

**STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD**

IN THE MATTER OF THE CENTRAL)	
NEBRASKA PUBLIC POWER AND)	
IRRIGATION DISTRICT’S PETITION TO)	PETITION FOR
AMEND ITS CHARTER)	CHARTER AMENDMENT 6
)	
IN THE MATTER OF THE DAWSON)	
PUBLIC POWER DISTRICT’S PETITION)	
FOR DISSOLUTION)	

PETITIONERS’ POST-HEARING BRIEF

I. INTRODUCTION

The Central Nebraska Public Power and Irrigation District (“Central”) is a public power and irrigation district formed in 1933 pursuant to Chapter 70 of the Nebraska Revised Statutes. (Exh. 69). Dawson Public Power District (“Dawson”) is a public power district organized in 1937 also pursuant to Chapter 70 of the Nebraska Revised Statutes.

A. Background of Central and Dawson Pre-Petition

Central operates a system of reservoirs, dams, and canals (the “System”) that stretches 200 miles between Lake McConaughy and Minden that delivers surface water for irrigation to more than 1,100 accounts and generates hydropower at four plants. (268: 3-5; 297:16-20; 451:13-15). Central has approximately 100 employees, annual revenues of approximately \$20 million, and plant asset valued at \$195 million. Central’s Chartered Territory comprises Gosper, Kearney, Phelps, Dawson, Keith, and Lincoln counties and is represented by a 12-person elected board of directors in accordance with NEB. REV. STAT. § 70-612(4). (Exh. 1; Exh. 22, p. 6). Presently, Central does not have an operating area, also known as a “service territory,” for electric distribution.

Operationally, Exhibit 21 depicts Central's System, including the Supply Canal and three irrigation canals - E65, E67 and Phelps - which provide water to approximately 103,000 acres in Gosper, Phelps and Kearney counties, with approximately 5,000 acres in Lincoln and Dawson counties receiving water directly from the Supply Canal. (136:5-7; 245:18-19) (Exh. 21, p. 10). Water is delivered to customers pursuant to Water Service Agreements (also described during the hearing as Water Service Contracts or Delivery Contracts). As water travels east through the System, it produces power first at Kingsley Dam (50,000 kilowatt generation capacity), and then at the Jeffrey, Johnson No. 1 ("J-1"), and Johnson No. 2 ("J-2") hydroplants (21,000 kilowatt generation capacity each). (245:16-25; 246:1-25)(Exh. 21, p. 16). Collectively, Central's System can generate up to 113,000 kilowatts of electricity. Approximately 75% of Central's revenues are derived from hydrogeneration. (Exh. 36).

The System also provides groundwater recharge to more than 310,000 acres in and adjacent to the canals and reservoirs, much of which does not receive surface irrigation water from Central. (Exh. 22, pg 5). The recharge helps maintain, and, in areas increase groundwater levels which provides additional irrigation benefits to numerous other entities located within Central's entire territory, including irrigation companies, grain cooperatives, natural resource districts, and other ag related businesses. (220:11-20). Approximately 2.5% of Central's revenues are derived from recharge projects. (Exh. 36).

Central also provides a wide variety of recreational opportunities and environmental benefits. (81:19-25; 82:1-5). Lake McConaughy attracts vacationers and tourists who spend nearly two million visitor days annually in the area. Twenty-six lakes and reservoirs are located throughout the System, providing abundant recreational opportunities and wildlife habitat. (81:21-25; 82:1-5; 275:2-25; 276: 1-4; 280: 3-20). Several of Central's lakes also provide benefits to

owners of approximately 1,100 homes and cabins situated on land they lease from Central. (121:1-2). Approximately 6.5% of Central's revenues are derived from these lease agreements. (Exh. 36).

Dawson is a rural electric distribution provider that serves more than 23,000 electric meters and maintains over 5,800 miles of power lines in south central Nebraska. (Exh. 22, p. 5). Dawson is one of the largest electric distribution systems in Nebraska, with approximately 80 employees, \$70 million in annual revenue, over 30% of which is derived from irrigation accounts, and plant assets valued at \$247 million. (581:24; 583:14-22; 601:11-21). Dawson is governed by an 11-person elected board of directors, representing substantially equal population based voting subdivisions. (586:6-9). The district's service territory includes the rural areas of Buffalo and Dawson counties, approximately two-thirds of Gosper County, half of Lincoln County, and portions of Custer, Frontier, and Sherman counties. (Exh. 22, p. 65). Dawson's service territory includes several small municipalities but does not include Kearney, North Platte, Gothenburg, Lexington, Cozad, Elm Creek, Gibbon, Shelton, or Ravenna. (Exh. 22, p. 5)

B. Consolidation Genesis

As Dave Rowe, Central's President, testified, the Central Board of Directors has a standing instruction to district management to explore business opportunities to strengthen the district. (84:6-25). Central's General Manager, Devin Brundage, explored numerous ideas and projects, some of which are now tremendous assets to Central, such as the recharge projects. In this same vein, Brundage explored opportunities with Dawson in late 2020. (85:1-22). In 2020, Central's General Manager, Devin Brundage, approached Gwen Kautz, Dawson's General Manager, to explore the possibility of entering into a Power Purchase Agreement ("PPA") with Dawson for a portion of Central's hydro output. (85:1-22; 86:3-12; 561:16-25; 562:1-25)(Exh. 22, p. 1). This discussion quickly expanded into a conversation about opportunities that their joint operations

could provide to their respective customers and stakeholders. (456:15-23; 561:1-25; 562:3-25; 566:15-576:6). Central has a storied history of being a visionary district focused on creating opportunity for the residents it serves. (Exh. 69).

When Brundage raised the idea of a consolidation to Central's Board of Directors, they supported exploring the opportunity thoroughly and carefully. (85:2-25; 86:3-25). Brundage and Kautz developed a study process whereby each board and their management team would independently evaluate the merits of a potential consolidation. The study process entailed four phases, or "decision gates," where each board would independently determine whether to continue exploring consolidation or terminate the study if it was not in the best interest of their district. (88:13-20; 563:9-25) (Exh. 21, p.73; Exh. 22, p. 4, 7). If either board voted not to continue the study at the conclusion of any phase, all discussions would terminate. (616:8-23).

C. Due Diligence

The Board of Directors for both Central and Dawson authorized studies to ascertain whether a consolidation was in the best interest of their customers and constituents—rural irrigation customers and rural electrical users, respectively. This was not a quick process, nor superficial, lasting nearly two years. (90:5-20) (Exh. 44, pgs. 10-12) Early on, Central and Dawson engaged the assistance of professional consultants to advise them, and, after reviewing multiple proposals, jointly selected Power Systems Engineering ("PSE"), which has significant experience with merging electric utilities. PSE assisted with an initial evaluation of the process before conducting an in-depth analysis of a potential consolidation, known as Phase I and Phase II, respectively. (563:5-24). As set forth in Exhibit 21, PSE presented its Phase II findings at a joint public meeting of the two boards on February 3, 2022.

