

# SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

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## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the matter of Black Hills                    ) Application No. P-12.32  
Nebraska Gas, LLC d/b/a Black                )  
Hills Energy, Rapid City,                    )  
South Dakota, seeking to                    ) ORDER GRANTING APPLICATION  
extend its service area for                    )  
purposes of serving an Omaha                )  
Public Power District site in                ) Entered: June 29, 2021  
Sarpy County.                                    )

BY THE COMMISSION:

On February 23, 2021, Black Hills Nebraska Gas, LLC, d/b/a Black Hills Energy ("Black Hills" or "Applicant") filed an application seeking to extend its service area for purposes of serving an Omaha Public Power District site in Sarpy County, pursuant to Neb. Rev. Stat. § 66-1829. On March 3, 2021, the Metropolitan Utilities District ("MUD") filed a Protest and Motion to Dismiss, and thereby became a party to this proceeding under 291 Neb. Admin. Code § 9-003.02. On March 18, 2021, the Omaha Public Power District ("OPPD") filed a petition for formal intervention pursuant to 291 Neb. Admin. Code § 1-002.12, which was granted by order of the Hearing Officer on March 19, 2021. A procedural schedule was set by Hearing Officer order on March 24, 2021.

## E V I D E N C E

A hearing was held in this matter in Sarpy County on June 9, 2021. Megan Wright and Douglas Law appeared on behalf of Black Hills. Andy Pollock and Jennifer Ralph appeared on behalf of MUD. Jessica Weborg appeared on behalf of OPPD. Sallie Dietrich and Nichole Mulcahy appeared on behalf of the Natural Gas Department of the Commission. Commission exhibits 1-11 were entered. Black Hills' exhibits 1 through 5 were entered. MUD's exhibits 6, 10-13, 16, 18, 19, 21, 22, 28, 32-25, 37, 40-45, 47, 48, 51-54, and 61 were entered.<sup>1</sup>

Black Hills first presented the testimony of Kevin Jarosz, Vice President of Operations. Mr. Jarosz stated that he prepared prefiled direct testimony and exhibits.<sup>2</sup> Mr. Jarosz then provided an oral clarification of his testimony regarding Black Hills' use

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<sup>1</sup> Exhibits will be referenced using the offering party's initials, e.g., PSC-1, BHE-1, or MUD-6.

<sup>2</sup> Ex. BHE-1.

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of renewable natural gas from the Sarpy County Landfill.<sup>3</sup> Mr. Jarosz stated that in his prefiled testimony, he was only referring to Black Hills' right to purchase the methane produced from the landfill, and that Black Hills does not claim or purchase the environmental attributes associated with the landfill gas for qualifying it for environmental credits from the Environment Protection Agency.<sup>4</sup> Mr. Jarosz then briefly summarized his prefiled testimony and was presented for cross-examination.

On cross-examination, Mr. Jarosz discussed exhibits offered as MUD-16 and MUD-33, which related to Commission Docket No. P-14.<sup>5</sup> Mr. Jarosz expressed agreement that the P-14 application was jointly filed by MUD and Black Hills in order to attempt to resolve ongoing service area disputes.<sup>6</sup> Mr. Jarosz testified that as part of the P-14 application, some maps were filed with the Commission depicting the parties' agreement as to their service territory areas.<sup>7</sup> Mr. Jarosz further testified that since the order closing the docket was entered in Docket No. P-14, Black Hills has made a large number of line extensions in the area depicted by the maps.<sup>8</sup> Mr. Jarosz did not know whether revisions to these maps depicting the extensions had ever been submitted to the Commission.<sup>9</sup>

Mr. Jarosz testified specifically to Black Hills' line extensions to the Sarpy County Landfill, to some data centers, and to the River Oaks subdivision, each of which were built after the entry of the order closing Docket No. P-14.<sup>10</sup> Mr. Jarosz stated that each of these extensions were built following agreement between Black Hills and MUD regarding the service area, and that no filings were made with the Commission regarding these extensions.<sup>11</sup> Mr. Jarosz also testified to an MUD line extension built to a Springfield town border station, which Black Hills consented to and notified the Commission regarding the extension,

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<sup>3</sup> Transcript at 15-16.

