

STATE OF NEBRASKA

POWER REVIEW BOARD



Pete Ricketts
Governor

August 9, 2016

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Chris Dibbern
General Counsel
Municipal Energy Agency of Nebraska
8377 Glynoaks Drive
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Dear Ms. Dibbern:

I received your request for an informal opinion dated August 3, 2016 concerning the process for the Municipal Energy Agency of Nebraska (MEAN) to decommission and/or sell wind farms or other generation facilities owned by MEAN. You pointed out that Neb. Rev. Stat. section 18-2461 prohibits agencies such as MEAN that are created under the Nebraska Municipal Cooperative Financing Act (agencies) from selling power plants. You also point out that Neb. Rev. Stat. section 18-2441 authorizes agencies to sell parts and commodities associated with a power plant. You also requested my opinion on the process that would need to be followed for an agency that is decommissioning or selling a power plant to sell the parts or remainder of the facility to a third party. Although the Power Review Board (PRB) has no direct role over decommissioning of power plants¹, I am willing to provide MEAN with my opinion of how to interpret the statutes involved.

I agree with your conclusion that Neb. Rev. Stat. section 18-2461 prohibits MEAN from selling a wind farm to a third party. The first sentence of the statute is very clear. It states "No power plant, system, or works owned by an agency shall be sold, alienated, or mortgaged by such agency." Later in the same statute it states "Neither by sale under foreclosure, receivership, or bankruptcy proceedings, nor by alienation in any other manner, may the property of such agency become the property of or come under the control of any private person, firm, or corporation engaged in the business of generating, transmitting, or distributing electricity for profit." The language used makes clear the Legislature intended to prohibit agencies from selling generation facilities to third parties.

¹ The PRB does have limited jurisdiction over decommissioning requirements for privately developed renewable energy generation facilities pursuant to Neb. Rev. Stat. section 70-1014.02(1), but that would not be relevant to a facility owned by MEAN.

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The language also prohibits agencies from selling its property to any private parties that are engaged in generating, transmitting or distributing electricity for profit. Admittedly, the latter prohibition would foreclose the sale of an agency's property from a generation facility, such as wind turbine parts with remaining useful operating ability, to what one would expect to be one of the primary buyers of such property – private companies engaged in the business of developing or operating electric generation facilities.

Yet in Neb. Rev. Stat. section 18-2441(1), it states that an agency has the power to “dispose of” one or more projects within or outside Nebraska. In section 18-2441(8) it states that an agency has the power to “sell, or otherwise dispose of, mortgage, pledge, or grant a security interest in any real or personal property, commodity, product, or service or any interest therein or right thereto”. When comparing the two statutes, the language in 18-2441 appears to contradict some of the language in section 18-2461. Normally when construing a statute, a court will try to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute being examined, using the plain, ordinary and popular sense of the language. See *Johnson v. Kenney*, 265 Neb 47 (2002). In order to reconcile two statutes that appear to contradict each other, a court will place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. Effect must be given, if possible, to all the several parts of a statute (or an act), and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. See *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003). Also, “Where different language is used in different parts of a statute (or an act), it will be presumed that the language is used with a different intent.” *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), aff'd 356 Neb. 61, 688 N.W.2d 689 (1999). In this case, there is one statute stating that an agency is authorized to “dispose of” its projects inside or outside of Nebraska and can “sell . . . any real or personal property” (section 18-2441(1)), but another statute prohibits an agency from selling or in any way alienating its power plants, and also prohibits the sale of the agency's property to private entities operating in the electric industry.

In order to review these two statutes together, one needs to engage in statutory construction. The Nebraska Supreme Court has stated that “[T]he rules of statutory construction require [a] court to give effect to the entire language of a statute, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.” *AT&T Communications v. Nebraska Public Service Commission*, 283 Neb. 204, 211 (2012). When applying the rules of statutory construction set out by the Nebraska Supreme Court, I believe the best way to reconcile the two statutes is that the Legislature intended in section 18-2461 to prohibit an agency from selling or transferring ownership of an electric generation facility that is either operating or capable of being operated from the agency which owns it to a third party. The Legislature also wanted to

prohibit an agency from selling the parts or property of such a facility to private parties engaged in the electric generation or transmission business. Based on the language in section 18-2441, the Legislature intended to allow an agency to sell the property or parts from an electric generation facility, so long as it is not sold to private entities operating in the electric industry.

When trying to ascertain the intent of the legislature, courts may examine the legislative history of a statute or act. I read the legislative history for the bill that created the Municipal Cooperative Financing Act (LB 132 (1981)). Both sections 18-2441 and 18-2461 were enacted as part of LB 132 (1981). Unfortunately, I found nothing in the legislative history that provides any guidance on the topics raised in your opinion request.

