STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD

IN THE MATTER OF THE COMPLAINT OF THE NORTHEAST NEBRASKA PUBLIC PUBLIC POWER DISTRICT, (Complainant), AGAINST PIERCE UTILITIES, CITY OF PIERCE, NEBRASKA, (Respondent).	))))))	**C - 45** **ORDER**

ON THE 18th day of March, 2011, the above-captioned matter came on for consideration before the Nebraska Power Review Board ("the Board"). Evidence was adduced on specific issues, after which the proceeding was recessed until April 22, 2011. The hearing was concluded on April 22, 2011. The Board, being fully advised in the premises, and upon reviewing said application and the evidence presented to the Board at said hearing, HEREBY FINDS AS FOLLOWS (references to testimony are designated by a "T" followed by the transcript page, then the lines upon which the testimony appears, while references to exhibits are designated by "Exh.":

FINDINGS OF FACT

1. That on the 15th day of December, 2010, the Northeast Nebraska Public Power District ("Complainant") filed a formal complaint with the Nebraska Power Review Board ("the Board") against actions by the Pierce Utilities of the City of Pierce, Nebraska, ("Respondent") that allegedly violate Neb. Rev. Stat. § 70-1011 and the service area agreement between the parties. (Exh. 1). The Complaint was designated "C-45."

2. On December 16, 2010, the Board provided a Notice of Complaint and Notice of Hearing Date to Complainant and Respondent in accordance with Nebraska law and the Board's rules of practice and procedure. The hearing date was set for January 21, 2011. (Exh. 2).

3. Respondent filed a Reply to the Complaint on January 5, 2011. (Exh. 3).

4. On January 13, 2011, Complainant filed a Motion for Continuance requesting the hearing be rescheduled to March 18, 2011. Respondent did not oppose the continuance. The hearing officer granted the continuance on January 13, 2011.

5. Prior to the hearing date, a conference call was held with the hearing officer, Complainant's counsel and Respondent's counsel to discuss preliminary matters and the procedures to be followed at the March 18 hearing. The parties and the hearing officer agreed it would be beneficial to present evidence and argument at the March 18 hearing pertaining only to certain legal issues, and have the Board provide preliminary conclusions of law on the issues. It was hoped that the preliminary conclusions of law would help the parties negotiate a mutually agreeable solution without the need to proceed to a final hearing on the merits. At the hearing the parties presented certain questions to the Board. The questions pertained primarily to the status of Respondent's customers that are located within one-half mile of Respondent's transmission line west of the City of Pierce that extends to the Village of Foster, and that are served by Respondent's said line. The Board then paraphrased the questions and provided its preliminary conclusions of law, with the understanding that the preliminary conclusions would be incorporated into the Board's final order in this proceeding. (T9:7 to 10:24).

6. At the conference call, the hearing officer also informed the parties that it was his opinion that since the proceeding was a Complaint, the Board did not have authority to order the transfer of customers, in the event the Board ruled that Respondent was serving customers without authority to do so. A Complaint would determine whether certain actions or connection of services were performed in violation of Nebraska law, and whether continued provision of electric service to certain customers constitutes an ongoing violation. An order to transfer those customers would probably be more appropriately handled in an application to serve a customer or customers filed by a power supplier. Neither party objected to this proposed restriction on the scope of the hearing on C-45 during the conference call or at the hearing. The hearing officer agreed that Complainant did not need to object to the limitation of the scope at the March 18 hearing in order to preserve Complainant's right to file a subsequent application to transfer customers or for a service area amendment, depending on the Board's ruling on the merits of C-45.

7. On March 18, 2011, the hearing was convened. Both parties submitted certain questions for the Board to address, and presented oral argument in support of their position on the questions presented. Both parties were also allowed to submit a brief addressing the questions presented. The hearing was then recessed until April 22, 2011, if necessary. The Board then issued its Preliminary Conclusions of Law on April 14, 2011. The parties were informed that the Board's Preliminary Conclusions of Law would be incorporated into the Board's final order in this proceeding if the parties were not able

to resolve their dispute. The parties were not able to arrive at a mutually agreeable resolution to the issues remaining in C-45 prior to the April 22 hearing.

