

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

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Docket No. EL24-110-000

**MOTION TO INTERVENE AND COMMENTS OF
THE NEBRASKA POWER REVIEW BOARD**

Pursuant to Rules 212 and 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.214, the Nebraska Power Review Board (NPRB) hereby moves to intervene in the above-referenced proceeding. It is the NPRB’s understanding that the Federal Energy Regulatory Commission (FERC or the Commission) requests that a party submit its comments associated with the intervention along with the Motion to Intervene. The NPRB therefore submits its comments for the Commission’s consideration following the arguments in support of its intervention.

I. MOTION TO INTERVENE

The NPRB is an agency of the State of Nebraska, created pursuant to state statute as set out in Neb. Rev. Stat. § 70-1003. Each of the NPRB’s five members are appointed by the Governor of the State of Nebraska and confirmed by the Nebraska Legislature. Pursuant to Neb. Rev. Stat. §§ 70-1001 to 70-1028, the NPRB is the state agency with

primary jurisdiction over electric suppliers operating in Nebraska. Nebraska is unique in the United States in that all of the electric suppliers with retail customers are not-for-profit consumer-owned utilities, commonly referred to as “public power” entities. Nebraska’s retail electric power suppliers are comprised of public power districts, municipalities, and cooperatives. The governing bodies of these utilities are allowed to establish their own rates without state-level approval. Although the NPRB does not approve electric rates, pursuant to Neb. Rev. Stat. § 70-1012 the NPRB is the state regulatory agency with authority to approve or deny applications filed by electric suppliers for approval to construct or acquire generation and transmission facilities in Nebraska. The NPRB is also the state agency responsible for approving the creation of certified retail electric service areas and any amendments thereto, and resolving service area disputes. All electric utilities in Nebraska that own bulk transmission assets have joined the Southwest Power Pool (SPP) as transmission-owning members. Each state which has at least one transmission-owning utility that is a member of the SPP has the right to designate a board member or commissioner to serve as that state’s representative on the SPP Regional State Committee. The NPRB has a voting representative that serves on the Regional State Committee.

Based on the information and summarized arguments contained in the Petition for Declaratory Order filed by the SPP in EL24-110-000, the NPRB has considerable interest in the outcome of the proceeding. According to the information in the SPP’s

filing, issues of great concern to the NPRB and Nebraska's regulatory framework for electric generation facilities and the interconnections thereof are implicated in the proceeding. The NPRB also believes it has information regarding the status of Nebraska law and Nebraska administrative processes that may be helpful to the Commission in this proceeding. In addition, the NPRB wishes to provide comments regarding the interpretation of SPP's tariff language for the Commission's consideration, as the ruling in this proceeding may not affect only the Omaha Public Power District, but would seem likely to affect all of Nebraska's public power electric utilities that are transmission-owning members of the SPP.¹ The NPRB agrees with SPP's statement that "The instant dispute has far-reaching implications beyond the parties."²

The NPRB therefore submits that, as the state agency with regulatory authority over electric suppliers operating in Nebraska, the NPRB's perspective is unique in this proceeding, its interests cannot be represented by any other party, and its participation as a party is in the public interest.

II. INTRODUCTION OF NPRB COMMENTS

The NPRB played no role and did not participate in any way in the negotiations concerning the generation interconnection agreement (GIA) between the Omaha Public

¹ The NPRB agrees with SPP's statements in its Petition at page 4, that "OPPD is not the only public power SPP Transmission Owner located in the State of Nebraska. The result of this dispute could impact other interconnection requests in Nebraska involving other Transmission Owners." [footnote omitted].

² SPP Petition at 4.

Power District (OPPD) and Eolian, L.P. (Eolian). The NPRB therefore bases its comments primarily on the information provided in SPP’s Petition for Declaratory Order and its appendices.

III. PREEMPTION ARGUMENT

In its Petition, SPP states that Eolian “expressed to SPP that it believes that the Commission has exclusive jurisdiction over the resolution of the GIAs and that SPP is required to file the unexecuted GIAs.”³ SPP goes on to state that “This dispute invokes issues such as federal supremacy and potential federal preemption of state law and the filed rate doctrine . . .” and that it “implicates States’ rights to determine what types of generation are built in their state to begin with, which is an issue that is decidedly beyond the Commission’s jurisdiction.”⁴ It is not clear to the NPRB if SPP is raising the issue of federal preemption of states’ rights *sua sponte*, or if Eolian at some point asserted to SPP that Nebraska law may be federally preempted. It is difficult for the NPRB to properly counter such a claim, as it is not specified exactly what federal statute or act is alleged to be the basis of such federal preemption, or the scope of such alleged preemption, but rather only that preemption is implicated.

Indeed, this proceeding does not really seem to raise a federal preemption question at all. SPP is essentially asking if it should comply with Section 39.1 of its own

³ SPP Petition at 17.

⁴ SPP Petition at 19.

FERC-approved Tariff that requires rejection of a GIA if the relevant public power entity asserts that the GIA violates state law. As the 4th Circuit in *Bryan v. BellSouth Communications, Inc.*, 377 F.3d 424 (4th Cir. 2004) stated:

And we are further cognizant that a filed tariff carries the force of federal law. See *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992) (observing that “federal tariffs are the law, not mere contracts”). As one of our sister circuits has explained, “[a] tariff filed with a federal agency is the equivalent of a federal regulation . . . *Cahnmann v. Sprint Corp.*, 377 F.3d 424 (2004). [*Id.* at 429].

Regardless of what party is raising the issue, the NPRB disputes any claim that the State of Nebraska’s regulatory framework and the NPRB’s jurisdiction over the approval of new generation facilities is preempted by federal law. The implications of such a finding would be far-reaching. To the extent this issue may be presented or argued by any party in this proceeding, the NPRB urges the Commission to reject it.

