

STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD

IN THE MATTER OF THE PETITION) FOR
CENTRAL NEBRASKA) PUBLIC CHARTER AMENDMENT 6
POWER AND IRRIGATION)
DISTRICT'S PETITION TO)
AMEND ITS CHARTER)

and

IN THE MATTER OF THE PETITION) FOR DISSOLUTION
DAWSON PUBLIC POWER)
DISTRICT'S PETITION)
FOR DISSOLUTION,)
Consolidated.) ORDER

On the 16th Day of December, 2022, the above-captioned matter came on for consideration before the Nebraska Power Review Board (the Board) to address the issue of whether Protestants had standing in this proceeding. Following the hearing the Board orally informed the parties that it determined the Protestants did have standing. The hearing was reconvened on February 15, 2023, to address the merits of the Petition. The Board, being fully advised in the premises, and upon reviewing said application and the evidence presented to the Board at said hearing, **HEREBY FINDS AS FOLLOWS** (references to testimony are designated by a "T" followed by the transcript page, then the lines upon which the testimony appears, while references to exhibits are designated by "Exh."):

FINDINGS OF FACT

1. That on October 25, 2022, the Central Nebraska Public Power and

Irrigation District (Central), headquartered in Holdrege, Nebraska, filed a Petition for Charter Amendment 6 (Petition to Amend) with the Board requesting approval to amend the District's charter. (Exh. 1). It is uncontroverted that Central is a public power and irrigation district organized under Chapter 70, article 6 of the Nebraska Revised Statutes. Thus, Central is a public corporation and political subdivision of the State of Nebraska. (Neb. Rev. Stat. 70-602; Exh. 1, page 1; Protestants' post-hearing brief at 4).

2. The Petition to Amend requested to amend Central's chartered territory, to amend how Central's chartered territory is subdivided for purposes of voting subdivisions, to change the description of the nature of the business in which Central is engaged, to change the number of Central's directors, to change the location of Central's principal place of business, and to change Central's name to the "Platte River Public Power and Irrigation District." (Exh. 1, pages 1-2).

3. Pursuant to Central's current charter, its board of directors consists of twelve (12) directors. (Exh. 1, pages 2, 8 and 11; Exh. 9, page 3). Central's current chartered territory consists of the counties of Kearney, Phelps and Gosper. Each of these counties is represented by three elected directors. In addition to the chartered territory, Central owns and operates irrigation works in the counties of Dawson, Lincoln and Keith counties. Pursuant to Neb. Rev. Stat. 70-612(4), each of these counties is part of the District and is represented by one elected director. Each county is a voting subdivision of the District. (Exh. 1, pages 36-37; Exh. 9, pages 2-4; Protestants' Brief at 4).

4. At a public meeting held October 24, 2022, Central's board of directors authorized and approved the filing of the Petition to Amend with the Board. The vote was nine (9) in favor and three (3) against the motion. (Exh. 1, pages 1 and 11). The vote was therefore authorized by the affirmative vote of more than three-fifths of all the directors of Central's board of directors.

5. If the Petition to Amend were approved by the Board, one of the results would be that as of the effective date of the approval, Central (as the renamed and consolidated district) would acquire all the retail electric service area rights currently held by the Dawson Public Power District (Dawson). Likewise, if the Petition to Amend were approved, Central (as the renamed and consolidated district) would acquire ownership of all real and personal property owned by Dawson, all Dawson employees would become Central employees, and Central would become responsible for all debts currently held by Dawson. (Exh. 1, pages 16, 19, and 20; Exh. 2, page 3, pages 12, 15 and 16).

6. In the Petition to Amend, Central requested that the approval of the requested amendments to its charter would be made effective on July 1, 2023, in order to allow both Central and Dawson time in which to implement the preliminary actions necessary to accomplish the changes outlined in the Petition to Amend. (Exh. 1, pages 3, 10, 12 and 15).

7. Attached to both the Petition to Amend and the Petition to Dissolve is a Plan of Consolidation. The Plan of Consolidation is an agreement between Central and Dawson that sets out the two districts' plan for how the proposed consolidation or merger of the two districts will be implemented. (Exh. 1, pages 14-33; Exh. 2, pages 10-29).

8. It is uncontroverted that Dawson is a public power district organized under Chapter 70, article 6 of the Nebraska Revised Statutes. Thus, Dawson is a public

corporation and political subdivision of the State of Nebraska. (Neb. Rev. Stat. 70-602; Exh. 1, page 3; Protestants' Brief at 6).

9. Dawson provides retail electric service to approximately 24,500 electric meters in Dawson and Buffalo counties, and portions of Custer, Gosper, Lincoln, Phelps and Sherman counties. (Day 2 - Testimony, T580:21-24; Exh. 22, page 12). Dawson owns assets including subtransmission and distribution facilities, substations, buildings and service vehicles. The total estimated value of Dawson's capital assets are approximately \$190,750,000. (Exh. 56). Dawson does not own generation facilities. Dawson purchases all of its electric power needs at wholesale and resells the electricity to its customers at retail. (Exh. 22, pages 12, 16 and 22).

10. Dawson purchases all of its wholesale electricity through a contract with the Nebraska Electric Generation and Transmission Cooperative, Inc. (NE G&T) that ends in 2035. Dawson's contract with NE G&T allows Dawson to obtain up to ten percent of its electricity needs from local renewable generation sources. (Exh. 22, page 22).

11. Dawson's board of directors consists of eleven (11) directors. (Exh. 2, pages 5 and 7). At a public meeting held October 24, 2022, Dawson's board of directors approved a resolution agreeing to the terms of the Plan of Consolidation, authorizing the District's management, officers and legal counsel to take all necessary actions to accomplish the terms of the Plan of Consolidation (including filings with the Board), and approving the execution and filing of a Petition for Dissolution. The vote was eight (8) in favor and three (3) against the resolution. (Exh. 2, pages 2 and 6). Eight (8) of Dawson's directors signed the Petition to Dissolve. (Exh. 2, page 5). The vote to approve the resolution was therefore authorized and signed by a 3/5 majority of all directors of Dawson's board of directors, and

the Petition to Dissolve was signed by more than a majority of all the directors of Dawson's board of directors.

