BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of Metropolitan Utilities District, Omaha, seeking authority for Competitive Natural Gas Provider authority in the state of Nebraska.	)))))	Application No. NG-0008 APPLICATION DISMISSED Entered: November 4, 2003

BY THE COMMISSION:

P R O C E D U R A L H I S T O R Y

By its application filed August 12, 2003, Metropolitan Utilities District of Omaha ("M.U.D.") seeks certification as a Competitive Natural Gas Provider ("CNGP") pursuant to LB 790 Sections 48 and 49. Notice of the application was published in *The Daily Record*, Omaha, Nebraska on August 15, 2003, pursuant to the rules of the Commission.

On September 5, 2003, an Informal Intervention was filed by NorthWestern Corporation ("NorthWestern"). On September 10, 2003, Formal Interventions and Protests were filed by Cornerstone Energy, Inc. ("Cornerstone") and Aquila, Inc. ("Aquila"). In addition to their Formal Interventions and Protests, Cornerstone and Aquila filed Motions to Dismiss M.U.D.'s Application for certification as a CNGP ("Application"). The Motions to Dismiss filed by Cornerstone and Aquila ask the Commission to dismiss M.U.D.'s application because M.U.D. is not authorized to offer CNGP services or to hold a certificate to perform such services because it lacks the required statutory authority to do so, and because it is not in the public interest to allow M.U.D. to act as a CNGP.

An oral argument on the Motions to Dismiss was held October 20, 2003, in the Commission hearing room. Attorneys Max J. Burbach and Stacia L. Norder appeared on behalf of Cornerstone. Attorney Douglas J. Law appeared on behalf of Aquila. Attorney Susan E. Prazan appeared on behalf of M.U.D. Each party presented its respective arguments on the Motions to Dismiss and the matter was submitted for decision by the Commission at the conclusion of the October 20, 2003 oral arguments.

F A C T U A L B A C K G R O U N D

The Metropolitan Utilities District of Omaha ("M.U.D.") is a municipal corporation and political subdivision of the State of Nebraska created by legislative charter to operate as a natural gas and water utility in the City of Omaha, Nebraska and

its environs. M.U.D. filed an application seeking certification from this Commission as a CNGP under LB 790 Sections 48 and 49.

Cornerstone is a corporation organized under the laws of the State of Nebraska, engaged in the natural gas marketing business in the States of Nebraska, Missouri, Minnesota, Iowa, Kansas, Colorado, Arkansas, Oklahoma and Michigan, and has its principal place of business in Omaha, Nebraska.

Aquila is an investor-owned natural gas utility organized and existing under the laws of the State of Delaware and operating in seven different states, including but not limited to the eastern one-third of Nebraska.

Cornerstone and Aquila formally intervened and protested to oppose the M.U.D. application. In addition, Cornerstone and Aquila filed Motions to Dismiss M.U.D.'s application asserting that M.U.D. is a municipal corporation and subdivision of the State and lacks the legal authority to participate in the CNGP business on utility systems not owned by M.U.D.

D I S C U S S I O N

In support of their Motions to Dismiss, Cornerstone and Aquila contend that M.U.D. does not have the legal authority to act as a CNGP. Further, Cornerstone and Aquila (hereinafter "the Moving Parties") assert that granting such certificate would not only present issues of concern that are currently not addressed by Commission rules and regulations, but would be contrary to the public interest.

M.U.D. is a political subdivision created by legislative charter pursuant to §14-2101 et seq. of the Nebraska Revised Statutes. As a creature of statute, M.U.D. has only (a) those powers and authority expressly granted to it by the Legislature, (b) those powers necessarily or fairly implied in or incident to the express powers given to the district, and (c) such powers as are essential and indispensable to the objects and purposes of the district.[1] "Political subdivisions are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers that they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been delegated to them, or such as may

[1] In re Application of Lincoln Electric System, 265 Neb. 70, 655 N.W.2d 363 (2003), *citing* Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 69-70, 189 N.W. 643, 650 (1922).

