

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF BLACK HILLS
NEBRASKA GAS, LLC d/b/a BLACK
HILLS ENERGY PROVIDING NOTICE
REQUIRED BY NEB. REV. STAT. §
66-1863, AS AMENDED, THAT IT
INTENDS TO EXTEND OR ENLARGE
ITS SERVICE AREA OR EXTEND A
GAS MAIN.

APPLICATION No. P-12.32

**APPLICANT'S POST-HEARING
BRIEF**

Pursuant to Neb. Admin. Code, tit. 291, ch. 9, § 003.02, Black Hills Nebraska Gas, LLC d/b/a Black Hills Energy ("Black Hills Energy") has asked the Public Service Commission (the "Commission") to approve its Application to extend a natural gas main to serve OPPD's new natural gas generation facilities in the area of 168th Street and Fairview Road in Sarpy County ("OPPD's Papillion Site"). The evidence presented at the hearing demonstrates that Black Hills Energy's proposed main is in the public interest.

ARGUMENT

The five public interest criteria set forth in Neb. Rev. Stat. § 66-1860 and Neb. Admin. Code, tit. 291, ch. 9, § 003.07 have been addressed at length in the Commission's previous opinions on natural gas main extensions. In brief, the law requires analysis of the economic feasibility of a natural gas extension, the impact on ratepayers, orderly development of natural gas infrastructure, duplication or redundancy of natural gas infrastructure, and non-discrimination in the natural gas extension. Black Hills Energy presented evidence supporting each of the factors. M.U.D. did not submit any evidence contesting Black Hills Energy's evidence, instead arguing that it has the right to serve based on an

eleven-year-old agreement between Black Hills Energy and M.U.D. and an uncontested order entered by the Commission in Docket No. P-0014. As noted by the Commission in Ex. 11, the Commission is tasked with reviewing certain criteria to determine what is in the public interest and the Commission did not consider the public interest criteria in Docket No. P-0014.

I. A Rebuttable Presumption in Favor of Black Hills Energy Applies.

Under Neb. Rev. Stat. § 66-1861, “[a]ny enlargement or extension by a jurisdictional utility within a city other than a city of the metropolitan class in which it serves natural gas on a franchise basis or its extraterritorial zoning jurisdiction” is presumed to be in the public interest unless rebutted. Under this presumption, if neither party introduces any evidence, the statute mandates a ruling in favor of the party holding the presumption. *In re Application of Metropolitan Util. Dist. of Omaha*, No. P-0005, 2002 WL 35077477, at *6 (Neb P.S.C. July 9, 2002).

The rebuttable presumption is intended to allow “a utility, serving a city on a franchise basis, to grow with the city it serves.” *Id.* This presumption is particularly important with respect to a city’s extraterritorial zoning jurisdiction. *Id.* As the Commission explained, a “city is allowed to plan the infrastructure of its growth for several reasons, not the least of which are safety and consistency.” *Id.* Therefore, “if a city is served by one utility, territory that will soon be part of the city should naturally be served by the same provider.” *Id.* Because of the strong public interests favoring a utility already serving a city, the presumption

acts as “a shortcut to the analysis required” under the five public interest factors.

Id. at *5.

A party opposing an extension or enlargement to which the rebuttable presumption applies cannot simply establish that its main is in the public interest; instead, the protestant must demonstrate that the extension at issue is not in the public interest. *Id.* “Prior to any consideration of whether [a competitor’s] proposed extension is in the public interest, [the competitor] must establish that [the presumption holder’s] main is not.” *Id.*

Black Hills Energy has a franchise agreement with Papillion to provide natural gas services, and the proposed main extension is within the extraterritorial zoning jurisdiction of Papillion. Accordingly, Black Hills Energy’s main extension falls squarely within the intended coverage of the rebuttable presumption – the extension would allow Black Hills Energy to grow with Papillion. Therefore, before any consideration of a proposed extension by M.U.D.,¹ M.U.D. must demonstrate that Black Hills Energy’s main extension is not in the public interest.

II. Black Hills Energy Satisfies the Applicable Public Interest Criteria.

Even without the rebuttable presumption, Black Hills Energy has established that its proposed main is in the public interest.

¹ M.U.D. has not applied for Commission approval of any main extension and contends that no approval is needed because of the service areas established in Application P-0014. M.U.D. has not submitted any map of its proposed extension, nor has it submitted any analysis beyond brief testimony at the hearing regarding the public interest criteria. Contrary to M.U.D.’s testimony at the hearing, a proposed M.U.D. main to serve OPPD’s Papillion Site coming from 174th Street along Fairview Road would cross territory allocated to Black Hills Energy under the P-0014 map. [Ex. MUD-16 at BHE-00078, BHE-00083].