12. On October 25, 2022, Dawson filed a Petition to Dissolve (Petition for Dissolution) with the Board. (Exh. 2). Upon the effective date of the Petition to Amend, if the Board were to approve it, Dawson would no longer hold the rights to any retail service area, own any real or personal property, have any employees, hold any debts, and would therefore cease to function as a public power district or a separate legal entity. (Exh. 1, pages 39-40; Exh. 2, pages 3 and 8). The dissolution of Dawson is contingent upon the Board first approving Central's Petition to Amend. (Exh. 2, pages 2 and 3).

13. Dawson's Petition for Dissolution and Central's Petition to Amend are separate proceedings, with separate requirements for approval. However, the two are integrally intertwined. As previously stated, Dawson's Petition for Dissolution is contingent upon Central's Petition to Amend. Under Neb. Rev. Stat. 70-666, the Board is authorized to conduct "such independent investigation as may be deemed advisable" into a petition for dissolution. Many of the facts relating to Central's Petition to Amend are obviously closely intertwined with Dawson and its resulting dissolution. The Board therefore consolidated the two proceedings in order to conduct an evidentiary hearing to address Central's Petition to Amend, and simultaneously conduct its investigation into Dawson's requested dissolution. A separate order will therefore be issued to address Dawson's Petition for Dissolution, and this order will not directly address the approval or disapproval of Dawson's Petition for Dissolution.

14. Pursuant to Central's current charter, the District's principal place of business is the City of Holdrege, Nebraska. The Petition to Amend, if approved by the Board, would

designate the City of Lexington, Nebraska as the new principal place of business for Central, which would at that point also be renamed and consolidated with Dawson. (Exh. 1, page 8).

15. The Petition to Amend, if approved by the Board, would change the name of the District from the Central Nebraska Public Power and Irrigation District to the "Platte River Public Power & Irrigation District." (Exh. 1, pages 3, 7 and 15; Exh. 9, page 2).

16. On October 31, 2022, the Board issued a Notice of Hearing notifying both Central and Dawson that a formal evidentiary hearing had been scheduled on December 16, 2022, at which the Board would address the issue of the Petition to Amend and the dissolution of Dawson as a direct result. (Exh. 3).

17. Pursuant to Neb. Rev. Stat. 70-663, the Board published notice of Central's Petition to Amend in at least two newspapers with general circulation in Central's territory. The notices stated that any person or entity wishing to protest the approval of the Petition to Amend must file a written protest, complaint or objection that is received by the Board no later than 5:00 p.m. Central Time on December 9, 2022. The notice stated that any party with standing that files a protest, complaint or objection may appear and participate in the evidentiary hearing to address Central's Petition to Amend. The notice was published in the Lexington Clipper-Herald, the Holdrege Daily Citizen and the Keith County News newspapers on November 2, 9 and 16, 2022. All three newspapers have general circulation in Central's territory. (Exhs. 4, 5 and 6).

18. On December 5, 2022, Citizens Opposed to the Merger (Citizens Opposed), Greg Heiden, Linda Heiden, Richard Waller and Susan Waller (collectively

"Protestants"), filed a formal written Protest with the Board opposing the Board's approval of the Petition to Amend, pursuant to the provisions of Neb. Rev. Stat. 70-663 and the Board's Rules of Practice and Procedure, Title 285, Nebraska Administrative Code, 3-006. (Exh. 74; Exh. 11, page 24). The Protest stated 24 grounds or reasons upon which Protestants based their opposition to the approval of the Petition to Amend. (Exh. 74, pages 2-4). In the alternative, Protestants asked that if the Board were to determine Protestants lacked standing to file a Protest under Neb. Rev. Stat. 70-663, that the Board treat the Protest as a Petition for Intervention under Neb. Rev. Stat. 84912.02 and the Board's Rules of Practice and Procedure, Title 285, Nebraska Administrative Code, Chapter 3, 003.01e. (Exh. 11, page 24).

19. Greg Heiden and Linda Heiden are individuals who live in and own land in Phelps County, Nebraska, which is part of Central's chartered territory. Both Greg and Linda Heiden are eligible to vote in the election of Central's directors. The Heidens receive surface water irrigation service from Central pursuant to a contract with Central. Linda Heiden is the owner of record on two water service agreements with Central. Greg Heiden and Linda Heiden together are beneficiaries of one additional water service agreement with Central. Greg Heiden is a member and director of Citizens Opposed. (Exh. 13, page 2; Exh. 18).

20. Richard Waller and Susan Waller are individuals who live in and own property in Phelps County, Nebraska, which is part of Central's chartered territory. Both Richard and Susan Waller are eligible to vote in the election of Central's directors. The Wallers receive surface water irrigation service from Central pursuant to a contract with Central. The Wallers are owners of record on four water service agreements, and are

beneficiaries of six additional water service agreements with Central. Richard Waller is a member of Citizens Opposed. (Exh. 13, page 3; Exh. 18)

21. Citizens Opposed to the Merger is a non-profit corporation incorporated in the State of Nebraska. (Exh. 16, page 2; Exh. 17, page 1; Exh. 18, page 2). Citizens Opposed was formed for the purpose of opposing the merger of Central and Dawson. (Exh. 16, page 2; Exh. 18, page 2). As of December 14, 2022, Citizens Opposed had sixty members, of which approximately 49 were irrigation customers of Central. (Exh. 17). On or about February 17, 2023, Citizens Opposed had 115 members, of which somewhere between 95 to 105 are irrigation customers of Central. (Day 3 — Testimony, T957:22 to 958: 17). The bylaws of Citizens Opposed authorize the organization to participate in the Protest proceedings before the Board in the matter of the Central's Petition to Amend on behalf of its members. (Exh. 17, page 2).

22. On December 9, 2022, the parties filed a "Joint Stipulation and Request for Procedural Order." In it, Central informed the Board it intended to challenge whether Protestants have standing to appear and participate as a party in the proceeding. The parties stipulated that if the Board found none of the Protestants had standing to participate in the proceedings, nothing in the Joint Stipulation would preclude Central from requesting the Board to conduct an evidentiary hearing on the merits of the Petition to Amend on December 16, 2022, following the Board's determination on standing. (Volume 1, T157:19 to 158:23).

