS: We're going to get  
10 to the same point.

11          COMMISSIONER FEDORCHAK: That's why it  
12 wasn't on the map.

13          MR. JOHNSON: And I guess I didn't -- I  
14 didn't feel that even -- I know the Kesslers had  
15 made statements and allegations and testified to  
16 the fact that they'd been telling people for a long  
17 time that this was going to be used, but then the  
18 company did bring to light, I think, something that  
19 was really important too. They laid out the  
20 timeline of all those other options and everything  
21 else, and when the Kesslers were stating -- and I  
22 know that it's a long time ago and there was, I'm  
23 sure, a ton of people they were talking to, but up  
24 until 2009, they couldn't have been telling  
25 Minnesota Power or ALLETE that they were going to

1 be using this because they weren't even talking to  
2 them about it because it was an option to a  
3 different company.

4 So I guess -- I guess for me where it --  
5 it didn't -- to me it seemed like the first time  
6 that -- and this is just about who you're going to  
7 believe and whatnot, but I don't know that it was  
8 real clear in the record that Minnesota Power was  
9 put on notice prior to the hearing that that was an  
10 occupied residence. Certainly after that I think  
11 there was more in the record to support that  
12 statements were made or that they were put on  
13 notice, but, again, I wasn't -- I wasn't real --  
14 I'm not saying that there was.

15 I'm just saying it seemed like timewise  
16 and between the -- even the discrepancies in  
17 testimony about who said what and when, it was more  
18 likely that that didn't happen until the day of the  
19 hearing or after. So that's why I'm a little soft  
20 on 3. But I can definitely look at the record  
21 again to see if there's anything to support that it  
22 was -- it was real solid before --

23 COMMISSIONER CHRISTMANN: And we're kind  
24 of over time here, too, so like has been said, it  
25 probably gets just to the same point based on 1 and

1 2. Do you feel you have enough information from us  
2 to --

3 MR. JOHNSON: Absolutely.

4 COMMISSIONER CHRISTMANN: -- create an  
5 order on 1 and 2?

6 MR. JOHNSON: Absolutely. So finding on 1  
7 of occupancy and that the turbine is to be moved,  
8 removed? What do you guys -- how --

9 COMMISSIONER CHRISTMANN: Well, I would  
10 think --

11 COMMISSIONER FEDORCHAK: It has to be --  
12 it has to be 1400 feet from -- they have to comply  
13 with the order.

14 MR. JOHNSON: Okay.

15 COMMISSIONER FEDORCHAK: It has to be --

16 MR. JOHNSON: Sure.

17 COMMISSIONER FEDORCHAK: -- no less than  
18 1400 feet from that residence.

19 COMMISSIONER CHRISTMANN: Well, I think  
20 the -- yeah, this has to be removed. You can't  
21 make it 1400 feet without removing it, but in  
22 order --

23 COMMISSIONER FEDORCHAK: Well, that's up  
24 to them.

25 COMMISSIONER CHRISTMANN: -- in order to

1 just move it to a different location, won't they  
2 need to do a study of that and get an approval? We  
3 approved these locations. Did we approve somewhere  
4 else?

5 COMMISSIONER KROSHUS: You're talking a  
6 variance to the order if they want to put it  
7 1500 feet away?

8 COMMISSIONER CHRISTMANN: Well, I mean, it  
9 would be a different location, so doesn't that need  
10 to be --

11 COMMISSIONER FEDORCHAK: Yeah.

12 MR. JOHNSON: I believe --

13 COMMISSIONER CHRISTMANN: -- a review  
14 to --

15 MR. JOHNSON: I believe the -- I believe  
16 the footprint's so they could make the  
17 certifications that this will not impact any  
18 excludance or avoidance areas and -- and they could  
19 move the location -- I'm not a hundred percent  
20 sure -- unless there was also an alternative tower  
21 site that was approved at the time that they could  
22 move it to, but I'm sure they don't want to be  
23 taking that tower away from -- I believe it was the  
24 Lennicks who own it. I mean, that's a source of  
25 income for them. So I think they would like to --

1 to keep it with them, but -- but --

2 COMMISSIONER CHRISTMANN: I would --

3 MR. JOHNSON: -- Pat would have been a  
4 good one for that. I --

5 COMMISSIONER FEDORCHAK: It's up to them.

6 COMMISSIONER CHRISTMANN: Yeah, I think  
7 this order just has to do with that this needs to  
8 be removed.

9 MR. JOHNSON: Correct.

10 COMMISSIONER CHRISTMANN: And they're  
11 going to have to determine whether they rebuild  
12 elsewhere, and if they do, whether they need a -- a  
13 certificate from us or if this one covers it  
14 somehow.