be inferred from some express delegated power essential to give effect to that power."[2] Where doubt exists as to whether or not a political subdivision has the power to perform certain acts or functions, such doubt must be resolved against the grant of power.[3] Legislative charters "are construed with a greater degree of strictness than ordinary civil statutes, and the rule in Nebraska is that they shall be strictly construed. Their authority to perform municipal acts will not be extended beyond the plain import of the language of the charter."[4]

Express Authority

M.U.D. asserts that it has been granted express statutory authority to act as a CNGP under Neb. Rev. Stat. §14-2125. However, it is clear from the legislative history of §14-2125 that express authority to operate as a natural gas marketer was never contemplated by the Legislature, much less expressly granted to M.U.D. In particular, M.U.D. cites subsection (2) of §14-2125 as granting express authority. This subsection provides as follows:

> A metropolitan utilities district may ***own, construct, maintain, and operate*** an interstate or intrastate pipeline, whether within or outside of the district's boundaries, for purposes of securing and transporting natural gas supplies for itself or others and may enter into contractual agreements with other pipeline companies, gas distribution companies, municipalities, or political subdivisions or any other legal entity whatsoever for such purposes. (Emphasis added).

Based upon a plain and ordinary reading of the statute, M.U.D.'s authority to contract pursuant to this section is limited to the purposes of owning, constructing, maintaining and operating a pipeline. Leasing of M.U.D.'s capacity to another entity is not necessary in order to "own, construct, maintain and operate" a pipeline, and the subsection does not appear to even contemplate leasing of capacity as a CNGP. Thus, the Commission does not find any authority in the plain language of §14-2125.

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[2] Nebraska League of Savings and Loan Associations v. Johnson, 215 Neb. 19, 337 N.W.2d 114 (1983).
[3] Nelson-Johnston & Doudna v. Metropolitan Utilities District, 137 Neb. 871, 291 N.W. 558 (1940).
[4] Metropolitan Utilities District v. City of Omaha, 171 Neb. 609, 107 N.W.2d 397 (1961).

Furthermore, "One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question."[5] Therefore, in order to determine the scope and intent of the grants of authority in §14-2125(2), we will take notice of the statute's legislative history.

The legislative history of §14-2125 clearly indicates that subsection (2) was intended to allow M.U.D. to build a pipeline to seek out the best natural gas rates possible for M.U.D.'s customers, not to allow M.U.D. to market natural gas. This intention is stated clearly in both the discussion in the Committee on Urban Affairs and the Legislative floor debate. During the floor debate, Senator Hall states:

> LB 177 is enabling legislation for the Metropolitan Utilities District in Omaha to either build or join in a joint effort of building a pipeline so that they could own one. The M.U.D. is a municipal corporation so it is constrained by statutory language. It was born from statutory language so it is necessary that they come back through myself and a number of other co-sponsors from the Metro Omaha area to ask for the authority to build the pipeline. The bottom line, the reason for doing this is to have the ability to look for the best possible natural gas rates for the consumer, the customers of the district.[6]

That §14-2125(2) was not enacted by the Legislature to grant M.U.D. the authority to act as a natural gas marketer appears obvious from the legislative history. Furthermore, at the time this legislation was enacted, there was no established, non-utility retail market for natural gas in Nebraska, and thus an intent to grant authority for M.U.D. to participate in the marketing of natural gas to off-system retail customers could not reasonably be inferred. Therefore, M.U.D.'s argument that express authority to act as a natural gas marketer outside its own system was given by the Legislature in §14-2125(2) is incorrect.

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[5] Pump & Pantry, inc. v. City of Grand Island, 233 Neb. 191, 444 N.W.2d 312 (1989).

[6] Nebraska Unicameral Floor Debate, *Senator Hall*, p. 399 (Jan. 30, 1987).

On May 30, 2003, the Governor signed LB 790, the State Natural Gas Regulation Act (the "Act") which, in Sections 48 and 49, requires CNGPs to be certified by the Commission. It is under this provision that M.U.D. makes its application. However, there are no express provisions in LB 790 granting Nebraska's many metropolitan utilities districts, municipal natural gas utilities, or co-operative energy agencies authority to act as a CNGP. To the contrary, it is apparent from both the Act's contents and exclusions that the intent of the Act was not to provide M.U.D. with the authority to act as a CNGP.