Importantly, PSE was not asked to provide a recommendation on whether to consolidate the districts. (326:9-15; 438:4-19). Rather, its task was to present relevant information to the respective Boards of Directors for their assessment, in particular, the strategic fit of the two districts, an assessment of their management and operations, a due-diligence review, preparation of an eight-year financial forecast, and identification of challenges that would need to be addressed and resolved for any consolidation. (326:9-15) (Exh. 22).

As set forth on page 3 of Exhibit 21, PSE identified potential cost savings. The numbers and values utilized in determining those cost savings were very conservative and a “worst case” scenario. (495:24-25; 496:1-3; 544:10-13; 545:2-6). But, as testified to by Dan Muhlbach, Dawson President, these cost savings, while significant and in the best interest of their customers, are not the sole or primary impetus to consolidate the districts together. (675:11-17). Rather, it is the benefits identified on page 31 of Exhibit 21 that demonstrates why this consolidation is in the best interests of the districts: power supply and power sales; workforce savings and improved benefits; coordination of water and energy management; and enhancing flexibility for the future. (676:1-25; 677:1-17) (Exh. 22).

The respective boards determined that consolidation was in the best interest of their districts, customers and constituents for three reasons: 1) Because revenue tied to irrigation is significant for both districts; 2) because both districts are involved in power; and 3) because the existing territories of the districts are adjacent and often overlapping. In doing so, the boards and management understand that their duty is to not only operate today but to ensure the ability to carry out the mission in the future. (532:2-25). Kautz best described the duty a director must undertake:

We charge a director with representing the stakeholder or customer base now; but also the stakeholder/customer base that will be present in 10 or 20 years. Decisions

made in the boardroom today will affect the district in the short term and long term. Both companies are seeing a transformation within our respective industries. Outside influences or forces are responding to regulatory, political, and social pressure, which demands change. Today's director does not have the luxury of short-term thinking, nor do they have a crystal ball. To examine the impact of a consolidation like this, directors should also evaluate the prospects of what happens if there is no consolidation. (Exh. 22, p. 4).

Both boards also recognized that the opportunity to consolidate exists now. Central's Jeffrey hydroplant is already electrically connected to Dawson's sub-transmission system while J-1 and J-2 are in close proximity. (Exh. 21, p. 15; Exh. 22, p. 25). Central's current PPA with an out of state utility (Evergy) for Jeffrey, J-1, and J-2 concludes in 2023, allowing it to explore other opportunities. (299:1-18; 311:2-4). Meanwhile, the current power purchase agreement between Dawson and Nebraska Public Power District (NPPD), through Nebraska Generation & Transmission Cooperative ("NEG&T"), requires that Dawson purchase its power from NEG&T. (485:14-24; 487:4-24). However, the contract allows Dawson to offset a portion of its power purchases from a "Qualified Local Generation" ("QLG") component. (Exh. 21, pgs. 35-36). That QLG can apply to generation with a nameplate rating of 10% of Dawson's demand if the QLG is from methane, wind, solar, biomass, geothermal or hydropower sources. (336:24-25, 337:1-12, 578:3-5). Dawson's 2021 eligible demand was approximately 20 megawatts, closely matching the Jeffrey hydro's capacity of 21 megawatts. (299:1-2; 601:10-25).

In a consolidated district, the ability to apply the Jeffrey hydro generation to the demand load during peak periods, rather than purchase it, would produce significant savings. These savings can be realized now and are not dependent upon renegotiation of the NEG&T wholesale power contract. Furthermore, as testified to by Kautz, there is an expectation that NPPD and NEG&T will soon renegotiate the current wholesale power contract and that a consolidated district will be able to utilize an even greater percentage of its native load to serve its customers, and, therefore, generate even greater savings. (578:6-25; 579:1-10).

D. The Plan of Consolidation

After the Phase II report, both Boards of Directors voted in February 2022 to proceed to Phase III, which consisted of intentional conversations between five directors and the General Managers of both Districts to discuss the “Challenges” for a consolidated district identified in the Phase II report, including name, mission statement, board size, representation and governance, management and organization, employee compensation and benefits, financing philosophies, and rates. (331: 1-24; 585:1-25, 586:13-25) (Exh. 21). While not unanimous, the general consensus from these conversations was that the challenges could be addressed to the satisfaction and in the interest of both Districts. The subsequent respective votes to proceed to Phase IV then authorized negotiation teams from both boards to pursue final terms on all major issues. (563:16-18). Those terms were tentatively agreed to in September 2022 and the drafting of a Plan of Consolidation formalizing those terms then followed. (681:2-25). During this drafting period, the Districts held public open houses and made a concerted effort to engage what had otherwise been a quiet and supportive constituency. (Exh. 44, p. 12). Both boards of directors then held a final joint public meeting on October 24, 2022 in Elwood, Nebraska, where each board voted to approve the Plan of Consolidation and to approve its respective filing – Central, a Petition to Amend (“Petition”); Dawson, a Petition to Dissolve - with the Nebraska Power Review Board (“NPRB”). (353:10-15) (Exh. 1, pgs. 11-12; Exh. 2, pgs. 5-8).

1) Central After Consolidation

As set forth in the Petition, Central will be the legally surviving entity after the consolidation with Dawson. Primarily due to Federal Energy Regulatory Commission (“FERC”) licensing requirements, a consolidation that results in creation of a new District was neither prudent nor feasible. (357:15-18; 564:10-23). Nonetheless, reflecting this new chapter, Central will be renamed Platte River Public Power & Irrigation District (“Platte River”). (Exh. 44, p. 2). With

Central as the surviving entity, all of Dawson’s assets, liabilities, and obligations prior to consolidation will become Platte River’s assets, liabilities, and obligations at consolidation. (356:19-24; 604:3-7; 677:9-17). Platte River will be a member of NEG&T and assume the all-requirements contract with NPPD; Platte River will assume the former Dawson service territory and enter into Service Territory Agreements with neighboring power suppliers; and Platte River will, through assumption of loans and reissuance of bonds, be obligated on outstanding Dawson debt that cannot, by law, be otherwise defeased. (647:7-25; 648:1-9; 720:1-24; 721:2-25; 722:1-23; 726:1-25; 730:13-16). Most significantly, Platte River will deliver electric service to Dawson’s current end use customers.

