

STATE OF NEBRASKA

POWER REVIEW BOARD



Jim Pillen
Governor

August 12, 2025

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David A. Jarecke
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Dear Mr. Jarecke:

I received your request, submitted on behalf of several Nebraska public power districts that are your clients, for my opinion regarding certain provisions in a proposed Wholesale Power Contract (2026 WPC) currently being negotiated between the Nebraska Public Power District (NPPD) and your clients. The specific question you requested me to address is “whether the proposed language that purports to identify and set geographic limitations upon which entities may provide electricity, at wholesale, runs contrary to or circumvents the statutory requirements found in NEB. REV. STAT. § 70-1002.01.” My review of the contract, with one exception, is limited to the language in Article I, Sections A (definitions) and B (Term of Contract and Eligibility).

I do not see where in Sections A or B the 2026 WPC would limit the geographic area in which NPPD or its wholesale customers may offer or sell electricity at wholesale. However, as I read Section B of the proposed contract, it would provide some restrictions as to the customers to which NPPD and its wholesale customers can sell electricity at wholesale. Based on that understanding, it is my opinion that the language in Section B of the proposed contract is the type which Neb. Rev. Stat. § 70-1002.01 anticipates would be set out in a wholesale service area agreement.

It should first be acknowledged that the NPRB plays no role in wholesale power supply contracts. The NPRB has no authority to approve or otherwise become involved in the negotiation or enforcement of wholesale contracts between utilities, just as the NPRB lacks similar authority over power purchase agreements between public power utilities and other utilities or private developers.

The NPRB does have explicit statutory authority to approve wholesale service area agreements. As previously stated, the relevant statute on the issue of wholesale service area agreements is Neb. Rev. Stat. §70-1002.01. It states:

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All suppliers of electricity, including public power districts, public power and irrigation districts, individual municipalities, registered groups of municipalities, electric membership associations, and cooperatives, shall have authority to enter into written agreements with each other limiting the areas in which or the customers to which a party to the agreement shall provide or sell electric energy at wholesale. Wholesale electric energy is hereby defined as electric energy which is sold to another agency for resale to the ultimate user, hereafter referred to as the retail customer. Before such agreements shall become effective, they shall be submitted to and approved by the Nebraska Power Review Board created by section 70-1003. It is declared to be the purpose of this section to promote and encourage the making of such agreements. Such agreements may be amended by the parties thereto at any time, and such amendments shall require the prior approval of the Nebraska Power Review Board. When requested to approve such an agreement or amendment thereto, the Nebraska Power Review Board shall consider whether or not the proposed agreement or amendment can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area covered by the agreement. It may make such investigation as it deems necessary and hold a hearing if it determines one to be desirable. At the conclusion of its investigation the Nebraska Power Review Board shall approve the agreement or amendment unless it determines that it cannot be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area covered. Such agreements when approved by the Nebraska Power Review Board shall not be binding on other suppliers that are not parties to the agreement and the Nebraska Power Review Board shall have no authority to impose conditions that will be binding or applicable to other suppliers that are not parties to such agreements. Such agreements shall not be considered as establishing service areas within the meaning of Chapter 70, article 10.

Once parties have entered into a wholesale service area agreement and the NPRB approves it, the suppliers involved in the agreement shall not “offer, provide or sell electric energy at wholesale in areas or to customers in violation of any agreement entered into and approved by the Nebraska Power Review Board pursuant to section 70-1002.01.” Neb. Rev. Stat. § 70-1002.02.

Pursuant to the two statutes cited above, electric suppliers in Nebraska are authorized, but not required, to enter into wholesale service area agreements limiting the geographic area where they are allowed to sell electric service at wholesale, or the customers to which the parties to the agreement can provide or sell electricity at wholesale. If two electric suppliers do enter into such an agreement, it must be approved by the NPRB to be effective and enforceable. The NPRB can then act to prevent violations of wholesale service area agreements pursuant to its authority under Neb. Rev.

Stat. § 70-1015. Specifically, if an entity attempts to serve any wholesale customers in violation of § 70-1002.02, the NPRB can bring an action in the name of the State of Nebraska to enjoin the violation.