The Act specifically provides that a CNGP includes "an affiliate of a natural gas public utility."[7] Notably, though, no section of the Act provides for a metropolitan utilities district or any arm or affiliate of such an entity to operate as a CNGP. M.U.D. had adequate notice of the proposed legislation that became LB 790 to participate in the hearing process, offer testimony, and use necessary lobbying efforts to add provisions to include itself and other public entities in the express language of the bill, but apparently elected not to participate in the legislative process. M.U.D., which had ample opportunity to request specific inclusion in LB 790's CNGP provisions, cannot now assume, by negative inference, that such authority to act as a CNGP may be found within LB 790. If the Legislature had intended to provide such authority, it could easily have done so. For example, it could have provided (but did not) that a CNGP includes "an affiliate of a natural gas public utility *or a metropolitan utilities district* offering services outside the areas in which it provides natural gas service through pipes it owns." The Legislature's refusal to grant M.U.D. such authority was no accident. Rather, LB 790's lack of provisions allowing M.U.D. to engage in non-regulated CNGP activity is fully consistent with the overall purpose behind such districts and with the Legislature's overall approach to strictly define and limit the powers of these districts.

[7] LB 790, Section 48.2(a) (Neb. 2003). While allowing affiliates to operate as a CNGP, the Act attempts to ensure that such an affiliate does not gain any improper competitive advantage by directing the Commission to ensure that the utility's ratepayers do not subsidize the affiliate's non-regulated activities. Id., Section 24.10. Because the Commission has no rate setting authority over M.U.D., it cannot enforce such a prohibition against subsidization.

M.U.D. has thus cited no express legislative grant of authority for M.U.D. to act as a CNGP.

Implied Authority

M.U.D. maintains it has implied authority to act as a CNGP so that it may manage its excess interstate natural gas transportation capacity purchased from Northern Natural Gas Company ("Northern") more efficiently. M.U.D. suggests that it would like to sell that excess capacity to retail end users on the natural gas distribution systems of Aquila, NorthWestern or Kinder Morgan. The Commission does not find M.U.D.'s reasoning persuasive, nor does it constitute a basis for granting the requested CNGP certification. Under Federal Energy Regulatory Commission ("FERC") Order No. 636, FERC Stats. and Regs., Regulations Preambles 1991-1996 ¶30,939 (1992), FERC required all interstate pipelines to provide interstate transportation "capacity release" mechanisms through which shippers, like M.U.D., can voluntarily reallocate all or a part of their firm transportation capacity rights. This activity is essentially a wholesale activity regulated by FERC.[8]

M.U.D. does not need to perform CNGP activities to manage its excess Northern interstate pipeline capacity requirements. Nor will it be harmed by the Commission's dismissal of its application here. M.U.D. can continue to allocate or assign that capacity to other Northern marketers or shippers through the capacity release mechanism (i.e. electronic bulletin boards) established by Northern. Northern is required by FERC to post on its electronic bulletin board all available capacity – its own and that of shippers. This FERC capacity release mechanism was approved by FERC to allow firm capacity holders to permanently or temporarily release some or all of their capacity through the pipeline as efficiently as possible to persons desiring capacity. Thus, M.U.D. already has a wholesale market for its excess interstate pipeline capacity, and does not need to be certified as a CNGP to accomplish its goal of shedding its excess interstate pipeline transportation capacity. Northern's electronic bulletin board mechanism has been available to M.U.D. since 1992.[9] Accordingly, the Commission fails to see how acting

[8] *See also* 18 C.F.R. §284.8 (2003) (capacity release of firm transportation service), and FERC Order No. 536, FERC Stats. And Regs., Regulations Preambles 1991-1996 ¶30,994 (1994) (requiring interstate pipelines to post standardized information relevant to available interstate pipeline capacity on their electronic bulletin boards (EBBs) and to make that information available in downloadable files).

[9] *See* Effective FERC Regulations, 18 C.F.R. §284.10(a).

as a CNGP will increase M.U.D.'s ability to shed its excess capacity.

