

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Petition for) Application No. NG-0019
Declaratory Ruling of Metropolitan)
Utilities District of Omaha (MUD))
seeking a determination that Neb.)
Rev. Stat. §§ 57-1302 through 57-)
1307 and Neb. Rev. Stat. § 66-1849)
and Neb. Admin. Code, Title 291,) ORDER
Chapter 9 Sections 003.01 through)
003.11 and Section 009.01 do not)
apply to a natural gas supply and)
transportation arrangement between)
M.U.D. and Nebraska Public Power)
District (NPPD).) Entered: May 11, 2004

BY THE COMMISSION:

On February 23, 2004, a petition for declaratory ruling was filed by Metropolitan Utilities District of Omaha (MUD) seeking a determination that Neb. Rev. Stat. §§ 57-1302 through 57-1307 and Neb. Rev. Stat. § 66-1849 and Neb. Admin. Code, Title 291, Chapter 9 Sections 003.01 through 003.11 and Section 009.01 do not apply to a natural gas supply and transportation arrangement between MUD and Nebraska Public Power District (NPPD).

On February 26, 2004, notice of the filing of the above captioned application was published in The Daily Record. NPPD filed a Petition of Informal Intervention on March 15, 2004. The National Public Gas Agency (NPGA) filed a Petition for Formal Intervention on March 26, 2004. Cornerstone Energy, Inc. (Cornerstone) and Aquila, Inc. (Aquila) both filed petitions to formally intervene and protests on March 29, 2004.

A hearing on this matter took place on March 31, 2004, at 10:00 a.m. in the Commission Hearing Room. The parties then submitted post-hearing briefs. On May 11, 2004, the Commission entered its order finding that the above-mentioned statutes and regulations applied to the service proposed by MUD. On the same day, the Honorable Steven D. Burns of the District Court of Lancaster County entered an order on an appeal of NG-0008 in which Judge Burns affirmed the Commission's dismissal of MUD's application on different grounds holding that the Commission lacked jurisdiction to consider MUD's application for a certificate to operate as a competitive natural gas provider.

On May 20, 2004, MUD filed a Motion for Rehearing based upon

E V I D E N C E

MUD 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.

NPPD is a public corporation and political subdivision of the state of Nebraska authorized and engaged in the business of the generation, transmission and delivery of electric energy on a nonprofit and cost-of-service basis under Neb. Rev. Stat. § 70-601 et seq. The parties stipulated to the fact that NPPD is, for purposes of this declaratory action, a high-volume ratepayer as defined in Neb. Rev. Stat. § 66-1802.

Thomas J. Schroeder, fossil fuels manager for NPPD, testified, that he is charged with the responsibility to procure all fuel necessary for NPPD's fossil-powered plants including negotiation, execution and implementation of all necessary agreements.

According to Mr. Schroeder and pre-filed comments, NPPD is constructing a 251-megawatt combined-cycle power plant that will utilize natural gas as its source of fuel for the production of electricity. The plant will be located outside the city limits and zoning jurisdiction of the city of Beatrice. NPPD anticipates that the plant will be operational by Fall 2004.

NPPD solicited bids for the natural gas and associated services necessary for the plant. In approximately July 2003, MUD submitted a proposal to NPPD. Aquila, according to Mr. Schroeder's testimony, declined the opportunity to submit a proposal. At the time of the hearing, NPPD was considering MUD's proposal and those of two other companies.

The natural gas necessary for the operation of the plant will be delivered via two laterals constructed by NPPD off the Northern Natural Gas pipeline and the Trailblazer pipeline.

At the time of the hearing, the contract had not yet been awarded and no agreements drafted or executed. However, based upon testimony from Mr. Schroeder and the pre-filed comments, MUD proposes to own 100 feet of the 2.7-mile lateral connecting the plant to the Northern Natural Gas pipeline. Mr. Schroeder testified that NPPD will "never allow permanent ownership of that line by an outside entity, and... [NPPD] would not allow the line to be tapped for any other facility..." Mr. Schroeder testified that the term of the agreement will be up to three years and ownership of the 100 feet of pipe will revert automatically to NPPD upon expiration of the contract. At the time of the hearing, no agreements had been reached regarding ownership of any portion of the lateral between the plant and the Trailblazer pipeline.