8. The hearing was reconvened on April 22, 2011 to address the remaining issues in C-45.

9. The parties agree that Complainant, Northeast Nebraska Public Power District, was formed by the merger of the Wayne County Public Power District and the Northeast Nebraska Rural Public Power District. (T12:3-7; T19:8-11). The former Wayne County Public Power District shared the service area boundary with Respondent in the territory involved in C-45. For purposes of the hearing and this order, "Complainant" includes both Wayne County Public Power District and its successor in interest, the Northeast Nebraska Public Power District.

10. In July 1964 Complainant and Respondent entered into a service area agreement establishing the boundary between the two electric power suppliers' retail service territories. The agreement is comprised of written text and a map showing the location of the service area boundary line. The map also shows certain customers that would be retained by each supplier, even though the customers were located in what would otherwise be the other supplier's service area. (Exh. 4). The agreement was subsequently approved by the Board and was designated "S.A.A. 267." (Exh 4; Exh. 1, page 2; Exh. 3, page 2.)

11. Complainant and Respondent filed a joint application to amend S.A.A. 267 on October 8, 2010. (Exh. 5). The Board designated the application as "SAA 267-10-

A." The Board issued an order approving SAA 267-10-A. (Exh. 6). The amendment then became part of Service Area Agreement 267. (Exh. 1, page 2; Exh. 3, page 2.)

12. It is undisputed that from 1963 to 1979, the language in Neb. Rev. Stat. § 70-1008 pertinent to the issues in C-45 stated the following:

> "In the absence of an agreement between the suppliers affected . . .
>
> (2) In determining the service area of a municipally-owned electric system, there shall be included, as a maximum, the corporate area of the municipality, the zoning area outside the corporate limits of such municipality, and the area beyond the zoning area which is presently being served by such municipality, including not more than the area one half mile on each side of the line presently used by such municipality to serve its existing customers, except for customers presently served by other suppliers."

The statute was amended in 1979, removing the language in § 70-1008 making the area one-half mile on each side of a municipal system's transmission or distribution line part of the municipality's service area.

13. The first cause of action in the Complaint alleges that Respondent is currently providing electric service to the Village of Foster, and that it established electric service to an unknown number of customers located in Complainant's service area. The first cause of action alleges Respondent is not authorized to provide service to the Village of Foster or the customers located in Complainant's service area, and Respondent's service to the Village of Foster and the other customers constitutes a violation of the

parties' service area agreement and Neb. Rev. Stat § 70-1011. (Exh. 1, pages 2 and 3). At the hearing Complainant orally withdrew that part of the first cause of action challenging Respondent's legal right to serve the Village of Foster. (T144:1-7). The second cause of action in the Complaint was not withdrawn.

14. In its prayer for relief Complainant requests that the Board find the following: 1) that Respondent acted in violation of Neb. Rev. Stat. § 70-1011 and Service Area Agreement 267 by providing electric service to additional customers located inside Complainant's service area without Complainant's consent or the Board's approval; 2) that Complainant is now entitled to provide electric service to those customers located in its service area that Respondent is presently serving that are not served pursuant to part of a prior agreement; 3) that the provision of such service does not involve the wasteful and unwarranted duplication of facilities; 4) that Complainant is entitled to modification of Service Area Agreement 267 and shall have the right to service all customers within its service area; and 5) that the parties shall have 90 days in which to finalize a new Service Area Agreement map and to attempt to agree on the amount of compensation Respondent must pay Complainant pursuant to Neb. Rev. Stat. § 70-1010 for any customers or facilities transferred from Respondent to Complainant that are identified as part of the agreement. (Exh. 1, pages 3 and 4).

15. At the request of Complainant's counsel, a conference call was held with the hearing officer and both parties' counsels the day before the hearing was reconvened. The primary purpose of the conference call was to discuss whether the evidence would be limited on Complainant's second cause of action. The second cause of action dealt with

transferring customers that Complainant alleges are being improperly served, and to transfer certain customers that might be legally served based on allegations that Respondent is failing to provide adequate service to those customers. It was the hearing officer's opinion that a complaint proceeding was not the proper proceeding in which to address the issue of transferring customers between power suppliers, as was requested in the second cause of action. The primary purpose of a complaint proceeding is to determine whether violations of law or regulations have occurred. The hearing officer opined that the Board's mechanism to transfer customers is accomplished as a result of either an application to amend a service area agreement or an application to serve a customer or construct a line in another power supplier's service area. Although the hearing officer did not issue an order limiting the evidence, he informed the parties of his opinion and stated that he would rule accordingly at the hearing. Neither party objected to the hearing officer's decision during the conference call or the hearing, but Complainant's counsel and the hearing officer clarified on the record that Complainant was not thereby waiving its right to pursue transfer of customers if the Board's ruling in C-45 merited such action. (T31:7 to 33:3).

