

STATEMENT OF LYNN BOUGHEY 5-18-26

My name is Lynn Boughey from the Boughey Law Firm in Mandan.

I was the attorney for the Kessler's before the Public Service Commission when it made its decision in 2021, where Minnesota Power illegally placed a wind tower closer than 1400 feet from one of the Kessler's residences.

The PSC found that Minnesota Power failed to place the structure on the map presented to the PSC at the site hearing even though it put every other structure on the map, including abandoned structures. When the mistake was discovered, Minnesota Power did not act like a good neighbor or an honest broker. It instead presented a false factual claim to cover their mistake, asserting to the PSC that the residence was unoccupied.

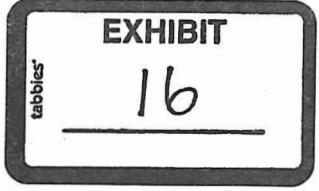
So the Kessler's had to continue using me at the evidentiary hearing to present the truth to the PSC that the home – which had electricity, water, heat in the winter, and was being used by the Kessler's – was indeed occupied. The main result: Minnesota Power was ordered to take the tower down.

All three commissioners agreed that this had to be done. But one commissioner wanted to go further, and that commissioner – Randy Christman – is still on the PSC and is here today.

At the final meeting regarding the Kessler matter, Randy raised a major concern that what really happened was that Minnesota Power withheld information 34:11-12, clearly was unthorough in its analysis 35:13-14, chose not to find out the truth about the use of the residence 36:11-12, and did not bother to check with the Kessler's as to the use of that property. Randy to specifically state that he thought that Minnesota Power was withholding evidence when it submitted its application 36:17-18.

As to the map submitted by Minnesota Power, Randy asserted “you don't just close your eyes and ignore the things out there” 39:1-5. Randy further stated he didn't need to know why Minnesota Power withheld information, “they didn't put it on the map” 57:10 even though the map included some unoccupied residences 57:17-18.

Randy concluded that Minnesota Power “provided a map and it's not on there” 60:2-3. Had Randy had one more vote, the PSC could have pressed on and decided whether to disallow Minnesota power from ever operating in North Dakota again – not just because they left the Kessler second residence off the map, but because



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)

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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 Kelth 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

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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

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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

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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

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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.

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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

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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

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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

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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

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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

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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

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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.

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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

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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

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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

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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

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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 --

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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

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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

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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

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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.

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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

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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

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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

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


Randy Christmann
Commissioner


Julie Fedorchak
Chair


Brian Kroshus
Commissioner

I AM IN FAVOR of the expansion of the windfarm. I heard other neighbors cite opposition to any wind farm plus noise and landscape concerns, which they ALREADY are dealing with and I sympathize with, but I heard little how the additional towers will negatively affect the area. Alternative tower sites may be considered to replace areas of my Neighbors in extreme opposition from the New sites. Expanding this existing farm is a better alternative than a new farm elsewhere in Morton county. I believe agriculture, wildlife, and windfarms are compatible with minimal disturbance. The economic benefits will greatly benefit my family and others.

Land owner Brenda J. Duppong
William Duppog, Jr

Damn Shepard

Township 140 - Sec 26 - Range 87

SW 1/4

(Deaton Hitchcock - ^{land}owner)