

**STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD**

IN THE MATTER OF THE APPLICATION)	
OF THE NEBRASKA PUBLIC POWER)	SAA 311-03-A
DISTRICT, HEADQUARTERED IN)	
COLUMBUS, NEBRASKA, AND THE)	
CITY OF PLATTSMOUTH, NEBRASKA)	
TO MODIFY THE EXISTING SERVICE)	ORDER
AREA AGREEMENT BETWEEN THE)	
NEBRASKA PUBLIC POWER DISTRICT)	
AND THE OMAHA PUBLIC POWER)	
DISTRICT BY TRANSFERRING TO THE)	
NEBRASKA PUBLIC POWER DISTRICT)	
CERTAIN PORTIONS OF THE OMAHA)	
PUBLIC POWER DISTRICT'S SERVICE)	
AREA AS CONTAINED IN S.A.A. 311.)	

ON THE 16th day of January, 2003, the above captioned matter came on for consideration by the Nebraska Power Review Board ("the Board"), and the Board, being fully advised in the premises, finds as follows:

FINDINGS OF FACT

1. That on the 24th day of November, 2003, the Nebraska Public Power District ("NPPD") and the City of Plattsmouth ("the City"), (collectively "the Applicants"), filed an Application for Modification of Existing Service Area Agreement 311 with the Board. (Exh. 8). Service Area Agreement 311 is the agreement, approved by the Board, that establishes the boundary between the adjoining service areas of NPPD and the Omaha Public Power District ("OPPD"). (Exh. 13). The application was designated "SAA 311-03-A."

2. Written notice was provided to OPPD notifying it that the application had been filed and a hearing date of December 19, 2003 established.

3. On the 12th day of December, 2003, OPPD filed a Protest objecting to the approval of Application SAA-311-03-A, in which OPPD set out its reasons for opposing the application.

4. On December 19, 2003, the hearing on SAA 311-03-A was convened.

5. It is uncontested that the City owns the electric distribution system within the corporate city limits of Plattsmouth. (T52:23 to 53:1). The City also owns the electric distribution system located within NPPD's service area that surrounds the City's corporate limits. (T139:14 to 140:12).

6. NPPD holds the retail service area rights to the territory that comprises the entire corporate limits for the City, as the corporate limits existed prior to the annexation upon which SAA 311-03-A is based. (T130:7 to 132:23). NPPD also holds the retail service area rights to the territory in the nearby vicinity surrounding the City. (Id.). The boundary for NPPD's service area surrounding the City generally follows an uneven circular shape, as shown by the boundary demarcation line on the service area agreement map. (Exh. 13, page 6). NPPD is the sole retail electric power supplier for the service area inside the uneven circular shape around the City, including the territory inside the City's corporate limits.

7. Pursuant to Ordinance 1691, on October 6, 2003, the City annexed a tract of land generally located to the southwest of the City. (Exh. 8, page 3). The City's Ordinance No. 1691 provides a metes and bounds description of the exact boundaries of the total annexed territory. (Exh. 6, pages 2-3; Exh. 8, pages 5-6). Part of the annexed tract is already located inside NPPD's current service area, and is not involved in this application. Another portion of the annexed tract, located in section 26, Township 12 North, Range 13 East, is located outside NPPD's current service area. (Exh. 8, page 3). This portion of the annexed tract is located in OPPD's service area. (Exh. 8, page 3; Exh. 13, page 6). Only that portion of the annexed tract located outside NPPD's current service area including and near the City is the subject of this application.

8. NPPD operates the City's electric distribution system pursuant to a "Professional Retail Operations Agreement." (Exh. 7; T53:2-5). Under the terms of the agreement, NPPD has leased the City's electric distribution system for 25 years beginning on January 1, 1990. (Exh. 7, page 4; T5:12-18). NPPD supplies the retail electricity needs of all customers located within NPPD's service area including and in the nearby surrounding vicinity of the City. NPPD is responsible for maintaining the distribution system and constructing any necessary additions to the system. (Exh. 7, page 6; T7:1-10). NPPD also establishes the rates for the customers served by the system. (Exh. 7, page 5). NPPD uses the City's electric distribution system in order to serve the City and its nearby area at retail. It is uncontested that such arrangements are known in the Nebraska power

industry as “lease-operated towns”. (Applicants’ brief at 5, Protestant’s brief at 1).

9. Retail operations agreements such as the one between NPPD and the City are relatively common in Nebraska’s electric industry, and for NPPD in particular. (T:16:21 to 17:19; T13:24 to 14:5).

10. If Application SAA 311-03-A were denied, OPPD would serve that portion of the annexed territory that extends beyond NPPD’s service area boundary, while NPPD would continue to serve the remainder of the City and its surrounding area. This would create a situation where the City is served by two power suppliers operating within its corporate limits.

