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October 28, 2024

Timothy J. Texel, Executive Director
Nebraska Power Review Board
301 Centennial Mall South
P.O. Box 94731
Lincoln, NE 68509-4713

RE: *Request for Opinion Interpreting the Term "Construction" in Neb. Rev. Stat. §§ 70-1012(2)(a) and 70-1014.02(2)(a).*

Dear Director Texel:

The Nebraska Power Review Board (Board) has requested our opinion as to the interpretation of the term "construction" with respect to recent amendments to Neb. Rev. Stat. §§ 70-1012(2)(a) and 70-1014.02(2)(a).¹ Specifically, the Board asks whether "construction" as used in these provisions means the initial building of a facility or structure, or whether the term also encompasses repairs, maintenance, additions, renovations, and installing replacement equipment to an existing structure. The Board recognizes that "construction" is generally interpreted in statutes to mean only when a facility is first built. However, the Board believes this definition appears to conflict with the Legislature's intent in enacting LB 1370.

Section 70-1012(2)(a) provides:

Before any electric supplier commences construction of or acquires an electric generation facility or transmission lines or related facilities carrying more than seven hundred volts that will be located within a ten-mile radius of a military installation, the owner of such proposed facility, transmission lines, or related facilities shall provide written notice certifying to the board that such facility or facilities contain no materials, electronics, or other components manufactured by

¹ See 2024 Neb. Laws LB 1370, §§ 6 and 7.

any foreign government or foreign nongovernment person determined to be a foreign adversary pursuant to 15 C.F.R. 7.4.²

Section 70-1014.02(2)(a) similarly provides that owners of privately developed renewable energy generation facilities, “prior to the commencement of construction,” must certify to the Board “that the facility, if located within a ten-mile radius of a military installation: (A) Contains no materials, electronics, or other components manufactured by any foreign government or foreign nongovernment person determined to be a foreign adversary pursuant to 15 C.F.R. 7.4.” Neb. Rev. Stat. § 70-1014.02(2)(a)(vi). The Board interprets the broad objective of these provisions as safeguarding military installations by restricting the use of components manufactured by foreign adversaries in nearby electric infrastructure facilities. The Board believes that wider national security objectives could be further advanced by LB 1370 if “construction” is interpreted to include work performed on existing facilities. The Board has asked whether, in this context, “construction” should be defined broadly.

“Statutory interpretation begins with the text, and the text is to be given its plain and ordinary meaning.” *State v. Yzeta*, 313 Neb. 202, 210, 983 N.W.2d 124, 130 (2023). “[A] statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning.” *O’Neill Prod. Credit Ass’n v. Schnoor*, 208 Neb. 105, 108, 302 N.W.2d 376, 378 (1981). Nebraska courts “often turn to dictionaries to ascertain a word’s plain and ordinary meaning.” *Ash Grove Cement Co. v. Nebraska Dep’t of Revenue*, 306 Neb. 947, 972, 947 N.W.2d 731, 748 (2020).

“Construction” is commonly understood to mean “the process or method of building or making something.”³ Some courts have found the common meaning of “construction” to include “the act of putting parts together to form a complete and integrated object.” *Dycom Indus., Inc. v. Pension, Hospitalization & Benefit Plan of the Elec. Indus.*, 98 F.4th 397, 400 (2d Cir. 2024) (quoting *Carpet, Linoleum and Soft Tile Local Union No. 1247*, 156 N.L.R.B. 951, 958 (1966)). When the term appears undefined in a statute or contract, numerous courts distinguish “construction” from repair and maintenance work. See *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382 627 N.E.2d 538 (1994) (defining construction as “[t]he creation of something new, as distinguished from the repair or improvement of something already existing”) (alteration in original) (quoting *Black’s Law Dictionary* 312 (6th ed.1990)); see also *Monongalia Cnty. Coal Co. v. United Mine Workers of Am.*, 234 F. Supp. 3d 797, 803 (N.D.W. Va. 2017) (defining construction as distinct from repair and maintenance work in that it brings about something new that had not existed prior).

² Effective July 18, 2024, this regulation was redesignated 15 C.F.R. § 791.4.

³ <https://www.oxfordlearnersdictionaries.com/definition/english/construction> (accessed on Aug. 28, 2024).

The Board concedes that in some contexts the term “construction” refers only to when a structure is first built. It seems to us that the definition of “construction” in §§ 70-1012(2)(a) and 70-1014.02(2)(a) is unambiguous. “The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.” *Ash Grove Cement Co. v. Nebraska Dep’t of Revenue*, 306 Neb. 947, 974, 947 N.W.2d 731, 749 (2020). If the Legislature had intended a definition of “construction” distinct from its ordinary meaning, it would have included a technical definition. The common understanding of “construction” refers to the creation or building of a new facility. In the context of §§ 70-1012(2)(a) and 70-1014.02(2)(a), the ordinary definition still applies.

“In order for a court to inquire into a statute’s legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.” *Stewart v. Nebraska Dep’t of Revenue*, 294 Neb. 1010, 1016, 885 N.W.2d 723, 728 (2016). While we conclude the meaning of “construction” as used in the two statutes is unambiguous, we have reviewed the legislative history of LB 120, the relevant portions of which were amended into LB 1370. In a hearing before the Natural Resources Committee, the bill’s introducer was directly asked whether new restrictions on foreign-made materials would impact existing facilities. He answered unequivocally, “[n]o, it’s all new. . . . Anything that would be planned from here forward.” Committee Records on LB 120, 108th Neb. Leg., 2nd Sess. 3 (Feb. 22, 2024) (Statement of Sen. Bostelman). Later, the committee questioned the security of existing electric generation facilities. A consensus was reached that existing facilities would not be impacted by the bill. See Committee Records on LB 120, 108th Neb. Leg., 2nd Sess. 13 (Feb. 22, 2024) (Statements of Sen. Hardin and Sen. Hughes). This history further supports interpreting “construction” in § 70-1012(2)(a) to mean newly created facilities.

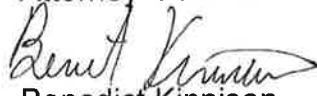
We understand the Board is concerned that this interpretation of “construction” as used in §§ 70-1012(2)(a) and 70-1014.02(2)(a) allows some components manufactured by foreign adversaries to still be placed within electric infrastructure near military installations. However, a plain reading of the statute does not frustrate the Legislature’s intent of restricting foreign components at new facilities. The Board lacks any “power or authority other than that specifically conferred upon it by statute or by construction necessary to accomplish the purpose of the act.” *Application of Lincoln Elec. Sys.*, 207 Neb. 289, 291–92, 298 N.W.2d 366, 368 (1980). Further, the Legislature is aware of the shortcomings in LB 1370 and intended the statute as a first step that could be bolstered in future sessions. See Committee Records on LB 120, 108th Neb. Leg., 2nd Sess. 3, 14 (Feb. 22, 2024) (Statement of Sen. Hardin). Additional changes to §§ 70-1012(2)(a) and 70-1014.02(2)(a) may be appropriate for accomplishing wider national security goals. However, such changes are a matter reserved for the Legislature. If the Board has concerns about protecting wider national security objectives by interpreting “construction”

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to include work previously performed on existing facilities, it may seek amendatory legislation.

Sincerely,

MIKE HILGERS
Attorney General

A handwritten signature in black ink, appearing to read "Benedict Kinnison", written in a cursive style.

Benedict Kinnison
Assistant Attorney General

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