16. According to a map prepared by Complainant, Respondent is currently serving thirty customers located inside Complainant's service area. Four of the services are north of the City of Pierce, while the remaining services are within one-half mile of Respondent's distribution line that leads to the Village of Foster west of the City of Pierce. Complainant's map also indicates the existence of eleven services inside Complainant's service area that were served by Respondent pursuant to the original

service area agreement map, but now are either retired, the load has moved from the original location, the nature of the load has changed, or Complainant is unable to determine the load's current status. Two of these services are located east of the City of Pierce, while the remaining loads are within one-half mile of Respondent's distribution line extending to the Village of Foster west of the City of Pierce. (Exh. 8).

17. In the discovery documents, Respondent provided a list of its services that are located within Complainant's service area. (Exh. 10, pages 4 and 5; T85:12 to 86:24). The list indicates that Respondent established electric service to thirty-one (31) services in Complainant's service area prior to the 1979 amendment to Neb. Rev. Stat. § 70-1008. Counting those services that are indicated to have two loads increases the total loads established prior to 1980 to forty (40). The list indicates that some of these loads were designated to be part of Respondent's service area on the original service area agreement map. The list also indicates that Respondent established service to twenty-one (21) services in Complainant's service area after the statute was amended in 1979. When counting the services that are indicated to have multiple loads at one general service location, the total number of loads established subsequent to the 1979 statutory amendment increases to twenty-eight (28). Respondent also prepared another copy of the list as Exhibit 10, but numbered each of the listed services in order to allow easier reference to them on another map showing where the services are located. (Exh. 14; Exh. 15; T87:1 to 88:7). The testimony and exhibits indicate that two of the services on Respondent's list, served from its line to the Village of Foster, may actually be located in a third power supplier's service area, and that Respondent received the Board's approval

to serve these loads. These services involve Stech Farms and are numbered 51 and 52 on Exhibits 14, 15 and 7. They are located in sections 25 and 26, approximately three miles west of the Village of Pierce. (T89:16 to 90:5; Exh. 7, Exh. 15)

18. Complainant does not contest the customer or load information Respondent provided in Exhibit 10, pages 4 and 5. In fact, Complainant used Respondent's customer information when it prepared its own maps showing the approximate locations of the services indicated in Exhibit 10, pages 4 and 5. (T51:21 to 53:16; Exh. 7; Exh . 8).

19. The loads or customers remaining at issue in C-45 are those to which Respondent established service after Neb. Rev. Stat. § 70-1008 was amended in 1979. (T53:17-22). Complainant asserts that any load to which Respondent established service after 1980 without the Board's approval is in violation of Service Area Agreement 267. (T54:4-10). These loads are indicated by pink squares on Exhibit 8.

20. Complainant does not have its employees check along Respondent's line extending west of the City of Pierce to the Village of Foster for new services that may not be indicated on the original service area map. (T56:9-12).

21. Complainant alleges that Respondent's failure to coordinate with Complainant regarding establishing service to loads within Complainant's service area after 1980, and Respondent's failure to obtain the Board's approval to serve those same loads, has caused Complainant financial harm. Complainant alleges that not only did Respondent's actions deprive it of revenue from the loads involved, but also that Complainant would have engineered its distribution system in the area differently had it been able to provide service to the loads in question. (T56:13 to 57:3).

22. Until perhaps the past several years, Complainant has no record of communications with Respondent where the parties engaged in coordination to determine which power supplier would be better situated to provide service to new loads established after 1964 near Respondent's distribution lines in Complainant's service area. (T61:1-11). In the past it was Complainant's practice to provide written authorization in the form of a letter or similar written agreement for other neighboring power suppliers to serve loads in Complainant's service area. Likewise, it was Complainant's practice to request such a letter or agreement if it wanted to serve a customer located within a neighboring power supplier's service area. However, neither an application nor the letters were filed with the Board. (T61:24 to 62:21). In at least one instance, Complainant provided an undated letter to Respondent indicating that it would sign a consent and waiver form to submit to the Board in order for Respondent to serve a load located inside Complainant's service area. (T94:2-25; Exh. 16).