In conversations with Eolian’s legal counsel during the NPRB’s public meeting held May 31, 2024, and in subsequent conversations, it was expressed that Eolian’s position is that the filing and implementation of the GIA is controlled by federal law instead of SPP Tariff section 39.1, but Eolian acknowledges the NPRB’s jurisdiction to accept a filing and consider approval of the ESRs. Regardless of what decision the Commission makes regarding the application of federal law to the GIA, SPP Tariff section

39.1, and SPP Membership agreement § 3.12, the NPRB supports the position that if interconnection were to be ordered, Eolian would then at some point prior to commencement of construction need to file an application with the NPRB for approval of the facilities, as provided for in Nebraska law. The NPRB would then address the issue raised in this proceeding regarding whether Nebraska law allows private entities to construct and operate generation facilities not covered by the privately developed renewable energy generation facility (PDREGF) process established in Neb. Rev. Stat. § 70-1014.02 and 70-1001.01(10).⁵

The NPRB agrees with SPP's reading of FERC Orders 2003 and 841, specifically that those orders pertain to generator interconnections and access to wholesale markets once an ESR is in existence.⁶ It is the NPRB's understanding that the orders do not address or interfere with a state's regulatory approval process for approving proposed facilities, including ESRs. Interconnection of a generator is a separate and distinct issue from a state's regulatory approval process for generator resources.

IV. SPP TARIFF LANGUAGE

In determining what action SPP should take regarding the GIA, based on the information available to the NPRB, it appears to the NPRB that the language in SPP's

⁵ Parties should be aware that the subdivisions in Neb. Rev. Stat. § 70-1001.01 have been renumbered by the Nebraska Revisor of Statutes in early June 2024 due to the enactment of several bills that amended the statute during the 2024 legislative session, some of which are already in effect and codified.

⁶ SPP Petition at 20 and 24.

Tariff is clear and controlling. SPP Tariff section 39.1 states, in pertinent part, “[I]n the event that the governing board of such public-power entity(ies), subject to state court review, determines that a conflict exists between the applicable state law, regulations, or rate schedules, and provisions of this Tariff as interpreted by the Commission, such state law, regulations or rate schedules shall govern with respect to the application of this Tariff to such public-power entity(ies).”⁷ Tariff section 39.1 goes on to state that if the public power entity’s governing board determines a conflict with state law exists, the public power entity must file documentation with the Commission notifying it of the governing board’s determination and provide an explanation of the conflict and any action taken in response to the governing board’s determination.

In the present proceeding involving Eolian and OPPD, OPPD’s board of directors passed Resolution No. 66346 during a public meeting held on April 16, 2024.⁸ OPPD provided written notice to SPP of the OPPD board’s determination in a letter dated May 9, 2024.⁹ It therefore appears OPPD has complied with all requirements set out in SPP Tariff section 39.1.

SPP confirms in its Petition that OPPD has followed the process set out in Tariff section 39.1.¹⁰ Thus, in the absence of a Nebraska state court ruling to the contrary, the

⁷ SPP Petition, Appendix 1, page 11.

⁸ SPP Petition, Appendix 1, page 8

⁹ SPP Petition, Appendix 1, pages 1-3; SPP Petition at page 4.

¹⁰ SPP Petition at 28.

OPPD board's interpretation of state law is determinative for purposes of considering the propriety of accepting Eolian's GIA. It therefore appears incumbent on SPP to follow its Tariff and deny the interconnection. The NPRB takes this position not to effect policy or to necessarily espouse support for the mechanism in SPP Tariff section 39.1 used to determine the appropriate interpretation of state law, but rather to ensure compliance with the procedures that the SPP and its members established in the Tariff, which the Commission approved, that will likely affect numerous Nebraska public power utilities.

V. STATE REMEDIES AVAILABLE TO THE PARTIES

The NPRB points out that both Eolian and OPPD have state administrative and judicial remedies available to them to make a final determination whether private entities can construct electric generation facilities in Nebraska.¹¹ The NPRB wants to inform the Commission that the NPRB has never ruled on this issue in the context of a formal adjudicatory process. No application filed by a private entity for authority to construct an electric generation facility in Nebraska has gone through the administrative hearing process, followed by a formal written decision issued by the NPRB.¹² Thus, the

¹¹ Although the NPRB has never addressed the specific issue raised in SPP's Petition, the NPRB has made a finding that Energy Storage Resources (ESR) fall under the NPRB's jurisdiction and require either NPRB approval prior to construction or installation, or a determination that the facility falls under an exemption. See the NPRB's Order in docket PRB-3949-ESR, paragraph 34, Exhibit 1 to these comments.

¹² There is a specific notice and certification process under Nebraska law for facilities that qualify as a privately developed renewable energy generation facility under Neb. Rev. Stat. § 70-1014.02, as well as small net metering facilities (up to 25 kilowatts capacity) under Neb. Rev. Stat. §§ 70-2001 to 70-2005.

NPRB has never issued a final decision on the topic, which would then be subject to appeal to the Nebraska Court of Appeals and ultimately to the Nebraska Supreme Court.

Parties wishing to obtain a determination of a particular issue within the NPRB's primary jurisdiction, but not wanting to file an application for a generation facility, have other administrative remedies available to them. Under the Nebraska Administrative Procedure Act, a person or entity can file a petition for declaratory order with the NPRB to request a determination of the issue.¹³ Neither Eolian nor OPPD, nor any other party, has filed a petition for declaratory order requesting that the NPRB determine whether a private party is authorized under Nebraska law to construct or install a generation facility in Nebraska that is outside the context of the facilities using renewable fuels enumerated in the PDREGF process or net metering.

Likewise, no Nebraska state court has ruled on the specific issue of whether Nebraska law allows private entities to construct electric generation facilities in Nebraska, or prohibits such construction (other than those facilities using renewable fuel sources enumerated in the PDREGF statutes). No entity, including Eolian and OPPD, has brought such an action in Nebraska state court to address this issue.

¹³ Neb. Rev. Stat. § 84-912.01.