<sup>4</sup> *Id.*

<sup>5</sup> Commission Docket No. P-14, *In the Matter of the Joint Application of Black Hills/Nebraska Gas Utility Company, LLC and Metropolitan Utilities District, both of Omaha, providing notice as required by Neb. Rev. Stat. Section 66-1863, that they intend to extend or enlarge their service areas ("P-14")*.

<sup>6</sup> Transcript at 21-22.

<sup>7</sup> *Id.* at 25-26.

<sup>8</sup> *Id.* at 29-30.

<sup>9</sup> *Id.* at 49-50.

<sup>10</sup> *Id.* at 31-35.

<sup>11</sup> *Id.*

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but did not file an application with the Commission regarding the extension.<sup>12</sup>

Mr. Jarosz testified to a previous dispute between the cities of Papillion and Springfield, which was heard by the Nebraska Supreme Court.<sup>13</sup> Mr. Jarosz testified that the dispute was ultimately resolved by an interlocal agreement between the cities, effective October 4, 2016.<sup>14</sup> Mr. Jarosz testified that at the time the P-14 application was filed, MUD and Black Hills were attempting to estimate how the various cities in Sarpy County, including Springfield and Papillion, would grow.<sup>15</sup> Mr. Jarosz stated that the intent of the parties at the time the P-14 application was filed was that MUD would continue to serve its existing infrastructure in Sarpy County and Springfield, and Black Hills would serve the rest of Sarpy County, including Papillion.<sup>16</sup> Mr. Jarosz further stated that Black Hills holds a franchise agreement with the City of Papillion, and that the future OPPD site lies within the extraterritorial zoning jurisdiction of Papillion.<sup>17</sup>

Mr. Jarosz testified that if this application were approved, he anticipated that the extension would improve the financial profile for Black Hills Energy and benefit future ratepayers.<sup>18</sup> Mr. Jarosz stated that the proposed pipeline extension would only serve the OPPD site and no other customers.<sup>19</sup> Mr. Jarosz also testified that if the application were denied, and MUD were to serve the OPPD site, that this would result in duplicate pipe and the potential for confusion in the event of an emergency.<sup>20</sup>

Mr. Jarosz testified that if Black Hills' application were granted, Black Hills would need to run approximately one mile of pipeline from Northern Natural Gas facilities.<sup>21</sup> He further testified that Black Hills would not be bypassing other potential customers to build this extension.<sup>22</sup> Mr. Jarosz also testified that

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<sup>12</sup> *Id.* at 35-37; Ex. MUD-54.

<sup>13</sup> Transcript at 39-40; see also *City of Springfield v. City of Papillion*, 294 Neb. 604, 883 N.W.2d 647 (2016).

<sup>14</sup> Transcript at 39-40.

<sup>15</sup> *Id.* at 48.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 55-56; Ex. BHE-1 at 8.

<sup>18</sup> Transcript at 42.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 42-43.

<sup>21</sup> *Id.* at 44.

<sup>22</sup> *Id.*

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the contract to be negotiated with OPPD would be negotiated in the same manner as any other large volume customer.<sup>23</sup>

Black Hills then presented the testimony of Steven Coleman, Director of Asset Risk Management, Engineering, and Standards. Mr. Coleman stated that he prepared prefiled direct testimony and exhibits.<sup>24</sup> Mr. Coleman stated that his prefiled testimony consisted of an outline of how Black Hills intended to serve the OPPD site.<sup>25</sup> Mr. Coleman testified that Black Hills intended to build a 10-inch pipeline for approximately for one mile running beside Fairview Road.<sup>26</sup>

Mr. Coleman testified that the project was economically feasible because OPPD would be responsible for the cost of the project, and ratepayers would not be responsible for the building costs.<sup>27</sup> On cross-examination, Mr. Coleman testified that Black Hills intended to reach a contract with OPPD that would be generally comparable to other contracts that Black Hills holds with large volume customers.<sup>28</sup> At the close of Mr. Coleman's testimony, Black Hills rested.

