

# STATE OF NEBRASKA

## POWER REVIEW BOARD



**Dave Heineman**  
Governor

April 30, 2014

**Timothy J. Texel**  
*Executive Director  
and General Counsel*  
301 Centennial Mall South  
P.O. Box 94713  
Lincoln, Nebraska 68509-4713  
Phone: (402) 471-2301  
Fax: (402) 471-3715  
[www.powerreview.nebraska.gov](http://www.powerreview.nebraska.gov)

David Levy, Esq.  
Baird Holm, LLP  
1700 Farnam Street  
Omaha, NE 68102-2068

Dear Mr. Levy:

I am providing you with this letter following up our telephone conversation yesterday regarding questions about the Nebraska Power Review Board's (NPRB) jurisdiction in certain situations. Please be advised that the opinion in this letter is my opinion as the NPRB's general counsel, but the Board itself has not addressed this issue. If you or your client would like the Board to consider adopting my opinion through formal action during a public meeting or through the declaratory order process provided for under the Nebraska Administrative Procedure Act, please let me know and we can decide how best to proceed.

As I understand the situation, Valentine Wind, LLC intends to construct a single wind turbine electric generating unit southwest of the City of Valentine. The output from the turbine will be sold to the City of Valentine. Valentine Wind, LLC, obtained authority to construct the turbine from the Federal Energy Regulatory Commission under the process provide for in the Public Utility Regulatory Policies Act of 1978 (PURPA). The interconnection line connecting the turbine to the City's electric grid will be approximately three miles in length. The turbine and the intertie line will be located in K.B.R. Rural Public Power District's certified service area. K.B.R. RPPD does not object to the construction of the line in its territory. The primary purpose of the line is to transmit the electricity generated by the turbine to the City's distribution grid. The secondary purpose of the line is to provide power to the turbine during periods when the turbine is not generating sufficient electricity to power its needs, such as aviation lights and monitoring equipment.

The question arose whether NPRB approval is required prior to construction of an intertie line constructed solely to serve the needs of a PURPA-approved generation facility such as the one involved in situation described above. Normally, prior to

**Stephen M. Lichter**  
*Waterloo  
Chair*

**Frank J. Reida**  
*Omaha  
Vice Chair*

**MEMBERS**  
**Chuck D. Haase**  
*Grand Island*

**Rick A. Morehouse**  
*Scottsbluff*

**Dennis E. Grennan**  
*Columbus*

commencing construction of any transmission or distribution line carrying more than 700 volts, a power supplier must obtain the NPRB's approval. See Neb. Rev. Stat. § 70-1012. Exceptions apply for short line extensions, but the three miles involved here does not qualify. A power supplier is defined by State statute as "any legal entity supplying, producing, or distributing electricity within the state for sale at wholesale or retail." See Neb. Rev. Stat. § 70-1001.01.

Although normally all generating units such as the one described above require NPRB approval, if a generating unit or facility is approved under the federal PURPA process, the NPRB's jurisdiction is preempted. See Nebraska Attorney General's Opinion 04024 (2004). We discussed whether an intertie line serving a PURPA-approved facility falls within the NPRB's jurisdiction, or if the PURPA approval for the line necessary to serve a federally-approved project likewise preempts NPRB jurisdiction. As I noted during our telephone conversation, I believe the federal regulations provide a clear answer to the question. A qualifying facility for PURPA application purposes is defined in Title 18 C.F.R. Part 292, Subpart A, as follows:

- "(b) *Definitions.* The following definitions apply for purposes of this part.
- (1) *Qualifying facility* means a cogeneration facility or a small power production facility that is a qualifying facility under Subpart B of this part.
    - (i) A qualifying facility may include transmission lines and other equipment used for interconnection purposes (including transformers and switchyard equipment), if:
      - (A) Such lines and equipment are used to supply power output to directly and indirectly interconnected electric utilities, and to end users, including thermal hosts, in accordance with state law; or
      - (B) Such lines and equipment are used to transmit supplementary, standby, maintenance and backup power to the qualifying facility, including its thermal host meeting the criteria set forth in *Union Carbide Corporation*, 48 FERC ¶61,130, *reh'g denied*, 49 FERC ¶61,209 (1989), *aff'd sub nom.*, *Gulf States Utilities Company v. FERC*, 922 F. 2d 873 (D.C. Cir. 1991); or
      - (C) If such lines and equipment are used to transmit power from other qualifying facilities or to transmit standby, maintenance, supplementary and backup power to other qualifying facilities."

Title 18, C.F.R. 292.101, Subpart A (emphasis in original).

David Levy, Esq.  
April 30, 2014  
Page 3 of 3

As stated previously, the primary purpose of the proposed line is to transmit the power from the turbine to the City's electric grid, and the secondary purpose is to provide backup power to the turbine when it is not producing electricity. The project was approved by FERC under the PURPA process, the PRB was notified of the approval, and the notice was designated in the NPRB's files as QF-14-149. Under the regulations in (b)(1)(i)(A) above, the proposed line would be considered part of the federally-approved qualifying facility project since the line interconnects the turbine with the City's electric grid. The project would also be considered part of the qualifying facility under (b)(1)(i)(B), since the line also supplies the turbine with standby, maintenance and backup power. It is my understanding these are the only two purposes the line serves.

For the reasons set out above, it is my opinion that the NPRB's jurisdiction to approve or deny a transmission or distribution line project is preempted when the sole purpose of the line is to serve a generation facility approved by the Federal Energy Regulatory Commission under the Public Utility Regulatory Policies Act of 1978. Applying this to the situation involving the line serving the turbine southwest of the City of Valentine, it is my opinion the Nebraska Power Review Board has no jurisdiction to approve or deny the proposed line.

Sincerely,

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

Timothy J. Texel  
Executive Director and General Counsel