23. On December 13, 2022, Central and Dawson filed a brief in opposition to the Protest. The Districts opposed Protestants' standing whether under Neb. Rev. Stat. §70-663(1) or 84-912.02. In their brief, Central and Dawson argued that none of the Protestants

had a legal right that would benefit by the relief to be granted, none of the Protestants had an injury in fact, and if there were an allegation of injury, that Protestants would not have an injury that differs from the general public, or at least the general population of other Central customers with water service agreements with Central.

(Petitioner's Brief in Opposition to Protest at 3).

24. Although Neb. Rev. Stat. 84-912.02 anticipates that the hearing officer will rule on interventions, the Board previously designated itself as the decision-maker on all motions or jurisdictional issues that would be dispositive regarding a party's ability to participate in a proceeding before the Board. The Board therefore previously instructed its hearing officer that the Board reserves the right to rule on matters such as motions to dismiss or standing. The Board is therefore issuing the ruling on the issue of standing instead of the hearing officer.

25. On December 16, 2022, the Board convened a hearing to address the issue of the Protestants' standing. (Transcript of Hearing, Volume I).

26. Following the hearing and deliberation, the Board announced orally that it found all Protestants had standing to participate in the proceedings as parties. The hearing officer informed the parties that a written order on the issue of standing would be issued at a later date. There were no limitations or restrictions placed on Protestants' participation in the proceedings.

27. The parties engaged in discovery, involving both interrogatories and depositions. (Exhs. 67, 68, 71 and 72).

28. Although initially the Board scheduled the hearing to address the merits on January 27, 2023, the parties jointly requested a continuance. The Board set the new hearing

date to begin on February 15, 2023. The Board reserved February 16 and 17 for additional hearing days, if needed. (Exh. 75, page 15).

29. On February 15, 16 and 17, 2023 a hearing on the merits of whether the Petition to Amend should be approved was held. At the conclusion of the hearing the Board requested that each party (Central and Protestants) submit simultaneous briefs, and a due date and page limits were set.

30. In addition to a system of canals and irrigation works, Central owns and operates four hydropower generation facilities and four substations. The hydropower facilities have an aggregate generating capacity of just over 110 megawatts (MW). (Exh. 22, page 12). Kingsley Dam, which is on Lake McConaughy, has a generating capacity of 50 MW. Central has a contract with the Nebraska Public Power District to sell the entire output from Kingsley Dam. Johnson No. 1 and Johnson No. 2, on Lake Johnson, have a combined generating capacity of 40 MW. Jeffrey, on Lake Jeffrey, has a capacity of 20 MW. Central has a contract with Evergy to sell the entire output of Johnson No. 1, Johnson No. 2 and Jeffrey. (Exh. 22, page 23).

31. Central's primary purpose is to provide water to its water service customers. Central's contract with NPPD provides that the hydropower output from Kingsley Dam is variable, and although attempts will be made to accommodate NPPD's request for energy, the needs of Central's water service customers are prioritized over hydropower production. (Exh. 55, page 3).

32. Central's capital assets, as of 2020, were valued at approximately

\$84,277,000, according to book value. (Exh. 56). At least one estimate suggests the present value of the assets, when taking into account replacement value and the value of the water in the reservoirs under Central's control, could potentially be billions of dollars.

(Day 3 - Testimony, T1036:21 to 1038:13).

33. As of 2020 Central had approximately \$115,000,000 in cash reserves. (Exh. 56). Central's financing mechanism for significant projects is to create a cash reserve fund and pay for large expenditures from the cash reserve. (Exh. 21, page 48; Exh. 22, pages 9 and 61; Day 2 - Testimony, T507:9 to 508:7).

34. Central's primary source of revenue is from selling electricity created by its hydropower generation facilities. Central's annual revenue from hydropower can fluctuate dramatically from year to year. The amount of water available to release to produce hydropower is dependent on the snow melt in the Rocky Mountains and rainfall upstream of Central's hydropower facilities. If there is a prolonged period of insufficient water availability, Central can go five or six consecutive years where hydropower revenues hover around \$3,500,000. During years with abundant water, Central's hydropower revenues have reached \$18,000,000. (Exh. 36; T152:1-17, T458:22 to 460: 16; T461:13 to 463:18).

35. As of 2020 (the latest confirmed numbers available) Dawson had annual revenue of approximately \$65 million, and outstanding debt of approximately \$60 million. (Exh. 56). Dawson's financing mechanism is to issue revenue bonds to finance large projects. (Exh. 22, pages 9 and 62). If the merger of Central and Dawson were approved, Central (under the name Platte River Public Power and Irrigation District) would assume and become responsible for Dawson's debt. (Exh. 1, page 19; Exh. 38; Exh 39; Exh. 44, page 18).

36. After the adjournment of the hearing in this proceeding, it came to the attention of the Board and parties that the written Protest filed by Protestants was inadvertently not offered into evidence as an exhibit. After consultation with counsels for Central and Protestants, the Board reopened the record for purposes of supplementing the record and a certified copy of the Protest was accepted into evidence as Exhibit 74. The parties jointly requested that the hearing officer's Second Prehearing Conference Order also be accepted into evidence. A certified copy of the Second Prehearing Conference Order was accepted into the record as Exhibit 75.

CONCLUSIONS OF LAW

Jurisdiction

37. The Board's jurisdiction over the petitions for creation and subsequent petitions to amend existing charters of public power districts and public power and irrigation districts is clear. Under Neb. Rev. Stat. 70-603 and 70-604, both petitions for creation and petitions to amend public power district and public power and irrigation district charters are to be filed with the Board. Once a petition for creation of a district is approved by the Board (or was under its predecessor agencies) the document becomes the district's charter. *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 308 (1956). Under Neb. Rev. Stat. 70-612(1)(a), the decision of a district's board to amend its charter to divide its territory into subdivisions for the purpose of nominating and electing directors is subject to the approval of the Board. If a district includes all or part of two or more counties and is engaged in either 1) furnishing electric light and power and more than fifty percent of its customers are rural customers, or 2) furnishing electric light and power and in the business of owning and operating irrigation works, then a district's subdivisions may be formed by following precinct or county boundary lines without regard to population, if in the judgment

of the Board the interests of the rural users of electricity or the users of irrigation water service in the district will not be prejudiced thereby. In the present proceeding, it is uncontroverted that Central operates in all or part of two or more counties, is engaged in furnishing electric light and power at wholesale, and is in the business of owning and operating irrigation works. The Board finds that it has jurisdiction over, and is the appropriate approval authority for, petitions to amend the charters of public power districts and public power and irrigation districts and has jurisdiction over Central's Petition to Amend.