VI. INTERPRETATION OF NEBRASKA LAW

In its Petition for Declaratory Order, SPP states “Therefore, a Declaratory Order is needed to provide guidance as to whether SPP is required to file the GIAs unexecuted, as Eolian asserts, or whether Nebraska law precludes the development and operation of the Eolian ESRs by Eolian, as OPPD avers.” [footnote omitted].¹⁴ The NPRB would submit that SPP’s dilemma is answered by a determination of whether OPPD provided proper documentation to show it made the necessary determinations as to the status of Nebraska law. If OPPD complied with its procedural requirements, the inquiry appears to be answered, due to the absence of a Nebraska state court ruling on the issue.

To the extent that an interpretation of Nebraska law would be needed, the NPRB submits that the entities best situated to make such a determination would be the NPRB, as the applicable state regulatory commission, or a state court. As described in section V above, to the extent that a determination separate from OPPD’s board of directors is needed, there are avenues available for the parties to obtain such an interpretation from the two sources who have legal authority over the statutes involved. The NPRB is the state agency responsible for implementing the statutes involved in this discussion in Chapter 70, article 10, Nebraska Revised Statutes. Either party could seek review of the NPRB’s decision by the Nebraska Court of Appeals and ultimately the Nebraska Supreme Court. In the alternative, the parties could request a

¹⁴ SPP Petition at page 24.

declaratory order from the NPRB or potentially from a Nebraska district court.

Interpretation and enforcement of the SPP Tariff is clearly within the Commission's jurisdiction, but the NPRB believes that interpretation of Nebraska law should remain with Nebraska's state regulatory commission or a state court.

For completeness, we do point out that the issue of whether a private entity has the authority to construct a generation facility in Nebraska was addressed in an Attorney General's opinion requested by the NPRB in 1996.¹⁵ The subject of the opinion was "Can a Private Electric Operator Construct a Plant in Nebraska and Provide Power to a Public Power Supplier's Existing Customers?" The first question addressed was "Does a Private Power Electrical Power Generator have the Right to Construct a Plant in Nebraska?" The determination of that question was "We conclude that there is nothing prohibiting a private entity from constructing an electric power generating plant in Nebraska." Although the opinion is on point, it is in this context neither determinative nor even legally relevant to the proceedings. It appears to the NPRB that the crux of the dispute in FERC docket EL24-110-000 is whether Tariff Section 39.1 controls, or whether the requirement that an ESR or other generation source must be interconnected controls.

¹⁵ Attorney General's Opinion 96073, Exhibit 2 to these comments. The opinion is also available online at ago.nebraska.gov/opinions/archive

VII. COMMUNICATIONS

All correspondence and communications in the above-captioned proceeding should be addressed to the following individual:

Timothy J. Texel
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Nebraska Power Review Board
301 Centennial Mall South -Lower Level
Lincoln, NE 68509
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VIII. CONCLUSION

Based on the foregoing, the NPRB respectfully requests that the Commission grant the NPRB's Motion to Intervene in docket EL24-110-000, allow the NPRB to participate in the proceedings as a party, and accept the NPRB's comments submitted in this pleading for the Commission's consideration.

Respectfully submitted,

Michael T. Hilgers
Nebraska Attorney General

/s/ Timothy J. Texel
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Attorney for the Nebraska Power Review Board

Dated: June 18, 2024

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules or Practice and Procedure, I hereby certify that I have on this day caused the foregoing document to be served on each of the persons or parties designated in the official service list compiled by the Secretary in this proceeding.

Dated at Lincoln, Nebraska, this 18th day of June, 2024.

/s/ Timothy J. Texel

Timothy J. Texel
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301 Centennial Mall South – Lower Level
Lincoln, NE 68509

EXHIBIT NO. 1

**STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD**

IN THE MATTER OF THE APPLICATION OF)	PRB-3949-ESR
THE OMAHA PUBLIC POWER DISTRICT,)	
HEADQUARTERED IN OMAHA, NEBRASKA,)	
REQUESTING AUTHORITY TO CONSTRUCT)	ORDER
A ONE MEGAWATT ELECTRIC ENERGY)	
STORAGE RESOURCE AND RELATED)	
FACILITIES IN CASS COUNTY, NEBRASKA.)	

References in this Order 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.”

ON THE 12th day of July, 2021, the above-captioned matter came on for consideration before the Nebraska Power Review Board (the Board). 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:

FINDINGS OF FACT

1. That on June 17, 2021, the Omaha Public Power District (OPPD), headquartered in Omaha, Nebraska, filed an application with the Board requesting authority to construct a one megawatt (MW) electric energy storage resource (ESR) and related facilities. (Exh. 1). The application was designated “PRB-3949-ESR”.

2. The estimated total cost for PRB-3949-ESR, including the battery storage system, new substation and switchyard is \$2,500,000. Of the total cost, \$1,350,000 is for

the battery storage unit, while \$1,150,000 is for the substation and switchyard. (T109:17 to 21; Exh. 1, page 2).

3. That the proposed location for the generation facility in PRB-3949-ESR is adjacent to OPPD's substation 972, approximately two miles west of the City of Weeping Water, just north of the intersection of State Highway 50 and Fletcher Avenue in Cass County, Nebraska. Two maps showing the proposed location of the project area were included with the application. (Exh. 3, pages 4-5).

4. That those power suppliers, other than the Applicant, that the Board deemed to be potentially affected by or interested in application PRB-3949-ESR were the City of Lincoln doing business as the Lincoln Electric System, the Municipal Energy Agency of Nebraska, the Nebraska Public Power District, the City of Fremont, the City of Auburn, the City of Tecumseh, the City of Wahoo, and the City of Nebraska City. (Exh. 2, pages 4-5). Written notice of the filing of the application and the hearing date, and the opportunity to file a Petition for Intervention or a Protest, was provided to these potentially interested power suppliers, the Applicant, and the City of Weeping Water, via certified U.S. mail. (Exh. 2).

5. Notice of the filing of the application and the hearing date, and the opportunity to file a Petition for Intervention, was provided to the general public by publication in the *Omaha World-Herald* newspaper on Thursday, June 24, 2021. (Exh. 3). No members of the public filed a Petition for Intervention.