Platte River will retain all of Central’s existing assets, responsibilities, services, and operations while adding a new division—electric distribution. As set forth in the Plan of Consolidation, the primary purpose of Platte River will be to, at as low an overall cost as possible, deliver surface irrigation, distribute electrical power, and operate hydropower facilities to generate electrical power for wholesale and retail distribution. The secondary purpose of Platte River will be to recharge groundwater, enhance the environment, provide recreational opportunities, and facilitate economic development. (354: 13-356:12) (Exh. 44, pg 2).

Central’s Petition is remarkably simple. Beyond adding the chartered territory descriptions for Dawson, refining subdivision boundaries, adjusting representation for each subdivision, and changing the name and headquarters, the only significant change was inserting the words, “and distribution,” so that Platte River can distribute the power that it already generates. (Exh. 1, p. 6).

2) Board of Directors

The Platte River Board of Directors will initially be comprised of 23 directors, eventually reducing to 14 permanent directors after the November 2028 general election. (Exh. 44, p.17). The

existing Central and Dawson directors from each of the seven proposed subdivisions of Platte River were assigned to seats designated A, B, C, or D. All A and B seats are “permanent” seats while C and D seats are temporary and will expire at the conclusion of the current director’s term of office. No preference was given to either Central or Dawson directors, nor whether a director has a certain expertise, nor how they voted for or against the Plan of Consolidation or filing the Petition or Petition to Dissolve, respectively. Directors were pooled together and assigned to their Platte River seats based on their county of residence and the alphabetical order of their last names. (405:21-25) (Exh. 1, p. 7).

Platte River will continue Central’s committee structure to govern. (554:22-25). Currently, Central’s Board of Directors utilizes six committees. (554:3-10). However, a new committee will be created and added to the committee system to maintain expertise and strategic vision on electric distribution. Because Platte River will have both water service and distribution services committee, Platte River directors with expertise in those respective operational areas will continue to guide board decision-making on irrigation and electric distribution matters. That is not to suggest that Dawson directors will not sit on any of the other six committees, but the committee structure will allow for Dawson directors to learn the Central mission of delivering surface irrigation water and allow the Central directors to learn the mission of electric distribution. Over the course of the next five years, by 2029 when the Board reduces to fourteen directors, all fourteen directors are expected to be knowledgeable about the full scope of Platte River’s operations.

II. THE PROTEST

On December 5, 2022, Citizens Opposed to the Consolidation (“Citizens Group”), Greg Heiden, Linda Heiden, Richard Waller and Susan Waller (together with Citizens Group, collectively “Protestants”), filed a Protest objecting to the Petition and proposed consolidation. The parties have either stipulated to or the hearing officer has ruled on the sufficiency of certain claims

within the Protest, therefore, the issues remaining from the Protest are: Protestants oppose and protest the Petition because: (i) the proposed amendments are contrary to and not in the best interests of Central; (ii) the proposed amendments will jeopardize and impair the rights of Protestants; (iii) the proposed amendments will jeopardize and impair the rights of rural users of irrigation water service provided by Central. (Exh. 74, p. 2).The Protestants identified numerous claims in Paragraph 10 of Exhibit 74, the following of which are still at issue:

1. The proposed amendments described in the Petition would prejudice rural users of irrigation water service provided by Central;
2. The chartered territory of the proposed combined district fails to comply with the requirements of Neb. Rev. Stat. § 70-604.01;
3. The operating area of the proposed combined district fails to comply with the requirements of Neb. Rev. Stat. § 70-604.02;
4. The proposed amendments would unfairly obligate irrigation customers who will not receive electricity from the combined district to guaranty debts previously incurred by Dawson Public Power District.

III. ARGUMENT

Respectfully, while Petitioner acknowledge the concerns raised by Protestants, these concerns are 1) not relevant to the NPRB's statutory task, 2) are not properly within the jurisdiction of the NPRB, and 3) are nothing more than purely speculative conjecture that are neither a legally protected right nor an interest capable of being remedied by the NPRB.

A. Legal Standard

The NPRB, as an administrative board of the State of Nebraska, has no power or authority other than that specifically conferred upon it by statute or by construction necessary to accomplish the purpose of the act. *Choquette v. NPPD*, 281 Neb. 350; 798 N.W.2d 572. In an appeal from an order of an administrative agency, the Supreme Court examines the record to determine whether the agency acted within the scope of its authority and whether evidence shows that the order in

question was unreasonable or arbitrary. *In re Application of Red Carpet Limo. Serv., Inc.*, 221 Neb. 340, 377 N.W.2d 91 (1985); *In re Application of Amsberry, Inc.*, 220 Neb. 353, 370 N.W.2d 109 (1985); *In re Application of Crusader Coach Lines*, 213 Neb. 53, 327 N.W.2d 98 (1982). If there is evidence to sustain the findings and action of an agency, the Supreme Court cannot intervene. Conversely, where the agency's finding is against all evidence, the Supreme Court may hold that such finding by the agency is arbitrary. *In re Application of Red Carpet Limo. Serv., Inc.*, *supra*. See, also, *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981). An agency's action is arbitrary if taken in disregard of facts or circumstances and without some basis which would lead a reasonable and honest person to the same conclusion. *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). "As we have often said, this determination by the Commission is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the Commission was illegal or arbitrary, capricious, and unreasonable. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest are matters of legislative and administrative determination peculiarly resting in the judgment of the Commission. [Citation omitted.] . . . 'The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.'" *Robinson v. National Trailer Convoy, Inc.*, 188 Neb. 474, 475-76, 197 N.W.2d 633, 635 (1972).

The NPRB is tasked with interpreting the affirmative language found in NEB. REV. STAT. § 70-664:

Unless it shall appear affirmatively that the adoption of such proposed amendment will be contrary to the best interests of such district, or that it will jeopardize and impair the rights of the creditors of such districts, or of other persons, the Nebraska Power Review Board shall issue in duplicate a certificate of approval of such proposed amendment, and cause

one copy to be filed in the office of the Secretary of State of the State of Nebraska and one copy to be filed in the office of the county clerk of the county in which is located the principal place of business of the district.

Therefore, the NPRB is tasked with answering the following three questions: 1) Is the proposed Charter Amendment contrary to the best interest of Central; 2) Does the proposed Charter Amendment jeopardize or impair the rights of the creditors of Central; and 3) Does the proposed Charter Amendment jeopardize or impair the rights of other persons? Without concrete affirmative evidence demonstrating that the Petition is contrary to the best interest of Central, that it impairs the rights of Central's creditors, or that it impairs the rights of other persons, the NPRB must approve the Petition.