38. Under Neb. Rev. Stat. 70-662(1), a district may request to amend its charter in order to remove territory from, or add territory to, the district's chartered territory, subdivide its territory within the boundaries of the district, and change the general description of the nature of the business in which the district is engaged. Under Neb. Rev. Stat. 70-662(2), a district may amend its charter to change its name, change the location of its principal place of business, or change the number of members on its board of directors. In order to accomplish the changes set out in 70-662(1) and (2) a district must file a petition to amend its charter with the Board. The Board therefore has jurisdiction over approval of these issues. The statute goes on to state in 70-662(2) that the amendments to the district's charter in subsections (1) and (2) must be authorized by the affirmative vote of three-fifths of all the directors of the district. In this proceeding, Central's directors approved the filing of the Petition by a vote of nine (9) to three (3), which exceeds the three-fifths majority requirement. Dawson's directors approved the merger with Central, and the resulting filing of a Petition for Dissolution, by a vote of eight (8) to three (3). Thus, Dawson's directors approved both the merger and the dissolution by more than a three-fifths vote. The Board finds that the requirements in §70-662 are therefore met.

39. The procedure the Board is to follow when deciding whether to approve a charter amendment is set out in Neb. Rev. Stat. 70-663. In compliance with the provisions in 70-663 the Board published notice of Central's proposed charter amendments in at least two newspapers with general circulation in the district. As the affidavits of publication in this proceeding demonstrate, the Board published notice in three newspapers with general circulation in Central's territory for three consecutive weeks. The publication requirement and public notice of opportunity to protest, object or intervene have therefore been met.

40. Pursuant to Neb. Rev. Stat. 70-664, the Board shall approve a petition to amend a district's charter "unless it shall appear affirmatively that the adoption of such proposed amendment will be contrary to the best interests of such district, or that it will jeopardize and impair the rights of the creditors of such districts, or of other persons." In the present proceeding, Central has no long-term debt. It has no loans or outstanding bonds. Central therefore has no creditors other than short-term debt prior to the payment of the district's monthly bills incurred in the ordinary course of business. Protestants do not assert that they are creditors Central. (Exh. 75, pages 9-10). Protestants assert they fall within the "other persons" category whose rights would or could be jeopardized and impaired by the approval of the Petition to Amend.

Protestants' Standing

41. In Petitioners' Brief in Opposition to Protest, Central and Dawson address the common-law requirements for standing. They cite caselaw for the proposition that a litigant must clearly demonstrate that it has suffered an "injury in fact." The injury must be concrete in a qualitative and temporal sense, must be distinct and palpable, not merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. Central and

Dawson assert that "Even if Protestants are residents [of Central's territory], however, that alone is not sufficient to confer standing." (Petitioners'

Brief in Opposition to Protest at 6). The districts argue that Protestants' residence in Central's territory only grants them the right to file a protest, but they still must meet the requirements for common-law standing. (Petitioners' Brief in Opposition to Protest at 67; Volume 1, T1 10:6 to 112:3).

42. The Nebraska Supreme Court has made it clear that standing can be created by the Legislature through a statute, or standing can be conferred on a party using common-law principles. In *Griffith v. Nebraska Dept. of Corr. Servs.*, 304 Neb. 287 (2019), the Court stated:

[I]n some cases, the Legislature provides by statute who has standing to pursue relief. see *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). In other cases, we rely on common-law standards to determine whether a plaintiff has standing. See *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996) (concluding Legislature did not supplant common-law standing doctrine by statute).

Id. at 291-292. Although Central and Dawson correctly point out that the Board typically has addressed whether a party has standing based on common-law principles (Petitioners' Brief in Opposition to Protest at 6), that is because the parties involved were not afforded standing by an express statutory provision. In reviewing whether a party filing a protest, objection or intervention opposing the Board's approval of a generation or transmission facility, the party wishing to intervene must be able to demonstrate that it meets the requirements for common-law standing. See *Op. Att'y Gen. No. 1-13004* (Neb. 2013). Thus, a party seeking intervention would need to show an injury in fact, and that the injury is special and apart from any general injury common to all members of the public. See *Nebraskans Against Expanded Gambling, Inc. v. Nebraska Horsemen 's Benevolent*

& Protective Ass'n, 258 Neb. 690 (2000). These principles were set out in the Board's analysis of whether a party had standing in a previous administrative proceeding. (Exh. 12). However, in that proceeding no statute requires the publication of notice informing the public of the ability to file a protest, objection or intervention, nor does any statute provide criteria that a party would need to meet in order to demonstrate standing. Under Neb. Rev. Stat 70-1013, the Board is only required to provide notice of the application to "such power suppliers as it deems to be affected by the application." The interested power suppliers have the right to file a protest or intervention and participate in the hearing addressing the approval of the application. The interested power suppliers therefore have standing by express statutory provision. Since there is no such specific provision for standing by other parties, common law principles of standing apply to determine whether any other parties have the right to file a protest, objection or intervention. In contrast, in the present proceeding Neb. Rev. Stat. 70-663 expressly provides for publication of notice informing the public of the opportunity to file a protest, complaint or objection in opposition to the Board's approval of a petition for a charter amendment. The statute provides the criteria for what persons or entities have standing to file a protest, etc. The statute states:

If any person residing in such district, or affected by the proposed amendment, shall, within the time provided, file a protest, complaint or objection, the Nebraska Power Review Board shall schedule a hearing and give due notice thereof to the district, the district's representative, and the person who filed such protest, complaint or objection. Any person filing a protest, complaint or objection may appear at such hearing and contest the approval by the Nebraska Power Review Board of such proposed amendment.

