

**STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD**

IN THE MATTER OF THE CENTRAL)	PETITION FOR
NEBRASKA PUBLIC POWER AND)	CHARTER AMENDMENT 6
IRRIGATION DISTRICT’S PETITION)	
TO AMEND ITS CHARTER)	
)	
and)	
)	
IN THE MATTER OF THE DAWSON)	
PUBLIC POWER DISTRICT’S)	
PEITITION FOR DISSOLUTION)	

**PROTESTANTS’ POST-HEARING BRIEF
AND CLOSING ARGUMENT**

Central Nebraska Public Power and Irrigation District (hereinafter “Central”) commenced these proceedings on October 25, 2022, by filing its Petition to Amend its charter pursuant to Neb. Rev. Stat. § 70-662 et seq. Therein, Central seeks to amend its charter and consolidate its assets, liabilities, operations, and employees with the assets, liabilities, operations and employees of Dawson Public Power District (hereinafter “Dawson”). Dawson separately filed a Petition to Dissolve Dawson contingent upon approval of Central’s Petition to Amend necessary to create the combined consolidated district (hereinafter “Consolidated District”). The Petition to Amend further seeks to modify the chartered territory and represented territory of the Consolidated District, subdivide territory within its boundaries, change the description of the nature of the business in which it is engaged, change the name of the district, change the location of its principal place of business and increase the size of the Consolidated District’s board of directors.

Greg Heiden, Linda Heiden, Richard Waller, Susan Waller and Citizens Opposed to the Merger (“Citizens”), a mutual benefit association incorporated as a Nebraska non-profit corporation (collectively referred to as “the Protestants”), filed a protest pursuant to Neb. Rev. Stat. § 70-663 opposing the consolidation on the grounds that the merger: (1) would not be in the best interests of Central; (2) would jeopardize and impair the rights of Central’s rate paying water services customers; and (3) would be prejudicial to users of irrigation water service.¹ Protestants further objected to the Petition to Amend on the grounds that the petition and proposed amendments fail to comply with Nebraska law. A three-day evidentiary hearing was conducted before the Nebraska Power Review Board (“Board”) which concluded on February 17, 2023. Protestants submit this Post-Hearing Brief and Closing Argument in Support of the Protest and for the reasons set forth herein, respectfully request the Board to deny the Petition to Amend.

Protestants oppose the consolidation because it is contrary to the best interests of Central. Central failed to identify any meaningful benefit that Central and its stakeholders will gain from consolidation through three days of hearings. Central’s primary purpose is to manage and deliver water. It has no need for retail electric customers. Beyond a few meager cost savings which may or may not materialize, the Petitioners offered only speculative, nebulous benefits such as “flexibility, diversity and political strength” and “economic development” to justify the merger.² Yet, in exchange for such questionable benefits, Central will surrender the exclusive control it presently has over the operations, assets, revenues and resources of Central. The loss of that exclusive control will put the rights of Central’s water users in jeopardy, and the restructuring of subdivisions and voting districts will prejudice irrigation waters users by depriving them of the local control they currently enjoy.

¹ Exhibit 74.

² (Kautz, 591:16-592:10).

STANDARD OF REVIEW

Central commenced these proceedings by filing the Petition to Amend its charter pursuant to Neb. Rev. Stat. § 70-662. As the petitioning party seeking to amend its charter, Central bears the burden of proving that the proposed amendments are in compliance with Nebraska law and the burden of persuading this Board to grant the petition pursuant to the factors set forth in Neb. Rev. Stat. §§ 70-664 and 70-612. Accordingly, in determining whether to approve the Petition to Amend, the Board must determine the following:

1. Whether the Petition to Amend and proposed charter amendments satisfy the requirements of Nebraska law. If the Petition to Amend or proposed charter amendments do not comply with the requirements of Nebraska law, the Petition cannot be approved, and the Board need not consider the merits of the proposed consolidation. The statutory requirements are mandatory and the Board lacks authority to approve a petition that does not strictly conform to Nebraska law.

