

**STATE OF NEBRASKA  
NEBRASKA POWER REVIEW BOARD**

IN THE MATTER OF THE APPLICATION )	<b>SAA 159-09-B</b>
OF THE CITY OF DAVID CITY, )	
NEBRASKA, TO AMEND RETAIL )	
SERVICE AREA AGREEMENT 159 BY )	
TRANSFERRING ANNEXED TERRITORY )	<b>ORDER</b>
FROM THE BUTLER COUNTY RURAL )	
PUBLIC POWER DISTRICT TO THE CITY )	
OF DAVID CITY. )	

ON THE 11<sup>th</sup> day of December, 2009, the above captioned matter came on for consideration before the Nebraska Power Review Board (“the Board”) and the Board, being fully advised in the premises, finds as follows (references to testimony set out in the transcript of proceedings are designated by a “T” followed by the transcript page, then the lines upon which the testimony appears, while reference to exhibits are designated by “Exh.”):

**FINDINGS OF FACT**

1. That on the 29<sup>th</sup> day of June, 2009, the City of David City (“the City” or “Applicant”) filed an application to amend retail Service Area Agreement 159 (“S.A.A. 159”) with the Board. (Exh. 1). Service Area Agreement 159 is the agreement, approved by the Board, that establishes the boundary between the adjoining service areas of David

City and the Butler Public Power District (“Butler PPD” or “Protestant”). The application was designated “SAA 159-09-B.”

2. Written notice was provided to Butler PPD notifying it that the application had been filed and a hearing date of August 21, 2009 established.

3. On the 23<sup>rd</sup> day of July, 2009, Butler PPD filed a Protest objecting to the approval of Application SAA 159-09-B, in which Butler PPD set out its reasons for opposing the approval.

4. On August 18, 2009, David City filed a Motion for Continuance of the hearing. Butler PPD had no objection and the Continuance was granted. The hearing was rescheduled for September 18, 2009.

5. On August 21, 2009, Butler PPD filed a Motion for Continuance of the hearing. Both parties agreed to the Continuance, which was granted. The hearing was rescheduled for October 23, 2009.

6. On October 19, 2009, David City filed a Motion for Continuance of the hearing. Butler PPD had no objection and the Continuance was granted. The hearing was rescheduled for November 13, 2009.

7. When the application was filed, Protestant’s formal name was the “Butler County Rural Public Power District.” On October 23, 2009, the Board approved an amendment to Protestant’s charter. The amendment changed Protestant’s name from the “Butler County Rural Public Power District” to the “Butler Public Power District.” This

is the reason that the captions in the pleadings filed prior to October 23, 2009 vary slightly from those filed subsequent to October 23, 2009.

8. On November 13, 2009, the hearing on SAA 159-09-B was convened.

9. During that portion of the Board's public meeting held November 13, 2009, following the conclusion of the hearing, the Board voted to table its decision on the matter until its next scheduled public meeting on December 11, 2009. At its December 11, 2009 public meeting the Board voted 5 to 0 in favor of approving a motion to approve application SAA 159-09-B as corrected during the hearing.

10. It is undisputed that the David City is a municipal corporation of the State of Nebraska. It is also undisputed that the City owns and operates its own electric system, with which it provides electric service to the municipality. (Exh. 1, pages 2-3, 20-21).

11. On June 14, 2006, David City adopted Ordinance No. 1017. The purpose of Ordinance No. 1017 was to annex four tracts of real estate located in section 18, township 15 north, range 3 east of the 6<sup>th</sup> prime meridian, Butler County, Nebraska. (Exh. 2, pages 15-21).

12. On September 12, 2007, the City adopted Ordinance No. 1055. The purpose of Ordinance No. 1055 was to annex the northwest quarter of section 18, township 15 north, range 3 east of the 6<sup>th</sup> prime meridian, Butler County, Nebraska, except for three described tracts of real estate, existing roads, and railroad right-of-way.

(Exh. 2, page 9-11). David City published notice of the adoption of Ordinance No. 1055 in a local newspaper on September 20, 2007. (Exh. 2, pages 12-14; Exh. 5).

13. In adopting Ordinance No. 1055, David City waived the three readings or hearings that would normally be performed when adopting an annexation ordinance. (T14:14-17). David City believed that the three readings could be waived because the owner of the land to be annexed petitioned the City for the annexation. (T14:14-22).