MUD then presented the testimony of Jim Knight, Vice President of Gas Operations. Mr. Knight stated that he prepared prefiled direct testimony.<sup>29</sup> Mr. Knight testified that the OPPD site lies within MUD's service territory pursuant to the maps submitted to the Commission in the P-14 application.<sup>30</sup> Mr. Knight stated that the purpose of the agreement reached in P-14 was to avoid disputes over service territory, and that MUD and Black Hills have followed that agreement since 2010 with rare exceptions.<sup>31</sup> Mr. Knight estimated that MUD has made 51 pipeline extensions in Sarpy County since that docket, and that neither party has filed proposals or notices with the Commission for any of these extensions.<sup>32</sup> Mr. Knight stated that MUD has relied on the P-14 service area maps in 11 years since the agreement.<sup>33</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> Transcript at 65; Ex. BHE-2.

<sup>25</sup> Transcript at 65.

<sup>26</sup> *Id.* at 65-66.

<sup>27</sup> *Id.* at 66.

<sup>28</sup> *Id.* at 74.

<sup>29</sup> *Id.* at 79; Ex. MUD-6.

<sup>30</sup> Transcript at 80.

<sup>31</sup> *Id.* at 81.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 82.

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Mr. Knight was then presented for cross-examination. Mr. Knight testified that should Black Hills' application be denied, MUD intended to serve the OPPD site.<sup>34</sup> In that case, Mr. Knight stated that MUD would not file an application with the Commission for a pipeline extension, because the site is within MUD's service territory as shown in the P-14 maps.<sup>35</sup>

Mr. Knight testified that if MUD were to serve the OPPD site, it would run approximately one mile of pipe from Northern Natural Gas facilities.<sup>36</sup> Mr. Knight stated that this pipeline would not run through existing Black Hills territory, cross existing pipes, or result in duplicative infrastructure.<sup>37</sup> Mr. Knight further testified that MUD being allowed to serve the site would be of financial benefit to MUD and its ratepayers.<sup>38</sup>

Mr. Knight testified that when the P-14 application and maps were filed, the intent was that MUD would serve Springfield, with newer developed areas outside Springfield being served by Black Hills.<sup>39</sup> Mr. Knight did not know whether MUD had kept a copy of those maps following the application filing, but noted that prior to the filing of the current application, MUD personnel had visited the Commission to obtain a copy of those maps.<sup>40</sup> Mr. Knight did not know whether the P-14 maps had been updated internally at MUD.<sup>41</sup> Mr. Knight did not know if changes to the service maps had been filed with the Commission.<sup>42</sup>

Following Mr. Knight's testimony, no further witnesses were called, and the hearing was closed. Black Hills and MUD each submitted a post-hearing brief on June 16, 2021.

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<sup>34</sup> *Id.* at 85.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 86.

<sup>37</sup> *Id.* at 86-87. Black Hills disputes this statement in its post-hearing brief, stating that a proposed MUD main along Fairview Road would cross Black Hills Territory. Applicant's Post-Hearing Brief at 3.

<sup>38</sup> Transcript at 87.

<sup>39</sup> *Id.* at 91.

<sup>40</sup> *Id.* at 91-92.

<sup>41</sup> *Id.* at 92.

<sup>42</sup> *Id.*

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### S T A N D A R D   O F   R E V I E W

The Commission has the authority to determine whether a proposed pipeline extension is in the public interest pursuant to Neb. Rev. Stat. §§ 66-1858 - 66-1864. Specifically, Neb. Rev. Stat. § 66-1863(1) provides that:

[N]o jurisdictional utility or metropolitan utilities district proposing to extend or enlarge its natural gas service area or extend or enlarge its natural gas mains or natural gas services after July 14, 2006, shall undertake or pursue such extension or enlargement until the proposal has been submitted to the commission for its determination that the proposed extension or enlargement is in the public interest.

In reviewing pipeline extension applications, the Commission must consider the factors set forth in Neb. Rev. Stat. §§ 66-1860 and 66-1861. Neb. Rev. Stat. § 66-1860 sets out a five-factor test for determining whether an extension or enlargement ("project") is in the public interest, including (1) the economic feasibility of the project; (2) the impact the project will have on existing and future natural gas ratepayers; (3) whether the project contributes to the orderly development of natural gas utility infrastructure; (4) whether the project will result in duplicative infrastructure; and (5) whether the extension or enlargement will be nondiscriminatory in nature.