6. A certified copy of Consent and Waiver forms were offered and accepted into evidence at the hearing, as provided by law and the Board's Rules of Practice and

Procedure, whereby the Lincoln Electric System, the Municipal Energy Agency of Nebraska, and the Nebraska Public Power District consented to the approval of application PRB-3949-ESR and waived a hearing in the matter. (Exhs. 4, 5 and 6). No power supplier that received notice of the application filed a Protest or Petition for Intervention.

7. That pursuant to the requirement set out in Neb. Rev. Stat. § 37-807(3), the Board consulted with the Nebraska Game and Parks Commission (the Commission) to ensure that the Board utilizes its authority in furtherance of the purposes of the Nebraska Nongame and Endangered Species Act, and to ensure that approval of the proposed generation facilities would not jeopardize the continued existence of any endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the Commission to be critical. The Commission provided a letter to the Board, dated June 24, 2021, addressing PRB-3949-ESR. (Exh. 7).

8. In the letter addressing PRB-3949-ESR, the Commission stated that the project area is within the range of the threatened Northern Long-Eared Bat and the Western Prairie Fringed Orchid. However, there are no records of those species within the vicinity of the project area, and the Commission noted that the work will be performed entirely within an existing substation area. The Commission therefore determined that application PRB-3949-ESR will have “No Effect” on state-listed endangered or threatened species, and the Commission did not object to the Board’s approval of the project. (Exh. 7).

9. That on July 12, 2021, the Board convened the formal evidentiary hearing to address application PRB-3949-ESR.

10. The Board has previously issued Guidance Document 14, which sets out the Board's definition of ESRs, the Board's interpretation of state law with regard to the Board's jurisdiction over ESRs, and procedural issues related to the filing and consideration of applications for ESRs. In the Guidance Document, the Board finds that ESRs fall within the agency's jurisdiction, and ESRs must either be approved by the Board or found to be exempt. (Exh. 8).

11. The proposed ESR will have the ability to operate as either a generation or transmission asset. (T78:12-14). It will therefore be a multi-use ESR, as defined in Guidance Document 14. (Exh. 8, page 3).

12. The ESR, when operating as a transmission asset, will be interconnected to the local distribution system at 13,800 volts, or 13.8 kilovolts (kV). (T32:8-13; T75:5-8; Exh. 9, page 5).

13. Although ESRs are sometimes paired with generation facilities, the proposed ESR in PRB-3949-ESR will be a stand-alone project. It will not be paired with any specific generation facility. (T33:11-13).

14. The ESR will have the ability to inject one megawatt of electricity onto the transmission or distribution grid for two hours. (T33:16-24).

15. In June 2020 the Nebraska Environmental Trust (the Trust) awarded OPPD a grant in the amount of \$600,000 to help offset the cost of the ESR. (Exh. 12). Part of the agreement is that OPPD will share the information learned from operating the ESR

15; Exh. 9, page 8). The grant from the Trust will therefore fund approximately 24 percent of the total cost of the project. The grant funds would not be available to OPPD if other resources (such as capacitor banks) were used to accomplish some of the services to be provided by the ESR. The grant is specific to a battery storage system, or ESR. (T109:22 to 110:14). The final cost of the ESR is not large enough to have an impact on OPPD's rates. (T110:4-6).

16. Intermittent resources, such as wind and solar generation facilities, are volatile in terms of dispatchability, or the ability to depend on the asset being available to produce electricity when needed. These resources are, of course, dependent on the availability of wind and sunshine, respectively, in order to produce electricity. Intermittent resources can experience rapid and significant fluctuations in their ability to generate electricity. ESRs have the ability to inject electricity onto the grid very quickly, and can thus provide stability to electricity supply and system reliability. (T36:10-23; Exh. 9, page 9). The dramatic increase in variable energy resources in recent years has caused the need for resources such as ESRs that can offset the negative impacts of the volatility of the intermittent resources. (T37:7-10; T43:7 to 44:6 ; T47:12 to 48:5; Exh. 9, pages 10, 15, 17).

17. The North American Electric Reliability Corporation (NERC) is a federally approved entity that establishes mandatory reliability standards for load-serving utilities such as OPPD. The Midwest Reliability Organization (MRO) performs auditing and enforcement of NERC's reliability standards for the region that includes Nebraska. Both NERC and MRO operate under the direction of the Federal Energy Regulatory

Commission (FERC). Compliance with NERC's reliability standards are mandatory for electric utilities that operate the bulk power system such as OPPD. (T38:5-14; Exh. 9, pages 11-12). Penalties for noncompliance with NERC's reliability standards can be as much as one million dollars in civil penalties per day for violations. (T38:20 to 39:1).

18. The Southwest Power Pool is a federally approved regional transmission organization that has authority over transmission facility planning, energy markets, and transmission grid operation in a region that includes Nebraska. (T38:15-18; Exh. 9, page 11).

19. NERC regularly issues reports that deal with risks within the electric industry. In two of NERC's most recent reports it pointed out that the changing resource mix is causing balancing and ramping concerns. The need for resources with flexible capacity is increasing. NERC acknowledged in its reports that ESRs or battery storage systems can help offset resource variability issues by providing voltage support and frequency response services. (T38:8-16; Exh. 15; Exh. 16). OPPD believes the proposed ESR would help ensure that OPPD has adequate tools to address variable generation and the volatility that comes with variable generation resources. (T48:6-13).

20. At this time OPPD intends to use the ESR to reduce OPPD's load. The ESR will not be registered as a generator in the SPP market, and the release of its electric charge will not be sold into the SPP market. This is subject to change depending on the circumstances and OPPD's familiarity with operating an ESR. (T40:4 to 41:9).

21. The proposed location for the ESR was selected to enhance reliability and provide voltage support to a rural substation, namely OPPD substation 972. Substation

972 provides electrical service to several industrial loads in the area. The ESR will be located adjacent to substation 972. (T:53:18 to 54:2; T75:5-8; Exh. 1, pages 4 and 5; Exh. 9, pages 18 and 29). Although Substation 972 is in a rural area, it has a relatively high amount of industrial load. This causes some fluctuations in the local grid. OPPD believes placement of the ESR adjacent to Substation 972 can help alleviate the fluctuations, making the proposed location an excellent choice not only for assisting with grid stability, but also for OPPD personnel to learn how to operate ESRs in such an environment. (T75:5-19; T77:9 to 78:11; Exh. 9, page 30).