23. Complainant has established service to between two to four customers within Respondent's service area without obtaining a consent and waiver from Respondent and filing an application with the Board for authority to do so. Although there is some evidence that at least two of the services were established after 1980, it is unknown when the remaining services were established. (T73:20-25; T80:2-23).

24. Complainant has not previously filed any formal objection, application or complaint with the Board contesting Respondent's right to provide service to the Village of Foster or any of the loads interconnected to Respondent's line to the Village of Foster. (T68:4 to 69:16; Exh. 11, page 3). The parties stipulated that the present proceeding is

the only complaint filed by either Complainant or Respondent against the other party. Neither party has previously filed a complaint or similar formal action objecting to the other party serving one or more customers in the other's service area. (T79:15-24; T82:7-23).

25. Respondent in two previous instances filed an application to serve a customer in another power supplier's service area. These customers were located further than one-half mile from Respondent's line to the Village of Foster. (T89:16 to 90:5). In both known previous instances, the loads were located in Elkhorn Rural Public Power District's service area. Although Exhibits 7 and 15 seem to indicate that Complainant's service area was amended to encompass the southern half of section 25, which is approximately three miles due west of the City of Pierce, the Board's official service area map does not confirm this boundary. The Board's map shows that Complainant's service area ends at the east-west half-section line though section 25. This means that the services labeled 51 and 52 on Exhibits 7, 15 and 20 are both outside Complainant's service area, and in fact are in Elkhorn Rural Public Power District's service area. (T104:6 to 105:2; Exh. 7; Exh. 15; Exh. 20; Exh. 4, page 4, Exh. 5; Exh. 6).

26. In at least one other instance after 1980, Respondent obtained a Consent and Waiver form from Complainant and filed an application for authority to serve a customer located in Complainant's service area. (T112:15-19; Exh. 18).

27. Respondent admits that it established service to customers located within one-half mile of its line passing through Complainant's service area west of town after 1980, and even after 1991. Respondent's staff believed it still had the authority to

establish new services within one-half mile of its lines located outside its service area. Respondent's utilities manager testified that sometime between 1991 and 2000 he contacted the Board via telephone regarding Respondent's authority to serve a new load that was close to one-half mile from Respondent's line to the Village of Foster. He testified that an unknown Board staff member told him that the City of Pierce did not require permission to establish service to new loads if the line extension necessary to serve the load would be less than one-half mile in length. (T95:22 to 98:5). There is no evidence that the Board ever provided written confirmation of this opinion.

28. The evidence indicates that Respondent did not establish service to new electric loads located further than one-half mile from its distribution facilities without the Board's approval. (T89:16-25; T98:6-13).

29. Respondent asserts that it has incurred substantial financial investments in its distribution system necessary to establish and continue service to the loads located within one-half mile of its distribution facilities in Complainant's service area — perhaps in the millions of dollars. In support, Respondent cites to the addition of a substation and conversion of Respondent's rural facilities from a delta to a wye system. However, the testimony also demonstrates that the conversion from delta to wye was performed in 1962 or 1963, which was prior to the creation of S.A.A. 267 in 1964. (T98:14 to 99:8; (Exh. 4, pages 2 and 3). Respondent also asserts that it has a power supply contract with the Municipal Energy Agency of Nebraska ("MEAN"), and if Respondent were required to turn over the right to serve the customers to whom service was established after 1980 to Complainant after the numerous intervening years since service was established,

Respondent's rates could potentially be adversely impacted due to its responsibility to purchase the electricity that is necessary to service its minimum load requirements. (T101:4 to 102:11; T106:3-23; T110:7-21; Exh. 17). One of the Respondent's witnesses also testified that MEAN informed Respondent that although MEAN does not normally alter its contract such as the one it has with Respondent, and may not be required to do so under the terms of the contract, if a serious change in circumstances would occur that apparently is beyond the other contractual party's control, that MEAN would consider amending its contract. MEAN's entire board of directors would have to vote on whether to amend the contract. (T133:13 to 134:1).

30. Respondent's actions after 1980 to establish service to customers along its line to the Village of Foster were initiated in response to a request from either a customer or another power supplier. (T104:13 to 105:2; T112:10-13).

