

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Keith and Deanna Kessler  
v. Minnesota Power, a division of ALLETE, Inc.  
Complaint**

**Case No. PU-20-194**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**August 4, 2021**

**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 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.

**Preliminary Statement**

On April 23, 2020, Petitioners Keith and Deanna Kessler (the Kesslers) filed a complaint concerning the siting of ALLETE, Inc.'s (ALLETE's) Bison 4 Wind Project (the Project) Turbine 441 relative to a structure owned by the Kesslers in Section 15, Township 141 North, Range 87 West, in Oliver County (the Farmstead). The Kesslers allege that, among other things, the Farmstead should have been identified by ALLETE as an occupied residence and that Turbine 441 was located in violation of a 1,400-foot setback from the occupied residences requirement ordered by the North Dakota Public Service Commission (Commission).

On April 27, 2020, the Kesslers filed a revised complaint.

On May 20, 2020, ALLETE filed a response requesting that the Kesslers be required to file a complaint containing a concise statement of the claims or charges to clarify the issues, for all involved, to allow ALLETE to be able to appropriately respond.

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 ALLETE.

On June 29, 2020, the Kesslers filed a Second Revised Complaint upon the request of Commission Staff.

On July 20, 2020, ALLETE filed an Answer to the Second Revised Complaint. ALLETE also filed a Motion for Partial Dismissal requesting dismissal of four claims for relief by the Kesslers.

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, ALLETE filed a Reply Brief in support of its Motion for Partial Dismissal of Revised Complaint.

On September 23, 2020, the Commission issued an order granting partial dismissal of the following four claims for relief by the Kesslers:

1. Have the [Commission] conduct a survey of other landowners to determine if ALLETE has a pattern of misconduct relating to North Dakota landowners;
2. Prohibit ALLETE 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 ALLETE to reimburse all attorney fees incurred by the Kesslers relating to the prosecution of this action.

On November 13, 2020, ALLETE filed a Notice of Motion and Motion for Partial Summary Judgement and supporting documents.

On January 4, 2021, the Kesslers filed a Brief in Response to ALLETE's Second Motion for Partial Dismissal of Revised Complaint, with exhibits.

On January 14, 2021, ALLETE 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 ALLETE's Motion for Partial Summary Judgment.

On February 3, 2021, the Commission issued a Notice of Hearing identifying three issues to be considered:

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 ALLETE withhold information relating to the Section 15 structure from the Commission that ALLETE should have communicated to the Commission; if so, what remedies are appropriate.

On March 8, 2021, ALLETE filed witness and exhibits lists and the pre-filed testimony and exhibits of 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 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 ALLETE.

On March 9, 2021, ALLETE 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, ALLETE filed a Motion in Limine and Brief in Support of Motion.

On March 19, 2021, the Kesslers filed a Brief in Response to ALLETE's Motion in Limine, with exhibits.

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, ALLETE filed a Response in Opposition to the Kesslers' Motions for Reconsideration of Order Dismissing Attorney Fees.

On March 24, 2021, the ALJ issued an Order on Motion in Limine.

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.

On March 25, and April 22, 2021, the evidentiary hearing was held.

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**

1. Minnesota Power is a division of ALLETE, Inc. ALLETE 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.
2. On May 6, 2013, ALLETE filed an application for a certificate of site compatibility for the Bison 4 Wind Project in Oliver and Mercer Counties, see Case No. PU-13-127. On September 25, 2013, in Case No. PU-13-127, the Commission issued Certificate of Site Compatibility No. 34 designating a location for the construction, operation and maintenance of the Bison 4 Wind Project.
3. Paragraph 35 of the Commission's September 25, 2013 Findings of Fact, Conclusions of Law and Order granting the site certificate, states that no turbines will be placed within 1400 feet of an occupied residence.
4. ALLETE's Project progress report for the week ending September 29, 2013, states that ALLETE began mobilization, stripping topsoil and commenced road construction.
5. Project commissioning, completion and commercial operation date was January 16, 2015.
6. The Kesslers reside in Glen Ullin. The Kesslers own the Farmstead, 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.
7. Within the Project boundary, ALLETE constructed Turbine 441 approximately 1100 feet from the Farmstead.
8. ALLETE used several methods to determine occupancy of residences. The Oliver County plat book and satellite information was used by ALLETE in its determination. Also, site visits were performed by personnel to the 83 turbine sites.
9. In the Oliver County plat book, farmsteads with livable buildings are marked with an asterisk and the name of the current resident is listed next to the asterisk. The plat book states that "no representation is made as to the complete accuracy, errors, or omissions". The plat book used by ALLETE was compiled in 2011.