2. If the Board determines that the Petition to Amend satisfies the requirements of Nebraska law, the Board must then consider the merits of the proposed consolidation pursuant to Neb. Rev. Stat. § 70-664 and determine whether the proposed amendments: (i) will be contrary to the best interests of Central, or (ii) will jeopardize and impair the rights of other persons. If the Board determines in its judgment that the proposed amendments will be contrary to the best interests of Central, or that the amendments will jeopardize and impair the rights of other persons, the Petition to Amend must be denied.

3. The Board then must determine whether the interests of users of irrigation water service will be prejudiced by the proposed amendments to subdivide the territory and voting districts of the Consolidated District divisions pursuant to Neb. Rev. Stat. § 70-612(1)(b)(ii). If the

Board determines that the subdivisions proposed for election of the directors will prejudice users of irrigation water service, the Petition to Amend must be denied.

4. The Nebraska Supreme Court has ruled that the Board lacks statutory authority to approve a charter amendment subject to conditions or limitations not stated in the petition.³ The Board's authority is therefore limited to approving or denying the Petition to Amend and proposed amended as written and submitted by Central.⁴

THE PARTIES

Central Nebraska Public Power and Irrigation District ("Central"). Central is a public power and irrigation district organized pursuant to Chapter 70, article 6 of the Nebraska Revised Statutes.⁵ As such, Central is a political subdivision of the State of Nebraska governed by an elected board of directors.⁶ The territorial boundaries of Central include the entirety of six counties (Kearney, Phelps, Gosper, Keith, Dawson, and Lincoln), with each county constituting a subdivision of Central.⁷ Central's existing chartered territory consists of Kearney, Phelps and Gosper counties.⁸ Keith, Dawson and Lincoln counties are outside Central's chartered territory, but are part of the District. Pursuant to Central's existing charter, the three chartered territory counties each elect three directors, while the counties outside Central's chartered territory each elect one director.⁹ Thus, voters in Kearney, Phelps and Gosper counties currently elect nine of twelve directors on Central's Board.

Originally known as the "Tri-County Project," Central was formed in 1933 for the purpose of building an irrigation system to provide irrigation water to farms located primarily in the Tri-

³ *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 312-313, 75 N.W.2d 619, 627 (1956).

⁴ Id. ("The express power conferred is to approve and by implication to disapprove" a petition).

⁵ Neb. Rev. Stat. § 70-604.

⁶ Neb. Rev. Stat. §§ 70-608; 70-609 et seq.

⁷ Exhibit 1, Ex. E, ¶ (3). Adams County was removed from Central effective January 6, 2011.

⁸ Id.

⁹ Id.

County region consisting of Phelps, Kearney, Gosper counties.¹⁰ The same is true today. More than 103,000 acres of Central's total 108,206 surface water irrigated acres (96%) lie within Phelps, Kearney and Gosper counties ("Tri-Counties").¹¹ The current charter protects the interests of the core water irrigation service customers in the Tri-Counties by granting them a super-majority of directors. Furthermore, the current charter protects water users because Central has exclusive control over its operations, assets, revenues and resources.

Today, Central owns and operates several reservoirs, four hydropower generation units, and miles of canals and irrigation works. The largest reservoir, Lake McConaughy, is an instream reservoir located in Keith County having a storage capacity in excess of 1.74 million acre-feet of water.¹² The four hydropower generation units have an aggregate generation capacity exceeding 110 MW of carbon-free capacity.¹³ The hydropower generation units were constructed to provide a supplemental source of revenue to support the cost of maintaining the irrigation system and has done so admirably. Despite the fact that Central's power generation revenues vary considerably from year to year based on water supply, Central has been able to maintain stable water rates.¹⁴ Although Central's considerable assets are carried on its financial statements at book value, if appraised at present fair value, they would be valued in the tens of billions of dollars.¹⁵ Central has no debt and has accumulated large cash and investment reserves over the years which currently exceed \$100 million.¹⁶

Central's rate-paying customers are Nebraska farmers who utilize surface water irrigation delivered by Central pursuant to water service agreements. Central is also a wholesale power

¹⁰ Exhibit 69.

¹¹ Exhibit 67, Answer to Interrogatory No. 18.

¹² (Yahn, 1038:21-25).