22. ESR facilities, often referred to as battery storage, provide numerous benefits to a utility. An ESR provides grid support in that it can ramp up very quickly to discharge electricity into the grid to smooth variations in intermittent generation resources, and can provide support if the utility nears its peak demand. (T61:21-23; Exh. 9, page 23).

23. The ESR will be able to provide peak-load reduction. An ESR is able to charge during off-peak periods, or periods of lower electric consumption, and the charge in the ESR can be discharged during high or peak usage periods. By serving this purpose, the ESR can defer the need for system upgrades by helping to ensure that the system does not operate outside the loading levels for which the equipment is designed. (T86:13 to 87:6).

24. Another use the ESR can provide is energy arbitrage, or charging during off peak hours and then discharging during periods where the cost of electricity is high in the SPP market. This can produce savings by preventing OPPD from having to purchase the

amount of electricity in the ESR's charge from the more expensive SPP market during high cost periods. (T87:7-10).

25. The ESR can also help reduce losses on OPPD's transmission system. This can allow OPPD to carry less generating capacity to serve its load. (T87:11 to 88:8).

26. Another purpose served by the ESR is voltage support. The ESR can provide reactive power through its inverter in both the transmission and distribution level. (T87:17-22).

27. In addition to its operational benefits, the ESR will provide valuable educational benefits for OPPD and other Nebraska utilities regarding ESRs. As stated in paragraph 15, one of the conditions of the grant which OPPD received from the Nebraska Environmental Trust was that OPPD would share what it learns about ESRs with other Nebraska electric utilities. This is important, as the proposed ESR will be the first commercial ESR in the State of Nebraska. The ESR will allow OPPD to determine the value an ESR brings to a utility and compare that to other resources that could provide some of the same services, although none of the other resources individually could provide the package of services that an ESR can. (T90:3-21; T115:15-23).

28. The ESR will use lithium ion technology. Lithium ion is a common type of battery technology that has been used for many years. Lithium ion batteries are used in many applications, including cell phones and electric vehicles. Some battery technologies are better for applications that require longer duration for the discharge of electricity. For its ESR, OPPD needs a technology that is designed for short term durations. Lithium ion technology serves that purpose. Lithium ion technology has a

high efficiency ratio for charging and discharging, which lends itself to the type of purpose for which OPPD intends to use the ESR. (T64:19-23; T64:1-4; T63:17-25; T65:20 to 66:5; T66:21 to 68:5; Exh. 9, pages 25-26).

29. In determining the appropriate capacity and duration of charging and discharge, OPPD examined several options. One option was the one megawatt capacity with a two hour discharge capability, at 365 cycles. Another option was a one megawatt capacity facility with a four hour discharge capability, also at 365 cycles. This option was 40% more expensive than the ESR with a two hour discharge. The operating expenses for a four megawatt facility are also higher. OPPD also considered a one megawatt capacity facility at 250 cycles. At 250 cycles the wear and tear on the ESR would be reduced when compared to the 365 cycle options. The 250 cycle option was only three percent less capital cost than the 365 cycle option. Although a two megawatt facility was considered for comparison purposes, the grant from the Nebraska Environmental Trust was specific to a one megawatt facility, so a two megawatt facility was not considered a financially viable option. OPPD and its consultant engineering firm, Fractal Energy Storage Consultants, determined that the additional operating flexibility and durability provided by the one-megawatt, 365 cycle ESR offset the additional three percent higher capital cost. (T94:12 to 98:19 ; Exh. 9, page 32).

30. The Federal Energy Regulatory Commission (FERC), in Order number 841, requires electric utilities to allow ESRs and distributed energy resources to have access to wholesale markets. OPPD is one of utilities that must comply with Order 841. OPPD believes the proposed ESR will allow OPPD personnel to better understand the

interconnection requirements for ESRs, as well as what would be needed when developing processes and policies for ESRs in OPPD's operating area. It would also provide insight into what selection criteria should be used for future ESR projects, and operational safety aspects for ESRs. All this information will be shared with other Nebraska electric utilities. (T106:24 to 107:23; T108:24 to 109:3).

31. Although there are other technologies and equipment that could provide some of the individual services that the ESR will provide, no other resource is capable of providing the variety of generation and transmission services that the ESR will be able to provide. (T80:16 to 81:7; T83:23 to 84:16).

32. OPPD plans to have the ESR facility constructed or installed and ready for commercial operation in the summer of 2022. (T33:6-10; Exh. 1, page 2).

CONCLUSIONS OF LAW

33. Pursuant to Neb. Rev. Stat. §§ 70-1012, 70-1013, and 70-1014, the Board has jurisdiction to conduct a hearing and either approve or deny an application for authority to construct generation and certain transmission facilities located in the State of Nebraska or owned by a power supplier headquartered in the State of Nebraska. Such approval is required prior to commencement of construction of the generation or transmission facilities.

34. Pursuant to Guidance Document 14, the Board has already determined that under Nebraska law it has jurisdiction over ESRs built by power suppliers in the State of Nebraska. (Exh. 8). The proposed ESR will be a multi-use ESR due to its ability to be operated as a generation asset or a transmission asset. (Exh. 1, page 6). The Board

therefore finds that it does have jurisdiction over the construction of an ESR facility such as the one described in application PRB-3949-ESR.

35. The Board has complied with the requirements under Neb. Rev. Stat. § 37-807(3) to consult with and request the assistance of the Nebraska Game and Parks Commission in order to utilize the Board's authority in furtherance of the purposes of the Nebraska Nongame and Endangered Species Act, and to insure that approval of the proposed generation facilities would not jeopardize the continued existence of any endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the Commission to be critical.

36. It is in the best interests of OPPD's customers to install equipment at the proposed location in Cass County to address voltage support issues in the affected area. The ESR will be able to reduce the volatility of the voltage in the area and ensure that the local grid system remains in compliance with required operational standards.