A. Economic Feasibility

The proposed main is economically feasible for Black Hills Energy to extend. OPPD will pay the entire cost of the main, including materials, land rights, construction, installation, operation, and ongoing maintenance. [Ex. BHE-2, p. 5]. As a public power district, OPPD is credit worthy. The proposed main is Black Hills Energy's preferred, most direct, most efficient, and least disruptive route and extends approximately one mile of 10 inch main along Fairview Road from the Northern Natural Gas Company's interstate pipeline to OPPD's Papillion Site. [Ex. BHE-2, pp. 3-4]. The proposed main satisfies Black Hills Energy's economic feasibility analysis, and OPPD will be required to make up any deficiencies in the event OPPD and Black Hills Energy negotiate a different payment structure than the specific analysis presented to the Commission. [Ex. BHE-2, p. 6].

B. Impact on Existing and Future Ratepayers

Because the cost of the proposed main will be borne by OPPD, there is no cost to other customers of Black Hills Energy for the extension of the proposed main. OPPD's natural gas volume requirements will be subject to contract negotiations because OPPD's transportation service across the line will qualify OPPD as a High Volume customer under Neb. Rev. Stat. §§ 66-1802(9) and 66-1810(1). The level of service anticipated to be used by OPPD will ultimately benefit all other existing regulated customers of Black Hills Energy as costs are allocated fairly between customers. Revenues from OPPD will strengthen the overall financial profile of Black Hills Energy, contribute to fixed costs of the

entire system, and lower overall costs for Black Hills Energy residential and commercial customers over time. [Ex. BHE-1, pp. 10-11].

In addition, Black Hills Energy pays taxes on its infrastructure and a five percent franchise fee that is used to support Papillion's day-to-day operations, such as police, fire, public works, parks, recreation, and the like. M.U.D. does not serve any customers in Papillion or its extraterritorial zoning jurisdiction. [Ex. BHE-3, Req. Nos. 3-4]. M.U.D. does not pay any franchise fee to Papillion and would not pay any taxes in connection with its service to OPPD's Papillion Site. Furthermore, if M.U.D. serves OPPD's Papillion Site, Black Hills Energy's customers could bear additional costs arising out of customer confusion relating to location, leaks, and other safety and related problems with a gas line in the area owned and operated by a different utility.

C. Orderly Development of Natural Gas Infrastructure

"The orderly development requirement is not limited to scrutiny of whether a particular extension would be part of orderly growth of a particular natural gas utility; rather, the legislature requires consideration of orderly development of natural gas utility infrastructure as whole." *In re Application of Metropolitan Util. Dist. of Omaha*, App. No. P-0005, 2002 WL 35077477, at *7 (Neb. P.S.C. July 9, 2002). "Orderly development by its very nature denotes a level of organization necessary to avoid confusion and to ensure the system as a whole will function safely, efficiently and serve its intended purpose." *In re Application of Aquila, Inc.*, App. No. P-011, 2006 WL 7354046, at *3 (Neb. P.S.C. July 11, 2006). Black Hills Energy's proposed main will contribute to the orderly

development of natural gas utility infrastructure as a whole. OPPD's Papillion Site is entirely within Papillion's extraterritorial zoning jurisdiction. While a short segment of the proposed main next to the Northern Natural Gas town border station is not yet in Papillion's extraterritorial zoning jurisdiction, *see* Ex. BHE-2 at Ex. SCC-1, the entire proposed main is located in Papillion's area of future growth under the agreement between Papillion and Springfield. *See* Ex. BHE-1 at Ex. KMJ-1, p. 9.

Black Hills Energy provides natural gas services to Papillion and its extraterritorial zoning jurisdiction under a franchise agreement with Papillion. [Ex. BHE-1, p. 14]. As Papillion grows, Black Hills Energy will expand its services to provide service to customers in the area. Black Hills Energy already has natural gas main in the area. Black Hills Energy purchases methane from the Sarpy County landfill, which is directly adjacent to OPPD's Papillion Site and utilizes the methane gas in its distribution system.

M.U.D. does not have any natural gas main within one mile of OPPD's Papillion Site. [Ex. BHE-3 at Req. 10]. Service by M.U.D. would result in parallel mains by different utilities in Fairview Road. As discussed by Mr. Jarosz and Mr. Coleman, public safety is best served when only one utility has natural gas main in the area so that first responders know who to contact in the event of an emergency.

D. Duplicative or Redundant Infrastructure

Black Hills Energy's proposed main will not result in duplicative or redundant infrastructure. No existing main in the area can presently meet

OPPD's supply needs, because of the significant natural gas volume that OPPD's Papillion Site is anticipated to require. [Ex. BHE-2, p. 7]. As discussed above, Black Hills Energy already has natural gas main in the area that could provide partial service to OPPD's Papillion Site. [*Id.*].

If M.U.D. were to serve OPPD's Papillion Site, two pipelines owned by two companies would be in the same area. As discussed above, such a scenario creates public safety concerns.

E. Non-Discriminatory Manner

The non-discriminatory manner factor "is intended so that the provider serves each customer similarly to the way they served the last customers or their current customers." *See Transcript of Floor Debate*, LB 78 at 3523 (1999). The evidence at the hearing established that the proposed main is being extended in a non-discriminatory manner. Black Hills Energy has negotiated and is negotiating with OPPD regarding the proposed main to provide service to OPPD's Papillion Site in a commercially reasonable fashion and in the same way that Black Hills Energy negotiates with other large High Volume natural gas customers. No evidence to the contrary was presented.