15 COMMISSIONER FEDORCHAK: Right.

16 MR. JOHNSON: Sure.

17 COMMISSIONER KROSHUS: We can't force them  
18 to remove and replace -- well, and --

19 MR. JOHNSON: We can -- we can ask that it  
20 be removed from that location and that it be  
21 brought into compliance. I don't think we can  
22 specify anything other than that. As long as it  
23 complies with the order and --

24 COMMISSIONER FEDORCHAK: Right.

25 MR. JOHNSON: -- and the new location, if

1 it needs approval, is approved, whether  
2 certifications or -- or we have to actually approve  
3 a new site. But, yeah, I don't think we can say  
4 you've got to move it X amount of more feet or  
5 anything like that.

6 COMMISSIONER KROSHUS: Well, you hit the  
7 nail on the head. This -- this is a financial hit  
8 if they just take it down completely and then --  
9 Lennicks; correct?

10 MR. JOHNSON: Yeah.

11 COMMISSIONER KROSHUS: They're out. So  
12 that's why I was asking, well, can we -- and I kind  
13 of knew the answer already, but --

14 COMMISSIONER FEDORCHAK: Okay. I think  
15 we're good.

16 MR. JOHNSON: All right.

17 COMMISSIONER FEDORCHAK: So I would like  
18 to wrap this up, though. So I know our next  
19 Commission meeting is -- is it the 14th? Is it the  
20 12th or 14th?

21 COMMISSIONER CHRISTMANN: 15th, I think.  
22 Something like that.

23 COMMISSIONER FEDORCHAK: Something like  
24 that --

25 COMMISSIONER CHRISTMANN: That week, I

1 think.

2 COMMISSIONER FEDORCHAK: -- that week. Is  
3 it possible to get this by then?

4 MR. JOHNSON: I will try.

5 COMMISSIONER FEDORCHAK: Okay.

6 COMMISSIONER KROSHUS: It is the 14th.

7 COMMISSIONER FEDORCHAK: Yeah. So just a  
8 draft. That would, I think, require us to have a  
9 draft next week. I'm looking at my calendar here.

10 MR. JOHNSON: Well, we all know Steve  
11 loves a good lead add to the agenda, so --

12 COMMISSIONER FEDORCHAK: 14th is -- yeah,  
13 it's the 14th. And so next, like, Thursday would  
14 be -- one of those days -- Tuesday, Wednesday,  
15 Thursday -- is the day where you should have it to  
16 me and then everybody -- but I -- I would say get  
17 it to all of us --

18 MR. JOHNSON: Mm-hmm.

19 COMMISSIONER FEDORCHAK: -- don't just  
20 send it to me --

21 MR. JOHNSON: Sure.

22 COMMISSIONER FEDORCHAK: -- so everybody  
23 has maximum amount of time, including you, and then  
24 if we can try to have -- have it on the -- you  
25 know, a finalized by that 9th, or would you guys be

1 comfortable adding it that next week, the 12th or  
2 13th or not?

3 COMMISSIONER CHRISTMANN: It would sure be  
4 nice if we had it by that Friday because I know we  
5 have a hearing on that -- on the 12th, and then I  
6 have a presentation to give to an outside group out  
7 of town on Tuesday. And so I'm not going to have a  
8 lot of time to review.

9 I'm also, we'll say -- you've held the  
10 siting portfolio for quite a while and you're a  
11 pretty good writer and editor that tends to make  
12 changes on things, so I'm okay with you having it a  
13 day or two before us because you finding a  
14 technicality somewhere and then you rewriting the  
15 whole paragraph, sometimes I like to have you have  
16 your stuff --

17 COMMISSIONER FEDORCHAK: Sure.

18 COMMISSIONER CHRISTMANN: -- even before,  
19 but I sure would like to see a reviewed draft by  
20 Friday if it was possible.

21 COMMISSIONER FEDORCHAK: Friday, the 9th.

22 MR. JOHNSON: Friday, July 9th?

23 COMMISSIONER CHRISTMANN: But if that  
24 became impossible, I'd also like to see this get  
25 done at that meeting --



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CERTIFICATE OF COURT REPORTER

I, Stephanie A. Smith, a Registered Professional Reporter,

DO HEREBY CERTIFY that I transcribed the foregoing audio recording had and made of record at the time and place hereinbefore indicated.

I DO HEREBY FURTHER CERTIFY that the foregoing typewritten pages contain an accurate transcript of the audible portions of the audio recording.

Dated at Bismarck, North Dakota, this 4th day of August, 2021.

=====  
Stephanie A. Smith  
Registered Professional Reporter

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