¹³ Exhibit 22, § 3.5.

¹⁴ Exhibit 36.

¹⁵ (Yahn, 1037:1-2).

¹⁶ Exhibit 56.

generator. Central currently sells the power generated by its four hydropower facilities via long-term wholesale power purchase agreements, but the sale of power is secondary to Central's primary purpose of delivering irrigation water. In fact, Central's power purchase agreements specifically provide that Central is not required to schedule or deliver any specific quantity of electricity and specifically prioritizes the delivery of water for water service customers over the generation or delivery of electricity.¹⁷ Because Central does not currently have any retail electric rate-paying customers, Central's board does not have to resolve conflicts regarding water management or allocation of resources when the interests of irrigation customers and retail electric customers do not align.

Central owns, operates and maintains the hydro units, reservoirs, dams, canals and distribution system. However, Central does not "own" the water contained within Lake McConaughy. The water held within Central's reservoirs is a public want subject to appropriated water rights held by Central's water service customers. Central holds the appropriated water rights of its water surface customers in trust for the benefit of its customers. Central manages water releases from its reservoirs to serve the needs of its water service customers, and in accordance with water use agreements with the Nebraska Public Power District ("NPPD") and others, and the terms and conditions of Central's FERC license.

Dawson Public Power District ("Dawson"). Dawson is a retail electric distributor serving customers in Dawson and Buffalo counties, and parts of Lincoln, Custer, Sherman, Gosper and Phelps counties. Dawson is a public power district organized pursuant to Chapter 70, article 6 of the Nebraska Revised Statutes. Dawson does not currently own any generation resources. Instead, it buys all of its power through long term power supply agreements. While Central is motivated to

¹⁷ Exhibit 55, § 5.01.

negotiate the highest possible sales price for its hydropower energy, Dawson is motivated to obtain the lowest cost power possible so that it can avoid raising retail electric rates. Dawson currently purchases all of its power requirements through the Nebraska Electric Generation & Transmission Cooperative, Inc. (“NEG&T”). Dawson is contractually prohibited from procuring electricity from any source other than NEG&T until the agreement terminates in 2035. The NEG&T agreement provides an exception which allows Dawson to procure up to ten percent (10%) of its power requirements through local renewable sources meeting certain requirements (“QLG Carveout”). Thus, for at least the next twelve years, Dawson is obligated to continue procuring at least ninety percent (90%) of its power requirements from NEG&T, even if the consolidation is approved.

The strength of Dawson’s balance sheet pales in comparison to Central. As a retail electric utility, its assets consist primarily of the poles, wires and transformers associated with its distribution system and the related equipment necessary to maintain the system. Dawson has few cash reserves.¹⁸ Unlike Central, which carries no debt, Dawson has substantial debt of \$59 million according to its 2020 audited financial statements, which will be assumed by the Consolidated District if the consolidation is approved.¹⁹ Much of Dawson’s existing debt will need to be refinanced in order to consolidate.²⁰

Dawson currently does not have an irrigation system, does not manage water resources and does not have any water service irrigation customers. Accordingly, Dawson’s board does not currently need to resolve conflicts regarding water management when the interests of water irrigators and power generation do not align with its retail electric customers.

¹⁸ Exhibit 56.

¹⁹ Exhibit 56.

²⁰ Exhibit 1, Ex. F.

The Protestants (“Protestants”). The Protestants include individual water service irrigation customers of Central who are residents of Central’s chartered territory, and a mutual benefit association incorporated by a group concerned citizens. Citizens has more than 115 members, the vast majority of which are Central water service customers who hold farmland within the Central’s chartered territory.²¹ The Protestants hold appropriated water rights pursuant to Nebraska law as regulated by the Nebraska Department of Natural Resources (“NDNR”), which Central holds in trust for the benefit of Central’s customers.