Unlike the situation involving the Board's approval of generation and transmission facilities, the direction from the Legislature is clear. Any party residing in the district and any person affected by the proposed amendment is granted statutory standing. The common law

principles requiring the showing of an injury in fact and that the injury is special and apart from a general injury shared by all members of the public do not apply to persons meeting the criteria in 70-663. The Legislature can determine what parties are guaranteed to have standing in an administrative proceeding and has chosen to do so in this circumstance. In the Griffith case, the Nebraska Supreme Court stated "But just as the Legislature can provide for standing that is broader than common-law standards, so too can it provide for more specific or more restrictive standing requirements." Griffith at 297. In perhaps even more clear language, the Nebraska Supreme Court in another case (cited by the Court in Griffith, and by Protestants' in their Brief in Response to Motion in Opposition to Protest at page 5), stated succinctly "The Legislature may, however, by statute, supplant common-law concepts of standing. When it does so, then a special injury is not required." Schauer v. Grooms, 280 Neb. 426, 437 (2010). Central and Dawson argue that it is too strict an interpretation of the statute to "just say just because you're inside the line, it's automatic that you have standing." (Volume I, T27:18-21). The Board disagrees. It is the Legislature's prerogative to determine what parties have standing, and the Legislature has done so in this instance. The Board believes the language in the statute is clear and unambiguous. It is the Board's duty to follow the Legislature's direction, not to question whether it is the best policy, or whether it is too broad or too narrow. Here, the Legislature has determined who has standing, obviating the need to determine if common-law standards apply to parties meeting the statutory standard. The authorities cited in the Board's Order on the Sierra Club's standing to file a Petition for Intervention in a proceeding to review the approval of a proposed generation facility are therefore inapposite. (Exh. 12).

43. Protestants Greg Heiden, Linda Heiden, Richard Waller and Susan Waller reside within Phelps County, which is part of Central's chartered territory. Central correctly points out in its brief addressing standing that the Heidens and Wallers did not assert in the Protest that they are residents of Central. (Petitioners' Brief in Opposition to Protest at 6). Central and Dawson also raised this issue at the December 16, 2022, hearing. (Volume I, T28:5-21). However, at the hearing on December 16, 2022, held to address the issue of whether Protestants qualify for standing in this proceeding, the affidavits submitted by the Heidens and Wallers establish that they do, in fact, reside in Central's territory. (Exh. 16; Exh. 18). The affidavits also clarify that the Heidens and Wallers are eligible to vote in the election of Central's directors, and receive surface water irrigation service from Central pursuant to a contract with Central. The Board believes Protestants' counsel correctly summed up the issue at the standing hearing when he said "By establishing that my clients are residents of the - - of the district, I do contend that that is the only showing we need to make because that's what the statute provides." (Volume I, T51:3-7; see also T57:6-19). Since all four of the individuals named in the Protest reside in the district involved, the Board finds that they are afforded standing to file a Protest and participate in these proceedings under Neb. Rev. Stat. 70-663.

44. The Heidens and Wallers are also affected by the proposed amendment due to their contracts with Central for surface water irrigation service. Even if the Heidens and Wallers did not reside in Central's territory in their Protest, they could or would still be "affected by the proposed amendment" due to their ownership of land in Central's territory and their contracts and irrigation water rights with Central. The Heidens and Wallers assert that the Petition to Amend, if approved, would jeopardize and impair their rights, and in

particular jeopardize and impair their rights as rural users of irrigation water service provided by Central. If proven true, these claims establish the Heidens' and Wallers' standing. "The focus of the standing inquiry is not on whether the claim the plaintiff advances has merit; it is on whether the plaintiff is the proper party to assert the claim. See *v. Norris*, 300 Neb. 171, 912 N.W.2d 758 (2018). Indeed, in considering standing, the legal and factual validity of the claim presented must be assumed. *Id.*" Griffith at 291. It is undisputed that not all people that reside in Central's territory have surface water irrigation contracts. (Volume I, Tl 16:12-21). The potential or alleged effect of the merger on their contracts and water rights affect the Heidens and Wallers directly, and distinguishes them from members of the general public, which means they would also qualify for standing as parties "affected by the proposed amendment" under 70-663.

45. In 70-663 a person has standing if they either 1) reside in the district's territory, or 2) are affected by the proposed amendment. The fact that the Legislature chose to use the disjunctive word "or" in between the categories of residents of a district and those affected by the proposed amendment shows that a person need only demonstrate he or she meets one of the two alternatives. The word "or" is defined as a "coordinating conjunction introducing: a) an alternative [red or blue] or the last _in a series of choices b) a synonymous word or phrase [oral, or spoken]." Webster's New World Dictionary, Fourth Edition, © 2002. The pertinent definition in this proceeding is that "or" indicates alternatives. Therefore, to show they have standing the Heidens and Wallers need only show that they reside in Central's territory. In the alternative, they must show they are affected by the proposed amendment. In this case, they can show both.

46. The pertinent phrase is "If any person residing in such district, or affected by the proposed amendment, shall . . . file a protest, complaint, or objection, the Nebraska Power Review Board shall schedule a hearing" The Protestants acknowledged at the hearing on standing that in certain instances the use of "or" at the end of a list could indicate that the "or" could be construed to be the equivalent of "and." (Volume I, T 147: 18-24). Nebraska caselaw confirms that if it is necessary in context, an "or" could be read to be synonymous with "and." However, this is only done when such a reading is necessary to avoid an absurd result that is obviously not what the Legislature intended. "When connecting a list of elements, 'and' connotes a conjunctive list while 'or' connotes a disjunctive list. We have said that the plain meaning of the words 'and' and 'or,' when used to connect elements in a list, may be disregarded when such a reading would lead to an absurd result in conflict with clear legislative intent. And we will adhere to the plain meaning of a statute absent a statutory indication to the contrary." *State v. Patricia B. (In re Levanta S.)*, 295 Neb. 151, 167 (2016). In the context of 70663, the Board believes it appears clear the Legislature intended the normal disjunctive use of the word 'or' when used in the pertinent phrase. The Legislature meant to provide standing to file a protest opposing a charter amendment to any person who resides in a district. If a person would be affected by a proposed charter amendment but lives outside the district's territory, that person also has standing. This makes sense to protect the protest rights of property owners that could be affected by a charter amendment, but may live elsewhere in the state, or in another state. The Board finds that the word 'or' in the applicable phrase in 70-663 should be read in its normal disjunctive sense. "[T]he word 'or', when used properly, is disjunctive." *Neb. Protective Servs. Unit, Inc. v. State*, 299 Neb. 797, 803 (2018). This plain meaning of the statutory language makes the most sense, while an alternate