14. On October 12, 2007, Butler PPD filed a Complaint in the District Court of Butler County, Nebraska, Case No. CI07-116, challenging the validity of Ordinance No. 1055 and requesting injunctive relief prohibiting the enforcement of Ordinance No. 1055. Butler PPD later dismissed its lawsuit. (Exh. 3; T37:18 to 38:3; T46:17 to 47:6; T52:24 to 53:4).

15. After seeking legal advice on the ability of a municipality to waive the three readings in an annexation action, David City made a determination that it lacked the authority to waive the readings and that Ordinance No. 1055 was not properly adopted. (T14:23 to 15:4; T21:11-19; T24:5-23; T33:18 to 34:9).

16. On June 11, 2008, David City adopted Ordinance No. 1073. The purpose of Ordinance No. 1073 was to annex a tract of real estate in the southeast quarter of the northwest quarter of section 18, township 15 north, range 3 east of the prime meridian, Butler County, Nebraska. (Exh. 1, pages 5-7).

17. On October 8, 2008, David City adopted Ordinance No. 1086. The purpose of Ordinance No. 1086 was to annex the northwest quarter of section 18, township 15 north, range 3 east of the prime meridian, Butler County, Nebraska, except for three described tracts of real estate, existing roads, and railroad right-of-way. (Exh. 1, pages 8-12). The City performed three readings of Ordinance No. 1086 prior to its adoption. (T15:12-18; T21:25 to 22:3).

18. Ordinances Nos. 1055 and 1086 both involved annexation of the same tract of real estate. (Exh. 1, pages 9-10; Exh. 2, page 11; Exh. 5 page 4).

19. It is uncontested that the portion of the northwest quarter of section 18 that David City was attempting to annex in Ordinances Nos. 1055 and 1086 totals approximately 147 acres. (T8:23-25; T11:11-12; T16:16-21). The territory that is the subject of Ordinance Nos. 1055 and 1086 is indicated on Exhibit 7 by the area marked with an "A" and the name "R.J. Hein."

20. In SAA 159-09-B, David City claims that the basis for its right to amend S.A.A. 159 by acquiring certain territory from Butler PPD in section 18 are Ordinances Nos. 1073 and 1086. (Exh. 1, pages 2-3).

21. It is uncontested that Ordinance No. 1055 has never been declared invalid by a court. (T18:16-20; T24:25 to 25:3; T35:23 to 36:9). There is no evidence before the Board that David City ever repealed Ordinance No. 1055.

22. David City acknowledges that it filed its request to amend S.A.A. 159 by transferring that portion of section 18 that was the subject of Ordinance No. 1073 from Butler PPD to David City more than one year after adopting the ordinance. (T14:1-8; T27:6-13).

23. In its application, David City asked the Board to transfer the 147 acres that comprises the bulk of the northwest quarter of section 18 from Butler PPD to David City. (Exh. 1, pages 8-11). This is the territory that was the subject of Ordinance No. 1086, and prior to that, Ordinance No. 1055. The territory is shown on Exhibit 1, page 20 outlined by a green dashed line and containing green cross-hatching (T30:1-13), and it is indicated on Exhibit 7 by the area marked with an "A" and the name "R.J. Hein." There are no electric customers currently located in the 147 acre tract. (T42:22-24; T44:1-13). Butler PPD does have electric distribution facilities in the tract marked as parcel "A" on Exhibit 7. (T42:25 to 43:11). David City acknowledges its obligation to pay Butler PPD for the electric facilities in the tract marked "A" on Exhibit 7 should application SAA 159-09-B be approved. (T16:7-15).

24. In its application David City also asked the Board to transfer a smaller tract near the southeast quarter of the northwest quarter of section 18, as shown on Exhibit 1, page 7 by a square with "3.00 acres" appearing in the middle of the square. This is the territory that was the subject of Ordinance No. 1073. The territory is shown on Exhibit 1, page 20 outlined by a light red dashed line and containing light red cross-hatching.

During testimony David City requested that the Board grant an exception to the normal requirement that amendments to acquire annexed territory be filed by a municipality within one year and instead approve a transfer of the tract in order to avoid creating an “island” of Butler PPD service area surrounded by David City’s service area. (T16:22 to 18:12). However, in later testimony David City’s witness clarified that the City is now only asking the Board to transfer the 147 acre tract in the northwest quarter of section 18. (T30:9 to 33:3; T35:7-22).