THE WATER

A key concern regarding the proposed consolidation pertains to the delivery and prudent management of one of Nebraska’s most precious resources: its water.²² Nebraska’s climate west of the 98th meridian is semi-arid and requires supplemental irrigation to support agriculture.²³ The effort to bring supplemental irrigation to central Nebraska began in earnest in the early 1930’s, after several years of prolonged drought decimated farms in central Nebraska and the Tri-County region in particular, a group of concerned citizens and state leaders formed the Tri-County Project in an effort to deliver water where it was sorely needed. Writing in support of the Tri-County Project in 1934, J.E. Lawrence warned:

The social problem involved is the security and stability of a region possession no other natural resource than agriculture. Its lands are becoming less remunerative through any form of farm operation, and unless subsoil moisture and fertility can be restored to the conditions which prevailed when farm homes were built, the virgin sod broken, and towns and cities established as trading centers, abandonment of the farms and gradual decline of the cities and towns will become inevitable.²⁴

²¹ Robison, (957:22-958:4); Exhibit 53(4:12-17:25).

²² Exhibit 72 (14:10-15:25).

²³ Mossman, *supra*, Creigh. L. Rev. at 68.

²⁴ Exhibit 69.

Tri-County Project advocates and state leaders were ultimately successful in convincing the necessary state and federal stakeholders that an extensive irrigation works was the answer.²⁵ The value of the water supplied by Central to farms in central Nebraska simply cannot be overstated. Within twenty years of completion of Central's irrigation works, crop yields jumped from 28 bushels per acre, to more than 100 bushels per acre within Central's territory.²⁶ Today, irrigated farmland in the Tri-Counties yields more than 250 bushels per acre and the value of irrigated farmland within Central's territory is significantly greater than non-irrigated farmland.²⁷ Water is the lifeblood of south-central Nebraska and control over the management of the water is of paramount importance.

Effective stewardship of the water requires proper management of the storage and release of water from storage reservoirs to ensure adequate water is available to meet present needs, as well as anticipated future needs. Water management must also take into consideration the interests of other water users, including industrial and recreational users as well as environmental impacts. These interests are not always in harmony. For example, while demand for water release by irrigators and hydropower customers may align during the summer when the need for irrigation water and hydropower electricity is at its peak, those interests diverge during the irrigation off-season.²⁸ During the late fall, winter and early spring, farmers have no need for irrigation water and irrigations systems with storage typically use those months to store water for future use.²⁹ But retail electric customers need electricity year-round.

Additionally, instream water flows are variable.³⁰ Flows on the North Platte and South

²⁵ Id.

²⁶ Exhibit 69.

²⁷ (Robison, 928:22-929:11).

²⁸ (Brundage, 467:9-468:23).

²⁹ Id.

³⁰ (Yahn; 1017:22-1020:7).

Platte rivers vary from year to year due to several factors, including the amount of snow melt flowing from the Rockies and upstream rainfall. The variability of the water supply is amply reflected in the variability of Central's hydropower revenues.³¹ Since the rate Central receives for electricity supplied is fixed pursuant to long term power purchase agreements, the year-to-year variability of hydropower revenues is due to variations in the amount water available to generate electricity. Farmers rely more heavily on irrigation in dry years than wet years. Central must manage the water stored in its reservoirs to ensure that water is available even in dry years. Prudent water management often requires holding more water in a given year by allocating reduced amounts of released water to maintain adequate storage for future years.³² The year round need for water release for hydropower generation will conflict with the need to withhold water for release during dry years. Central currently does not have any conflicts over water management because its power purchase agreements allow Central to give priority to the needs of its water service customers over power generation.

Nebraska law allocates surface water rights pursuant to the prior appropriation doctrine.³³ The prior appropriation doctrine focuses on the application of the water for beneficial use and is allocated on a first-in-time, first-in-right basis.³⁴ The Nebraska Constitution enshrines the priority of beneficial uses of surface waters for purposes of appropriation:

Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those

³¹ Exhibit 36.

³² (Yahn; 1017:22-1020:7).

³³ Mossman, *supra*, Creigh. L. Rev. at 69.