III. The Public Interest Criteria Must be Weighed Based on Current Circumstances.

Rather than controverting Black Hills Energy's evidence regarding the public interest criteria, M.U.D. relies on the 2010 agreement between M.U.D. and Black Hills Energy and their application to the Commission drawing agreed boundary lines. Despite the fact that the Commission did not consider the public

interest criteria in Docket No. P-0014, *see* Ex. 11 at p. 2, M.U.D. argues the P-0014 order is determinative and that because OPPD's Papillion Site was in M.U.D.'s territory under the 2010 P-0014 map, M.U.D. has the right to serve in 2021. M.U.D.'s argument ignores what the parties' agreement was and that circumstances have changed since 2010.

Jim Knight and Kevin Jarosz both testified that the agreement was for M.U.D. to serve Springfield and Black Hills Energy to serve the rest of Sarpy County, apart from areas where M.U.D. had already laid natural gas main and had existing facilities. M.U.D. and Black Hills Energy attempted to identify where Springfield's future growth would be but knew that circumstances may change over time. [BHE-1, pp. 5-6]. Importantly, the boundary between Papillion and Springfield was defined in 2016 after a dispute between the two cities, and OPPD's Papillion Site is on the Papillion side of the boundary between the cities. [BHE-1, pp. 6-7; BHE-3, Req. Nos. 5-7]. In addition, because of growth by Papillion, OPPD's Papillion Site is now within Papillion's extraterritorial zoning jurisdiction. [BHE-3, Req. 1].

In the 11 years since Application P-0014 was filed, M.U.D. has not installed any infrastructure or served any customers in the area of OPPD's Papillion Site. In fact, M.U.D. declined to install infrastructure to take gas from the Sarpy County Landfill that is adjacent to OPPD's Papillion Site.

Whether or not an extension by Black Hills Energy or M.U.D. to serve OPPD's Papillion Site is in the public interest must be evaluated based on the public interest factors and circumstances as they currently exist. In *In re Peoples*

Natural Gas, 2004 WL 726828 (Neb. Ct. App. Apr. 6, 2004), the Nebraska Court of Appeals affirmed a finding that a proposed extension by M.U.D. was not in the public interest and thus that M.U.D. was not entitled to serve the Highway Crossing development and had to transfer service of the development to Aquila (now known as Black Hills Energy). The Court of Appeals reversed a Commission determination that M.U.D. could not re-establish service to the development in the future, stating that “[b]ased on the facts before it, the Commission could not determine whether MUD would fail to meet the public interest test in the future.” *Id.* at *6. The Court noted that if MUD were invited in the future to provide service to the municipality encompassing the Highway Crossing development and MUD proposed an extension, “the public interest test is operative at that time, not now.” *Id.* The same rationale applies to this situation.

M.U.D.’s assertion that M.U.D. and Black Hills Energy agreed on boundaries cannot overcome the need to satisfy the public interest criteria under the current circumstances. Under Nebraska law, “[a] party cannot, by contractual agreement with another party, obtain the power to do something that state law forbids.” *Rath v. City of Sutton*, 267 Neb. 265, 287, 673 N.W.2d 869, 889 (2004) (citation omitted); *Sanford v. Clear Channel broadcasting, Inc.*, 14 Neb. App. 908, 915, 719 N.W.2d 312, 319 (2006) (“If an act is prohibited by statute, an agreement in violation of the statute is void.” (citation omitted)). The public interest statute “would be meaningless, as would the Commission’s role, if [the Commission] decided that the contractual agreement controls whether the

extension associated with the service has met the public interest test.” *In re Peoples Natural Gas*, 2004 WL 726828, *6 (Neb. Ct. App. Apr. 6, 2004).

In addition, the Commission is free to reject M.U.D.’s argument regarding the 2010 map because the Commission has the power to revise its prior orders, findings, or conclusions of law that are no longer in the public interest. *Canada v. Peake, Inc.*, 184 Neb. 52, 165 N.W.2d 587 (1969) (“An order of the Nebraska State Railway Commission granting or denying application for a certificate of public convenience and necessity is the act of the commission and not of the court. It would seem clear that the commission has continuing jurisdiction over its orders and the right to modify, annul, and vacate them thereafter.”).

CONCLUSION

Given the changed facts and legal consequences of the boundary dispute between the Cities of Papillion and Springfield, Nebraska, that occurred years after the P-0014 order, and the expansion of Papillion’s boundaries and extraterritorial zoning jurisdiction, the State Natural Gas Regulation Act requires an evaluation of the public interest factors in connection with an extension to OPPD’s Papillion Site. Black Hills Energy’s proposed extension meets the public interest criteria, and Black Hills Energy respectfully requests that the Commission approve its application.

Respectfully submitted this 16th day of June, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by e-mail and U.S. Mail, sufficient postage prepaid on the 16th day of June, 2021 upon the following individuals:

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