

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF BLACK HILLS )  
NEBRASKA GAS, LLC d/b/a BLACK )  
HILLS ENERGY RAPID CITY, SOUTH )  
DAKOTA, SEEKING TO EXTEND ITS )  
SERVICE AREA FOR PURPOSES OF )  
SERVING AN OMAHA PUBLIC POWER )  
DISTRICT SITE IN SARPY COUNTY )

APPLICATION NO. P-12.32

**PROTESTANT’S POST-HEARING  
BRIEF**

The Metropolitan Utilities District (“M.U.D.” or “Protestant”), by its attorneys Rembolt Ludtke LLP, respectfully submits this Post-Hearing Brief in compliance with the Hearing Officer’s verbal order made at the June 09, 2021, hearing in the above-captioned matter. For all the reasons described below, M.U.D. respectfully requests that the Commission deny Black Hills Nebraska Gas, LLC’s d/b/a Black Hills Energy (“Black Hills Energy”) Application.

**INTRODUCTION**

What is the effect of the Order in the matter docketed Application P-14? This question was posed by Commissioner Ridder during the hearing in this matter and the answer dictates the result of this proceeding. While Commissioner Ridder’s question was answered in confidence and off the record, Nebraska law provides the definitive answer. The P-14 Order<sup>1</sup> and Nebraska law conclusively establish that M.U.D.’s service territory as outlined in the P-14 maps<sup>2</sup> is in the public interest. Because the OPPD site at issue in this proceeding is within M.U.D.’s P-14 service territory, Black Hill Energy’s Application and position is not tenable. Black Hills Energy seeks to disregard Nebraska law, nullify the Commission’s 2010 Order, and call into question the entirety of where Black Hills Energy and M.U.D. may serve all because of the prospect of adding one large

<sup>1</sup> The “P-14 Order” refers to M.U.D. Exhibit 33, Order Closing Docket in Application No. P-0014 (NPSC May 12, 2010).

<sup>2</sup> The “P-14 maps” refers to M.U.D. Exhibit 16 at BHE-000777-00084, Exhibit A to the P-14 Application Letter.

volume customer to its system. Black Hill Energy's position is not supported by the law or facts and its Application should be denied accordingly.

## **FACTS**

Prior to the May 12, 2010 P-14 Order, Black Hills Energy and M.U.D. (together, the "Parties") engaged in a number of contentious disputes regarding their respective service territories. (Exhibit ("Ex.") 41). The Parties filed at least eleven separate applications with the Public Service Commission seeking a determination of whether expansions of service were in the public interest. Ex. BHE Ex. 1, Jarosz Direct Testimony ("Jarosz Direct") 5:10-12. As described by Mr. Jarosz, following these repeated disputes, at least one Commissioner encouraged Black Hills Energy and M.U.D. to work together to put an end to the ongoing disputes. Black Hills Energy and M.U.D. heeded that advice.

According to Mr. Jarosz's testimony, key members of both Black Hills Energy and M.U.D., including counsel for both entities, engaged in extensive negotiations to reach agreement as to their respective service territories and conditions for modifying those territories. He described that the Parties spent months hashing out the terms of the agreement. The Parties negotiated both the boundary lines of their service territories (*see, e.g.*, MUD Ex. 37) and the conditions for how the Parties could deviate from those territories. (*see, e.g.*, MUD Ex. 10, 11 at BHE-00005-00006, 00028-31, 12 at BHE-00032, 00055-58). The negotiated "Conditions Applicable to Service Areas" permitted each entity to serve in the other's territory only under specified circumstances and to otherwise reach agreement to revise their respective boundaries. (MUD Ex. 16 at BHE-00085). As noted by Mr. Jarosz, both Parties had input into the terms of the agreement. And even if the Parties contemplated the growth of certain cities at the time of negotiations as Mr. Jarosz testified, they

did not include a condition permitting the Parties to change their service territories based on city growth or unexpected city growth. (MUD Ex. 16 at BHE-00085).

