

**STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD**

IN THE MATTER OF THE APPLICATION)	
OF THE NEBRASKA PUBLIC POWER)	SAA 315-02-A
DISTRICT AND THE CITY OF OGALLALA,)	
NEBRASKA TO MODIFY THE EXISTING)	
SERVICE AREA AGREEMENT 315)	
BETWEEN THE NEBRASKA PUBLIC)	
POWER DISTRICT AND THE MIDWEST)	ORDER
ELECTRIC COOPERATIVE)	
CORPORATION BY TRANSFERRING TO)	
THE NEBRASKA PUBLIC POWER)	
DISTRICT CERTAIN PORTIONS OF THE)	
MIDWEST ELECTRIC COOPERATIVE)	
CORPORATION'S SERVICE AREA, AND)	
FOR A DETERMINATION OF THE)	
PURCHASE PRICE FOR SUCH)	
PROPERTIES.)	

NOW, on the 6th day of December, 2002, 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 16th day of August, 2002, the Nebraska Public Power District (NPPD) and the City of Ogallala (the City), (collectively "Applicants"), filed an Application for Modification of Existing Service Area Agreement 315 with the Nebraska Power Review Board (the Board). Service Area Agreement 315 is the agreement establishing the boundary between the adjoining service areas of NPPD and the Midwest

Cooperative Corporation (Midwest). The application was designated "SAA 315-02-A)." (Exh. 11).

2. Notice of the application was provided to Midwest.

3. On the 10th day of September, 2002, Midwest filed a Protest objecting to the approval of Application SAA-315-02-A, in which Midwest set out its reasons for opposing the application. (Exh. 7).

4. On September 20, 2002, the hearing on SAA 315-02-A was convened. No evidence was taken at the September 20 hearing, and both parties agreed to continue the hearing until November 8, 2002. (T7:17 to 9:12).

5. It is uncontested that pursuant to Ordinance 1140, on April 9, 2002, the City annexed a tract of land generally described as the Northwest Quarter of Section 30, Township 14 North, Range 38 West of the 6th P.M. in Keith County, Nebraska. (Exh. 11, pages 4-7; Exh. 4, pages 2-3). The annexed tract contains 14 street lights which receive electric service from Midwest. As part of the annexation, the City purchased the street lights from the State of Nebraska and now owns said street lights. (T46:9-24).

6. The City owns the electric distribution system within the corporate city limits of Ogallala. (T25:13-16).

7. NPPD holds the retail service area rights to the service area that includes the entire corporate limits for the City. NPPD is the sole retail electric power supplier for the service area including the City's corporate limits. (T24:3-22).

8. NPPD operates the City's electric transmission system pursuant to a "retail operations agreement." Under the terms of the agreement, NPPD has leased the City's electric distribution system for 25 years beginning on January 1, 1990, and supplies the retail electricity needs of all customers located within NPPD's service area in the City. NPPD is responsible for maintaining the distribution system, customer billing and constructing any necessary improvements to the system. (T20:3-22; Exh. 1).

9. Retail operations agreements such as the one between NPPD and the City are relatively common in Nebraska's electric industry. (T19:2-21).

10. Although there was evidence regarding the possibility that a City well field might be located inside the area annexed by the City and currently served by Midwest, no well is currently operating in the annexed area, Midwest is not currently receiving any revenue from any well located in the annexed area, and the City has no specific plans to locate a well in the annexed area now served by Midwest. (T36:6-16; T44:6 to 45:17).

11. If Application SAA 315-02-A were denied, the City would have to pay Midwest for the electricity used by the 14 street lights located in the annexed area, while it would pay NPPD for other electricity used by the City. This would create a situation where the City is served by two power suppliers operating within its corporate limits. (T56:6-18).

12. Midwest calculated that it would incur damages totaling \$176,227.85 if the application were approved. Of the total estimated damages, \$84,763.50 was based on

revenue lost from future businesses that might locate in the annexed area, while \$91,464.35 was based on revenue lost due to the City's future well field that might be located in the annexed area. (Exh. 7, pages 3-4). Neither of these figures was based on an existing electric revenue source located in the annexed area that Midwest would lose to NPPD if Application SAA 315-02-A were approved. (T77:14 to 78:3).

