STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD

IN THE MATTER OF THE APPLICATION OF THE CITY OF NELIGH, NEBRASKA, TO MODIFY THE EXISTING RETAIL SERVICE AREA AGREEMENT 400 BETWEEN NELIGH AND ELKHORN RURAL PUBLIC POWER DISTRICT.	))))))	SAA 400-16-A **ORDER ON CONTROLLING STANDARD OF REVIEW IN ANNEXATIONS**

The issue before the Board is the controlling standard of review in situations where a municipal electric utility annexes territory and files a timely application with the Nebraska Power Review Board (the Board) to transfer the annexed territory into its retail service area. The parties submitted briefs[1], and oral arguments were heard at a hearing held on October 28, 2016. For the reasons set out below, the Board finds that Neb. Rev. Stat. § 70-1008 establishes the standard of review that the Board must apply in SAA 400-16-A and similar situations.

The City of Neligh (Applicant) argues that Neb. Rev. Stat. § 70-1008 establishes the controlling standard to be applied in this situation. Under § 70-1008, a municipal electric utility has the right to take over the service area rights to annexed territory if it is pursuant to a valid annexation. The application to take over the service area rights must be filed within one year of the annexation. It is uncontested that the annexation action taken by Applicant was not challenged in court. It is also uncontested that Applicant

[1] Briefs were submitted by the City of Neligh and the Elkhorn Rural Public Power District. The Battle Creek Farmers Cooperative did not file a separate brief.

filed its application with the Board within one year of the annexation action, albeit on or near the last day of the one year period. The Elkhorn Rural Public Power District's (Protestant) position is that the statutes that establish the controlling standard in this situation are Neb. Rev. Stat. §§ 70-1101 and 70-1011. These statutes would require the Board to determine whether a municipal system has the ability to adequately and reliably serve the annexed area prior to approving an application.

Neb. Rev. Stat. § 70-1008 provides the following:

> In the absence of an agreement between the suppliers affected and notwithstanding the provisions of subdivisions (1) to (5) of section 70-1007:
> (1) Existing service areas presently designated by agreements and exhibits filed with and approved by the board, or previously ordered by the board, shall remain and be established as certified service areas.
> (2) A municipally owned electric system, serving such municipality at retail, shall have the right, upon application to and approval by the board, to serve newly annexed areas of such municipality. Electric distribution facilities and customers of another supplier in such newly acquired certified service area may be acquired, in accordance with the procedure and criteria set forth in section 70-1010, within a period of one year and payment shall be made in respect to the value of any such facilities' customers or certified service area being transferred. The rights of a municipality to acquire such distribution facilities and customers within such newly annexed area shall be waived unless such acquisition and payment are made within one year of the date of annexation. If an application is made to the board within one year of the date of annexation for a determination of total economic impact as provided in section 70-1010, such right shall not be waived unless the municipality fails to make payment of the price determined by the board within one year of a final decision establishing such price. Notwithstanding other provisions of this section, the parties may extend the time for acquisition and payment by mutual written agreement.
> (3) All retail power suppliers having adjoining certified service areas shall engage in joint planning with respect to customers, facilities, and services, taking into account the considerations specified in section 70-1007, including the possibility that an area may be annexed by a municipality within a reasonable period of time.

As Applicant correctly points out in its brief, the language in section 70-1008 specifically applies to situations involving annexation actions by municipally-owned electric utilities that want to acquire the service area rights to the annexed territory. The language in the statute is plain, direct, and unambiguous. The Nebraska Supreme Court has consistently held that in such instances, no statutory interpretation is necessary, or even allowed. In a case involving the Board, the Court stated "In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct and unambiguous." *In re Application of City of Grand Island*, 247 Neb. 446, 449, 527 N.W.2d 864, 866-867 (1995) (citations omitted). In another case involving the Board, the Court similarly stated "In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning." *In re Application of City of Lincoln*, 243 Neb. 458, 464, 500 N.W.2d 183 (1993) (citations omitted). See also *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998), "When the words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning." *Id.* at 603, 578 N.W.2d at 426-427. Other than the filing of a properly prepared application, within the one year time frame, and evidence of a facially valid annexation action, there are no other qualifiers needed to entitle a municipal utility to acquire the service area rights to annexed territory. If the Legislature had intended the

Board to determine whether the municipally-owned electric utility can adequately and reliably provide electric service to the annexed territory, the Legislature could have provided the Board with that authority in section 70-1008. The Legislature evidently chose not to do so. The Board declines the opportunity to read into the statute something that is not clearly stated, nor is the interpretation urged by Protestant necessary in order to achieve the purposes of the overall act.