Directly marketing excess interstate pipeline transportation capacity to retail sales or transportation customers of jurisdictional utilities is also not in the public convenience and necessity, and is not even possible under the current method of conducting business. Under the transportation programs of the jurisdictional utilities (e.g., Kinder Morgan's "Choice" plan or Aquila's "Business Energy Options"), each transportation customer or its designated CNGP is allocated an amount of existing interstate pipeline transportation capacity that was previously obtained by the jurisdictional utility to serve the customer while that customer was a sales customer of the jurisdictional utility. Thus, while M.U.D. may desire this class of customer as a new market for its unused interstate transportation capacity, there is no means to transfer and no customer need for M.U.D.'s excess interstate pipeline capacity. M.U.D.'s marketing of its excess interstate pipeline capacity, if permitted, would only serve to cause a shift of costs from transportation customers of M.U.D. to the remaining sales customers of the respective jurisdictional utility by causing the remaining sales customers to absorb unused interstate pipeline capacity. This activity therefore is not a convenience to the customers of the jurisdictional utilities, whom this Commission is required by statute to regulate and protect.[10]

Moreover, the Commission fails to see how any customer on a jurisdictional utility such as Kinder Morgan would want or need excess interstate transportation capacity of M.U.D. obtained from Northern's interstate pipeline system, since all of the interstate natural gas requirements of Kinder Morgan's transportation customers would be shipped through Kinder Morgan's own interstate pipeline, KMI, and not Northern's. Accordingly, M.U.D.'s argument that implied authority results from the need to release excess capacity is inapplicable and unsupportive of its application for certification as a CNGP.

M.U.D. also argues that implied authority arises from several statutes within Chapter 14 of the Nebraska Revised Statutes, specifically §§ 14-2112, 14-2113, 14-2125, and 14-2150. However, "implied powers, as the words themselves indicate, must find their justification and foundation in express power granted; that is, they are only implied ex necessitate that the express powers may be fully and completely exercised."[11] M.U.D. states that the express power of §14-2112

[10] 2003 Neb. Laws 790.
[11] Consumers' Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N.W. 643 (1922).

to "purchase, hold, and sell personal property" and to have the "sole management and control of its assets, including all utility property, real and personal, now or hereafter owned" results in implied power to act as a CNGP. This argument is ineffective as it is not necessary for M.U.D. to act as a CNGP to "fully and completely exercise" the express powers of §14-2112. Likewise, the express authority to sell surplus real or personal property under §14-2150 does not result in a grant of implied power for M.U.D. to act as a CNGP because, as illustrated above, M.U.D. currently has the opportunity to release its excess firm transportation capacity through other, more efficient, means.

M.U.D. cites §14-2125(1) in its Brief Opposing the Motions to Dismiss of Cornerstone and Aquila as a source of implied authority to act as a CNGP. This subsection states:

> A metropolitan utilities district may enter into agreements with other companies or municipalities operating gas distribution systems and with gas pipeline companies, whether within or outside the state, for the transportation, purchase, sale or exchange or available gas supplies or propane supplies held for peak-shaving purposes, so as to realize full utilization of available gas supplies and for the mutual benefit of the contracting parties.

A plain and ordinary reading of this section provides no authority for M.U.D. to act as a CNGP. This section only applies to "peak-shaving purposes," meaning M.U.D. could enter into agreements for utilization of resources during periods of peak demand, not during periods of weak summer demand as M.U.D. suggests in its brief.[12]

In addition, it is once again proper to look to the legislative history of this subsection to construe the Legislature's intent. In so doing, the Commission finds that subsection (1) was enacted as a response to the natural gas shortage in the late 1970s and in no way contemplated M.U.D.'s marketing of natural gas outside its own system. During the Floor Debate on March 24, 1977, Senator Swigart, in discussing the bill that would become designated §14-2125(1), stated:

> I just want to make a couple of points. One is, … it's for homes only. Although this is not restricted in the bill, it is in the rules and regulations of M.U.D. which has already made up and in force. So

[12] M.U.D. Brief Opposing Motions to Dismiss, p. 5-6.