25. Butler PPD’s objection to the approval of SAA 159-09-B is based on David City’s failure to file its application to acquire the service area rights to the 147 acre tract in the northwest quarter of section 18 within one year of the annexation action for that tract taken by adoption of Ordinance No. 1055. (T49:22 to 50-1).

### **CONCLUSIONS OF LAW**

26. Pursuant to Neb. Rev. Stat. §70-1008(2) and §70-1010, the Board has jurisdiction to conduct a hearing and render a determination on matters pertaining to the establishment and modification of service area boundaries.

27. Pursuant to Neb. Rev. Stat. § 70-1008(2), a municipally owned electric system that serves a municipality at retail has the right to absorb newly annexed territory into its retail service area. Electric distribution facilities in the newly acquired service area may also be acquired. The municipality’s right to acquire the service area rights of

annexed territory is waived unless the municipality acquires the service area rights within one year of the date of annexation.

28. The method by which a municipality acquires the service area rights to annexed territory is for the municipality to file an application for a service area agreement amendment with the Board. Neb. Rev. Stat. § 70-1008. The filing of an application with the Board demonstrates a municipality's commitment to acquire the service area rights of annexed territory. See In re Application of City of North Platte, 257 Neb. 551, 557-558, 599 N.W.2d 218, 223 (1999).

29. David City claims that because it filed its application based solely on Ordinance No. 1086, and since that ordinance has never been invalidated by a Court, the Board can look no further than Ordinance No. 1086, and David City is therefore entitled to have its application approved. (Applicant's Brief at 4-5). It is Butler PPD's position that since Ordinance No. 1055 was never ruled to be invalid by a court, the annexation was accomplished when the ordinance was adopted. Because David City's application to acquire the annexed territory was filed more than one year after the adoption of Ordinance No. 1055, David City's right to acquire the service area and distribution facilities was waived. (Exh. 2, page 2; Protestant's Brief at 5). Butler PPD also claims that because David City took a position that Ordinance No. 1055 was valid in court proceedings, it should be estopped from now taking a position that the same ordinance was invalid. (Protestant's Brief at 4-5).



30. Both parties agree that the holding in City of Schuyler v. Cornhusker Public Power District, 181 Neb. 704, 150 N.W.2d 588 (1967) is applicable in this matter. (Applicant's Brief at 4; Protestant's Brief at 4). In that case, a municipality annexed two tracts of territory in two separate ordinances. The municipality then filed an application with the Board to acquire the service area rights to the annexed territory. The public power district that held the service area rights to the annexed territory objected to the approval of the application, alleging that the annexations were void. The Board found that it lacked statutory authority to determine the validity of the annexation ordinances, and made no finding in regard to the validity of the annexations. In its holding, the Court stated "The board was correct in recognizing its lack of jurisdiction to determine the validity of the annexation of territory to a municipality. An administrative board has no power or authority other than that specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act. *City of Auburn v. Eastern Nebraska Public Power Dist.*, 179 Neb. 439, 138 N.W.2d 629. So far as this proceeding is concerned, the annexation must be presumed to be valid." *Id.* at 706-707; N.W.2d at 590. The Board finds the ruling in City of Schuyler v. Cornhusker Public Power District to be controlling and determinative.

31. Butler PPD argues that to allow a municipality to adopt a second ordinance after the one-year deadline established in § 70-1008 expires would effectively render the deadline meaningless. Butler PPD goes on to state that it does not believe such a result is

what the Legislature intended when it enacted § 70-1008. (Protestant's Brief at 3-4). The Board agrees that it is reasonable to assume the Legislature did not intend to allow municipalities a mechanism through which the one-year filing deadline could be easily avoided. However, the Board believes the issue in the present situation involves a determination of what is the proper venue in order to avoid such a result. The Board finds that the appropriate mechanism to prevent a municipality from avoiding the one-year deadline by adopting a second ordinance is for a power supplier that would be adversely affected by the second annexation to challenge said second annexation in court. In this instance, Butler PPD did file a lawsuit challenging the validity of Ordinance No. 1055. But Butler PPD then dismissed its lawsuit pursuant to an agreement between the parties, and no ruling was issued regarding the legal status of Ordinance No. 1055. Had Butler PPD pursued its legal challenge through the court system, there would be no need for the Board to address this issue. Thus, the mechanism through which a municipality can be prevented from simply adopting another annexation ordinance to avoid the expiration of the one-year deadline in § 70-1008 is for the power supplier that would lose the service area involved to challenge the annexation in a court of competent jurisdiction and obtain a ruling on the validity of the ordinances involved. The Board believes this finding complies with the ruling in City of Schuyler.