37. The use of ESRs is expected to increase over time. It is therefore in the best interests of OPPD's customers for OPPD's personnel to be able to understand how to effectively operate and use an ESR resource. The proposed ESR is sized to ensure that it is large enough to serve this purpose, without incurring significant costs that might have an impact on rates. OPPD has agreed to share what it learns with other electric power suppliers in Nebraska. It is in the best interests of the other electric utilities in the State and their customers to learn about ESRs from this project.

38. Although it is possible that other equipment could serve several of the purposes for which the ESR will be installed, no other single type of equipment could

serve the breadth of purposes that will be served by the ESR. To provide the same services as the ESR with other equipment, multiple different types of equipment would need to be installed, which impacts the cost involved. Serving multiple purposes with one ESR eliminates the possibility of duplication of equipment by installing several different types of equipment to serve the same purposes as the ESR.

39. The ability for OPPD to engage in arbitrage with the ESR will provide not only operational and educational benefits, but financial ones as well. Using the output from the facility during periods when the cost of energy is high in the SPP market will save OPPD, and therefore its customers, money that would otherwise go to pay for high-cost electricity.

40. OPPD's cost for the ESR are greatly reduced due to a \$600,000 grant provided by the Nebraska Environmental Trust. This subsidizes approximately one-quarter of the cost for the facility. The funds would not be available to OPPD if the equipment installed were not an ESR.

41. The Board finds that the proposed ESR facility will serve the public convenience and necessity.

42. The Board finds that the evidence demonstrates that OPPD can most economically and feasibly supply the electric service resulting from the proposed project.

43. The Board finds that the evidence demonstrates the proposed project will not unnecessarily duplicate other facilities or operations.

44. That based on the foregoing findings, OPPD is entitled to an Order approving the construction of the ESR facility described in application PRB-3949-ESR.

ORDER

That during that part of its public meeting on July 12, 2021, held subsequent to the hearing on application PRB-3949-ESR, a majority of the members of the Power Review Board (4 yes, 0 no) voted in favor of a motion to approve application PRB-3949-ESR.

IT IS THEREFORE ORDERED by the Nebraska Power Review Board, pursuant to the Board's action taken during its public meeting held July 12, 2021, that the application designated PRB-3949-ESR, for authorization to construct a one megawatt electric energy storage resource and related facilities in Cass County, Nebraska be, and hereby is, APPROVED.

Reida (Chair), Hutchison (Vice Chair), Grennan, Loutzenhiser and Moen participating.

Ms. Loutzenhiser did not participate in the vote during the Board's public meeting on July 12, 2021, but did participate in the issuance of this written order.

Dated this 10th day of September, 2021.

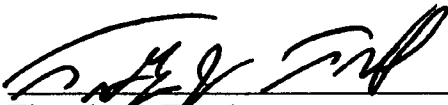


Frank Reida
Chairman

CERTIFICATE OF SERVICE

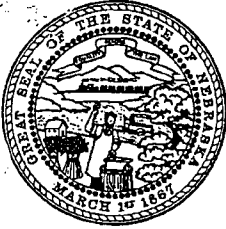
I, Timothy J. Texel, Executive Director and General Counsel for the Nebraska Power Review Board, hereby certify that a copy of the foregoing **Order** in PRB-3949-ESR has been served upon the following parties by mailing a copy of the same to the following persons at the addresses listed below, via certified United States mail, on this 10th day of September, 2021.

Stephen M. Bruckner, Esq.
Fraser Stryker, PC, LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102-2663



Timothy J. Texel
Executive Director and General Counsel

EXHIBIT NO. 2

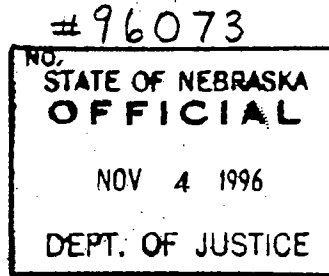


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DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL



DATE: October 31, 1996

SUBJECT: Can a Private Electrical Power Operator Construct a Plant in Nebraska and Provide Power to a Public Power Supplier's Existing Customers?

REQUESTED BY: Gary Gustafson, Executive Director
Nebraska Power Review Board

WRITTEN BY: Don Stenberg, Attorney General
Timothy J. Texel, Assistant Attorney General

You have requested the opinion of this office regarding two questions related to generation of electric power by private entities in Nebraska. Your questions state:

Does a private electrical power operator have the right to locate a plant in Nebraska and to provide power to an existing customer of a public power supplier when that customer is located in the supplier's retail service area?

If a private power supplier can locate in Nebraska and serve customers other than themselves, does the Power Review Board have jurisdiction over whether the plant can be constructed unless authorization is granted by the Power Review Board?

You explain in your opinion request that Rail Environmental Services, Inc. ("RES") has contacted the Power Review Board ("the Board") to inform the Board that it intends to construct an electric power plant near North Platte, Nebraska. The power plant

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will burn waste from the Union Pacific Railroad Company's North Platte facility and will in turn supply electricity and steam to the railroad. The Union Pacific facility's electric power is currently being supplied by the City of North Platte. RES wishes to sell whatever excess electrical power it produces to the Nebraska Public Power District ("NPPD"). According to a letter from RES to the Board, RES would like to enter into a 20 year contract covering the sale of its unused power to NPPD. Your opinion request states that the Federal Energy Regulatory Commission ("FERC") has approved the proposed plant, but FERC's approval did not deal with Nebraska law, and the Board believes it would have no impact on the Board's actions or authority.

Nebraska is unique in that it is the only state with an electric power system comprised entirely of public power entities. As you state in your opinion request, the ability of a private power supplier constructing a plant and taking existing customers from public power sources could have a substantial impact on Nebraska's public power system.

There are essentially three separate questions involved in your opinion request. We will address each issue in the order presented.

Does a Private Power Electrical Power Generator have the Right to Construct a Plant in Nebraska?