B. Will the Petition impair the rights of creditors of Central? No.

Before addressing the issues, it must be recognized that 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. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

Black's Law Dictionary defines a creditor as, "[a] person to whom a debt is owing by another person; one who has a legal right to demand and recover from another a sum of money on any account whatever, and hence may include the owner of any right of action against another, whether arising on contract or for a tort, a penalty, or a forfeiture." While the Protest filed by Protestants alleges that the Petition will impair the rights of Creditors, Protestants subsequently stipulated that they are not, in fact, alleging the rights of a creditor nor are they creditors of Central. Finding no evidence in support of this claim, in the second Pre-Hearing Conference Order, the NPRB dismissed this issue as a basis for protest. (Exh. 75, p. 4). Furthermore, no other protest was submitted by any other entity or individual. Central has no debt, therefore, the only potential

creditors are those Central deals with in the ordinary course of its operations or with whom it has contractual commitments. Because Central will continue to legally exist, both of these circumstances are unaffected. Consequently, this is not a basis for denying this Petition.

C. Will the rights “of other persons” be impaired? No.

This clause “of other persons” is where Protestant’s individual claims of potential harm is derived. Other than generally referring to contractual water delivery rights; however, Protestants have not identified what their rights are nor submitted evidence of actual impairment of same or any other rights. Likewise, no evidence was submitted asserting the rights of any other person that would be impaired by approval of the Petition. Therefore, Petitioner will focus upon the claimed contractual rights derived from the Water Service Agreements. Importantly, the Protestants contractual rights do not include a right of monetary payment from Central.

Protestants represent a group of individuals, some of whom, have Water Service Agreements with Central. (Exh.31-34). Protestants acknowledge that these Water Service Agreements and rights thereunder will remain unchanged by this Petition. The Water Service Agreements do not need to be assigned, do not require an amendment or re-execution, and the employees administering the contracts today for Central will administer them for Platte River after consolidation. The only potential change is in the composition of the board of directors determining policy that may impact these Water Service Agreements, particularly in times of scarcity. The hearing testimony confirmed that Protestants’ position can best be summarized as a fear of speculative harm to those Water Service Agreements in one of two ways: 1) Platte River will prioritize power generation over irrigation delivery; or 2) Platte River’s board of directors, which will include the former Dawson directors, will take action to deprive Protestants of water delivery or the water rights themselves. Both assertions are factually false and legally unfounded.

1. Platte River may not prioritize power generation over irrigation delivery.

Although a majority of Central's revenues are currently derived from the sale of the hydropower generation (see Exh. 36), at times accounting for 75% of the overall revenues, Central does not, nor will Platte River in the future, prioritize power production over delivery of surface water for irrigation. (113:5-17; 114:14-23; 384:1-25; 385:1-25). As stated by Rowe, "[w]ater and the delivery of was key. Like I said before, that is innate in all of us on the board. I mean, that goes without saying." (87:22-24). "And I do believe that Dawson understood that, too. There's -- many of their directors are irrigators as well." (88:3-6). Protestants have attempted to create a perceived conflict between power generation and irrigation delivery—as if somehow that tension would be new by virtue of this Petition. Given that most of Central's revenues come from hydropower generation today, that tension already exists and has consistently been decided in favor of irrigation. If the Petition is approved, the only changes are that Platte River will inter-divisionally pay itself and that some customers receiving the generated output will live in the district. (603:1-9). Protestants offer no evidence of conflict and even their "experts" could not identify how a conflict could arise. Instead, there was ample speculation that, under certain situations - all of which exist presently, it could be financially lucrative to prioritize hydropower generation which might cause a conflict. Furthermore, Platte River cannot disregard Nebraska law, which statutorily resolves this perceived "conflict." In times of scarcity, when there is not enough water for all users and all uses, agriculture must come before power purposes.

NEB. REV. STAT. § 70-668 with its origins set out in the Nebraska Constitution provides:

In applying the provisions of law relating to the appropriation of water, priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose. Those using the water for agricultural purposes shall have the preference over

those using the same for manufacturing purposes, and those using the water for agricultural purposes shall have the preference over those using the same for power purposes, where turbine or impulse water wheels are installed, or for instream-basin-management purposes.

In *Hickman v. Loup River Public Power District*, 173 Neb. 428, 113 N.W.2d 617 (1962), the Court confirmed this statutory principle that irrigation and agricultural uses have preference over power generation. Furthermore, the Court clarified that the Department of Water Resources, now known as the Nebraska Department of Natural Resources (“NDNR”), has exclusive jurisdiction over water related issues, including jurisdiction to cancel and terminate such rights. This principle is codified in NEB. REV. STAT. § 61-206.

In *Loup River Public Power District v. North Loup River Public Power and Irrigation District*, 142 Neb. 141, 5 N.W.2d 240, **this preference principle** was discussed in dicta, though the question before the court related to priority in time and not the preference specifically stated in NEB. REV. STAT. §70-668, namely can irrigation be prioritized over power generation? The Court reasoned, in dicta, that because the Nebraska Constitution says domestic and irrigation purposes are a natural want and that Section 6, art. XV provides that agriculture has preference over manufacturing, “[I]t was clearly the intention of the framers of our Constitution to provide that water previously appropriated for power purposes may be taken and appropriated for irrigation use upon payment of just compensation therefor. It never was the intention of the framers of the Constitution to provide that water appropriated for power purposes could thereafter arbitrarily be appropriated for irrigation without the payment of compensation.” Simply put, the preference of agricultural purposes, including irrigation, over manufacturing purposes, including power production, are well established and recognized in state law. Platte River, like Central, will adhere to state law and, if it does not, those who claim injury will have an avenue for redress with NDNR.

2. Opportunity for Platte River

What Protestant's view as a "conflict" is what directors, management, and consultants view as "flexibility." Instead of being locked into a long-term, fixed PPA agreement for the entirety of its hydro output, Platte River's experienced directors and management will be able to maximize external market conditions for the benefit of the district and its local stakeholders. As explained by Kautz, "Ultimately that -- what to do with that 20 megawatts will become a board decision. They can choose to effectively reduce our peak by 20 megawatts, which shows the savings that is reflected in Power System Engineering's report; or they can choose to allow [Dawson] irrigators to run more, effectively making our meters spin, and that could have a different financial benefit; or if the market were high or at least what I deemed a greater benefit outside of [Dawson] irrigation, it -- that 20 megawatts could go to the market." (602:9-20).

While Protestants' "expert" suggested that a PPA would be just as effective, PPAs are long-term and inflexible. (1043:5-14). In Central's experience, while a PPA at the time of negotiation is economically fair and beneficial, its set terms do not change with operational, regulatory, or market conditions, often resulting in imbalance between the parties before its conclusion. (621:9-15). Furthermore, a PPA does not allow management to make decisions for the betterment of local stakeholders, instead being solely focused on realizing the most revenue the market will allow at a fixed point in time. A PPA does not allow for peak shaving of load, which is good for irrigation customers, both in terms of water delivery and electric rates required to run irrigation pumps. While Protestants are not generally Dawson customers currently, this fact demonstrates how the proposed consolidation will enhance local benefit and impact. Local electric distribution customers' payments will be made to the energy distribution division of Platte River, which will in turn pay the hydro-irrigation division, just as a third-party would.