Upon finalizing the agreement, Black Hills Energy and M.U.D. submitted a joint Notice of Proposed Extension of Service Area or Gas Main to the Public Service Commission as required by Nebraska law. (MUD Ex. 16). The Parties noted that they each intended to extend or enlarge their service areas as set forth in Exhibit A and Exhibit B to the Notice and stipulated that the extensions or enlargements satisfied and exceeded the requirements of Nebraska law. The Parties also highlighted that the agreement was discussed with representatives of Gretna, LaVista, Papillion, Springfield, Bellevue, and Sarpy County. (MUD. Ex. 16).

On May 12, 2010, Michael G. Hybl, Executive Director of the Nebraska Public Service Commission, certified that the P-14 Order was filed and recorded in the official records of the Commission. (MUD Ex. 33 at BHE 00288). That P-14 Order recites that the Parties filed a joint application with the Commission providing notice as required by Neb. Rev. Stat. § 66-1863(3) of their intent to extend or enlarge their service areas or extend gas mains. The Order further states that the Commission provided notice that protests or formal interventions in the matter had to be filed on or before May 11, 2010, and that no protests or petitions for intervention were filed. Finally, the Order reflects that pursuant to Nebraska law, the extensions were presumed to be in the public interest pursuant to Nebraska Rev. Stat. §66-1863(3). The P-14 Order directed the Parties to proceed with their extensions or enlargements. The Order was unanimously approved and signed by the five Commissioners, including the Chairman.

Following the entry of the P-14 Order, the evidence demonstrates that the Parties relied on the P-14 maps and Order without exception. Both Parties testified that they have made a significant

number of extensions or enlargements since the entry of the P-14 Order (Black Hills made “a lot” of extensions or enlargements and M.U.D. made at least 51 extensions or enlargements). Neither Party applied to the Public Service Commission for those extensions as would have been required by law had both Parties’ service areas not already been enlarged as a result of the P-14 Order. In other words, both Parties understood their extensions to be permitted because of the P-14 maps and Order.

Moreover, in the 11 years since the P-14 Order was issued, the Parties have complied with the “Conditions Applicable to Service Territories” and negotiated agreements between the Parties when necessary to deviate from the P-14 maps. For example:

- In 2015, Black Hills wished to extend a pipeline from the Sarpy County landfill to its existing system; this would require it to run pipe through M.U.D territory as established by the P-14 maps. Black Hills Energy contacted M.U.D. requesting an agreement to run the pipe through M.U.D.’s territory, assuring M.U.D. it would not serve customers within M.U.D’s territory. (M.U.D. Ex. 13). Mr. Jarosz noted that Black Hills Energy reached out to M.U.D. because of the P-14 territories. (M.U.D. Ex. 13). The Parties were able to reach agreement on the matter.
- In 2017, M.U.D. reached out to Black Hills Energy because a subdivision was being built that would have parcels in both M.U.D. and Black Hills Energy’s territory. The Parties worked together to adjust the boundary from the P-14 maps to account for the subdivision and reach agreement as to how to provide service to the area. (M.U.D. Ex. 19). Mr. Jarosz testified that he believes that both M.U.D. and Black Hills Energy currently serve the

subdivision, which also evidences the Parties' ability to safely serve customers in the same area.

- In 2019, M.U.D proposed to run a main partially through Black Hills Energy's territory towards Springfield. M.U.D. provided Black Hills Energy a map of the routing, which depicted the portion of the main that would run through Black Hills Energy's service territory and that reflected the P-14 maps. M.U.D. assured Black Hills Energy that it would not serve customers within Black Hills Energy's territory as defined by the P-14 maps. (M.U.D. Ex. 22). The Parties reached agreement on the project. (M.U.D. Ex. 20).