CONCLUSIONS OF LAW

13. 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.

14. 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" for purposes of the statute.

15. If Application SAA 315-02-A were denied, the City would pay Midwest for the electricity used by the 14 street lights in the annexed area. The City would therefore be served by two different power suppliers within its corporate limits. The policy of the State of Nebraska as set out in Article 70, Chapter 10 is to generally avoid situations where a municipality would be served by two power suppliers operating within the

corporate limits, especially in situations where the municipality involved objects to being served by two power suppliers.

16. The legislative history of § 70-1008(2) indicates that the term “municipally owned electric system” was understood to include situations where a public power district, including NPPD, operates a municipality’s distribution system pursuant to a lease agreement. (Exh. 9). 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.

17. Midwest argues 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.” To adopt this reasoning 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 (particularly when the annexed area is already being served by another power supplier such as in the present case). Absent concurrence of the adjoining suppliers, the only 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 doing so would involve the wasteful and unwarranted duplication of facilities. *See In re Application of City of Lincoln*, 243 Neb. 458, 466 (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 Midwest urges the Board to adopt would frustrate what the Board believes was the Legislature's intent -- to allow municipalities to be served by only one power supplier within their corporate limits.

18. 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 Ogallala, 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 that includes the City's corporate limits.

19. The Board's decision follows previous decisions by the Board in which the Board was called upon to address this issue. *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. 10).

20. Midwest must be compensated for any lost revenue caused by a service area transfer such as is requested in Application 315-02-A. Only revenue from existing electric customers of Midwest who have been or are purchasing electricity from Midwest as of the date of the filing of the application may be used for purposes of determining the amount of Midwest's lost revenue. See In re Application of City of North Platte, 257 Neb. 551 (1999). Future or potential loads or customers are speculative and therefore cannot be used when determining the amount of revenue lost.

ORDER

That during that part of its December 6, 2002, public meeting held subsequent to the hearing on Application SAA 315-02-A, a majority of the members of the Power Review Board (5 ayes, 0 nays) voted in favor of a motion to approve Application SAA 315-02-A and to require the Nebraska Public Power District to pay to the Midwest Electric Cooperative Corporation 2.5 times the annual revenue generated by the facilities located in the annexed area now served by Midwest Electric Cooperative Corporation.

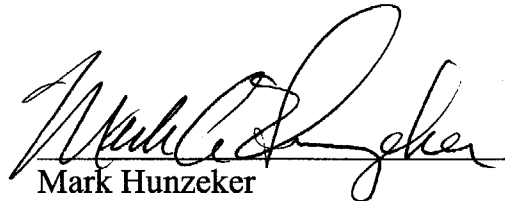
IT IS THEREFORE THE ORDER OF THE NEBRASKA POWER REVIEW BOARD that, pursuant to the Board's action during its public meeting held December 6, 2002, Application SAA 315-02-A, filed by the Nebraska Public Power District and the City of Ogallala, Nebraska, requesting that retail Service Area Agreement 315 be amended by adding the territory annexed by the City of Ogallala on April 9, 2002,

described in Ogallala City Ordinance 1140, to the Nebraska Public Power District's retail service area, be approved.

The Board further finds that for the rights to serve the area annexed by the City of Ogallala as described in application SAA 315-02-A, the Nebraska Public Power District is to provide compensation to the Midwest Electric Cooperative Corporation in an amount equal to two and one-half (2.5) times the annual revenue received by the Midwest Electric Cooperative Corporation from power sales resulting from providing electricity to the street lights in the annexed area during the twelve months immediately preceding August 16, 2002 (the date the application was filed with the Power Review Board).

NEBRASKA POWER REVIEW BOARD

BY


Mark Hunzeker
Chairman

DATE: 1-7-03

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-315-02-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 8th day of January, 2003.

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