What Protestants appear to view as a lost “opportunity cost” is an opportunity gained. While the electric distribution division will pay its share, it will also receive credit for savings associated with internal generation. For example, if the market price for electricity during a hot day exceeds the interdivisional rate by 10% and the most efficient and profitable use of the electric generation is to sell it into the market at a higher rate, Platte River can take that action. The associated savings from that decision to sell into the market must be identified with the internal cost savings for the electrical division. Two things happen at that moment in time: 1) Platte River customers will reduce their peak demand at precisely the moment when prices are highest; and 2) the hydro-irrigation division will be able to sell electricity into the market when both demand and price are at a peak. This combination of events will create substantial savings for the electrical division. The question is what price is paid inter-divisionally. Therefore, not entering into a PPA is not a lost opportunity cost, as that revenue will indeed be recognized by Platte River. Instead, Platte River will be able to always achieve the maximum benefit for the district through the flexibility it gains.

In addition, the stability of electric distribution revenues, which are not generally subject to climatic variability (as is hydrogeneration), will provide Platte River a strong financial base when expensive repairs and replacements for dams, canals, siphons, and generators must be addressed. Currently, Central builds up cash reserves and pays for such repair and replacement projects in full because its main revenue sources can vary significantly from year to year. (301:8-25; 302:1-25; 506:1-25; 507:1-3; 509:16-19). In contrast, with a robust balance sheet and greater diversification in revenue streams, Platte River will, like Dawson and other public power districts, have the option to utilize bonds for such projects going forward, thereby preserving its cash reserves rather than expending them all at once. (509:20-25; 510:1-14).

3. Platte River is not the sole multi-purpose district.

There are examples of districts engaged in hydropower generation, electric distribution, and surface water irrigation delivery in Nebraska today, most notably NPPD. (Exh. 22, p. 9) (445:10-25, 446:1-25, 447:1-25, 448:1-13). As the NPRB is well aware, NPPD operates numerous generation units while simultaneously maintaining a retail distribution division and surface water irrigation delivery. Management from another such district, Loup Public Power District, presented to Central and Dawson's boards on how hydropower generation and electric distribution are complementary activities. (425:18-22).

It must be recognized that Chapter 70 governs both public power districts and *public power and irrigation districts*. NEB. REV. STAT. § 70-601 defines, in relevant part: "District" as "a public power district, public irrigation district, or public power and irrigation district, organized under Chapter 70, article 6"; "Public power industry" as "public power districts, public power and irrigation districts, . . . and any other governmental entities providing electric service"; and "Power" as including "any and all electrical energy and capacity generated, produced, transmitted, distributed, bought, or sold, hydrogen produced, stored, or distributed, and ethanol produced for purposes of lighting, heating, power, and any and every other useful purpose whatsoever." If the Protestants' assertion that hydropower generation and electric distribution are inherently in conflict with surface water deliveries for irrigation were to be accepted, a *public power district and irrigation district* could never exist under the statutory authority because this so-called "conflict" would always be present. To the contrary, the Legislature has declared in NEB. REV. STAT. § 70-1301 that public power and irrigation districts should provide electric service:

It is hereby declared to be the public policy of this state to provide adequate electrical service at as low overall cost as possible, consistent with sound business practices and, in furtherance of such policy, electric service should be provided by

nonprofit entities including public power districts, public power and irrigation districts, nonprofit electric cooperatives, and municipalities.

See, also, NEB. REV. STAT. §§ 70-1001 and 70-1101.

4. Fear is not a valid basis for denial.

Protestants' witnesses testified that their fear of future water delivery reductions is based on time of use and scarcity during dry, hot months when the quantity of water is less than what all users are contractually entitled to receive. This fear is unfounded.

First, hydropower generation requires water to flow through turbines to generate electricity. That water then remains in Central's System and is available for surface water irrigation.

Second, as explained in the testimony of Brundage, Rowe, and Scott Dicke, there are many stakeholders and requirements impacting the quantities and timing of water releases from Lake McConaughy and other reservoirs in the System. (144:1-24; 467:1-8). For instance, the Platte River Recovery Implementation Program requires releases of certain quantities at certain points in time for wildlife use, as does Central's license with FERC, and NPPD requires certain releases from their storage right in Lake McConaughy. When these releases occur, they also end up benefitting irrigation customers.

Protestants' speculative fear incorrectly assumes all water releases by Central today are solely for irrigation. This assumption is incorrect. (150:6-21). Like Central today, Platte River will be required to release water which, when released, will benefit irrigation. Like Central today, Platte River will prioritize adequate storage of water to ensure it can fulfill various release requirements throughout the year that are not initiated by irrigation needs. If there is a prolonged drought, water delivery by Platte River to surface water irrigators may well be impacted, but it will not be due to the existence of Platte River but rather, as has been true since Central's founding, due to climatic conditions. The speculative fear that Platte River will harm Protestants is not

supported by evidence and does not establish that this Petition will impair the contractual rights of Protestants or any other persons.

5. Platte River cannot deny Protestant's water rights.

Protestants assert or imply that Platte River's board of directors will deny, transfer, or otherwise take away irrigation customers' water rights. However, Protestants incorrectly identify the actual legal interests of irrigators, misunderstand or misstate how these interests might be affected by contract, and contemplate an outcome that is not allowed by and would violate state law. Central provides the following explanation of how water rights and associated water delivery works, and will continue to work, under Nebraska law.

It must be understood that water appropriation rights are property rights recognized by the Nebraska Constitution which declares the necessity of water for domestic use **and for irrigation** purposes in this state to be a natural want. Neb. Const. art. XV, § 4. Appropriation rights cannot be "taken" or otherwise allocated unless for a public purpose and just compensation paid. See Neb. Const. art. I, § 25; *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015). Water appropriation rights are granted by the State of Nebraska and managed and adjudicated by the NDNR. NEB. REV. STAT. § 61-201 *et seq.* The right to use natural flow water is a "vested right," but it is inherently subject to the law at the time the vested interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the state. *Hill v. State*, 296 Neb. 10, 894 N.W.2d 208 (2017) citing *State v. Birdwood Irrigation District*, 154 Neb. 52, 46 N.W.2d 884 (1951). An appropriation right is a right to divert unappropriated surface water for beneficial use. NEB. REV. STAT. § 46-204; *In re Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009). Central has a statutory duty to deliver surface water to lands that have a water appropriation attached via the System. That duty is carried out via a Water Service Agreement (Exh. 31-34).