Ultimately, the evidence establishes that the only time either of the Parties has sought to circumvent the P-14 maps and "Conditions Applicable to Service Areas" is in this proceeding. Black Hills Energy suggests the P-14 maps must be disregarded, because Papillion's ETJ has been extended, which was not anticipated at the time of the P-14 Order. But, the expansion of Papillion's ETJ cannot have been so critical, as the Interlocal Cooperation Agreement effectuating that expansion became effective well over four years ago. (M.U.D. Ex. 57). In fact, it was only upon realizing that the OPPD site, along with its significant gas load, was within M.U.D's P-14 service territory that Black Hills Energy sought to determine which ETJ the site fell within. (M.U.D. Ex. 40).

## ARGUMENT

### A. **Nebraska Law requires the Commission to deny Black Hills Energy's Application.**

Black Hills Energy offered evidence and the Commissioners elicited testimony regarding whether Black Hills Energy's proposed extension is in the public interest. All such evidence is foreclosed from consideration, however, because Nebraska Law has already conclusively

presumed M.U.D.'s P-14 service territory, which covers the OPPD site at issue, is in the public interest. Neb. Rev. Stat. §66-1863(3) provides, "If no person or entity has filed with the commission a protest alleging that the proposed extension or enlargement is not in the public interest within fifteen business days after the date upon which the application was made public, the enlargement or extension shall be conclusively presumed to be in the public interest and the jurisdictional utility or metropolitan utilities district may proceed with the extension or enlargement without further commission action." As recognized by the P-14 Order, no protests were filed in opposition to M.U.D. or Black Hills Energy's expansion of service territory in the P-14 matter, which means that the conclusive presumption in §66-1863(3) became effective.

What is the effect of a conclusive presumption? The Nebraska Court of Appeals has described a conclusive presumption as "a presumption that cannot be overcome by additional evidence or argument." *In re Estate of Stephens*, 9 Neb. App. 68, 75 (2000) (citing Black's Law Dictionary 1204 (7th ed. 1999)). A "*legislative decision* to make a presumption conclusive is one based on 'overriding social policy' and typically 'rests upon grounds of expediency or public policy so compelling in character as to override the requirement of proof.'" *Salem Grain Co. v. City of Falls City*, 302 Neb. 548, 561 (2019) (emphasis added) (quoting the Utah Supreme Court). The presumption is actually "a substantive rule of law directing that proof of certain basic facts conclusively proves an additional fact which cannot be rebutted." *Id.* at 560. It is important to understand that conclusive presumptions are "evidentiary rules affect[ing] the merits of an action." *Id.* at 561.

In this case, § 66-1863(3) provides that the basic fact to be proved is that no person or entity filed a protest within the fifteen business days allowed after the application. The P-14 Order

already recognizes that no protests were filed in response to the P-14 Application. (M.U.D. Ex. 33). With a finding already made as to this underlying basic fact, the conclusive presumption applies by operation of Nebraska law.<sup>3</sup> Thus, the service areas outlined in the P-14 maps are in the public interest. A decision to the contrary by the Commission would be circumventing the legislative decision to create the conclusive presumption found in §66-1863(3).

Black Hills Energy cannot rebut this presumption and any such evidence attempting to rebut the presumption should be disregarded. Certain Commissioners also raised questions during the hearing pertaining to what taxes both M.U.D. and Black Hills Energy contribute to surrounding communities. While such questions may be relevant to whether an extension is in the public interest pursuant to Neb. Rev. Stat. § 66-1860, the operation of the conclusive presumption in Sec. 66-1863 forecloses further inquiry into this topic. When nobody protested the P-14 Application, a legislative decision was made to foreclose further inquiry into any of the public interest factors. In sum, Nebraska law leaves nothing for the Commission to decide. As a matter of law, M.U.D.'s service territory is in the public interest and Black Hills Energy cannot serve the OPPD site within M.U.D.'s territory.