conjunctive reading would lead to a result that although may not be absurd, does not make sense. Protestants further assert that the Legislature's insertion of a comma after each alternative shows that the clauses were intended to be independent. (Volume I, T 147:2 to 148: 11). The Board will read the language in its plain and ordinary sense. "Statutory language is to be given its plain and ordinary meaning. When interpreting a statute, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided." *McEwen v. Nebraska State College System*, 303 Neb. 552, 570 (2019). "In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary & popular sense." *Preserve The Sandhills v. Cherry County*, 310 Neb. 184, 189 (2021). In the context of 70-663, the Board finds no support for an interpretation other than the Legislature intended the use of the disjunctive "or" in the pertinent phrase to indicate two alternatives.

47. Since standing is provided for persons situated as the Heidens and Wallers by 70-663, the Board need not determine whether the Heidens and Wallers qualify for intervention under Neb. Rev. Stat. 84-912.02.

48. In addition to the Heidens and Wallers, the Protest was also filed by Citizens Opposed. As a Nebraska non-profit corporation, Citizens Opposed has a principal place of business or headquarters in Buffalo County, but since it is not a person the Board does not believe it would qualify for intervention based on residence. Citizens Opposed has not provided any evidence that the corporation itself would be harmed or affected in any way by the approval of the Petition to Amend. Rather, Citizens Opposed argues that it has standing to sue under the doctrine of associational representation.

Normally a party must assert its own rights and interests, and not the legal rights or interests of third parties in a court proceeding. See *Central Nebraska Public Power and Irrigation Dist. v. North Platte Natural Resources Dist.*, 280 Neb. 533 (2010) (cited in Exh. 12, pages 13-14). The same is true in an administrative proceeding. In order to qualify for associational representation, an entity must show that one or more of its members have standing on their own merits, that the interests at stake are germane to the entity's purpose, and that neither the claim nor the relief requires participation of the organization's individual members. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). In addition, the Nebraska Supreme Court has held that for an organization to have associational or representative capacity it must have the authority to represent its members in legal proceedings. In *Smithberger v. Banning*, 130 Neb. 354 (1936) the Court dismissed a petition for intervention filed by an organization comprised

of petroleum dealers licensed to sell vehicle fuels. The Court stated:

Its complaint is wholly based on the fact that it is made up of constituent members who are, in their respective and private capacities, dealers in gasoline oils, etc., which the terms of the legislation in suit purport to tax. However, in addition to the fact of the identity of its membership, its representative capacity and its authority to appear for or in behalf of its membership in the present litigation is nowhere alleged, and cannot be presumed. In this class of cases corporate identity is wholly distinct from the persons who compose it.

Id. at 357.

49. In the present proceeding, Greg Heiden is both a member and director of Citizens Opposed. Richard Waller is a member of Citizens Opposed. Since both Greg Heiden and Richard Waller have standing in this proceeding, Citizens Opposed has one or more members that can demonstrate they have standing on their own merits, and Citizens Opposed meets the first requirement for associational representation.

50. Citizens Opposed was formed to represent the interests of its members in opposing the proposed merger of Central and Dawson, and is authorized by its bylaws to resist and object to the proposed merger of Central and Dawson that would be accomplished by the Petition to Amend in these proceedings. (Exh. 17, pages 1 and 2). Citizens Opposed therefore meets the requirements that the interests at stake are germane to the organization's purpose.

51. The interests of the members of Citizens Opposed and its members are completely aligned. (Volume I, T75: 1 to 76:21). The members of Citizens Opposed, which includes Greg Heiden and Richard Waller, formed the group to oppose Central's Petition to Amend. The relief of denying the Petition to Amend does not require the participation of the organization's members in these proceedings. Citizens Opposed could appear on its members' behalf and oppose the approval of the Petition to Amend and therefore the

merger. In this case, neither the claim nor the relief requires participation of the organization's individual members themselves, even though two of the organization's members are participating in the proceeding. The Board finds that the requirement that neither the claim nor the relief requires participation of the organization's individual members is met.

52. The last requirement for associational representation is that the organization is specifically authorized to appear on behalf of its members and represent their interests. Here, as previously mentioned, the organization was formed for the purpose of opposing the merger of Central and Dawson. The bylaws of Citizens Opposed authorize the organization to participate in the proceedings before the Board to oppose the proposed merger of Central and Dawson. (Exh. 17, pages 1 and 2). The Board therefore finds that Citizens Opposed has the authority to represent its members in administrative proceedings to oppose the merger of Central and Dawson, as is required by the Smithberger decision.

53. The one issue that remains concerning the standing of Citizens Opposed is whether Nebraska authorizes associational representation in legal proceedings, and by extension, in administrative proceedings. It appears clear that the doctrine of associational representation is well established in federal law. The Board addressed the topic in its ruling on the Sierra Club's Petition for Intervention in applications PRB-3931G and PRB-3932-G (consolidated). (Exh. 12). In that proceeding, the Board denied the Sierra Club's intervention based on associational representation. The Board noted that it did not find any caselaw where the Nebraska Supreme Court adopted the federal view on associational standing. The Board went on to state that "Regardless of whether the federal

test on associational representation applies, in the present proceeding the Sierra Club would still not be able to meet its requirement for standing." (Exh. 12, page 20). The fatal defect in that proceeding was that the Sierra Club could not show that any of its members had standing on their own merits. Since this requirement for associational representation could not be met, the Sierra Club's Petition for Intervention was denied. Unlike the Sierra Club, Citizens Opposed can show that at least two of its members have standing on their own merits. This is a crucial distinction between the two situations.

