STATE OF NEBRASKA

POWER REVIEW BOARD

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

Pete Ricketts
Governor

To: Nebraska Power Review Board Members

From: Tim Texel, Executive Director & General Counsel

Date: March 31, 2020

Subject: Legal Counsel's Opinion Regarding Guidance On Acceptable Deviation When Considering Public Power District Population Apportionment Plans

During one of its recent public meetings, the Power Review Board considered a public power district's Petition for Charter Amendment in which the district was apportioning population among its voting subdivisions. The specific details of that situation are not relevant to this analysis. Near the conclusion of the discussion at the Board's public meeting, the district's legal counsel noted that it would be helpful if the Board were to provide the districts with additional guidance regarding what population deviations would be acceptable when a district amends its charter to allocate population among its voting subdivisions. The Board asked me to examine the issue and provide it with some guidance. At the March 9, 2020 meeting I provided the Board with a memo outlining my research and initial recommendations. The Board asked me to put my research and recommendations into the form of a legal counsel's opinion.

It has been the Power Review Board's (PRB) longstanding practice that, as a general rule, if the population of a district's voting subdivisions vary by ten percent or less from the ideal, the PRB will afford a presumption that the district made a reasonable and good faith effort to distribute the district's population among its subdivisions in as equal a manner as can reasonably be expected. This was essentially treated as a rebuttable presumption. The Board historically based its general rule on a ten percent variance plus or minus from the number that would be the ideal average in each subdivision.

When examining a petition to amend a public power district's charter, the Legislature has established the criteria the PRB will follow. Regarding the population of voting subdivisions, Neb. Reb. Stat. § 70-612(1)(a) states that "Each subdivision shall be

composed of one or more voting precincts, or divided voting precincts, and the total population of each such subdivision shall be approximately the same." Section 70-612 deals specifically with charter amendments, so it would be directly applicable to the current issue. In a related statute, Neb. Rev. Stat. § 70-604(6) states "When the Nebraska Power Review Board finds from the evidence that subdivisions, from which directors are to be elected or appointed, are necessary or desirable, such subdivisions shall be of substantially equal population." However, §70-604 applies to the initial creation of public power districts, not amendments to their charters.

Although no doubt it would be enormously helpful to the districts, their legal counsels, the PRB staff and even the PRB members, to have guidelines that are as definitive as possible regarding what population variances will and will not be allowed, the caselaw indicates that the discretion of the decision-maker is vitally important, and to establish specific guidelines would interfere with such discretion. The caselaw provides examples of numerous factors that should be weighed when determining if an entity has succeeded in achieving voting subdivisions that are "approximately the same" or "substantially equal".

By using the phrases "approximately the same" and "substantially equal" it can reasonably be inferred that the Legislature acknowledged that some discrepancy from the ideal allocation is either anticipated or allowable. "Approximate" and "substantially" are both qualifying terms that allow for at least some degree of variance. Thus, it seems clear the Legislature intended to allow the Board some level of discretion. This appears to be consistent with the analysis conducted by many other governmental bodies tasked with establishing or approving voting population distribution plans. The Board historically provided informal guidance by establishing a level of discrepancy that would be afforded general deference for acceptability – a ten percent variance from the ideal. It could be argued that in so doing the Board took more liberty than is authorized by Nebraska law. As a general proposition, giving some deference to a modest level of variance appears to be consistent with Nebraska and federal caselaw. If the Board were to go further and, for example, create a Guidance Document establishing additional parameters of what population variance would be approved, I believe there is a substantial likelihood a court would find that the Board is abandoning its duty to exercise its judgment based on the facts presented on a case by case basis. A court may well find that the Board is making predeterminations not authorized by statute. Although well-intentioned, the caselaw indicates a decision-making body should not make such predeterminations regarding population apportionment in voting districts.

There are court precedents that can provide guidance in determining whether a district's population variance is acceptable. As previously mentioned, the factors involved in an individual case would need to be examined on a case-by-case basis, though.
In *Pelzer v. City of Bellevue*, 200 Neb. 541 (1978), the Nebraska Supreme Court analyzed redistricting ordinances enacted by the City of Bellevue. The Court upheld the

redistricting even though there was a total variance of 9.73 percent from the ward with the greatest population to the one with the smallest population. The Court held that it was legitimate for the municipality to take into account considerations such as keeping neighborhoods together, moving as few people as possible from one district to another, and to change existing district lines as little as possible. The Court went on to say that "Mathematical precision and exactness are impossible as a practical matter, and can be approached only within flexible limits . . . ." *Id.* at 545.