**B. The Commission must adhere to its 2010 P-14 Order to promote certainty and order.**

Black Hills Energy's Application must also be denied because the Commission may not revoke its P-14 Order. "[T]he Commission [is] limited under normal circumstances to modify or revoke its own order." *Nebraska Public Power Dist. V. Huebner*, 202 Neb. 587, 594 (1979). "The

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<sup>3</sup> Black Hills Energy implicitly recognizes the operation of this presumption. In a presentation to OPPD, it noted that if M.U.D. did not protest its current Application for extension within 15 days, the "expansion is deemed in the public interest." M.U.D. Ex. 28 at BHE-000265.

Commission may reconsider an order on its own motion during the 30 days after the mailing of a copy of the order and before an appeal to [the Nebraska Supreme Court] has been taken. Upon the expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected to [the Nebraska Supreme Court], the power of the Commission to reconsider its order upon its own motion terminate[s]. It would, therefore, be a strange situation if under normal circumstances neither an interested party nor the Commission itself could affect a final order after the passage of 30 days and yet the Commission could in some manner revoke its previous order 137 days after initially entering it.... There must be some finality to judgments and persons must be able to rely at some point in time upon the action of an administrative body. To hold otherwise would be to promote uncertainty and chaos.” *Id.* (emphasis added) (reversing Public Service Commission and holding Commission’s final order granting District authority to construct line could not thereafter be revoked).

The P-14 Order cannot be revoked. At the June 9, 2021, hearing in the above matter, it was suggested that the Commission simply “accepted” Black Hills Energy and M.U.D.’s 2010 application for extensions of their service territories. With all due respect, this reflects that the Commission may not have been fully informed prior to the hearing on the extent of its action in Docket P-14. As reflected in M.U.D Exhibit 33, the Commission took official action in response to the Parties’ P-14 Application. The Executive Director certified an original order in the proceeding and filed it with the official records of the Commission. Neb. Rev. Stat. §75-135 provides, “When certified to be a true and correct copy of the original by the executive director of the commission, a commission order shall be admitted in evidence in all courts and tribunals of this state, without further proof, as prima facie evidence of every fact found and that such order is



prima facie just and reasonable.” The Nebraska Supreme Court has further directed that such orders are final and binding. The P-14 Order is therefore much more than a mere acceptance by the Commission. The Commission cannot now revoke the Order, even if it believes Black Hills Energy’s application to be in the public interest. First, doing so would signal that any Commission Order could be revoked at any time, depriving all Parties before the Public Service Commission of any certainty as to the force of the Commission’s Orders. Moreover, doing so will create the exact uncertainty and chaos that the Nebraska Supreme Court has deemed unacceptable.

In this case, such uncertainty and chaos is particularly unacceptable given implicated safety concerns. Should the Commission grant Black Hills Energy’s Application and effectively revoke the P-14 Order which the Parties have relied on for over eleven years, nobody -- including the Commission, the Parties, or the public -- would know whether service territories remain. This will likely lead to competition-driven deployment of infrastructure in the prior service territories and another round of contentious proceedings over what utility is best-suited to build under Nebraska statute. It will also likely require that every future main extension within the prior service territories, even routine extensions that are without dispute, be submitted to the Commission in advance for approval in accordance with Neb. Rev. Stat. §66-1863. In sum, the Nebraska Supreme Court has directed that the Commission is not at liberty to disregard its P-14 Order in this matter and the underlying reasons for that dictate, certainty and order, are particularly important given the safety concerns at issue in this case.

## **CONCLUSION**

Black Hills Energy cannot undo an Order which has governed Black Hills Energy and M.U.D’s deployment of infrastructure for over eleven years. Nebraska law provides that the P-14

maps are binding and cannot be rebutted. Moreover, the Nebraska Supreme Court has directed that the Public Service Commission's final Orders cannot be revoked, as parties must have certainty as to the effect of orders after they become final. FOR THESE REASON AND ALL OF THE ABOVE REASONS, Protestant respectfully requests that the Commission deny Black Hills Energy's Application.

DATED this 16th day of June 2021.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **Protestants' Post-Hearing Brief** was served upon the following by email and first-class United States mail, postage prepaid, on this 16th day of June 2021:

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