54. Another case cited by the Board in its analysis of the associational representation issue in applications PRB-3931 -G and PRB-3932-G (consolidated) was *Concerned Citizens of Kimball County, Inc. v. Department of Environmental Control*, 244 Neb. 152 (1993). Protestants also cite this case in their brief addressing standing. (Brief in Response to Motion in Opposition to Protest at 9-10). In the case, the organization Concerned Citizens of Kimball County filed a petition for declaratory relief to challenge the Nebraska Department of Environmental Control's issuance of a permit to build a hazardous waste incinerator. The group argued that its members were residents and landowners in Kimball County who owned property in close proximity to the proposed incinerator. The Supreme Court reversed a district court's decision to dismiss the organization's petition with prejudice, not allowing the organization to correct the defects in its pleadings. The Supreme Court, citing to the *Smithberger* case, held that an association which itself has no standing must plead authority to appear on behalf of its members. The Supreme Court found that such a defect is curable and remanded the decision to the district court to allow the organization to attempt to correct the error.

55. As Central and Dawson pointed out in their brief opposing the Protest, in the proceeding addressing the Sierra Club's standing the Board stated in its order denying standing that "Any party, including associations and groups such as the Sierra Club, must be able to demonstrate that the specific entity filing the Petition for Intervention faces a direct, identifiable injury that is specific to that association or group in order to demonstrate standing in a proceeding before the Board." (Petitioners' Brief in Opposition to Protest at 7). The Board went on to state:

If individual members of an association or group can show direct injury, but not the association or group, then the individual members must file a Petition for Intervention. In the present applications, the Sierra Club has not demonstrated that it faces any reasonably foreseeable direct harm that might come to the organization, apart from those that might affect the general public or all OPPD ratepayers, if the Board approves either or both of OPPD's proposed generation facilities.

(Exh. 12, pages 23-24). In the situation before the Board involving the Sierra Club, the Sierra Club could not establish associational representation capacity because the members it cited did not have standing on their own merits. After further review of the caselaw in situations where one or more of an organization's members do have standing on their own, the Board finds that associational representation does apply under Nebraska caselaw, and therefore by extension in administrative proceedings before the Board. The language in the Smithberger and Concerned Citizens of Kimball County cases, although not explicitly adopting the doctrine of associational representation, appear to simply assume that the doctrine is recognized in Nebraska, and follow the doctrine's requirements. If an organization could not represent its members through associational representation, the language in Smithberger regarding representative capacity and a group's authority to appear for or on behalf of its membership make little sense.

Likewise, there would be no reason for the Court in the Concerned Citizens of Kimball County case to remand a case to allow an association which itself has no standing to correct a pleading to show that it has authority to appear on behalf of its members unless curing the defect would allow the representation. To the extent that the Board's language in its decision on standing in PRB-3931-G and PRB-3932-G (consolidated) would not allow associational representation in proceedings before the Board, the Board hereby reverses that finding.

Merits of the Petition

56. As Protestants point out in great detail in their brief, Central's Petition to Amend does not include language requesting to add a statement in its charter that the District "shall not have the power to . . . issue general obligation bonds." Pursuant to Neb. Rev. Stat. 70-604(5), public power districts and public power and irrigation districts are required to include such a statement in their charter or subsequent amendments thereto. Protestants assert that the failure to include this language is a fatal flaw and requires the Board to deny Central's Petition to Amend. It appears clear statutory language must be included in a district's charter, and be included as part of a petition to amend the charter if the language would for some reason not be part of a district's existing charter.

57. Central has been in existence since 1933. Since that time Central amended its charter on five previous occasions. When Central filed its Petition for Charter Amendment 6, it appears clear that neither Central nor the Board were familiar with the requirement in 70-604(5) as it pertains to the inclusion of language prohibiting general

obligation bonds. The omission was discovered by the hearing officer during the proceedings, well subsequent to Central's filing of its Petition to Amend. During the second prehearing conference, the parties and hearing officer examined Central's challenges to the bases Protestants asserted in their Protest. One basis Protestants had raised was in section 10.1. of the Protest, in which Protestants asserted that Central's Petition failed to comply with the requirements of Neb. Rev. Stat. 70-604. The argument centered on whether the Petition to Amend was required to include the language "The district shall not have the power to levy taxes." The hearing officer initially indicated he would sustain Central's objection to paragraph 10.1. of the Protest because Central's current charter included a statement that the District shall not have the power to levy taxes. Since that section of the charter was not amended by the Petition to Amend, the language would remain in place for the consolidated district if the Petition to Amend were approved. Thus, the hearing officer determined the language did not need to be restated in the Petition to Amend. While preparing the written order for the Second Prehearing Conference, the hearing officer reviewed the exact language in 70-604(5) and discovered that the additional required language regarding obligation bonds was missing from Central's current charter. The hearing officer notified the parties, then

reversed his initial oral ruling in the written Second Prehearing Conference Order. (Exh. 75, pages 13-14).

58. This same requirement has escaped notice by a total of fifteen public power districts and public power and irrigation districts (including Central). The omission of the required language by approximately half the districts in the State of Nebraska demonstrates this is a common oversight. The statutory provision in question was enacted in 1933. It required that a district's charter include language stating that the district shall not have the power to levy taxes. In 1937 the Legislature amended the statute to add the provision "nor to issue general obligation bonds." All the districts that currently exist in Nebraska whose charters were in existence prior to the 1937 amendment lack the required language regarding general obligation bonds. Thus, none of the fifteen districts updated their charters with the new language since 1937, and evidently the Board and its predecessor agencies were unaware of the requirement and failed to take action to ensure that the language was added to the charters or was part of petitions to amend. For eighty-five years Central and fourteen other districts have been operating without the statutory language. During that time period there is no evidence that Central has ever attempted to issue general obligation bonds. (Day 1 — Testimony, T307:21 to 308:16).

59. Protestants argue that neither the Petition to Amend nor the proposed amendments address the general obligation bond language. (Protestants' brief at 20). But as Protestants acknowledge, Central does state in paragraph 2 of its Petition to Amend that the District "is without the ability to levy taxes or issue general obligation

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bonds." (Exh. 1, page 2). Unfortunately, that language is descriptive and is not part of the language that would be included in the consolidated district's charter. Central does not claim that it has, or the renamed consolidated district would have, the authority to issue general

obligation bonds. (Day 1 — Testimony, T308:4-16) But the fact remains that the language regarding general obligation bonds is not included in Central's current charter, and would not be added to the charter if the Petition to Amend were approved.