CONCLUSIONS OF LAW

31. Pursuant to the Board's Rules of Practice and Procedure, Title 285, Nebraska Administrative Code, Chapter 3, § 008, the Board has jurisdiction to conduct a hearing and render a determination on Complaints filed by any party alleging a violation of Nebraska law over which the Board exercises jurisdiction. The Board's jurisdiction extends to allegations that a power supplier is providing service to additional ultimate users outside its service area, or that the power supplier is constructing or has constructed an electric line or extension of an existing line into another power supplier's service area in order to serve customers without the Board's prior approval. Neb. Rev. Stat. § 70-1011. With certain exceptions, all power suppliers must receive the Board's approval

prior to building a transmission line carrying over seven hundred volts that will exceed one-half mile outside the supplier's own service area. Neb. Rev. Stat. § 70-1012.

32. There is uncertainty concerning the status of Respondent's right to continue serving customers located within one-half mile of its distribution line west of the City of Pierce and extending to the Village of Foster due to the language in Neb. Rev. Stat. § 70-1008 prior to 1979 allowing municipal electric utilities the right to provide service to customers located within one-half mile of their transmission lines passing through another utility's service area. The statute does not address the effect, if any, of the statutory change on those services existing prior to the 1979 amendment.

33. As described in the Findings of Fact above, in conjunction with that part of the hearing held on March 18, 2011, the parties submitted both orally and in writing certain questions they needed the Board to address in order to resolve the issues in C-45. For purposes of addressing the parties' questions, in the following five paragraphs the questions are paraphrased and stated in boldface, followed by the Board's conclusions.

34. The first question the parties requested the Board to address is "**Does Complainant have the initial burden of proof to show that Respondent is serving customers in what is now Complainant's service area?**" The Board believes Complainant does have the initial burden of proof to show that Respondent is providing retail electric service to customers in what is now Complainant's certified retail service area. A power supplier alleging a violation of its service area has the initial burden to show that another entity, which will usually be another electric utility, is attempting to or

has already established electric service to a customer or load within the complaining party's service area.

35. The second question submitted by the parties was "**Should the former version of § 70-1008 be read to mean that the area one-half mile on each side of Respondent's line was part of Respondent's service area, or is that provision inapplicable if the parties had a service area agreement?**" The version of § 70-1008 that was in effect prior to 1980 stated that the area within one-half mile of a transmission line passing through another power supplier's service area became part of the service area of the power supplier owning the line. Complainant asserts that because § 70-1008, in both the pre-1980 and post-1980 versions, states "In the absence of an agreement between the suppliers affected . . ." that the statute is inapplicable in the present situation, since the parties have a retail service area agreement. The Board believes the former version of § 70-1008 made the area one half mile on each side of Respondent's line part of Respondent's service area, unless the parties had a written agreement specifically altering this arrangement. The Board does not believe the service area agreement is the "agreement" referenced in the introductory language in the former version of § 70-1008, and therefore the existence of a service area agreement does not automatically negate the applicability of the language in subsection (2) regarding the service area on either side of Respondent's line. All adjoining power suppliers are required by law to have a service area agreement establishing the boundary line dividing their retail service areas. Neb. Rev. Stat. § 70-1002. Although every word and clause in a statute is important and meaningful, the reading urged by Complainant would essentially make the former version

of § 70-1008 say "In the absence of an agreement that the parties are mandated by law to enter into, the following will apply: . . ." Under such a reading, there would never be the absence of an agreement between the parties, making the language in the introductory section superfluous. Neither a court nor this Board will adopt an interpretation that renders statutory language essentially meaningless if it can be avoided. "Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided." Nelson v. Lusterstone Surfacing Co., 258 Neb. 678, 684, 605 N.W.2d 136, 142 (2000). The Board believes the appropriate interpretation of the applicable introductory language is that it refers to an agreement where the parties involved specifically agree to alter the status of the area within one-half mile of the municipality's line that is set out in the statute. In other words, the statute sets out the default parameters, but the Legislature provided the parties with the option of creating an alternate arrangement. This could be accomplished in the service area agreement or in another document, but it would need to explicitly state what alternate arrangement is being created. The Board believes this interpretation achieves the Legislature's intent, while avoiding what would appear to be an absurd result if the literal reading of the statute were followed. "In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice or absurdity." Rebman v. School Dist. No. 1, 178 Neb. 313, 318, 133 N.W.2d 384, 387 (1965), quoting Hevelone v. City of Beatrice, 120 Neb. 648, 234 N.W.2d 791 (1931).