In fact, the Board believes its reading of the statute complies with the Legislative intent that municipalities be allowed to serve their entire corporate area. In *Application of the City of Schuyler*, 181 Neb. 704, 150 N.W.2d 588 (1967), the Nebraska Supreme Court addressed a situation where a municipality annexed territory, placing the area in which a customer was located within the City's zoning area. At that time, section 70-1008 provided a municipally-owned electric utility the right to serve territory within its zoning area. The City wished to transfer the new zoning area into its retail service area. As with the present proceeding, the issue was the right of the municipal system to acquire additional service area based on an annexation action, although in the *City of Schuyler* case the customer was in the new zoning area created by the annexation, not the annexed territory itself. In the *City of Schuyler* case, the Court stated "The question presented is whether a municipality is entitled to enlarge its service area to include extensions of its zoning area." *Id.* at 708, N.W.2d at 591. The Court went on to state that "the act provides that a municipality which operates a retail system shall have a preference within its corporate limits and zoning area." *Id.* The Court pointed out that "At the time this

legislation was under consideration, the Legislature was concerned with the problems that arise where there are multiple suppliers within a municipal area. The act evidences an intention to avoid similar situations in the future." *Id.* A finding that section 70-1008 establishes the controlling standard, giving municipally-owned electric suppliers the right to transfer the service area rights to annexed territory, furthers the objective identified by the Court. The Board's finding provides clarity and consistency for Nebraska power suppliers, and helps to avoid situations where multiple electric power suppliers serve customers inside a municipality's corporate limits, a situation the Nebraska Legislature prefers to avoid. The Board in *City of Schuyler* took the position that a municipal electric system had the right to serve retail customers in new zoning areas acquired as a result of an annexation only in the absence of a retail service area agreement between the affected suppliers. The Court reversed the Board, finding that the Board's ruling failed to give effect to the spirit of the act and the purpose of the legislation, which was to lessen the instances of multiple power suppliers operating within a municipality.

The Board finds that the language in section 70-1008 is clear and unambiguous, providing a municipally-owned electric utility the right to absorb newly annexed territory into its retail electric service area. The Board therefore does not believe there is a need to inquire further into the legislative history or background of the statutes pertaining to annexations. "If the language of a statue is clear, the words of such statute are the end of any judicial inquiry regarding its meaning." *State v. Jones*, 258 Neb. 695, 701, 605

N.W.2d 434, 438 (2000), citing *Ameritas Life Ins. v. Balka*, 257 Neb. 878, 601 N.W.2d 508 (1999).

Protestant argues, in both its brief and at oral arguments, that by providing the Board with the authority to "approve" an application filed by a municipally-owned electric utility to acquire the service area rights to annexed territory, it is implied or inherent that the Board exercise some discretion. The Board agrees that an "approval" indicates the opportunity to disapprove of the filing. However, the Board believes that Protestant reads the term too broadly. When a statute sets out with clear language the right of a municipally-owned electric utility to acquire service area rights to annexed territory, the Board believes its determinations are limited to ensuring that the application form is properly completed and filed, that the application was filed within the statutorily required time frame, and that the applicant provides evidence that a facially valid annexation occurred.

Protestant points out that section 70-1008 states the municipality "may" acquire the service area rights to the annexed territory, not that it must be acquired. Protestant's brief at 8. When the word "may" is used in a statute, permissive or discretionary action is presumed. When the word "shall" is used, mandatory or ministerial action is presumed. Neb. Rev. Stat. § 49-802(1). Protestant asserts that "If the Board was required to automatically approve the Application without inquiry, then the statutory language would clearly state that upon application to and approval by the board then the newly acquired service area must be acquired according to § 70-1010." Protestant's brief at 8. The