11. It is uncontested that there are currently no customers of either NPPD or OPPD located inside the annexed area that extends into OPPD’s service area, nor are there any transmission, distribution, or related facilities of either NPPD or OPPD located in that portion of the annexed area that extends into OPPD’s service area. (Exh. 11; T115:9-12; T37:18-22; T43:17-19; T73:25 to 74:15).

CONCLUSIONS OF LAW

12. 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.

13. The Board finds that Neb. Rev. Stat. §70-1008(2) is ambiguous concerning whether a public power district holding the service area rights to a municipality’s

corporate limits and operating a municipality's distribution system under a "Retail Operations Agreement" should be considered a "municipally-owned electric system, serving such municipality at retail" for purposes of the statute. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. OPPD v. Nebraska Dept. of Revenue, 248 Neb. 518, 525, 537 N.W.2d 312, 317 (1995). Therefore, the relevant legislative history must be examined. "When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers." Witherspoon v. Sides Construction Co., 219 Neb. 117, 121, 362 NW2d 35, 40 (1985).

14. In 1979 the language in §70-1008 was amended by adoption of LB 223. (Exh. 2). Prior to the passage of LB 223, §70-1008(2) contained the phrase "a municipally owned electric system." LB 223 added the language "serving such municipality at retail", thus creating the current phrase in § 70-1008(2) "A municipally owned electric system, serving such municipality at retail" that is central to the present application. Based on the language used in Chapter 70, Article 10, the use of this phrase appears to be intentionally broad enough to indicate inclusion of entities other than solely electric utilities owned by a city or village. Other statutes in Chapter 70, Article 10, refer to electric utilities owned and operated by a city or village as "municipalities" or "individual municipalities", and these terms are used when listing all the types of public power suppliers in Nebraska. See Neb. Rev. Stat. §§ 70-1002(1) and (2), 70-1002.01, 70-

1012(3)(a), 70-1014.01. If the Legislature had intended that only electric utilities owned by a city or village have the right to apply to serve newly annexed areas, the Legislature could have used the same term or phrase that is used throughout Chapter 70, Article 10. The fact that a different phrase was chosen indicates that a distinction was intended. Statutes pertaining to the same subject matter are to be construed together as if they were one law and effect given to every provision. In re Interest of Aaron K., 250 Neb. 489, 493, 550 N.W.2d 13, 16 (1996). Where different language is used in different parts of a statute, it is presumed that the language is used with a different intent. Hansmeyer v. Nebraska Public Power District, 6 Neb. App. 889, 900, 578 N.W.2d 476, 483 (1998), aff'd 256 Neb 1, 588 N.W.2d 589 (1999).

15. OPPD argues that the legislative history for LB 220 establishes that the Legislature intended to prevent the type of service area expansion sought by NPPD in SAA 311-03-A. (Protestant's brief at 10). LB 220 was the bill that created the Board and established the basic framework for resolution of public power disputes in Nebraska. OPPD points out that Senator Orme, in support of his proposed amendment to clarify that municipalities serving themselves or other municipalities were to be given the privilege of serving all new customers located in a municipality's zoning jurisdiction, stated:

Now as the bill now reads any retail supplier of a municipality automatically gets all the expansion or the new business in a zoning area of a city. Now this supplier might be a municipally owned system or it might be a public power district. But since subsection 1 of section 8 grants a special legislative privilege as to the zoning area, my amendment would limit that special privilege to a municipally

owned and operated system and keep any public power districts from gaining this special privilege by riding on the coat tail of a municipal system.

(Exh. 9, page 1022) (Protestant's brief at 10). However, Senator Orme's amendment was defeated (Id. at 1025), and also lost on a motion for reconsideration. (Id. at 1026).

Senator Orme later submitted a new, reworded amendment that was adopted. (Id. at 1034, 1041). The discussion in which Senator Orme was engaged dealt with the Legislature's attempt to ensure that municipalities would have the sole preference to serve any new loads in their zoning area. Specifically, the senators wanted to avoid the situation found in the City of Lincoln ("Lincoln") where Lincoln was served by both Lincoln and the Consumers Public Power District ("Consumers"). Consumers was a predecessor company of NPPD. (T8:10-11, 9:1-4). Because the original language of section 8 in LB 220 allowed the power supplier serving a municipality to acquire customers in the zoning area, it was unclear who would be entitled to serve new loads in the zoning area when a municipality was served by both a municipality and a public power district. (Exh. 9, pages 1022-1025 and 1034-1041). Speaking on his unsuccessful amendment, Senator Orme made this point clear by stating:

This amendment, I'll admit it's especially important in the case of Lincoln, because Lincoln as you know is in the peculiar position of being served at retail by two suppliers instead of one. One of these is Consumers, the other is the city system. Now as the bill now reads, "the supplier", I'm putting that in quotes, is entitled to all the expansion in Lincoln's three mile zoning area, and there is no answer to Lincoln's question of "well which supplier?" Now that's the thing I'm trying to arrive at here.