60. As Protestants point out in their brief, the Board lacks the authority to place conditions on the approval of a petition to amend a district's charter, nor does the Board have any continuing jurisdiction following the issuance of its final order approving or denying a petition for charter amendment. (Protestants' Post-Hearing Brief at 22).

Protestants cite to *Custer Public Power District v. Loup River Public Power District*, 162 Neb. 300 (1956), asserting that the case clarifies that the Board has only the authority to approve or deny a petition for a charter amendment, and that "the Board is without the authority to approve the Petition to Amend subject to any terms, conditions or limitations imposed by the Board." (Protestants' Post-Hearing Brief at 22). The Board agrees with Protestants' reading of the Custer decision. In that case, the Nebraska Supreme Court held that the decision of the Nebraska Department of Roads and Irrigation (the Board's predecessor agency with approval authority over public power district and public power and irrigation district petitions for creations and charter amendments) to approve a petition to create a new district subject to certain ongoing conditions was beyond the department's authority. The Court stated:

The department's power and functions are prescribed by the statute. It can exercise only the powers conferred by express enactment or by necessary implication. *Scotts Bluff County v. State Board of Equalization & Assessment*, 143 Neb. 837, 11 N.W.2d 453. The express power conferred is to approve and by implication to disapprove. When it approves, its power ends. Thereafter there remains only the power to certify its approval and file. There is no discretionary power given to the department such as is conferred, for instance, in section 46235, R.R.S 1943. It is the petition when approved that becomes the charter of a district. It is the petition when approved that is subject to amendment. 76-662, R.R.S. 1943.

Custer at 312-313. The Court went on to find that "the restriction imposed by the department on the approval of Consumers' petition was outside its powers and void." Custer at 313. The Board's position when it comes to a petition for charter amendment is constrained to either approve or disapprove the petition. The Board has no authority to approve a petition subject to a corrective condition such as directing a petitioner to file a subsequent petition to add the language required in 70-604(5).

61. The Legislature's choice of the word "shall" in 70-604 demonstrates that the language is a mandatory requirement in a public power and irrigation district's charter. The Legislature makes such an interpretation very clear in Neb. Rev. Stat. 49802, where it states "Unless such construction would be inconsistent with the manifest intent of the Legislature . . . (1) When the word shall appears, mandatory or ministerial action is presumed." Nebraska Supreme Court caselaw has consistently reinforced this same principle. "As a general rule, in the construction of statutes, the word "shall" is considered mandatory & inconsistent with the idea of discretion." *Loup City Public Schools v. Nebraska Dept. of Revenue*, 252 Neb. 387, 393 (1997). In a case citing the *Loup City Public Schools* case, the Court stated "We noted that in statutory interpretation, 'shall,' as a general rule, is considered mandatory and inconsistent with the idea of discretion." *Prokop v. Lower Loup Nat. Res. Dist.*, 302 Neb. 10, 27-28 (2019). The Board therefore finds it has no discretion in the matter to ignore or waive the requirement in Neb. Rev. Stat. 70-604(5) that a public power and irrigation district include in a charter amendment language stating that the district lacks the authority to issue general obligation bonds in those instances where such language has not previously been included in the charter.

62. In some cases, a court or administrative agency may have the option of allowing an applicant or petitioner to amend its pleadings to eliminate a defect in those pleadings. In this proceeding, the Board finds that is not an option. When dealing with petitions to amend the charter of a public power district or public power and irrigation district, once a district's board of directors approves the amendment by the necessary three-fifths majority and the petition is filed with the Board, the Board is required to publish notice of the exact amended language in two newspapers with general circulation in the district's territory. Specifically, Neb. Rev. Stat. 70-663 states:

The Nebraska Power Review Board shall then cause notice to be given by publication for three consecutive weeks in two legal newspapers of general circulation within such district. Such notice shall set forth in full the proposed amendment. . . .

Under this language, the Board has a duty to publish notice of the exact language of the proposed amendments to the language in the district's charter, and allow an opportunity for protests, complaints or objections. The language regarding a district's lack of authority to issue general obligation bonds is not a mere minor grammatical correction, but rather is a substantive change to the charter language. Due to this, even if the pleadings were amended, the Board has not published notice in compliance with the statute, and the Board would not be able to approve the proposed amendment. As previously stated, the Legislature's use of the word "shall" in 70-663 indicates the duty is mandatory and the Board has no discretion in the matter to waive the requirement or allow the error to be cured in a subsequent filing. The Board therefore finds it is constrained to act on the Petition to Amend as presented to the Board.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Power Review Board that Greg

Heiden, Linda Heiden, Richard Waller, Susan Waller and Citizens Opposed to the Merger have standing to file a Protest opposing the approval of the Petition for Charter Amendment 6, and they have the right to participate in these proceedings as parties. There are no restrictions placed on Protestants' participation.

IT IS FURTHER ORDERED by the Nebraska Power Review Board that, based on the reasons set out in this order, the Central Nebraska Public Power and Irrigation District's Petition for Charter Amendment 6 be, and hereby is, DENIED without prejudice.

Reida (Chair), Hutchison (Vice Chair), Gottschalk, Moen and Peck, participating.

Board member Gottschalk does not participate in that portion of the Order pertaining to Protestants' standing. Dennis Grennan was a Board member and participated in the hearing and initial decision on Protestants' standing. Board member Gottschalk had been appointed to replace Mr. Grennan on the Board, but Ms. Gottschalk had not yet been confirmed by the Legislature. After the hearing and initial decision on Protestants' standing, Ms. Gottschalk's appointment was confirmed by the Legislature and she took her oath of office on February 1, 2023.



Dated this 21 day of April, 2023.

A handwritten signature in black ink, appearing to read "F. Reida", written over a horizontal line.

Frank Reida Chairman

CERTIFICATE OF SERVICE

I, Timothy J. Texel, Executive Director and General Counsel for the Nebraska Power Review Board, hereby certify that a copy of the foregoing Order in the Central Nebraska Public Power and Irrigation District's Petition for Charter Amendment 6 and the Dawson Public Power District's Petition for Dissolution has been served upon the

following persons via certified United States mail, first class postage prepaid, on this
21st day of April, 2023.

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