Neb. Rev. Stat. § 66-1861 sets forth certain rebuttable presumptions in considering an extension or enlargement. When one of these rebuttable presumptions applies, the Commission must consider it first, prior to reviewing the statutory factors set out in Neb. Rev. Stat. § 66-1860.<sup>43</sup> Neb. Rev. Stat. § 66-1861(2) provides a rebuttable presumption that "[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 in the public interest." A rebuttable presumption is a presumption which can be overturned upon the showing of sufficient proof.<sup>44</sup>

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<sup>43</sup> Commission Docket No. P-5, *In the Matter of the Application of Metropolitan Utilities District of Omaha, seeking resolution of a dispute under Nebraska Revised Statutes Section 57-1306*, Order (July 9, 2002) ("Prior to any consideration of whether M.U.D.'s proposed extension is in the public interest, M.U.D. must establish that Aquila's main is not." (emphasis in original)).

<sup>44</sup> *Variano v. Dial Corp.*, 256 Neb. 318, 326, 589 N.W.2d 845, 851 (1999).

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Neb. Rev. Stat. § 27-301 further clarifies that "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

In the case at hand, Black Hills, a jurisdictional utility, is proposing to serve a future gas generation site to be constructed by OPPD at the approximate location of 168th Street and Fairview Road, in Sarpy County, Nebraska. The location of the OPPD site is within the extraterritorial zoning jurisdiction of the City of Papillion.<sup>45</sup> Black Hills holds a franchise agreement with the City of Papillion.<sup>46</sup> Therefore, a rebuttable presumption that Black Hills' proposal is in the public interest applies to this application, and MUD has the burden of proof to show that Black Hills' proposal is not in the public interest.<sup>47</sup>

### O P I N I O N   A N D   F I N D I N G S

In prefiled testimony and at hearing, Black Hills presented evidence to support each of the five statutory factors in Neb. Rev. Stat. § 66-1860. The project is economically feasible, because OPPD will pay for the expenses of building the project and because an additional large-volume customer will improve Black Hills' financial profile.<sup>48</sup> Black Hills testified that the project would not result in duplicative infrastructure, "leapfrogging" of customers, or crossing of other pipelines.<sup>49</sup> Black Hills also stated that any contract reached with OPPD would be non-discriminatory in nature and negotiated in the same manner as any other large-volume customer contract.<sup>50</sup>

MUD, as a protestant to this application, presented minimal evidence to dispute whether Black Hills' proposal meets each of these five factors. Indeed, on the whole, it appears that MUD largely agrees with facts and circumstances relating to this

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<sup>45</sup> Application, Exhibit B.

<sup>46</sup> Transcript at 55-56, 91; Ex. BHE-1 at 8; Ex. BHE-3, Request No. 2.

<sup>47</sup> See also Commission Docket No. P-5, *In the Matter of the Application of Metropolitan Utilities District of Omaha, seeking resolution of a dispute under Nebraska Revised Statutes Section 57-1306* (July 9, 2002) (finding that a protestant to a pipeline extension application did not overcome the rebuttable presumption because the protestant argued that its own pipeline proposal was in the public interest, rather than challenging the applicant's proposal being in the public interest).

<sup>48</sup> Ex. BHE-2 at 5.

<sup>49</sup> Transcript at 44-45.

<sup>50</sup> *Id.* at 74-75.

project as presented by Black Hills. MUD's argument instead is narrowly focused upon the Commission's previous order entered in Commission Docket No. P-14. MUD contends that any consideration of the five factors set forth in Neb. Rev. Stat. § 66-1860 is foreclosed by the Order Closing Docket issued in Commission Docket No. P-14.<sup>51</sup>

MUD's argument falls short. MUD is focused upon the language of Neb. Rev. Stat. § 66-1863(3), stating that an application for extension or enlargement which is not protested "shall be conclusively presumed to be in the public interest."<sup>52</sup> MUD then argues that a conclusive presumption "cannot be overcome by additional evidence or argument."<sup>53</sup> However, this argument ignores the fact that the Commission's P-14 docket was closed on May 12, 2010, and has remained closed since.<sup>54</sup> While no additional evidence or argument may overturn the conclusive presumption in P-14, the application at hand is separate and distinct. This is a new application, and new evidence may therefore be adduced for the Commission's review of what is in the public interest.<sup>55</sup>