Scott Keep, department manager for MUD, testified that MUD's proposal to NPPD included the commodity purchase, the transportation, the nomination, the balancing and the storage of natural gas for the plant. MUD sought the contract in order to maximize use of its additional capacity during the summer months.

Mr. Keep and Mr. Schroeder each testified that MUD requested that it be permitted to own 100 feet of the Northern Natural Gas pipeline lateral to allow it to engage in balancing on the pipeline under its existing contracts between various delivery points so that the full amount of MUD's contracts on Northern can be used for all of its delivery points. Northern Natural Gas' tariff requires that a company own a "substantial" facility downstream of the delivery point in order to engage in balancing. Mr. Keep also stated that if ownership of the pipe will enable MUD to enter into the proposed agreement with NPPD, it would also pursue ownership of a portion of the lateral connected to the Trailblazer pipeline.

Mr. Richard Haubensak, a consultant for Cornerstone, testified regarding the risks involved in the business of marketing natural gas. He further testified that permitting MUD to engage in this type of activity would harm competition in the state of Nebraska.

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

Ripeness

As a preliminary matter, the Commission must address whether the present matter is "ripe" or whether any opinion by the Commission would be advisory in nature.

Pursuant to the Administrative Procedures Act, "Any person may petition an agency for a declaratory order as to the **applicability to specified circumstances** of a statute, rule, regulation, or order within the primary jurisdiction of the agency." Neb. Rev. Stat. §84-912.01(1) (Reissue 1999) (emphasis added).

Although no contract between MUD and NPPD has been drafted or executed, representatives from each entity have provided testimony regarding the planned arrangement. The issues regarding the applicability of the statutes and regulations set forth in MUD's petition for declaratory action are narrowly defined.

We find that with respect to the limited issues presented in this docket and based upon the testimony of MUD and NPPD, the circumstances are sufficiently specific to permit the Commission to make a determination as to the applicability of Neb. Rev. Stat. §§ 57-1302 through 57-1307 and Neb. Rev. Stat. § 66-1849 and Neb. Admin. Code, Title 291, Chapter 9 Sections 003.01 through 003.11 and Section 009.01 to the present circumstances.

MUD's Authority under its Charter

The Commission previously determined in an order dated November 4, 2003, in Application No. NG-0008, that MUD's charter and the applicable statutes provided neither express nor implied authority for MUD to act as a competitive natural gas provider.

MUD is created by legislative charter pursuant to Neb. Rev. Stat. § 14-2101 et seq. and as such has only those powers and authority expressly granted to it by the Legislature, those powers necessarily or fairly implied in or incident to the express powers given to the district, and 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 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

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).

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).

As the Commission previously determined in NG-0008, MUD does not have express or implied authority to operate as a competitive natural gas provider under Neb. Rev. Stat. § 14-2125, and the legislative history offers no evidence that the Legislature intended that MUD operate as a natural gas marketer outside its own system.⁵

Applicability of The State Natural Gas Regulation Act

MUD argues it is not required to obtain a certificate of authority under the State Natural Gas Regulation Act (Act) to provide natural gas to the plant as it is not a "competitive natural gas provider" for purposes of Neb. Rev. Stat. § 66-1849 because NPPD is not a retail end user and MUD will be providing natural gas to the plant through pipe it owns. MUD further contends that NPPD's status as a high-volume ratepayer exempts MUD from regulation in this case.

The Commission has jurisdiction to certify all competitive natural gas providers pursuant to Neb. Rev. Stat. § 66-1849 (2003 Supp.) A "competitive natural gas provider" is defined as "a person who takes title to natural gas and sells it for consumption by a retail end user." Neb. Rev. Stat. § 66-1848(2)(a) (2003 Supp.). A "competitive natural gas provider" does not include:

(ii) A city-owned or operated natural gas utility or metropolitan utilities district in areas in which it provides natural gas service through pipes it owns;

Neb. Rev. Stat. §66-1848(2)(b)(ii) (2003 Supp.).