Our research did not uncover any statute or case precluding private entities from constructing and operating electric power generating facilities in the State of Nebraska. A review of Nebraska's statutes dealing with electric power appears to indicate that the Legislature anticipated that only publicly owned power generating facilities would serve Nebraska's electricity needs. In § 70-1301, it states that it is Nebraska's public policy to provide adequate electrical service at the lowest possible cost. In furtherance of that policy, "electric service should be provided by non-profit entities. . . ." Neb. Rev. Stat. § 70-1301. But § 70-1301 is a policy statement dealing with Chapter 70, article 13, which controls arbitration of disputes. None of the statutes in article 13 prohibit privately owned electric plants. There is no language precluding private entities from constructing, owning, or operating electric power plants in any of the other statutes in Chapter 70, either.

The legislative history of the statutes creating Nebraska's public power entities cannot be consulted in this particular instance. We have learned from the Clerk of the Legislature's office that records for legislative histories were not kept prior to 1937. The enabling legislation for Nebraska's public power

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system was initially created in 1933. See Neb. Rev. Stat. §§ 70-601 to 70-671.

There is some statutory language supporting the contention that non-publicly owned electric power plants can exist in Nebraska. The first sentence in Neb Rev. Stat. § 70-1002(1) (1990) states:

(1) All suppliers of electricity, including public power districts, public power and irrigation districts, individual municipalities, registered groups of municipalities, electric membership associations, and cooperatives, serving customers at retail in adjoining service areas shall have the authority to enter into written agreements with each other specifying either the service area or customers each shall serve with electric energy.

Other statutes contain the same or similar language referring to all suppliers of electricity, not only public power entities. See Neb. Rev. Stat. §§ 70-1002.01 and 70-1502 (1990). If non-public entities were prohibited from owning or operating electric power generating facilities, there would be no reason for the Legislature to have used language referring to all electric suppliers, including those that are publicly owned. The use of the broad category "all suppliers of electricity," which would encompass, but not be limited to, publicly owned electric suppliers, may lead to the conclusion that privately owned suppliers are not prohibited. We note that Gary Gustafson, the Board's Executive Director, informed us that the Board believes there is nothing prohibiting a private entity from constructing an electric plant in Nebraska.

We conclude that there is nothing prohibiting a private entity from constructing an electric power generating plant in Nebraska.

Does a Private Electrical Power Operator have the Right to Provide Power to a Public Power Supplier's Existing Customers Located Within the Public Power Supplier's Designated Retail Service Area?

Although a private power supplier may be able to build and operate an electric plant, it appears that private electric suppliers are prohibited from serving customers who are located within a public power agency's service area and are already being served by the public power agency, at least until it can show that the current supplier is unable or unwilling to provide adequate electric service. The Board's opinion request indicates that the Board interprets Nebraska's public power statutes to disallow private electric plants from taking customers located in an

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established service area from the public agency already supplying electricity to that service area. The Board's Executive Director confirmed to our office that the Board does, in fact, believe that a private electric generator would be prohibited under most circumstances from taking customers located in a public power supplier's designated service area that are already being served by that public power agency. The Board's interpretation seems to comport with Nebraska's statutes establishing electric power service areas. See Neb. Rev. Stat. §§ 70-1001 to 70-1027 (1990) and §§ 70-1101 to 70-1106 (1990).

Neb. Rev. Stat. § 70-1002(1) provides that all adjoining suppliers of electricity at retail have the authority to enter into agreements establishing their respective service areas or customers to be served. The statute also requires all such agreements to be submitted to, and be approved by, the Board. If adjoining electric retail suppliers cannot come to an agreement, the matter is referred to the Board. Under this statute, electric suppliers are required to enter into agreements specifying their respective service areas. *City of Schuyler v. Cornhusker Public Power Dist.*, 181 Neb. 704, 707, 150 N.W.2d 588, 590-91 (1967). See also Committee Records on LB 220, 73rd Neb. Leg., 1st Sess., Introducer's Statement of Purpose (February 11, 1963).

Neb. Rev. Stat. § 70-1004 requires that all suppliers of electricity file maps indicating their service areas under their agreements with adjoining electrical suppliers. In the absence of an agreement, the electric supplier must file a statement explaining why it has not entered into agreements with its adjoining electric suppliers and showing what it claims to be its service area.

The Legislature declared the public policy of Nebraska to be to avoid and eliminate conflict and competition between public power districts and other electric suppliers and to avoid and eliminate the duplication of facilities and resources resulting from such conflict and competition and to facilitate the settlement of rate disputes between suppliers of electricity. Neb. Rev. Stat. § 70-1001 (1990). See also § 70-1101 (1990). However, these statutes only refer to preventing competition between public power agencies, and do not specifically state that they apply to private electric suppliers. The Nebraska Supreme Court, in addressing a contract dispute case, observed that the legislative history of § 70-1001 shows that the statute's purpose was "limited to legalizing service area boundary agreements between public power districts and municipally owned electric systems and to establishing a power review board." *Southern Nebraska Rural Public Power Dist. v. Nebraska Electric Generation and Transmission Cooperative, Inc.*, 249 Neb. 913, 920, 546 N.W.2d 315, 321 (1996).

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Although the preceding statutes indicate a general policy in disfavor of competition, it is not entirely clear whether their provisions apply directly to private entities. Other statutes may directly apply to private electric generators, though. Section 70-1501 states:

It is the public policy of this state to provide its citizens with adequate electric service at as low an overall cost as possible, consistent with sound business practices, and in furtherance of such policy it is necessary to avoid and eliminate conflict and competition among and between suppliers of electric power and energy and to avoid duplication of facilities and resources which result from such conflict and competition.

Neb. Rev. Stat. § 70-1501 (1990).

The Nebraska Supreme Court has also held that a preamble or policy statement in an act is generally not self-implementing but may be used to assist in interpreting the legislative intent of the act which the policy statement is a part. *Southern Nebraska Rural Public Power* at 920, 546 N.W.2d at 320.

