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**By Deena Ackerman at 4:21 pm, Mar 03, 2021**

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

**PROTEST  
And  
MOTION TO DISMISS**

The Metropolitan Utilities District (“M.U.D.” or “Protestant”), by its attorneys, Rembolt Ludtke LLP, pursuant to NEB. ADMIN. CODE, tit. 291, ch. 1, § 002.12, and ch. 9, § 003.02, in the above-captioned matter of the Application of Black Hills Nebraska Gas, LLC d/b/a Black Hills Energy (“Black Hills” or “Applicant”), files this Protest and Motion to Dismiss the Application. In support of this Protest and Motion to Dismiss, M.U.D. avers and alleges as follows:

1. Protestant’s address is 7350 World Communications Drive, Omaha, Nebraska 68122. M.U.D. is a metropolitan utilities district, which operates in Sarpy County and therefore has an interest in this proceeding pursuant to the State Natural Gas Regulation Act (“Act”), and in particular, NEB. REV. STAT. §§ 66-1858 to 66-1864.

2. On April 19, 2010, Black Hills and M.U.D. jointly filed a *Notice of Proposed Extension of Service Area or Gas Main* (No. P-0014) before the Public Service Commission (“Commission”). In their notice, the parties stated, “that they intend to extend or enlarge their service area as set forth in the attached Exhibits A and B.” The exhibits were maps jointly proposing service areas for each party (“Service Area Maps”). In the P-0014 Notice, Black Hills and MUD also said they, “stipulate and agree that such extension or enlargement satisfy and exceed the requirements” of what was then NEB. REV. STAT. § 57-1306 and is now NEB. REV. STAT. § 66-1863.

3. Following notice by the Commission, no protests or petitions for intervention were filed. In its May 12, 2010, *Order Closing Docket* (“P-0014 Order”), the Commission determined:

“Therefore, pursuant to NEB. REV. STAT. § 66-1863(3) the proposed enlargement or extension is presumed to be in the public interest and Applicants may proceed with the extension or enlargement without further Commission action.”

Thus, according to the P-0014 Order, any extension consistent with the service area maps submitted to the Commission is presumed to be in the public interest.

4. The statute cited by the Commission defines the nature of the public interest presumption:

“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.”

NEB. REV. STAT. § 66-1863(3) (emphasis added).

5. Under Nebraska law, a conclusive presumption is “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)) (prohibiting party from challenging will signature requirements because conclusive presumption applied). The Nebraska Supreme Court determined that a conclusive presumption “is not a presumption,”

but rather, “a substantive rule of law directing that proof of certain basic facts conclusively proves an additional fact which cannot be rebutted.” *Salem Grain Co. v. City of Falls City*, 302 Neb. 548, 569, 571 (2019).

6. As alleged in Black Hills’ Application, the Omaha Public Power District (“OPPD”) has proposed to build facilities in the area of 168<sup>th</sup> Street and Fairview Road in Sarpy County to generate electricity using natural gas (“OPPD Plant”).

7. The location of the proposed OPPD Plant, as alleged by Black Hills, lies within the M.U.D. service area established by the Service Area Maps.

8. In accordance with the Service Area Maps, the P-0014 Order, and Nebraska law, M.U.D. is planning a pipeline extension to serve the proposed OPPD Plant.

9. As the parties stipulated and agreed in their 2010 Notice accompanying the Service Area Maps, any extension or enlargement in either party’s service area was deemed to “satisfy and exceed” the requirements of the Act. Black Hills, therefore, has stipulated and agreed that an M.U.D. extension to the location of the proposed OPPD Plant meets and exceeds the requirements of NEB. REV. STAT. § 66-1863.

10. In its P-0014 Order, the Commission acknowledged that extensions in compliance with the Service Area Maps were presumed to be in the public interest by operation of law. The Commission, therefore, has acknowledged, as a matter of law, that an M.U.D. extension to the location of the proposed OPPD Plant is presumed to be in the public interest.

11. Under the Nebraska law cited above, the presumption that the M.U.D. extension to the location of the proposed OPPD Plant is in the public interest is a conclusive presumption that cannot be rebutted or overcome by additional evidence or argument.

12. Pursuant to NEB. REV. STAT. § 66-1863(3), as acknowledged by the Commission in its P-0014 Order, because an M.U.D. extension to the location of the proposed

OPPD Plant is presumed to be in the public interest, M.U.D. may proceed with the extension "without further Commission action."

13. The extension Black Hills proposes in the Application in this proceeding would be duplicative of the planned M.U.D. extension and therefore contrary to the public interest and Nebraska law. *See* NEB. REV. STAT. § 66-1852(1); NEB. REV. STAT. § 66-1860(4).


14. Protestant denies each and every allegation of the Application not expressly admitted in this Protest and Motion to Dismiss and specifically denies that Applicant's proposed extension is in the public interest or would contribute to the orderly development of natural gas utility infrastructure.

FOR THE ABOVE REASONS, M.U.D. respectfully moves and requests the Commission to summarily dismiss and deny Black Hills's Application, as a matter of law.

DATED: March 3, 2021

METROPOLITAN UTILITIES DISTRICT,  
Protestant

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that I caused a true and correct copy of the foregoing *Protest and Motion to Dismiss* to be sent by electronic mail, on March 3, 2021, addressed to:

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