MUD asserts that NPPD is not a "retail end user" for purposes of § 66-1848(2)(a) and, therefore no certification is necessary. The evidence clearly demonstrates that NPPD does not intend to take title to natural gas and resell that natural gas to another user. It instead intends to "consume" the natural gas it receives from MUD for the purposes of producing electricity. There has been no evidence that NPPD will be purchasing the natural gas on a wholesale basis for resale or that the natural gas will be passed on to any other user beyond NPPD. Based upon a plain reading of the statute, NPPD is a "retail end user" as contemplated by § 66-1848.

⁵ For the sake of brevity, the Commission refers and incorporates by reference its reasoning set forth in the November 4, 2003 Order in Application No. NG-0008 to the extent applicable.

MUD further contends that it is not a competitive natural gas provider required to obtain a certificate of authority under § 66-1848 as it falls within the exception set forth in § 66-1848(2)(b)(ii). It asserts that in servicing the plant, MUD will be providing natural gas through pipe it owns, referring to the 100 feet of the lateral between the plant and the Northern Natural Gas interstate pipeline.

However, the "ownership" of the pipe relied upon by MUD is insufficient to exempt it from the definition of a "competitive natural gas provider." By MUD's own admission, NPPD will not permit "permanent ownership" of any portion of the lateral and ownership will automatically revert to NPPD upon expiration of any agreement. This arrangement is more similar to a lease rather than ownership as contemplated by the Act.

MUD contends that the Commission lacks jurisdiction to require MUD to obtain a certificate of authority as a competitive natural gas provider due to NPPD's status as a high-volume ratepayer under § 66-1810(1).

The parties stipulated that NPPD in these circumstances is a high-volume ratepayer as defined in § 66-1802(7). "[H]igh-volume ratepayers shall not be subject to the jurisdiction of the commission." Neb. Rev. Stat. § 66-1810(1). However, the Commission is still permitted to request from the jurisdictional utility copies of its contracts with high-volume ratepayers. *Id.* Neb. Rev. Stat. § 66-1810 speaks only to exemption for the high-volume ratepayer and not the provider. There is no exemption from certification for competitive natural gas providers based upon the status of the customer.

Therefore, based upon the above, MUD is subject to Neb. Rev. Stat. § 66-1849 and Neb. Admin. Code, Title 291, Chapter 9 Section 009.01 and would be required to obtain a certificate to operate as a competitive natural gas provider.

Applicability of Statutes Governing Natural Gas Main Extensions

The proposed service is subject to regulation pursuant to Neb. Rev. Stat. §§57-1302 through 57-1307 and Neb. Admin. Code, Title 291, Chapter 9 Sections 003.01 through 003.11.

"No ... metropolitan utilities district may extend or enlarge its natural gas service area or extend or enlarge its natural gas mains or natural gas services unless it is in the public interest to do so." Neb. Rev. Stat. § 57-1303 (2002 Supp.).

MUD seeks to provide natural gas outside of its current service area. MUD has also argued that it will "own" a portion of the lateral between the plant and the Northern Natural Gas pipeline and that it will seek to acquire a portion of the lateral between the plant and the Trailblazer pipeline if needed. Simultaneously, MUD has asserted that it is not "extending" or "expanding" its service area. Such positions are inconsistent.

Based upon a reading of the plain language of § 57-1303, such activity clearly constitutes an extension or enlargement of its natural gas service. MUD's proposed activity constitutes an extension of its existing natural gas service area or services as contemplated by § 57-1302 et seq. MUD would, therefore, be subject to the regulatory jurisdiction of the Commission and be required to show that any such expansion is in the public interest and otherwise complies with Neb. Admin. Code, Title 291, Chapter 9 Sections 003.01 through 003.11. § 57-1303.

O R D E R

IT IS THEREFORE ORDERED by the Commission in the above-captioned matter that based upon the specific circumstances presented by MUD, that MUD is not exempt from the State Natural Gas Regulation Act, Neb. Rev. Stat. § 66-1849 and Neb. Admin. Code, Title 291, Chapter 9 Section 009.01 as it relates to competitive natural gas providers.

IT IS FURTHER ORDERED by the Commission that based upon the specific circumstances presented by MUD, that MUD is subject to the provisions of Neb. Rev. Stat. §§ 57-1302 through 57-1307 and Neb. Admin. Code, Title 291, Chapter 9 Sections 003.01 through 003.11.

MADE AND ENTERED at Lincoln, Nebraska, this 11th day of May, 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director