The landowner is the legal beneficiary of the irrigation appropriation. Central manages that appropriation for the benefit of the landowners to which the appropriation is attached pursuant to a Water Service Agreement. (209:4-15). As the Court stated in *Central Nebraska Public Power and Irrigation District v. North Platte Natural Resource District*, “[i]n other words, generally speaking, Central is an agent for the purposes of diverting, storing, transporting, and delivering water . . .” *Id. at* 280 Neb. 533, 543, 788 N.W. 2d 252 at 261. (2010). DNR serves as arbiter and adjudicator of those water appropriation rights, not Central. It is the responsibility of DNR to determine if an appropriator retains an interest in public waters, to which there is a valid appropriation, which is not put to a beneficial use. *In re Appropriation A-7603*, 291 Neb. 678, 868 N.W. 2d 314 (2015). One of the very purposes of the State in the administration of public waters is to avoid waste and to secure the greatest benefit possible from the waters available for appropriation for irrigation purposes. *Farmers Canal Co. v. Frank*, 72 Neb. 136, 100 N.W. 289 (1904). In an adjudication for non-use, the burden of proof is on the Department of Natural Resources to demonstrate that the appropriation has not been put to a beneficial use. *In re Birdwood Irr. District*, 154 Neb. 52, 46 N.W.2d 884 (1951).

The Water Service Agreement merely restates what the law requires. However, the contract language referenced as Section 7, “Water Appropriations,” assumes the reader understands the DNR process and has an in-depth knowledge of Nebraska water law.

Protestants implied that the signature on the Water Service Agreement is express consent for any location transfer or cancellation of a water appropriation. Under current DNR Rules, that is false. The Water Service Agreement cannot by itself cancel or transfer any rights without the express consent of the landowner **AND** Central, as trustee. A Water Service Agreement such as

those in Exhibits 31-34 are not express consent because the signature of the landowner must appear on the Application on a form provided by DNR.

Water rights can only be cancelled by DNR. DNR's regulations provide:

Title 457 - DEPARTMENT OF NATURAL RESOURCES RULES FOR SURFACE WATER Chapter 9 - TRANSFERS AND CHANGES

001.02 Applications: 001.02A Separate application on a form provided by the Department (see Appendices K, K-1, K-2, K-3) must be completed and filed:

001.02A1 For each appropriation to be modified 001.02A2 For each appropriator
001.02B Applicant must be the appropriator of record as shown in the Department's records.

001.02D5 For applications filed by irrigation districts, reclamation districts, public power and irrigation districts, or mutual canal companies, the names, addresses, and signatures of the landowners agreeing to have the water appropriation transferred off of their land must be included.

In summary, Section 7 of the Water Service Agreement states the landowner's intention to consent, on DNR's forms, in the event DNR brings a termination action against the landowner for non-use. The contract language exists for the protection of all water users served by Platte River and it may only be utilized if the landowner does not beneficially use the water for irrigation.

There is nothing in Nebraska law, the State of Nebraska's regulatory scheme, Central's history of surface water delivery, the Water Service Agreements, or the record before this Board, other than the blatant speculation, which indicates, much less affirmatively establishes, that the contractual rights of "others" as found in NEB. REV. STAT. § 70-664 would be impaired by this Petition. Consequently, this is not a basis for the NPRB to deny this Petition.

D. Will this Petition be contrary to the "best interest" of Central? No.

In order to find that this Petition is contrary to the "best interest" of Central, the NPRB must first determine what the "best interest" means. Unlike the above two subsections of NEB. REV. STAT. § 70-664, this "best interest" analysis could be interpreted as ambiguous and require

statutory construction. Black's Law Dictionary defines the phrase, "best interest" as, "[w]hen a party is delegated to take the best action for another party in the current situation. This is done when not all possibilities can be prepared for or when fast choices must be made in a critical situation." Where statutory construction is called for, a court looks to the statute's purpose and then construes the statute in a reasonable manner that will best achieve that purpose, rather than interpreting the statute in a way that would defeat its purpose. See, *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998). To determine the purpose of the statute, a court may consider the components of a series or collection of statutes pertaining to a certain subject. *Id.*

Looking to other components of NEB. REV. STAT. § 70–1001 et seq. it becomes clear that the policy behind the statutes is to provide Nebraskans with adequate electric service at the lowest cost possible, to eliminate conflict and competition between power suppliers, and to avoid duplicative facilities and resources. *In re City of North Platte*, 257 Neb. 551, 599 N.W.2d 218 (1999). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). An examination of all of Article 6 of Chapter 70 reveals that the legislature intended to permit public power and irrigation districts to operate in a successful and profitable manner. *City of O'Neill v. Consumers P. P. Dist.*, 179 Neb. 773, 140 N.W.2d 644 (1966). The Legislature provides the public power districts, and by implication public power and irrigation districts, all the usual powers of a corporation organized for a public purpose, and those usual powers are subject to the limitations of the petition for creation. *York County Rural*

P. P. Dist. v. O'Connor, 172 Neb. 602, 111 N.W.2d 376 (1961), *Schroll v. City of Beatrice*, 169 Neb. 162, 98 N.W.2d 790 (1959).

While NEB. REV. STAT. § 70-664 has not been interpreted by the Court, other statutes have been interpreted with similar “best interest” phrasing. Most analogous is a statute which permits landowners to petition for their land to be removed from a certain school district and added to another school district if such petition is “in their best interest.” A whole body of case law has deciphered what factors can be considered. In summary, because a school district is legislatively required to deliver an educational experience, the courts have interpreted the phrase, “best interest” to mean in the petitioner’s “best educational interest” with other factors, like convenience, of no value. See *Friesen v. Clark*, 192 Neb. 227, 220 N.W.2d 12 (1974). Applying the principles of *Friesen*, Black’s Law Dictionary definition of “best interest,” and a collective reading of Chapter 70, article 6, here, the “best interest” of Central is the ability to carry out its mission both today and, with careful consideration, in the future, admittedly not knowing what that future holds.

NEB. REV. STAT. § 70-604 provides, “[A] district may be organized to engage only in the electric light and power business, the production, storage, or distribution of hydrogen, and the production and distribution of ethanol, only in the business of owning and operating irrigation works, in any business identified in section 70-625, or in all of such businesses.” Chapter 70 contains numerous public policy statements, all of which declare that the purpose of public power, including power provided by public power and irrigation district is to provide adequate, low-cost electricity consistent with sound business practices.

This Petition is in the best interest of Central. Not only do the Central directors know it, but so do the district’s employees and only these Protestants believe it is not. Prior to the vote on

the Plan of Consolidation, the Central employees voted to de-certify its union. (348:1-10). This is significant.