Board agrees that the inclusion of "may" clearly provides for the exercise of some discretion. But the "may" does not appear in the portion of the statute giving municipalities the right to absorb annexed territory into their service area. It appears in the following sentence that pertains to the municipality acquiring the distribution system and customers of the incumbent power supplier for that area. This provides the municipality the discretion to determine whether certain customers in the annexed area should continue to be served by the existing power supplier. It acknowledges that the municipality may not be able to use the distribution infrastructure in the annexed territory due to incompatibility, the condition of the facilities, etc. It also allows the municipality the opportunity to waive its right to provide electric service to existing customers in the annexed territory and allow the incumbent power supplier to continue serving those customers, if the incumbent supplier is willing to do so. The municipality also has the opportunity not to exercise its right to absorb the annexed territory into its retail service area. Although the statutes create a preference for municipalities to serve all territory within their corporate limits, municipalities are not required to do so under section 70-1008. If a municipality fails to file an application with the Board within one year of the annexation, the municipality loses its ability as of right to take over the service area. After the one year period expires, the municipality would need to proceed under the only remaining method to acquire additional service area over the objection of an adjoining power supplier, which is "by meeting the requirements set forth in § 70-1011, that is, by establishing that the present supplier cannot or will not furnish adequate electrical service

or that its doing so involves a wasteful and unwarranted duplication of facilities." *City of Lincoln*, 243 Neb at 466, 500 N.W.2d at 189.

Protestant argues that Applicant has a qualified right to serve annexed territory. One of the qualifiers is that the "Board has an obligation to determine whether Neligh either cannot or will not provide adequate and reliable electric service to the newly annexed areas and whether such efforts would be an unnecessary duplication of services." Protestant's brief at 3. In support of its position Protestant cites to *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). See also Transcript Volume I, Oct. 28, 2016, 37:2 through 45:7. The Board believes the case is inapposite to the present proceeding. In the present case, Protestant alleges that Applicant is unable to provide adequate and/or reliable service to the annexed territory. In *City of Lincoln*, the Court pointed out that "There is no evidence that Norris [the Protestant in that case] is unable to service the consumers in the subject area or that such service involves a wasteful and unwarranted duplication of facilities." *Id.* at 461, 500 N.W.2d at 186. Neither does the decision indicate that the Protestant in that case alleged that the Applicant (the City of Lincoln) would be unable to provide adequate or reliable service to the annexed territory, or that the service would involve duplication. Also, in *City of Lincoln*, the territory the City wanted to acquire had not been annexed, but rather was within its zoning area. Although section 70-1008 had previously allowed municipally-owned electric utilities the right to acquire the service area rights to territory in its zoning area, the Legislature removed that provision from the statute through LB

223 (1979). After passage of LB 223, municipalities only had the right to absorb annexed territory into their service area, not the zoning area. Therefore, *City of Lincoln* effectively dealt with a situation where a power supplier attempts to acquire service area rights to adjacent territory over the objection of the adjacent power supplier currently holding the service area rights to that territory, without regard to annexation. As the Court pointed out "L.B. 223 removed the zoning area preference previously afforded to municipalities by § 70-1008; the present language of § 70-1008 makes annexation the event which triggers a municipality's right to serve the new area." *Id.* at 466, 500 N.W. 2d at 189.

Protestant relies in part on section 70-1101 in support of its contention that the Board must determine whether Applicant is capable of providing adequate and reliable electric service to the customers in the annexed area. Section 70-1101 sets out the following:

> It is hereby declared to be the policy of the state to provide for dependable electric service at the lowest practical cost to all of the citizens of the state, including the residents of cities and villages.
>
> The maintenance of competing electric systems within such cities or villages results in duplication of facilities and personnel and the needless expenditure of public funds by both such competing systems; that such needless expenditure for duplicating service by publicly owned agencies is not in accord with sound public policy. Whenever such duplicating competition exists in any municipality between a public power district organized under the provisions of Chapter 70, article 6, and other public agencies, including municipalities, such competition should be eliminated in the public interest for economy of operation and lower rates to the consumer.

The Board points out that section 70-1101 is a policy statement in Chapter 70, Article 11, while the Board's primary controlling statutes dealing with annexations and service areas, including section 70-1008, are set out in Chapter 70, Article 10. Policy statements are useful to assist in determining the Legislature's intent for a specific act. In this case, the policy statement is not part of the act in question (Chapter 70, Article 10). Also, as has already been discussed, the language in section 70-1008 is plain and unambiguous, and no interpretation is needed. Therefore, reference to a policy statement is not necessary. "A preamble or policy statement in a legislative act is generally not self-implementing, but may be used, if needed, for assisting in the interpreting the legislative act of which the statement is a part." *State v. Liston*, 271 Neb. 468, 471, 712 N.W.2d 264, 267 (2006). See also *Southern Neb. Rural Public Power Dist. v. Nebraska Electric*, 249 Neb. 913, 546 N.W.2d 316 (1996).