(Exh. 9, page 1023). The legislative discussion of LB 220 would be more useful in the

present case if it were not for the fact that the language in LB 220 dealt largely with the rights of municipalities and public power districts in the municipal zoning jurisdiction surrounding municipalities. However, the language discussed in LB 220 that pertains to §70-1008 was amended in 1979, and the reference to zoning jurisdictions is no longer part of the statute under consideration by the Board in the present matter.

16. The language in §70-1008 was amended in 1979 by LB 223. The legislative history for LB 223 pertains to the language as it currently exists in §70-1008 and provides support for the Board's interpretation. Testimony before the Public Works Committee on LB 223 indicates that the Nebraska Power Industry Task Force understood and intended for the term "municipally owned electric system" to include NPPD's lease-operated municipalities. (Exh. 2, pages 20-21). Speaking of the amendments to §70-1008(2), Mr. Blatchford, an employee of NPPD, noted that NPPD was part of the Task Force and stated:

Where the bill, as it reads, says, 'a municipally owned electric system,' the intent of the territorial committee was that this term certainly would include the leased municipalities which a municipal lease operates under a contract with NPPD. The intent of everyone was that NPPD's lease-operated municipalities would be included in this subsection 2. I don't know, as a bill, there could possibly be some misinterpretation of that, but certainly that was the intent of the committee, and as far as I know there was no disagreement that the leased towns of NPPD would be included in that classification.

(Exh. 2, pages 20-21). Admittedly, this was not testimony by a senator, but provides evidence that the industry understood and intended for the term to include lease operated towns such as Plattsmouth. No senator or other power supplier disputed the validity of

the interpretation. The bill's sponsor, Senator Sam Cullan, stated that "Legislative Bill 223 was developed over several years by the power industry. . . ." (Exh. 2, page 3). In his opening remarks in support of the adoption of the Public Works Committee's amendments, Senator Kremer (the Committee's Chairman) stated "These Committee amendments were brought to the Committee by the Task Force that worked on the bill itself" (Exh. 2, page 85). Senator Cullan's and Senator Kremer's remarks show that Nebraska's power industry played a large role in drafting the bill's provisions, and therefore could reasonably be expected to know how its terms were intended to be interpreted. Also, in the Committee Statement forwarding LB 223 to the Legislative floor, Senator Kremer stated that "Mr. Blatchford noted that the intent of the Task Force was that the language include lease towns operated by NPPD." (Exh. 2, page 54).

17. If Application SAA 311-03-A were denied, the City and/or its residents would be served by two different power suppliers within the City's corporate limits. The Board believes that the policy of the State of Nebraska as set out in Article 70, Chapter 10 is to allow municipalities the ability to avoid situations where the municipality will be served by two power suppliers operating within the corporate limits. However, the municipality involved must affirmatively act to avoid service being provided by two power suppliers within the corporate limits.

18. To adopt OPPD's argument that NPPD does not qualify as a proper party to file an application requesting that territory annexed by the City be added into the service

area including the City, because NPPD is not a municipality and therefore cannot be considered a “municipally owned electric system, serving such municipality at retail” would mean that in cases where a municipality is served at retail by a power supplier, there is virtually no means by which the retail service area including a municipality’s corporate limits can be expanded to include territory annexed by the municipality. Absent the concurrence of adjoining suppliers, the only present means through which a service area can be modified is to establish that the present supplier for that area cannot or will not furnish adequate electrical service or that its doing so would involve the wasteful and unwarranted duplication of facilities. *See In re Application of City of Lincoln*, 243 Neb. 458, 466, 500 N.W.2d 183, 189 (1993). In the present case, the City has no service area, and would lack standing to file an application to expand the service area in which it is located. The power supplier serving the municipality at retail is not itself a municipality, and cannot annex territory. The interpretation which OPPD urges the Board to adopt would frustrate what the Board believes was the Legislature’s intent -- to allow municipalities the opportunity to avoid being served by multiple power suppliers within the municipality’s corporate limits. A reasonable construction must be placed on a statute which best achieves the statute’s purpose, rather than a construction which would defeat the statute’s purpose. *Keller v. Tavarone*, 265 Neb. 236, 242, 655 N.W.2d 899, 905 (2003).