This Petition will result in an equalization of benefits and compensation for all employees of Platte River, vertically integrate its operations, diversify its business model and sources of revenue, make the district a larger and more significant entity in the Southwest Power Pool (“SPP”) market, provide opportunities to facilitate economic growth in central Nebraska, and realize cost savings for decades to come. As testified to, neither the consolidation nor this Petition is solely about the “here and now.” (130:3-11; 131:8-21). Rather, this Petition looks to the future and what a consolidated district can do and provide for its customers and residents of the Platte River valley decades down the road. Protestants’ “expert,” Don Wendell, attempted to refute this broad focus by suggesting that the current financials do not demonstrate a need for change or an inability of Central to continue without this consolidation. (795:5-9, 20-24). As a former auditor, he is historically correct. Looking at a short timeframe and only at the financial statements, there is not a need for this consolidation. But that suggestion is not conclusive evidence that this Petition is not in the best interest of Central as it seeks to fulfil its statutory mission to the best extent possible, not simply operate in a financially sound manner.

The directors of Central and Dawson were elected to ensure their districts operate well into the future—this requires forethought and vision. (82:6-25; 83:1-25; 84:1-11). By a 3/5ths vote, the Central Board declared that this Petition is in the best interest of Central, and the fact that the financials may not indicate a problem is meaningless to that assessment. The energy industry is at a critical point and undoubtedly changing. (575:7-10). The regulatory framework that Central operates in with SPP and FERC is likewise changing, as are overall economic conditions. This Petition does not change these overall circumstances and trends.

But this Petition is a hedging mechanism for both Central and Dawson. It does not fundamentally change the nature of Central's business—it adds to it. Central is presently engaged in both the electric light and power business and the business of owning and operating irrigation works. The only difference this Petition has on Central's statutory purpose is the *extent* to which it is engaged in the electric light and power business.

Protestants' "evidence" utilized concepts of 1) perceived internal divisional conflict; 2) lacking language in the Charter or bylaws; 3) insufficient due diligence; 4) opposition among customers; and 5) diminished and prejudicial representation for Gosper, Kearney, and Phelps counties as conclusory evidence that the Petition is not in the "best interest" of Central. None of these are substantive, much less affirmatively established.

The Plan of Consolidation provides that the existing Bylaws of Central will be the Bylaws of Platte River and that the regulations of Central and Dawson will govern the respective divisions on the Consolidation Date. (Exh. 44, p. 6). This demonstrates the trust the respective Boards have in one another and the confidence that neither seeks control for ulterior motives or immediate change. (133:9-25; 134:1-4; 437:7-10; 520:5-8; 666:1-10). Additionally, it underscores that this consolidation does not detract from Central's purpose, it only adds to it. As for why certain "protections" are not in the Charter document itself, NEB. REV. STAT. § 70-604 sets forth the statutorily required content and it is unclear whether additional content is allowed. In looking at other public power district and public power and irrigation district charters, the form and substance is remarkably uniform. It would be uncommon and out of the norm for these so called "protections" to be in the Charter. Finally, however, it should be noted that, as testified to by Gary Robison, there are no protections that could be placed in the Charter which would satisfy the Protestants. (986:2-10).

There were also numerous questions raised in Protestants' testimony regarding the process undertaken by the Central and Dawson board of directors and the analysis of the consultants. Unless that testimony shows that the due diligence conducted was contrary to the best interest of Central, such inquiry is statutorily irrelevant. Nevertheless, Central and Dawson note that PSE found operational savings and, more importantly, a model that would build flexibility and maximization of resources for Platte River going forward. (142:1-14; 310:1-17; 474:14-17). As previously addressed, the savings identified is a conservative forecast for the first eight years of consolidation, not a modeling of the true savings expected once Platte River is operating as a consolidated district. (338:1-24).

There was a substantive discussion regarding the savings allocation which identified that 75% was allocated to electric distribution and 25% to irrigation. Protestants portrayed this as a significant issue and a reason why this consolidation is not in the best interest of Central. (365: 3-20; 634:10-25; 635:19-25; 637: 24-25; 638:1-6; 643:9-12). This portrayal is, once again, too narrowly focused on only the current financials of the districts and fails to recognize the opportunities that consolidation will present for Platte River.

Two duly elected Board of Directors each voted by an affirmative 3/5ths majority to approve the Plan of Consolidation and respective petitions after studying the potential consolidation for nearly two years. The Boards took no fewer than five separate votes related to the due diligence and consolidation process and held at least twenty-five public meetings with consolidation as an agenda item. The Boards also had hundreds of information communications with members of the public over the course of two years. Protestants present the only opposition on file with the NPRB.

E. Will approval of the Petition be prejudicial to rural interests? No.

There was a great amount of testimony indicating that irrigators of Central will be prejudiced by a consolidation. However, the concept of prejudice speaks only to the subdivisions.

NEB. REV. STAT. § 70-612(1)(b) allows as follows:

(b) In the event a district formed includes all or part of two or more counties and is (i) engaged in furnishing electric light and power and more than fifty percent of its customers are rural customers or (ii) engaged in furnishing electric light and power and in the business of owning and operating irrigation works, then and in that event such subdivisions may be formed by following precinct or county boundary lines without regard to population if in the judgment of the Nebraska Power Review Board the interests of the rural users of electricity or of users of irrigation water service in such district will not be prejudiced thereby.

The legal question is not whether the merged district is prejudicial to rural interests, but rather, if the proposed voting subdivisions following county and precinct lines, without regard to population prejudices those interests.

In this case, the answer is a resounding no. Central's current subdivisions are based on geographic lines, namely county lines, and Platte River will continue to use geographic based subdivisions. The parties have stipulated that Central includes two or more counties, is more than fifty percent rural, is engaged in furnishing electric light and power, and is in the business of owning and operating irrigation works. (Exh. 75, pgs.7-8) (25:10-25; 26:1-25; 27:1-25; 28:1-25; 36:3-10). The parties have also stipulated that substantially equal population-based subdivisions are not part of this amendment and are not required of Central. Furthermore, the parties have stipulated that the proposed subdivision lines utilizing county and precinct lines are accurately drawn as presented in the amendment. (Exh. 75, pgs.7-8). Therefore, the only question is whether the rural users of electricity or irrigation water service are prejudiced by drawing subdivision lines along county and precinct lines. No evidence was presented that there would be such prejudice. Black's Law Dictionary defines "prejudice" as, "A forejudgment; bias; preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice."