36. The next question submitted by the parties was "**Are those services within one half mile of Respondent's line that were legally established by Respondent prior to the amendment in 1979 now grandfathered, allowing Respondent the right to continue serving those customers?**" The Board believes that the answer to this question is "yes." Although the statute does not specifically address this issue, the Board can find no reason why services that were legally established under Nebraska law would not continue to be legal services for that power supplier. To disallow these services to be grandfathered would be confusing to customers, disruptive to a utility, and potentially costly. There is nothing in the statute that indicates the Legislature did not intend to allow these legal services to remain with their existing power supplier.

37. Another question posed by the parties was "**If Complainant makes a showing that Respondent is serving customers in what is now Complainant's service area, and demonstrates that those customers are not indicated as exceptions on the parties' service area agreement map, does that create a rebuttable presumption that Respondent is illegally serving the customer?**" The Board believes the answer to this question is "No." If it can be determined that the service was established after the 1979 amendment became effective, and the service was not pursuant to a mutual agreement or by order of the Board or a court, then the service was established without legal authority. If it can be shown that the service was legally established prior to the 1979 amendment, then the answers to the previous questions clarify that Respondent is entitled to continue serving those customers.

38. The last question submitted by the parties to the Board at the March 18, 2011 portion of the hearing was "**If the date when service to a particular load was established is unknown, is the presumption that the customers Respondent is serving, if located within one-half mile of its line passing through Complainant's service area, were legally established by Respondent prior to the 1979 statutory amendment, or that they were established after the 1979 amendment and are presumed to be Complainant's customers?**" The Board finds that in instances such as those noted in the question, when the date of initial service cannot be determined using due diligence, that such services are presumed to have been legally established by Respondent prior to the 1979 amendment. The Board believes this approach minimizes customer confusion, as well as disruption and potential costs for the utilities involved.

39. That part of the hearing held on April 22, 2011, primarily addressed whether it constitutes a violation of Nebraska law or the Board's regulations for Respondent to have established service to, and to continue serving, customers located within one-half mile of Respondent's distribution line from the City of Pierce to the Village of Foster, when those services were established after 1980. Complainant alleges the services constitute a violation of Service Area Agreement 267, while Respondent claims that Complainant, by waiting years, sometimes decades, to raise this issue before the Board, has waived its right to serve those customers or acquiesced to Respondent serving those customers.

40. The Board concludes that Respondent is not entitled to a finding that Complainant has waived its service area protections for those services established after

1980 that are located within one-half mile of Respondent's distribution lines inside Complainant's service area or that Complainant has acquiesced to Respondent retaining those services. The Board understands that some of the loads involved have been served by Respondent for a considerable amount of time, potentially as much as thirty years, before Complainant brought this issue before the Board. However, there is nothing concrete in the record demonstrating that Complainant knew of the existence of the violations prior to filing its present Complaint. Even if Complainant had known of one or two instances of service area violations, it would not be unreasonable for Complainant to have believed these to be isolated instances, not necessarily warranting the time and expense of having its personnel conduct a thorough site investigation of all the services within one-half mile of Respondent's lines through Complainant's service area, particularly along the seventeen-mile line from the City of Pierce to the Village of Foster. The evidence indicates that Complainant does not, and never has, required its personnel to inspect all the services along Respondent's lines to ascertain which utility is providing electric service to the loads, and then compare that list to the service area map and prior applications to the Board to determine if Respondent had a legal right to serve that particular load. Complainant fails to do so at its own risk in the future, due to the Board's determination that if the date a service was established cannot be determined, it will be assumed that the Respondent established service prior to the effective date of the amendment to § 70-1008 rescinding Respondent's right to serve customers within one-half mile of its line passing through Complainant's service area.

41. The Board also finds that there is no evidence that Respondent acted in bad faith in establishing the services in question. The evidence indicates that Respondent believed it continued to have the right to serve loads located within one-half mile of its lines in Complainant's service area. The customers in question are almost all located within one-half mile of Respondent's line west of the City of Pierce that serves the Village of Foster. The few exceptions are located within one-half mile of Respondent's line north of the City of Pierce. The locations of Respondent's services along its lines in Complainant's service area tend to corroborate Respondent's assurance that its actions were performed in good faith. Although the Board accepts that Respondent did not act in bad faith, the Board cannot condone Respondent's failure to follow Nebraska law when it established a number of services inside Complainant's service area without prior approval from the Board or a court. It is a utility's responsibility to become informed regarding the legal requirements to establish electric services outside its service area, and to remain apprised of the amendments to those laws.