MUD further argues that the Commission must adhere to its P-14 order in order to promote certainty and order. MUD cites to *Nebraska Public Power Dist. V. Huebner*<sup>56</sup> to argue that Commission approval of Black Hills' application would amount to a revocation of the order it issued in P-14.<sup>57</sup> However, the action requested by Black Hills in this application is not to revoke a previous order;

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<sup>51</sup> See Protestant's Post-Hearing Brief at 5-6.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 6 (quoting *In re Estate of Stephens*, 9 Neb. App. 68, 608 N.W.2d 201 (2000)).

<sup>54</sup> Had the parties to P-14 wished for that docket to remain an open proceeding, such a request could have been made to the Commission at the time the P-14 application was filed. The parties also could have filed modifications to their agreement, including updates to the service territory area maps, in the eleven years following the order closing that docket. Because no such action took place, the Commission finds that the parties to P-14 intended for that docket to remain closed.

<sup>55</sup> MUD relies upon *Salem Grain Co. v. City of Falls City*, 302 Neb. 548, 924 N.W.2d 678 (2019). However, this case is distinguishable on a variety of factors; notably, the "conclusive presumption" described in statute in that instance differs from that described in Neb. Rev. Stat. § 66-1863(3). Neb. Rev. Stat. § 18-2129 provides for a finding that a bond may be conclusively deemed to be in the public interest. While the Court of Appeals refers to the statutory language at issue in *Falls City* as a conclusive presumption, we note that the language of Neb. Rev. Stat. § 66-1863(3) is that a project may be conclusively "presumed" rather than "deemed."

<sup>56</sup> 202 Neb. 587, 276 N.W.2d 228 (1979).

<sup>57</sup> Protestant's Post-Hearing Brief at 7-8.



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it is to expand or enlarge Black Hills' territory. As an administrative agency, the Commission is required to consider current public interest needs and is not bound to inflexible limits of past practice.<sup>58</sup> It would be a curious state of affairs if the Commission could never revise any of its previous findings to better serve the current public interest.<sup>59</sup> Instead, an agency faced with new developments may alter its past interpretation and overturn past administrative rulings and practice.<sup>60</sup>

The parties do not dispute that new developments have occurred since the P-14 order was entered. The parties to this application both testified that the boundaries of the cities in question grew differently than was expected at the time of the agreement in P-14.<sup>61</sup> Moreover, the parties recognized that the cities of Springfield and Papillion have reached their own agreement as to their respective boundaries.<sup>62</sup> In this instance, when over a decade has passed and intervening events have changed the territory in question, the Commission must review what is in the public interest at the present moment.

This review of the facts of the matter before us is not a revocation of the P-14 order, as the findings made in that docket as to what was in the public interest in 2010 remain untouched. The Commission has been tasked by the Legislature to decide what is in the public interest when Black Hills and MUD are unable to reach an agreement as to their respective service territories, as in the case before us.<sup>63</sup>

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<sup>58</sup> See, e.g., *American Trucking Assos. v. Atchison, T. & S. F. R. Co.*, 387 U.S. 397, 416, 87 S. Ct. 1608, 1618 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.").

<sup>59</sup> While the Commission takes pride in its origins as the Nebraska Railway Commission, it also recognizes that the needs of the public have changed dramatically since 1885.

<sup>60</sup> *American Trucking Assos. v. Atchison*, 387 U.S. 397, 416.

<sup>61</sup> Transcript at 46-48, 90-91.

<sup>62</sup> *Id.* at 39.

<sup>63</sup> Notably, the agreement submitted in P-14 did not describe what was to happen in the case that the parties failed to reach an agreement. Ex. MUD-16. Black Hills presented testimony that should there be a disagreement, it should be reviewed by the Commission; MUD's witness testified that he did not know what would happen in the event of a disagreement. Transcript at 47, 92-93.