> it's for homes only and not for industry…. So it's to clarify it and make it possible so that in times of emergency only for peak shaving purposes so that you can help your neighbors and help other cities that are in the state or out of it and only emergency times to heat homes and nothing else.[13]

It is clear, therefore, that the legislative intent of this subsection did not contemplate the marketing of natural gas as M.U.D. proposes in its CNGP application. Therefore, M.U.D.'s contention that it has implied authority under this subsection is incorrect.

The final section relied upon by M.U.D. as granting implied authority is §14-2113. This section states, in pertinent part:

> The board [of the metropolitan utilities district] shall also have the power to appropriate private property required by the district for natural gas and water service, to purchase and contract for necessary materials, labor, and supplies, and to supply water and natural gas without the district upon such terms and conditions as it may deem proper. The authority and power conferred in this section upon the board of directors shall extend as far beyond the corporate limits of the metropolitan utilities district as the board may deem necessary.

Section 14-2113 was first enacted in 1913 to govern metropolitan water districts. Throughout the years, it was modified to include natural gas. Because of the age of the statute, little legislative history is available to aid in interpretation. However, when examined with the Legislature's prevailing confining intent toward granting powers to M.U.D., it is clear that such statute was not meant to grant M.U.D. any marketing powers outside its own system.

The Commission is also aware that the Legislature's more recent amendments to the Nebraska Revised Statutes have acted to restrict the growth of M.U.D.'s distribution system. For example, Neb. Rev. Stat. §14-2117 limits M.U.D.'s expansion to only situations where economic feasibility is shown. Under Neb. Rev. Stat. §57-1301 et seq., M.U.D. cannot extend its system if such growth is not orderly or otherwise in the public interest. Such actions by the Legislature do not indicate an intent of the Legislature to expand M.U.D.'s authority into natural gas

[13] Nebraska Unicameral Floor Debate, *Senator Swigart*, p. 1892 (Mar. 24, 1977).

marketing on distribution systems of others as M.U.D. applies for herein.

This Commission therefore cannot find that the authority to act as a CNGP may be implied from any express powers granted to M.U.D.

In re Application of Lincoln Electric System

M.U.D. cites *In re* Application of Lincoln Electric System[14] (hereinafter referred to as the "LES Case") for the proposition that M.U.D. has the implied authority to act as a CNGP. However, such reliance upon the LES case is incorrect. M.U.D.'s intended CNGP service is not analogous to the LES case and may be distinguished from the facts of that case in many ways. The two most important distinctions for the purposes of this application are: (1) the differences in the underlying charters of the entities, and (2) the differences between the proposed uses of the service systems and areas at issue.

In the LES case, the Nebraska Supreme Court discussed in detail the authority provided by the Home Rule charter of the City of Lincoln and the interpretation of such authority as compared to legislative charters, like the charter creating M.U.D. The Court states:

> While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power…. We conclude that the present charter [of the City of Lincoln] is a limitation of powers charter. As such, the rule of strict construction, or Dillon's rule [which applies to legislative charters] does not apply, and the Commission erred in examining the charter language for an express or implied grant of power.[15]

The Court clearly distinguished between the strict interpretation of a legislative charter and the broad, general interpretation that could be given to a Home Rule limitation of powers charter. Thus, the Court's consideration of LES's application was based upon an entirely different standard of review than that applicable to M.U.D.'s application.

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[14] *Supra* note 1.
[15] Id.

In addition, LES's application was for certification to "provide telecommunications services [in its existing service area] by making efficient use of the facilities **it already uses** to provide public utilities."[16] M.U.D., however, is not proposing to be a CNGP on its own system or within its own service area to more efficiently use assets that it has overbuilt to serve its own needs. Instead, M.U.D.'s stated intent is to market its excess capacity and to otherwise engage in competitive marketing activity on other jurisdictional utility systems. As the State Natural Gas Regulation Act (LB 790) notes, no CNGP authority would be needed to the extent that M.U.D. desires to market its excess interstate capacity to retail transportation customers on its own system. However, nothing in the LES case, LB 790, or any other Nebraska statutes provide support or authority for M.U.D. to market excess interstate transportation capacity or to provide natural gas supplies to customers not connected or adjacent to M.U.D.'s gas distribution system.[17]

Therefore, based upon these two material distinctions between the LES case and M.U.D.'s current application, M.U.D.'s reliance upon the LES case is misplaced. The LES case in no way indicates that M.U.D. has either express or implied authority to act as a CNGP.