10. The plat book lists an asterisk on section 15 indicating livable buildings and lists the Kesslers as the owner of section 15 where the Farmstead is located. There is no current resident listed next to the asterisk.
11. ALLETE employee witness Barry Gartner confirmed that the plat book marked the Farmstead with an asterisk and confirmed that the plat book did not list a current resident. Mr. Gartner confirmed that section 15 is owned by the Kesslers.
12. ALLETE employee witness Barry Gartner stated that satellite data did not reveal use of the Farmstead as an occupied residence, and ALLETE's visit to the Farmstead gave no additional indication the Farmstead was an occupied residence. Mr. Gartner also testified that satellite imagery is periodically updated.
13. It is ALLETE's practice to err on the side of caution when evaluating whether a residence is occupied, that it is overinclusive in identifying occupied residences, and that it is appropriate to be overinclusive in identifying occupied residences.
14. Mr. Gartner testified the farmyard is visible from Turbine 441. Mr. Gartner also testified that the Farmstead was identified as a livable structure and not an occupied structure. Mr. Gartner expressed that, for the determination regarding occupied residence, he evaluated whether somebody was living in the structure as their home.
15. Mr. Gartner testified that no calls were made to the Kesslers to determine the status and use of the Farmstead. Mr. Gartner further testified that if they had known of the structure's use and that it was going to be occupied later, he believes ALLETE would not have placed Turbine 441 at its current location.
16. Wade Isaacson testified that ALLETE maintained a spreadsheet with all the landowner addresses and contact information.
17. ALLETE employee witness Matthew Freudenrich testified he did not see activity at the Farmstead that would indicate it was occupied but did not follow-up to confirm if anyone was there. Mr. Freudenrich stated that the grass was mowed, the yard was picked up and in decent shape. Mr. Freudenrich also testified that the Farmstead is visible from Turbine 441.
18. ALLETE classified other structures as occupied residences and placed them on the map as occupied residences despite no one living in them.
19. ALLETE determined that the Farmstead was not an occupied residence but did not contact the property owner to confirm this determination.
20. The Kesslers lived in the Farmstead from 1989 until 1992. Since 1992, the Kesslers have resided in Glen Ullin. Other family members intermittently lived at the Farmstead between 1993 and 2003.

21. From 2003 until 2015, the Kesslers used the Farmstead in a number of capacities. The Farmstead was used when working cattle or haying. Extended family stayed at the Farmstead for short periods. The Kesslers used the Farmstead socially for watching Super Bowls in 2007 and 2010. Mr. Kessler and his sons would also stay overnight at the Farmstead during hunting season.
22. The Kesslers maintained electric service, water supply, and sanitation for the Farmstead prior to and throughout the siting process. The Kesslers painted the house in 2012.
23. Mr. Kessler's son, Stephen Kessler, utilized the Farmstead in the summer of 2013 and occasionally resided there on weekends.
24. Keith Kessler's first communication with ALLETE about turbines located too close to the Farmstead was at the September 13, 2013 public hearing.
25. At a meeting after the public hearing, Keith Kessler stated that he was provided maps that contained the location of Turbine 441. After that meeting the Kesslers signed easements for turbines not located on section 15. This was corroborated by Deanna Kessler.
26. Deanna Kessler testified that, at the meeting after the public hearing when meeting with ALLETE's representatives and looking at the map, she stated that two turbines appeared to be too close to their property.
27. The Kesslers testified that they did not further challenge the location of Turbine 441 as they believed that ALLETE would follow the 1400 foot setback.

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

### **Conclusions of Law**

1. North Dakota Century Code chapter 49-22 provides that a site may be approved in an area when it is demonstrated by the applicant that any significant adverse effects resulting from the location, construction, and operation of the facility will be at an acceptable minimum.
2. N.D. Administrative Code Section 69-06-08-01 provides exclusion and avoidance areas, selection criteria, and policy criteria to guide the site suitability evaluation process. In addition to exclusion and avoidance areas specifically designated for wind energy conversion facilities, an applicant must demonstrate that effects on family farms and ranches must be maintained at an acceptable minimum. To evaluate the impacts, the Commission must rely on a high level of diligence by the applicant in fieldwork, surveying, and communication with landowners.

3. ALLETE offered and agreed to a 1400-foot setback from occupied residences. This setback was included in the September 25, 2013, Findings of Fact, Conclusions of Law and Order issuing Certificate of Site Compatibility No. 34.

4. ALLETE utilized a 2011 Oliver County plat book, satellite imagery, and on-site visits to determine the occupancy of residences during the siting process. ALLETE identified the Farmstead as a residential structure. From the testimony, ALLETE evaluated the occupancy of the Farmstead based upon whether it was currently being used as a full-time residence.

5. While not expressly defined in N.D. Admin. Code Section 69-06-08-01, the Commission does not find the definition of "occupied" to be as restrictive as ALLETE's evaluation provided. ALLETE did not observe any activity at the Farmstead. Testimony shows that the Farmstead was used, had utility service and sanitation, and was maintained by the Kesslers for farming and ranching activities and also as a residence. ALLETE agrees that, had it known of the Farmstead's use and future use as a full-time residence, the 1400-foot setback would have been followed.

6. For the purposes of N.D. Admin Code Section 69-06-08-01, the Commission finds the Farmstead to have been occupied at the time of siting.

7. Additionally, the Commission concludes that ALLETE's procedures could not have satisfactorily determined the occupancy of the Farmstead solely using the potentially outdated or incomplete Oliver County plat book, and the potentially outdated satellite imagery. ALLETE located a house and had knowledge of, or could have easily determined, the owner. ALLETE had a spreadsheet with contact information for all of the landowners. ALLETE failed to contact the owner to determine the status of the Farmstead. Only one ALLETE employee, Matthew Freudenrich, was physically in the yard while driving through looking for access to potential sites and observing that it appeared unoccupied.

8. Despite having contact with the Kesslers on other matters, ALLETE took no steps to identify the current or future use of the Farmstead or impacts that Turbine 441 may have at the Farmstead.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following order:

### **Order**

1. ALLETE shall remove Turbine 441 from its current location within 6 months. Turbine 441 will be idled until removed. The Commission may grant an extension of time upon a showing of good cause.

2. If Turbine 441 is relocated within the site designated by Certificate of Site Compatibility No. 34, ALLETE shall make a filing under NDCC 49-22-03(3) for the new location, and, the new location must be at least 1400 feet from the Farmstead.

**PUBLIC SERVICE COMMISSION**

  
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**Randy Christmann**  
Commissioner

  
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**Julie Fedorchak**  
Chair

  
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**Brian Kroshus**  
Commissioner