42. Respondent claims that it will be financially harmed if the Board finds that a service area violation has occurred and that Complainant has the right to take over the customers to whom Respondent established service after 1980 because Respondent will continue to be responsible to buy the electricity with which to serve those customers under its wholesale power supply contract with MEAN. An examination of the contract with MEAN, though, leads the Board to conclude that Respondent's contract with MEAN is, as indicated in the contract's title, a "Total Power Requirements Power Purchase Agreement." The terms of the contract require Respondent to purchase all of its electric

power at wholesale from MEAN. The contract does not establish a designated minimum purchase amount, nor does it specifically require Respondent to continue purchasing that amount of electricity for customers that Respondent has lost due to any reason such as a determination from an administrative agency that Respondent is serving those customers in violation of its service area agreement with Complainant. (Exh. 17). The contract states that "the City shall take from MEAN and pay MEAN for all electric power and energy required by the City of the Operation of its electric system, less its WAPA Allocation." (Exh. 17, page 8). The contract does allow MEAN to charge Respondent a demand charge (Exh. 17, page 14), which could be considered as a type of minimum purchase, but there is no evidence in the record demonstrating that the twenty-one services or twenty-eight individual loads established by Respondent subsequent to 1980 would constitute a large enough electric demand to affect Respondent's demand charge, when compared to Respondent's entire electric load.

43. Respondent provided the Board with an exhibit that sets out the distance between each of the post-1980 loads and Respondent's line to the Village of Foster, as well as the distance to the nearest line owned by Complainant that is capable of providing power to that load. (Exh. 23, pages 2 and 3; T121:3 to 125:22). This might be crucial information if the Board were attempting to ascertain which power supplier is in a position to more economically build a line to serve an individual load, but that is not the analysis involved in C-45. Under Nebraska law, a power supplier has the right, as well as the obligation, to provide electric service to all customers requesting service within its service area. Unless the power supplier holding the service area rights to a customer or

load's location consents to another power supplier providing service to that customer or load, the right to serve that load belongs to the power supplier holding the service area rights to that location. If the power supplier with the service area rights does not want to serve the customer, it can provide another power supplier with a signed consent and waiver form. In so doing, the power supplier consents to its neighboring power supplier serving that load, and waives a hearing on the matter. If a power supplier believes that it should provide the electric service to a location outside its service area, it can file an application with the Board, alleging that the power supplier holding the service area rights to that location cannot or will not furnish adequate electric service to the customer, or that the provision thereof by such supplier would involve wasteful and unwarranted duplication of facilities. See Neb. Rev. Stat § 70-1011. The issue in the present complaint proceeding before the Board is to ascertain whether violations of S.A.A. 267 occurred when Respondent established and continued to provide electric service to customers within one-half mile of its distribution line from the City of Pierce to the Village of Foster after 1980, and whether Complainant's failure to file a complaint or bring other similar formal action before the Board constitutes acquiescence, providing Respondent the right to continue serving the customers in question. The distances between Respondent's line and its post-1980 services, and between Complainant's nearest line and those same services, are therefore not relevant to the Board's decision.

ORDER

IT IS THEREFORE THE FINDING OF THE NEBRASKA POWER REVIEW BOARD that those customers within one-half mile of the City of Pierce's transmission or

distribution lines located inside the Northeast Nebraska Public Power District's service area to which the City provided electric service prior to the effective date of the 1979 amendment to Neb. Rev. Stat. § 70-1008 were established legally, and the City has the right to continue serving said customers.

IT IS THE FURTHER FINDING OF THE NEBRASKA POWER REVIEW BOARD that those customers or loads to which the City of Pierce established retail electric service in 1980 or afterwards (subsequent to the effective date of the 1979 amendment to Neb. Rev. Stat. § 70-1008) constitute a violation of retail Service Area Agreement 267 and the provisions of Neb. Rev. Stat. § 70-1011. If the date of initial service cannot be determined, it is presumed the City of Pierce established the service prior to 1980.

Dated this 24th day of June, 2011.

Michael Siedschlag
Chairman

Mark Graham
Vice Chairman

Pat Bourne
Member

Stephen Lichter
Member

Rick Morehouse
Member

CERTIFICATE OF SERVICE

I, Timothy T. Texel, Executive Director and General Counsel for the Nebraska Power Review Board, hereby certify that a copy of the foregoing **ORDER** in complaint C-45 has been served on the following persons at the addresses indicated, by mailing a copy of the same via certified United States mail, return receipt requested, first class postage prepaid, on this 24th day of June, 2011.

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