Nelson-Johnston & Doudna v. Metropolitan Utilities District

M.U.D. also relies upon Nelson-Johnston & Doudna v. Metropolitan Utilities District[18] (hereinafter referred to as the "Nelson-Johnston Case") as support for its argument that M.U.D. has implied authority to act as a CNGP. However, once again, this reliance is misplaced. The Nelson-Johnston case involved M.U.D.'s operation of a retail gas appliance store within its service area. Although the Court concluded that M.U.D. had implied authority to sell such appliances, the question before the Court was the narrow issue of whether such sales were allowed within M.U.D.'s service area to boost natural gas sales **on its own system**. The Court was not asked to determine whether there was authority for activities outside the service area of M.U.D. Thus, the Nelson-Johnston Case may be distinguished from the current application before the Commission. Further, in its brief, M.U.D. fails to note that the decision in the Nelson-Johnston Case was effectively superceded by statute by the

[16] Id. at 376.
[17] See e.g. Neb.Rev.Stat. §14-2101 (defining M.U.D.'s public utility district as those customers served under a common public utility system).
[18] *Supra* note 3.

Nebraska Legislature in §14-2153. This section, in part, states as follows:

> A metropolitan utilities district shall not sell any gas-burning equipment or appliances, at either retail or wholesale, if the retail price of equipment or appliances, at either retail or wholesale, if the retail price of that item exceeds fifty dollars, except that newly developed gas-burning appliances may be merchandised and sold during the period of time in which any such appliances are being introduced to the public. New models of existing appliances shall not be deemed to be newly developed appliances.

The Legislature appears to have enacted §14-2153 to clarify that they had not granted M.U.D. the power to sell gas appliances as M.U.D. wished, even inside its own service area. By superceding the decision in the Nelson-Johnston Case, the Legislature confirmed its previous strict and limiting treatment of M.U.D. Thus, the decision in the Nelson-Johnston Case does not act to grant M.U.D. implied power to act as a CNGP.

In short, this Commission finds the arguments of the Moving Parties summarized above to be persuasive, as well as arguments by the Moving Parties that the volatile and risky business of natural gas marketing, and the credit risks associated therewith, should be considered by the Commission in determining whether to dismiss M.U.D.'s application. Although the Commission does not have jurisdiction over M.U.D. when M.U.D. is acting as a utility owner and operator within its service area, the Commission does have the duty to determine whether any CNGP applicant is qualified. In the case of an applicant such as M.U.D., legal authority of such applicant to engage in CNGP activities is fundamental to the ability of the Commission to fulfill such duty. Because we find no express or implied authority for M.U.D. to engage in CNGP activities, dismissal of M.U.D.'s application is proper.

C O N C L U S I O N

In creating and defining metropolitan utilities districts, the Legislature simply has not granted authority, either express or implied, for M.U.D. to engage in off-system sales of natural gas, including acting as a CNGP. Any authority for M.U.D. to engage in such off-system, non-regulated activities must come from the Legislature, not through the Commission's certification process. M.U.D. cannot obtain, by administrative action, power that the Legislature did not intend it to have. If M.U.D. desires to pursue off-system non-regulated business enterprises,

it must first obtain statutory authority from the Legislature prior to submitting an application for certification as a CNGP.

In consideration of the evidence adduced at hearing and summarized above, the Commission is of the opinion and finds that the Metropolitan Utilities District of Omaha is not authorized to provide natural gas marketing services as a CNGP or to hold certification to perform such services because it lacks the required specific legal authority to do so.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Motions to Dismiss filed by Cornerstone and Aquila be granted, and that the application of M.U.D. to be certified as a Competitive Natural Gas Provider be, and hereby is, dismissed.

MADE AND ENTERED at Lincoln, Nebraska this 4th day of November, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

Chair

COMMISSIONERS CONCURRING:

ATTEST:

Executive Director