Protestant also cites to Neb. Rev. Stat. § 70-1001 in support of its position. Section 70-1001, in pertinent part, states the following:

> Declaration of policy.
>
> In order to provide the citizens of the state with adequate electric service at as low overall cost as possible, consistent with sound business practices, it is the policy of this state to avoid and eliminate conflict and competition between public power districts, public power and irrigation districts, individual municipalities, registered groups of municipalities, electric membership associations, and cooperatives in furnishing electric energy to retail and wholesale customers, to avoid and eliminate the duplication of facilities and resources which result therefrom, and to facilitate the settlement of rate disputes between suppliers of electricity.

As with section 70-1101, section 70-1001 is a policy statement. Although section 70-1001 is part of the Board's controlling act, it is a general policy setting out the overall purposes for Chapter 70, Article 10. As stated in the case citations above, it is not self-implementing. Section 70-1008 is a specific statute pertaining to acquisition of service area rights by municipally-owned electric utilities. As a statute specifically on point, section 70-1008 will control over the general statute setting out an overall policy. "[T]o the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute." *Sack v. Castillo*, 278 Neb. 156, 160, 768 N.W.2d 429 (2009). See also *AMISUB, Inc. v. Board of County Commissioners Douglas County*, 244 Neb. 657, 663, 508 N.W.2d 827, 832 (1993).

Protestant asserts that "Neligh and ERPPD are competing for the right to serve customers within the newly annexed areas by filing the Application to the Board and in protesting said Application." Protestant's brief at 5. As Protestant correctly points out, one of the purposes for which the Board was created, and for sections 70-1001 to 70-1020, is to avoid and eliminate conflict and competition between public power districts and municipalities in furnishing electrical energy to retail customers. . . ." Protestant's brief at 5, citing *Application of Eastern Nebraska Public Power District*, 179 Neb. 439, 444-445, 138 N.W.2d 629, 633 (1965). The Board's ruling provides clarity and avoids competition between power suppliers. A municipality has the right to serve newly annexed territory if it chooses to file an application within one year of the annexation. As stated by the Nebraska Supreme Court in the *City of Schuyler* case, avoiding competition

inside a municipality and having only one power supplier to service the entire corporate limits was the Legislature's intention.

The Board is cognizant of the fact that its decision means that it is presumed a municipality can and will provide adequate and reliable electric service to the customers within an annexed area. This presumption seems consistent with the statutory language, and the creation of such a presumption is the Legislature's prerogative. It is the Board's duty to implement it, not determine whether it is appropriate or should be modified. Protestor's position is reasonable, and would further the Board's mission to protect the public interest in electric service issues. However, as previously stated, the Legislature chose not to provide the Board with that authority, and the Board has no ability to create that authority when it has not been provided by the Legislature, especially when such an interpretation is not necessary to accomplish the purposes of service area transfers based on annexations. "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. Nebraska State Racing Comm'n*, 270 Neb. 186, 193, 700 N.W.2d 594, 601 (2005). See also *City of Schuyler*, 181 Neb. at 706, 150 N.W.2d at 590. If subsequent to the acquisition of the annexed territory the facts demonstrate that the municipality cannot or will not provide adequate and reliable service to the customers in the annexed territory based on the new utility's service record for that customer, the Board sees no prohibition against the previous power supplier filing an application with the Board to obtain the right to serve the customers under the standards set out in § 70-

1011. The Board does not dispute that this could place a customer in a possible position of having to deal with electric service issues for a period of time, but that is the process established by Nebraska law. The Board has no authority to alter that process, no matter how well-intentioned the action may be.

The Board wishes to clarify that its decision in no way absolves power suppliers with adjoining service areas from engaging in a good faith effort for joint planning, as is required under section 70-1008(3), in order to make service area transitions as seamless as possible for both power suppliers and their customers.

Lichter (Chair), Reida (Vice Chair) Grennan, Haase and Morehouse, participating.

NEBRASKA POWER REVIEW BOARD

BY: _____
Stephen M. Lichter
Chairman

DATED: November 22, 2016.

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 ON CONTROLLING STANDARD OF REVIEW IN ANNEXATIONS** has been served on the following persons at the addresses indicated via U.S. mail to the following parties on the 23rd day of November, 2016.

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