It is my opinion that an agency has the authority to decommission an electric generation facility by selling the parts of the facility that would make the facility able to function as an electric power plant. In the case of a wind powered generation facility, this might include disposing of the turbine nacelles and blades to any party other than private for-profit businesses owning or operating generation or transmission assets. I do not believe the Legislature intended to require agencies to so completely decommission a facility that it is essentially returned to its "green field" status, and then assign leases, making any other entity wanting to use that site for a wind farm to build an entirely new facility from scratch. Although the Municipal Cooperative Financing Act is not clear on this issue, it appears to me that the Legislature wanted to prevent an agency from selling generation facilities, but not to prohibit an agency from decommissioning a facility and selling the usable parts to any party other than private for-profit businesses operating in the electric industry. This would allow an agency to assign leases, sell the concrete pad sites, etc. To require that decommissioning of a facility return it to "green field" status and requiring another entity to rebuild those very same assets would not, in my opinion, seem to be a sensible result.

There does remain the fact that section 18-2441(1) authorizes an agency to "dispose of" power plants inside or outside Nebraska, and section 18-2441(8) authorizes an agency to "sell or otherwise dispose of" any real or personal property, while section 18-2461 prohibits the sale or alienation of power plants. Given the unequivocal and very specific language in section 18-2461, and that the language regarding selling power plants in 18-2441 was part of a somewhat lengthy list of activities that relate to the topic in a much broader context, I believe the prohibition in section 18-2461 controls. To the extent there is a conflict between two statutes on the same subject, the specific controls over the general statute. *Sack v. Castillo*, 278 Neb. 156, 160, 768 N.W.2d 429, 433 (2009).

Based on the forgoing, it is my opinion that MEAN could not sell or otherwise alienate its ownership of a wind farm or other generating facility, certainly one that MEAN owns by itself. Once the facility is decommissioned, meaning that it is rendered inoperable as a functioning generation facility, MEAN could sell the remaining parts and assign leases to a third party (other than private for-profit entities operating in the electric industry). So, for example, MEAN could decommission a wind farm by selling the nacelles and turbine blades, rendering the property inoperable as a wind farm. It would follow that MEAN could then sell other parts, such as the concrete pad sites and towers, and assign its leases (pursuant to contractual limitations), to any permissible third party. If any third party would want to purchase the pad sites, towers, etc. in order to turn the site back into a generation facility, that entity would be required to file an application with the PRB requesting authorization to construct the assets necessary to return the site to a functioning wind farm. It is difficult to say precisely what needs to be done so that the generating facility is no longer considered a power plant, but I would think it is what would render the facility inoperable as a generation facility. It seems to me reasonable to assume that removal of the nacelles and blades would render a facility inoperable as a wind farm.

Please understand that this letter constitutes my opinion in my capacity as the general counsel of the Nebraska Power Review Board. The Board itself has not formally addressed the issue, and has not taken a position on these issues either in a public meeting or in any administrative order, policy or declaratory order.

Sincerely,



Timothy J. Texel
Executive Director and General Counsel

Texel, Tim

From: Chris Dibbern <cdibbern@NMPPENERGY.ORG>
Sent: Wednesday, August 03, 2016 3:16 PM
To: Texel, Tim
Cc: Tim Sutherland; Bob Poehling; Brad Hans
Subject: Decommission questions

August 3, 2016

Timothy J. Texel
Executive Director and General Counsel
Nebraska Power Review Board
301 Centennial Mall South
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Lincoln, NE 68509-4713

Dear Tim:

The Municipal Energy Agency of Nebraska ("MEAN") would like your informal opinion about the possible decommission and sale of windfarms/ power projects in Nebraska. According to Nebraska Revised Statute § 18-2461, a power plant, system, or works cannot be sold by an agency – such as MEAN. If the decommissioning process were to begin, at what point is a power project no longer considered a plant, system, or work? Under Neb. Rev. Stat. § 18-2441, an agency like MEAN can sell parts and commodities associated with a power project, but the sections are a bit confusing when taken as a whole.

MEAN's understanding is that a facility does not have to be completely gone to be considered decommissioned. Rather, once the facility is no longer operating, parts, leases and commodities can be sold. Once parts have been sold and the facility is no longer operating, the new owners may have responsibility back before the Nebraska Power Review Board. After the sale it would seem the new owner of the lease would be able to restore the facility to a power plant, system, or work if they successfully complete their regulatory responsibilities.

We are interested to receive your opinion on this process. Thank you for your time and assistance in this matter.

Sincerely,

Chris Dibbern

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