Since the enactment in 1971 of the statutes establishing rules for wholesale service areas the NPRB has approved twenty-one wholesale service area agreements. Not all those agreements are still in effect, as it appears many of the agreements included automatic termination (a.k.a. sunset) dates. The agreements are not common. The most recent wholesale service area agreement was approved by the NPRB in 1988.

If I understand it correctly, an entity that purchases its electricity at wholesale from NPPD for the purpose of reselling the electricity to other entities is defined to be a “Customer” of NPPD. A “Distributor” is defined as an entity other than a member of the Nebraska Electric Generation and Transmission Cooperative that purchases its electricity at wholesale from an NPPD Customer in order to sell the electricity at retail to the Distributor’s end-use customers. Under Section B of the proposed 2026 WPC, NPPD Customers are prohibited from selling electricity at wholesale to any other NPPD Customer. There is a provision whereby NPPD’s board of directors, along with a super-majority of the Customer Committee, can approve an exception to the prohibition. If an NPPD Customer has a wholesale contract with a Distributor that predates the 2026 WPC, and the contract expires during the term of the 2026 WPC, the Customer and Distributor can renew the contract without the approval of the Customer Committee. Since the contract does not exempt the need for approval of NPPD’s board of directors, I assume the NPPD board must still approve such renewals. If a Distributor wants to enter into a new contract to purchase electricity at wholesale from an NPPD Customer during the term of the 2026 WPC (and the Distributor is not already purchasing electricity under a contract with NPPD), the new contract must be approved by a super-majority of the Customer Committee. If the Distributor does not renew the contract with the NPPD Customer, NPPD may offer to sell wholesale electricity to the Distributor. Such an offer is not subject to approval by the Customer Committee.

If the above understanding of the proposed 2026 WPC is correct, it does not limit the geographic areas in which the parties can provide or sell electric energy at wholesale. However, it does appear to provide some restrictions or limitations on the customers to which parties to the contract can provide or sell electric energy at wholesale. The language in § 70-1002.01 states that “Before such agreements shall become effective, they shall be submitted to and approved by the Nebraska Power Review Board created by section 70-1003.” However, the language does not clearly state if such wholesale sales restrictions are not valid unless set out in a wholesale service area agreement, or only that if the parties choose to create a wholesale service area agreement that is effective and enforceable, it must be approved by the NPRB.

The one exception to my review of the 2026 WPC language being limited to Article I, Sections A and B is the language in Article I, Section L (Wholesale Sales Cooperation). Under that provision, the parties acknowledge that, absent a contrary agreement arrived at by the parties, the contract prohibits the parties from serving or offering to serve at wholesale any wholesale loads presently served by the other. Section L provides that if a Customer desires, NPPD and the Customer shall execute a wholesale service area agreement and file it with the NPRB for approval. It therefore appears that the Customer can require NPPD to jointly create a wholesale service area agreement with the Customer and file it for approval with the NPRB.

Although it is my opinion that the Nebraska Legislature expected an attempt to limit the geographic area or the customers to which the electric suppliers can sell electricity at wholesale to be accomplished through a wholesale service area agreement approved by the NPRB, it appears that in the 2026 WPC a Customer has the ability to require the creation of a wholesale service area agreement with NPPD, and to have the agreement filed with the NPRB for approval. I also believe that the NPRB would not have any authority to prohibit the inclusion of the language in Section B of the 2026 WPC, nor would the NPRB have any ability to enforce such a contractual provision. As stated in the outset of this opinion, the NPRB has no role in a wholesale electric service contract between two power suppliers. The NPRB is not a party to the contract and has no statutory enforcement authority over wholesale sales unless a wholesale service area agreement exists. If a party to the contract believes the provisions limiting the geographic area in which the parties can sell electricity at wholesale, or the customers to which they can provide such wholesale electric service, might be void or voidable due to the language in Neb. Rev. Stat. § 70-1002.01, I believe any challenge to the contract provisions would need to be pursued in the appropriate state district court. The NPRB lacks the general equitable power necessary to strike or void a contractual provision or grant other equitable relief.

I point out that this letter constitutes my opinion in my capacity as the general counsel of the Nebraska Power Review Board. To my knowledge the Board itself has not formally addressed this issue in any administrative order, declaratory order or guidance document. As I am sure you are aware, my opinion does not bind the Board or establish precedent should this issue come before the Board in any formal administrative setting.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy J. Texel", written in a cursive style.

Timothy J. Texel