19. OPPD points out that pursuant to Neb. Rev. Stat. § 70-1008(2), it is not

mandatory that newly annexed territory be added to a municipality's service area -- it is only permissive. (Protestant's Brief at 6). It is true that an application must be filed with the Board requesting that newly annexed territory be incorporated into a municipal service area in those situations where the annexed territory extends beyond the municipality's existing service area. If no application is filed, two power suppliers may supply customers within the municipality with electric service. OPPD also argues that since the Legislature specifically provided for situations where a municipality would be served by two power suppliers (see Neb. Rev. Stat. §70-1002(2)), that this demonstrates the Legislature did not intend that such situations should be avoided. (Protestant's brief at 6). It is certainly true that the Legislature provided for situations where municipalities may be served by two power suppliers. However, a distinction must be drawn between a Legislative attempt to ensure that certain situations be avoided, and a Legislative intent to provide one party the ability to avoid certain situations if they so choose, through affirmative action. The Board believes the Legislature's intent was to provide municipalities with the ability to exercise a measure of self-determination over whether or not more than one power supplier could operate within the corporate limits. Since the Board finds that in the present situation NPPD qualifies as a "municipally owned electric system, serving such municipality at retail," for purposes of §70-1008(2), NPPD has the right, upon application and approval by the Board, to serve the newly annexed area. The Board acknowledges that if no application were to be filed, two power suppliers may

indeed provide service within the municipality's corporate limits.

20. It should also be pointed out that prior to 1979, §70-1008 provided that cities had the right to serve customers located within their zoning jurisdiction, which extended beyond the corporate limits of a municipality. According to the testimony of Senator Cullan, one of the bill's sponsors, one of the reasons for LB 223 was to change that part of §70-1008 that gave municipalities the right to provide retail electrical service to all customers located within the municipalities' zoning area. (Exh. 2, page 4). The bill's supporters wanted to amend the statute so that municipalities had the right to serve customers located inside newly annexed territory, but to remove the preference for municipalities to serve anyone inside the municipal zoning jurisdiction. (Exh. 2, pages 3-6). Although this does not specifically pertain to the situation presented in SAA 311-03-A where a power supplier other than the city or village itself provides electric service to customers within a municipality, it provides additional support that, as a general principle, the Legislature intended to give municipalities a great deal of control over the provision of electrical service within their corporate boundaries.

21. The legislative history of §70-1008(2) indicates that the term "municipally owned electric system" was understood by the industry and the Legislature to include situations where a public power district, including NPPD, operates a municipality's distribution system pursuant to a lease agreement. Such an interpretation furthers the goals of avoiding and eliminating conflict, competition and duplication among

Nebraska's power suppliers. The Board finds that the Legislature did not intend for municipalities served by public power districts under a lease agreement or "retail operations agreement" to be unable to avoid being served by multiple power suppliers operating within the municipality's corporate limits.

22. Based on the foregoing, the Board concludes that an electric distribution system located within the corporate limits of a municipality, but operated for retail power supply purposes by a public power district or other power supplier pursuant to a lease or retail operations agreement similar to that between NPPD and the City of Plattsmouth, constitutes a "municipally-owned electric system, serving such municipality at retail" for purposes of Neb. Rev. Stat. § 70-1008(2). NPPD therefore has the right to apply to have territory annexed by the City added to NPPD's service area.

23. The Board's decision follows previous decisions by the Board in which the Board was called upon to address the same issue as presented in SAA 311-03-A. See In the Matter of the Application of Loup River Public Power District and the City of Columbus, Nebraska, S.A.A. 252, (January 30, 1984) (Exh. 3); In the Matter of the Application of the Nebraska Public Power District and the City of Ogallala, Nebraska, SAA 315-02-A (January 7, 2003) (Exh. 4). The Board finds no substantive differences that would distinguish the present matter from its previous decisions. Given the findings and conclusions set out above, the Board can find no good cause to vary from its previous decisions.

ORDER

That during that part of its January 16, 2004, public meeting held subsequent to the hearing on Application SAA 311-03-A, a majority of the members of the Power Review Board (3 ayes, 1 nay) voted in favor of a motion to approve Application SAA 311-03-A.

IT IS THEREFORE THE ORDER OF THE NEBRASKA POWER REVIEW BOARD that, pursuant to the Board's action during its public meeting held January 16, 2004, Application SAA 311-03-A, filed by the Nebraska Public Power District and the City of Plattsmouth, Nebraska, requesting that retail Service Area Agreement 311 be amended by adding the territory annexed by the City of Plattsmouth on October 6, 2003, described in Plattsmouth City Ordinance No. 1691, to the Nebraska Public Power District's retail service area, be approved.

NEBRASKA POWER REVIEW BOARD

BY



Rick Sanders
Chairman

DATE: 2/25/04

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-311-03-A 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 26th day of February, 2004.

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