Robison testified that the consolidation would “prejudice” irrigation users in the “Tri-County” area, comprised of Gosper, Kearney, and Phelps counties because they would have less total representation on the Platte River board. Currently, this “Tri-County” area is represented by 9 of the 12 Central board members. (525:12-16; 933:12-22). It is not the subdivisions themselves that are the crux of the Protestants’ complaint but rather an unfounded fear of a perceived loss of control. (934:4-25; 935:1-13; 943:17-25; 944:1-21; 964:4-19; 1044:3-17).

The statutory standard is not would some rural users be prejudiced versus others, but rather, are rural customers prejudiced versus non-rural – i.e., those living in larger municipalities – interests. Here, clearly not. As identified in Exhibit C to the Petition, the total population represented by Platte River’s board will be 56,493, a reduction of nearly 30,000 residents versus Central today. (Exh. 1, p. 13). Consequently, even though Platte River will be a larger district than Central is today it will be more rural in nature than Central today.

Each subdivision will be represented by two directors. Therefore, the Tri-County area will have 6 directors. The fact that all subdivisions in Platte River will have an equal number of representatives is the best evidence that this Petition will not prejudice rural interests. Furthermore, given that subdivisions are defined in the charter, and the charter can only be changed with a 3/5 affirmative majority vote, that representation cannot change without at least one director from these counties approving such a change.

As shown on Exhibit 41, the geographic overlays of Central and Dawson are remarkably similar. The only additional territory that will be added to the Central chartered territory of any population significance is Buffalo County, however, the population centers within that county are excluded, including Kearney, Ravenna, Gibbon, and Elm Creek. Furthermore, the Petition removes from voting for Platte River directors the population centers of North Platte, Lexington,

Cozad, and Gothenburg that vote for Central directors today. In short, the Petition makes the voting subdivisions more rural in nature and equalizes representation across the geographic area that Central currently spans.

Additionally, the Legislature has opined that broad representation is preferred to the type of concentration that Protestants prefer. NEB. REV. STAT. § 70-609.01 recognizes the widespread impact public power has on local economies and therefore affirms the importance of broad representation. The Petition is consistent with this affirmation and accomplishes that goal, equalizing representation across the entire district and varied stakeholders.

The proposed geographic subdivisions conform to statutory requirements, are available to Platte River as a public power and irrigation district, and preserve and reflect the rural nature of Platte River. They are not prejudicial to rural interests and should be approved by the NPRB.

IV. THE PETITION SATISFIES STATUTORY REQUIREMENTS RELATED TO GENERAL OBLIGATION BONDS

The Scope of Hearing of the Third Prehearing Conference Order articulates “core issue” five to be decided by the Board as follows: “What effect, if any, does the exclusion of the statement that the District lacks the power to issue general obligation bonds have on the Board’s decision regarding approving or denying the Petition (pursuant to Neb. Rev. Stat. § 70-605(5)) (sic).”

This issue appears to stem from an Intraoffice Memorandum dated January 1, 2023 from Sara Birkett to Tim Texel (“Memorandum”) that notes that “section (6) of the charter” of Petitioner “is missing language that is required by Nev. Rev. Stat. section 70-604(5),” specifically, that Petitioner “shall not have the power to levy taxes nor to issue general obligation bonds.” (emphasis original). (Exh. 19). The Memorandum goes on to state that, upon review, ***fifteen charters*** of Chapter 70, article 6 districts, including that of Petitioner, do not include the language in question.

Furthermore, Petitioner asserts that it has, indeed, satisfied the requirements of NEB. REV. STAT. § 70-604(5).

NEB. REV. STAT. § 70-604 establishes what is required to be included in a petition to “create or amend the charter” of a district regulated by the Board. It states, in relevant part:

The petition shall state and contain:

....

(5) A statement that the district shall not have the power to levy taxes nor to issue general obligation bonds. (emphasis added)

Paragraph 2 of the Petition fulfills this requirement, as Petitioner affirmatively states in the Petition that it “is without the ability to levy taxes or issue general obligation bonds.”

While the phrase “amend its charter” is used at least four (4) times in Chapter 70, article 6, including in NEB. REV. STAT. § 70-662(2), the charter of Petitioner is not the actual document being reviewed by the Board. Rather, it is the Petition that is before the Board for its review and approval.

“It is the petition when approved that becomes the charter of a district. It is the petition when approved that is subject to amendment.” *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 313 (1956). This is reflected in NEB. REV. STAT. § 70-662(1), which states that, “A petition for the creation of a district organized under or subject to the provisions of Chapter 70, article 6, may be amended as provided in this section.” Because the petition becomes the charter of a district, it is what is contained in a petition that is determinative, not what is set forth in an exhibit thereto or, in the pending matter, what is even identified as a proposed amendment.

Core issue five refers to the “exclusion of the statement,” which appears to refer to the absence of the NEB. REV. STAT. § 70-604(5) language from the proposed changes set forth in Paragraph 13 of the Petition, as well as from the charter of Petitioner. As noted above, however,

the recognition of Petitioner's lack of power to issue general obligation bonds is expressly stated in Paragraph 2 of the Petition, the filing of which was authorized by the affirmative vote of three-fifths of all directors of Petitioner, as required by NEB. REV. STAT. § 70-662(2) and further recognized by witness testimony. (320:2-17; 754:6-20). Upon approval of the Petition, then, consistent with the Nebraska Supreme Court's guidance in *Custer Public Power Dist.*, the required language could be recognized by the NPRB as inherently included within section (6) of the Amended Charter of Petitioner. As the NPRB recognized in fifteen prior charter amendments, districts may not violate the law.

V. CONCLUSION.

The NPRB is tasked with determining if the Petition submitted by Central must be approved under the requirements set forth in NEB. REV. STAT. §70-664, which narrowly confines NPRB's analysis to three primary questions: 1) Is the proposed Charter Amendment contrary to the best interest of Central; 2) Does the proposed Charter Amendment jeopardize or impair the rights of the creditors of Central; and 3) Does the proposed Charter Amendment jeopardize or impair the rights of other persons?

NEB. REV. STAT. §70-664 requires this Petition be approved unless the answer to one of the three above questions is affirmatively "yes." To the contrary, Central has affirmatively established that each answer is "no." Central's evidence unequivocally demonstrates that the Petition is in the best interest of Central, does not jeopardize or impair the rights of creditors, and does not jeopardize or impair the rights of other persons. Therefore, to avoid an arbitrary, capricious, and unreasonable result, the NPRB must approve the Petition.

Submitted this 27th day of March, 2023.

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CERTIFICATE OF SERVICE

I, Ellen Kreifels, attorney for the Petitioners, hereby certify that a copy of the foregoing **Petitioners' Post-Hearing Brief** has been served upon the following persons by e-mail, a copy of the same at the address listed below to Mike Degan and Joshua Weiner on this 27th day of March, 2023.

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