The term "electric suppliers" is defined to mean "any legal entity supplying, producing, or distributing electricity within the state for sale at wholesale or retail." Neb. Rev. Stat. § 70-1023 (1990). Section 70-1023 states its definitions are intended for the purposes of §§ 70-1023 to 70-1027. Although not specifically provided for definitional purposes of other statutes, this definition provides the best available indication of the Legislature's understanding of what that term means as it is used in other statutes dealing with electric power issues. No other definition is provided for the term "electric suppliers."

Section 70-1011 prohibits any electric supplier from offering electric service to additional ultimate electric users outside its service area or to construct new electric lines into the service area of another electric supplier in order to furnish electric service in the competitor's service area. Prior to taking another supplier's customers, an electric supplier must first apply to the Board and receive its approval. This statute appears to provide strong evidence that a private electric power plant would not have the right to take current customers from a public power agency already serving that particular service area.

Section 70-1011 goes on to state that the Board shall only grant approval of encroachment into an existing service area if the desired customer "cannot or will not be furnished adequate electric service by the supplier in whose service area the customer is located, or that the provision thereof by such supplier would

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involve wasteful and unwarranted duplication of facilities." The statutory language makes it obvious that the Legislature disfavors allowing customers within an established service area to be taken by alternative suppliers, absent a failure to adequately serve the customer by the entity supplying that service area. Unless a newly constructed private electric plant could demonstrate that a desired customer, such as the Union Pacific Railroad's North Platte facility, is not being adequately served, the new supplier would be prohibited from taking that customer from the public agency currently supplying its electricity.

The statutes and case law indicate that a private electric power supplier is prohibited from taking existing customers located within a public power agency's designated service area unless the private supplier can demonstrate to the Board that the public agency is unable or unwilling to provide adequate service to the customer. The matter does not appear to be entirely clear, however, due to the fact that the statutes involved do not explicitly state whether they apply to private as well as public electric energy suppliers.

Does the Power Review Board have Jurisdiction to Require the Plant Obtain the Board's Authorization Prior to Construction?

The Board was created by Neb. Rev. Stat. § 70-1003. The last sentence in § 70-1003(1) (1990) states, "The board shall have jurisdiction as provided in Chapter 70, article 10." The Board is repeatedly referred to as having authority over "any" and "each" electric power generator and/or supplier throughout article 10. See Neb. Rev. Stat. §§ 70-1004, 70-1005, 70-1015, 70-1017, 70-1025 (1990). There is no language in article 10 restricting the Board's authority to only publicly owned electric suppliers. Neb. Rev. Stat. § 70-1023(2) defines the term "electric suppliers" to mean "any legal entity supplying, producing, or distributing electricity within the state for sale at wholesale or retail."

The language in Neb. Rev. Stat. § 70-1012 (1990) is also very important to this issue. It states:

Before any electric generation facility or any transmission lines or related facilities carrying more than seven hundred volts are constructed or acquired by any supplier, an application, filed with the board and containing such information as the board shall prescribe, shall be approved by the board. . . .

The statute continues on to list circumstances under which the Board's approval shall not be required. The Board would have to determine whether any of the listed exceptions are present in a

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situation such as the proposed RES facility. Section 70-1012 requires that any supplier desiring to construct any electric power plant must file an application with the Board and obtain the Board's approval. The statute applies to both retail and wholesale electricity suppliers. *City of Auburn v. Eastern Nebraska Public Power District*, 179 Neb. 439, 445, 138 N.W.2d 629, 634 (1965). The statute does not contain language limiting its application solely to public entities.

The Court, in the *City of Auburn* case, analyzed § 70-1012 and referred to the use of the term "any" as used in that statute. The Court found that the Legislature's reference to "any" electric generation facility by "any" supplier meant that the statute's application was not limited to retail suppliers, either by specific language or by implication. Based on the Court's analysis, it might also be inferred that the term "any" is broad enough to include both public and private suppliers and facilities. Section 70-1012 is not limited to public entities by specific language and does not appear to imply this conclusion.

The Court did state that the plain language in the Act confers power on the Board to exercise its stated authority as to construction of, in the *City of Auburn* case, certain transmission lines, whether for wholesale or retail sale "by any public corporation specified in the act." *Id.* at 446, 138 N.W.2d at 634. The Court did not specify whether this language was intended to mean merely that the statute applies to all the public corporations listed in § 70-1012 or that the statute's application is restricted to public corporations.

The Nebraska Supreme Court has addressed issues involving construction of electric generation facilities. In *Omaha Public Power Dist. v. Nebraska Public Power Project*, 196 Neb. 477, 243 N.W.2d 770 (1976), the Omaha Public Power District applied to build a nuclear-fueled electric generation plant. A group of Nebraska citizens filed a protest to the application. The Supreme Court noted that applicants wishing to construct electric power plants must have the plans approved by the Board. The Court stated:

Before any electric generation facilities may be constructed, an application must be filed with the board; a hearing must be held, at which any interested party may appear; and the application must be approved by the board.

Id. at 478, 243 N.W.2d at 771.

It should be pointed out that the above case dealt with a public power district's plans to construct an electric plant, as opposed to a private entity proposing to build one. However, the

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Court did not indicate the application and approval process would be any different for a private entity. The language concerning the requirement to file an application with and obtain approval from the Board was couched in broad terms that indicate the requirements are intended to cover the procedure for all new electric plants, not only publicly owned ones.

Also, as previously discussed in this opinion, § 70-1011 requires that any electric supplier wishing to provide service to customers within another supplier's service area to first apply to the Board and receive approval for this action. The language in this statute indicates the Board has authority over all electric suppliers. It does not limit its application to public power agencies.

There do not appear to be any Nebraska cases directly addressing the issue presented in the Board's opinion request. Based on the applicable statutory language and the most closely analogous case law, we believe the Power Review Board has jurisdiction to review and consider whether to approve a proposed private electric power plant prior to its construction.

Sincerely,

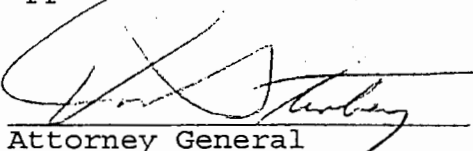
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Attorney General



Timothy J. Texel
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08-13-14.op

Approved:


Attorney General