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Upon review of the evidence submitted in this matter, the Commission finds that MUD has not met its burden of proof to overcome the rebuttable presumption in favor of Black Hills. Black Hills presented evidence on each of the five statutory factors set out in Neb. Rev. Stat. § 66-1860.<sup>64</sup> On questioning, MUD stated that if this application were to be denied, MUD would serve the OPPD site by building a one-mile pipeline to the site, the same length of pipe that Black Hills would build.<sup>65</sup> Whether a pipeline constructed by MUD would result in duplicative infrastructure is disputed.<sup>66</sup> Both parties testified that construction of the pipeline on their own system would be a benefit to their own natural gas ratepayers.<sup>67</sup> Black Hills presented evidence that the project would be nondiscriminatory in nature, and MUD did not rebut that evidence.<sup>68</sup> Based on the evidence presented, none of the factors set out in Neb. Rev. Stat. § 66-1860 weigh against Black Hills.

The Commission recognizes MUD's argument that granting this application could disrupt the orderly development of natural gas infrastructure according to the P-14 maps. However, the evidence presented at hearing shows that the maps as filed with the Commission are no longer accurate, and at least four significant changes to the maps have occurred without notice to the Commission or revisions to the maps filed with the Commission.<sup>69</sup> It is unclear to what extent the parties themselves relied on these maps in the past eleven years.<sup>70</sup> Ruling on the current application based solely on inaccurate, outdated maps would subvert the intent of Neb. Rev. Stat. § 66-1860 for a full and fair public interest review. The Commission cannot say that inflexible adherence to these maps would contribute to the orderly development of natural gas infrastructure in Sarpy County.

Upon consideration of the evidence presented in this matter, the Commission is of the opinion, and hereby finds, that the application of Black Hills Nebraska Gas, LLC d/b/a Black Hills Energy to construct a pipeline extension to serve the Omaha Public

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<sup>64</sup> *Supra* at 7.

<sup>65</sup> *Id.* at 65-66, 85-86; Application at 2.

<sup>66</sup> Transcript at 86-87; Applicant's Post-Hearing Brief at 3.

<sup>67</sup> Transcript at 41-42, 87.

<sup>68</sup> *Id.* at 73-75.

<sup>69</sup> Transcript at 31-37.

<sup>70</sup> See Transcript at 91-92 (MUD witness stating that he did not know if maps were updated internally, and that MUD personnel came to the Commission to obtain a copy of the map prior to the filing of P-12.32).

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Power District's planned Papillion natural gas generation facility should be, and hereby is, granted.

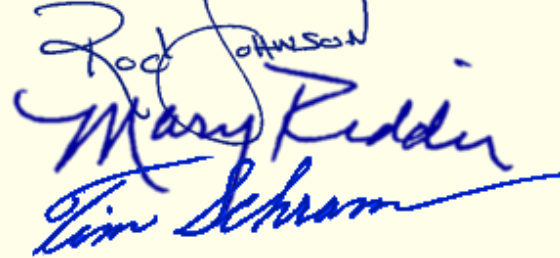
## O R D E R

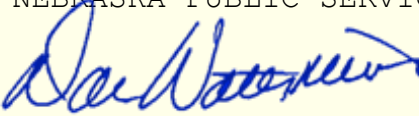
IT IS THEREFORE ORDERED that the proposed extension by Black Hills Nebraska Gas, LLC d/b/a Black Hills Energy to serve the Omaha Public Power District site in Sarpy County is in the public interest and the application submitted in this matter shall be, and is hereby, approved.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 29th day of June, 2021.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



  
Chair

ATTEST:

  
Executive Director

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### D I S S E N T

By Commissioner Rhoades:

There must be some finality to agency decisions and parties must be able to rely on the action of an administrative body. *Nebraska Public Power Dist. V. Huebner*, 202 Neb. 587, 594 (1979). The decision reached by the majority is contrary to settled law and ignores the Nebraska Supreme Court's direction that we provide finality to parties so that they can reasonably rely on our precedent. Accordingly, I dissent.