32. The Board finds that it lacks the authority to act on Butler PPD's claim that David City should be estopped from taking a position in the present matter that is in direct

contradiction to the position it took before the District Court of Butler County in Case No. CI07-116. It is beyond dispute that “An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.” Brunk v. NE State Racing Comm’n, 270 Neb. 186, 193, 700 N.W.2d 594, 601 (2005). See also Southeast Rural Fire Dept. v. Neb. Dept. of Revenue, 251 Neb. 852, 560 NW2d 436 (1997); CenTra, Inc. v. Chandler Ins. Co., 248 Neb. 844, 540 N.W.2d 318 (1995); City of Schuyler at 706, N.W. 2d at 590. The Board has no statutory authority to provide equitable relief to a party in a matter before the Board. Butler PPD did not cite any such authority at the hearing or in its brief. Even if the Board believed Butler PPD had a strong argument that merits the exercise of equitable relief, the Board simply lacks any authority to do so. The appropriate venue for Butler PPD’s estoppel argument would be a court of competent jurisdiction.

33. Butler PPD cites Hammond v. City of Broken Bow, 239 Neb. 437, 476 N.W.2d 822 (1991) for the proposition that the only method for a second class city to repeal an ordinance is by enacting a later ordinance which contains the entire text of the earlier ordinance being amended, along with a statement that the earlier version is repealed. (Protestant’s Brief at 4). Butler PPD argues that since Ordinance No. 1086 did not repeal Ordinance No. 1055, and since no court has ever ruled Ordinance No. 1055 invalid, the Board must presume that David City had the authority to adopt Ordinance No. 1055 and the one-year time period began to run upon its adoption. Butler PPD is correct

that the Board must presume David City had the authority to adopt Ordinance No. 1055, and the one-year time period began to run upon its adoption. What Butler PPD does not go on to acknowledge is that in order to comply with the ruling in City of Schuyler, the Board is constrained to give that same presumption to Ordinance No. 1086. For the Board to arrive at any other decision would require the Board to make some ruling on the comparative legal status of the two ordinances. The Board therefore finds that is required to presume both annexations are valid for purposes of SAA 159-09-B. David City filed its application based on Ordinance No. 1086, and it is uncontroverted that the application was filed less than one year after adoption of Ordinance No. 1086. The Board finds that it has no choice but to approve David City's application as amended at the hearing.


### **ORDER**

That during its December 11, 2009, public meeting a majority of the members of the Power Review Board (5 ayes, 0 nays) voted in favor of a motion to approve SAA 159-09-B as corrected during the hearing, that being that the service area constituting the portion of the Northwest ¼ of section 18, Township 15 North, Range 3 East, marked as area 'A' on Exhibit 7, currently owned by R. J. Hein, be transferred from Butler Public Power District to the City of David City, and the objection filed by the Butler Public Power District be overruled.

IT IS THEREFORE THE ORDER OF THE NEBRASKA POWER REVIEW BOARD that, pursuant to the Board's action during its public meeting held December 11,

2009, Application SAA 159-09-B, as amended at the hearing, is APPROVED, and the retail service area comprising approximately 147 acres in the Northwest ¼ of section 18, Township 15 North, Range 3 East of the 6<sup>th</sup> Prime Meridian, Butler County, Nebraska as described in the City of David City's Ordinance No. 1086, is transferred from Butler Public Power District to the City of David City.

NEBRASKA POWER REVIEW BOARD

BY   
Michael Siedschlag  
Chairman

DATE: 1/22/2010

## CERTIFICATE OF SERVICE

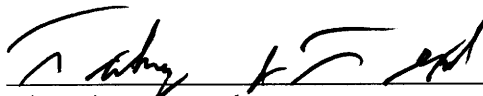
I, Timothy J. Texel, Executive Director and General Counsel for the Nebraska Power Review Board, hereby certify that a copy of the foregoing **ORDER** in SAA 159-09-B has been served on the following persons at the addresses indicated, by mailing a copy of the same via certified United States mail, on this 22<sup>nd</sup> day of January, 2010.

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Timothy J. Texel