Special purpose districts, such as public power districts, are generally afforded some additional discretion in attempting to equalize population among their voting subdivisions. Special purpose districts usually operate in a relatively small portion of a state. In *Abate v. Mundt*, 403 U.S. 182 (1971), the U.S. Supreme Court upheld a variance of 11.9 percent from the ideal. The Court noted that due to the smaller populations involved in local governmental entities, slightly greater percentage deviations from the population ideal may be tolerable than would be allowed for congressional or state plans. The *Abate* decision was cited by the Nebraska Supreme Court in its analysis of equal representation voting issues in its *Pelzer* decision.

Although courts have held that deviations from the mathematical ideal population distribution are allowable, the courts have also made clear that establishing a fixed level of deviation would not be acceptable.

In examining equal protection rights under a state redistricting plan created by the Alabama Legislature, the U.S. Supreme Court held that "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The Court later went on to say "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible. . . ." *Id.* at 579. Although the *Reynolds* case dealt specifically with apportionment for state legislatures, it would seem the same basic principles would apply equally well to public power districts. In examining equal protection issues, the Court declined to establish specific criteria for examining apportionment of population for voting purposes. The Court stated "For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment." *Id.* at 578. If one substitutes "State" with "public power district" the Court's determination that voter apportionment should be decided on a case-by-case analysis would seem to apply equally well to population distribution by Nebraska's public power districts.

The Nebraska Supreme Court cited the *Reynolds* decision, specifically referencing the idea that instead of establishing a set deviation that would be acceptable as a general rule, courts should rather examine apportionment challenges on a case-by-case basis. In its *Pelzer* decision, the Court stated:

> While the [U.S. Supreme] court rejected the idea that there is some fixed minimum deviation from equality that is permissible in every case, the court concluded that the facts of each case must be examined to determine whether the existing deviation is the product of proper state considerations. In Burns v. Richardson, 384 U.S. 73, 86 S. Ct. 1286, L.Ed. 2d 376, the Supreme Court indicated that variations from a pure population standard might be justified, and that such state policy considerations as the integrity of political subdivisions, the maintenance of compactness, and contiguity in legislative districts, or the recognition of natural or historical boundary lines might be appropriately considered.

Pelzer at 546. Citing another U.S. Supreme Court case, the Nebraska Supreme Court in its *Pelzer* decision went on to say:

> In Kirkpatrick v. Preisler, 394 U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519, the court recognized that while fixed numerical standards which excuse population variances could not be set without regard to the circumstances of each particular case, the extent to which equality may practicably be achieved may differ from state to state and from district to district. The court determined that the "as nearly as possible" standard requires that the state make a good faith effort to achieve mathematical equality.

Id. The Court went on to point out that "The principle of one man, one vote is, of course, applicable to local governmental bodies as well as to state legislatures." *Id.* at 546-547.

In *Mahan v. Howell*, 410 U.S. 315, 329 (1973), the U.S. Supreme Court upheld a Virginia legislative apportionment plan where the total deviation range from the mathematically ideal was 16.4 percent. In upholding the variance, the Court noted that "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviation is permissible, and what is not." The *Mahan* case was also cited by the Nebraska Supreme Court in its *Pelzer* decision.

Regarding whether a total variance of ten percent might be permissible as a general rule, it should be pointed out that in its *Pelzer* decision, the Nebraska Supreme Court noted that "In 1973, in two cases involving state legislative districts in which the deviation percentages were 7.83 percent and 9.9 percent, the Supreme Court determined that

plaintiffs had failed to make a prima facie case of constitutional violation, and that no rational state interest need be shown. See, *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321, 37 L.Ed. 2d 298; *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314." *Id.* at 547. It therefore appears there is some precedent for a somewhat relaxed standard when the deviation from the ideal is less than ten percent.

Based on a review of the caselaw cited in this opinion, I do not believe it would be appropriate for the Board to establish a standardized level of deviation that would or would not be acceptable in all circumstances when reviewing public power district petitions to reapportion population among subdivisions. Both the Nebraska and U.S. Supreme Court have indicated that the entity responsible for apportionment or approving an apportionment plan must be free to consider numerous factors when determining if the apportionment meets the standard of "approximately the same" population in each of a district's subdivisions. However, in order to provide the districts with as much guidance as the Board can, I believe it would be appropriate for the Board to follow a general rule that a total deviation of ten percent from the subdivision with the smallest population to the subdivision with the largest population will be afforded a general assumption that the district engaged in a reasonable and good faith effort to distribute the population among its subdivisions in numbers that are approximately the same. In other words, deference could be afforded a plan where no subdivision deviates from the ideal by more than five percent plus or minus from the mathematically ideal average number, or where the deviation is less than ten percent between the subdivisions with the greatest and lowest population numbers. The general assumption would be negated if the evidence indicates that the district could have apportioned the population with more accuracy, without the presence of mitigating factors showing that such deviation was needed to achieve a rational governmental interest. Admittedly, such a general presumption is not as definitive as the districts would prefer, but I believe it is the safest method to ensure any reapportionment plan would meet statutory and constitutional requirements and withstand court scrutiny.

Timothy J. Texel