There is no dispute that in 2010, the Commission approved a joint submission between these parties, after finding the service area extensions were presumed to be in the public interest pursuant to Neb. Rev. Stat. § 66-1863(3). Both parties were directed to proceed with their extensions or enlargements based upon the "conclusive presumption" that they were doing so with unanimous Commission support and consistent with public interest.<sup>71</sup> Since that time, both parties to this docket have, in fact, taken steps and have expended financial resources to make extensions and enlargements over the years based upon the belief that the Commission's decision authorized those actions.<sup>72</sup> Specifically, as it relates to MUD, it had reasonably relied on the Commission's decision to its detriment.

A decision had been made and it had been final. But now the majority finds that it wasn't. To reach its conclusion, the Commission engages in a new public interest analysis, which it should not have even done. MUD does not need to overcome the rebuttable presumption in favor of Black Hills because the Commission's P-14 Order is controlling in this matter. But even if it were appropriate to revoke the Commission's earlier decision, I would find Black Hills' arguments unpersuasive.

The majority's reliance on the 2004 franchise agreement is misguided. The franchise agreement itself says that it can be deemed invalid by any judicial, regulatory or legislative body having proper jurisdiction.<sup>73</sup> While Neb. Rev. Stat. § 66-1861(2) provides for a rebuttable presumption under franchise agreements, the statute does not allow the franchise agreement to override or

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<sup>71</sup> Ex. MUD-33; Transcript at 26-27

<sup>72</sup> Transcript at 29-30, 81-82 (Black Hills and MUD witnesses testifying that approximately 51 extensions have taken place since the P-14 order).

<sup>73</sup> Ordinance No. 1420, at 6 (filed with the Commission on July 7, 2004).

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nullify Commission orders which are supreme in this docket. When the area was annexed in 2016, either or both of the parties could and should have asked for a change to the maps based on the annexation. The parties failed to do that and therefore the current agreement should be honored.

There needs to be a pipeline extension. However, MUD testified it is willing to extend service in its area to serve this project.<sup>74</sup> The public interest would be best served allowing the public utility to provide service to the proposed site than allowing a private gas company to infringe upon the mutually agreed upon service areas and creating chaos in the regulatory framework.

It is not consistent with public interest to take away property belonging to a public non-profit entity and give it to a private for-profit entity. In granting this application, I believe the Commission is engaging in "regulatory taking" of a publicly owned and operated utility and giving it to a private for-profit company who will in turn make a profit for shareholders rather than allowing the existing public utility to provide the service.<sup>75</sup> This is harmful to the ratepayers of both OPPD and MUD. OPPD will be subject to negotiating with a privately owned company, which is beholden to shareholders, rather than negotiating with the local public utility who provides low-cost reliable service and can be held accountable via the publicly elected board. The ratepayers of MUD will lose a valuable, consistent source of revenue that would be as beneficial to them as it would be the private shareholders at Black Hills.

Moreover, the evidence presented at the hearing by MUD indicates permitting Black Hills to serve the proposed site would be disruptive to the orderly development.<sup>76</sup> The project is in MUD's service territory, and MUD stands ready and willing to provide service. Further, Black Hills did not explain how privatizing the service territory of a publicly held utility is in the public interest. As to the disagreement over whether a pipeline

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<sup>74</sup> Transcript at 85-86.

<sup>75</sup> See *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (It has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation). See also *J. Kennedy, concurring*, 545 U.S. 569, 491 (stating that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause).

<sup>76</sup> Transcript at 81-82, 89 (MUD witness testifying that the parties have relied on P-14 maps and that P-14 allows the parties to avoid disputes).

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constructed by MUD in MUD's own service territory would be duplicative, this is an extremely duplicitous argument made by Black Hills. If a duplication were to occur, it would be the fault of Black Hills and the result of Black Hills building in MUD's territory without the permission of the Commission.<sup>77</sup>

This is not about inflexible adherence to the maps. If MUD were unable or unwilling to provide service to the project area, then I would agree that it would be prudent to permit Black Hills to serve the area. However, that is not the case and this application should therefore be denied.

Accordingly, I dissent.

  
Commissioner Crystal Rhoades

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<sup>77</sup> As noted in the record, however, the parties are at odds over even this point of fact. While Black Hills argues in its post-hearing brief that MUD's pipeline would cross Black Hills infrastructure, Black Hills did not present evidence at hearing to demonstrate this. Applicant's Post-Hearing Brief at 3.