³⁴ *In re Application A-16642*, 236 Neb. 671, 684, 463 N.W.2d 591, 601 (1990).

using the same for manufacturing purposes.³⁵

The Nebraska Legislature further codified the priority of water used for agricultural purposes over water used for power generation purposes: “Those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes, and those using the water for agricultural purposes shall have the preference over those using the same for power purposes, where turbine or impulse water wheels are installed....”³⁶

Surface water rights are allocated by NDNR.³⁷ Once established, appropriated surface water rights become a vested use right.³⁸ However, surface water appropriation rights can be transferred, assigned or forfeited through abandonment or by failing to use the water for a beneficial or useful purpose.³⁹ Pursuant to Central’s Water Service Agreements, Central’s surface water service customers have contractually assigned over their appropriated water rights to Central upon termination of the water service agreements, which can be terminated at the option of either party upon ten years written notice.⁴⁰

THE PROPOSED CONSOLIDATION

The Parties jointly retained the services of Power Systems Engineering, Inc. (“PSE”) to evaluate the feasibility and potential benefits of a merger. PSE recommended a four-step phased approach, which would allow either party to terminate the process after each step. After an initial Phase 1 review, PSE reported that a consolidation of the two districts could yield annual cost savings of nearly \$5 million per year.⁴¹ Based on these findings, and other potential benefits, the Parties proceeded to Phase 2, which included a “deeper dive” to determine the feasibility of the

³⁵ Neb. Cost. Art. XIV, sec. 6.

³⁶ Neb. Rev. Stat. § 70-668.

³⁷ *In re 2007 Admin. of Approp. of Waters of Niobrara River*, 283 Neb. 629, 650, 820 N.W.2d 44, 62 (2012).

³⁸ *Enterprise Irr. Dist. v. Wills*, 135 Neb. 827, 831, 284 N.W. 329, 329 (1939).

³⁹ *In re 2007 Admin. of Approp. of Waters of Niobrara River, supra*, 283 Neb. at 651, 820 N.W.2d at 63.

⁴⁰ (Dicke, 238:2-242:25); Exhibit 34, § 4, § 7.

⁴¹ (Brundage, 541:24-542:13).

merger. PSE issued its Phase 2 Report on January 25, 2022. However, rather than yielding the initial projection of nearly \$5 million per year, the Phase 2 Report concluded that a consolidation would yield \$11.3 million in cost savings over the seven-year period spanning 2023 to 2030, an estimated cost savings of just \$1.6 million per year.⁴² Considering that Central and Dawson reported combined operating revenues in excess of \$88.8 million in 2020, potential savings of a \$1.6 million per year (1.8% of combined gross revenues) would seem to provide little incentive to merge.⁴³

The projected cost savings come from two principal sources: (1) the difference between costs avoided and external power sales from the Jeffrey Unit; and (2) reduced employee compensation and benefit costs to be realized over time through attrition. The Phase 2 Report further recognizes that a consolidation will require the Consolidated District to assume Dawson's outstanding debt.⁴⁴ The Phase 2 Report does not estimate those costs, or how those financing costs will impact the estimated \$1.6 million in anticipated annual savings. In fact, nowhere in the Phase 2 Report are the costs of consolidation discussed, let alone estimated, and the costs of consolidation are not even listed among the Consolidation Considerations set forth in the Phase 2 Report.⁴⁵

The Phase 2 Report also does not address the potential conflicts and challenges of assimilating two entirely different businesses into a single organization. While the 67-page Phase 2 Report explored the integration of Central's hydro power units with Dawson's retail electric distribution system in great detail, the report made no mention of water resource management or issues concerning the delivery of water irrigation, nor any mention of the inherent conflicts the board will face regarding delivery of water when the needs of irrigators and retail power customers

⁴² Exhibit 22, § 1.2, at 2.

⁴³ Exhibit 56.

⁴⁴ Exhibit 22, § 5.3.1.2, at 55.

⁴⁵ Exhibit 22, § 6, at 56.

do not align. The Phase 2 Report similarly fails to address the risks inherent in any merger.

Despite the significant reduction in anticipated savings, both districts elected to continue merger discussions. However, at no point did Central obtain any independent evaluation or risk/benefit analysis evaluation of the proposed merger. Nor did Central seek any outside guidance or advice regarding the particular conflicts, challenges and difficulties to be anticipated by merging an irrigation district with a retail electric utility, despite PSE's admission that such mergers are rare. Instead, Central relied upon its own "expertise" to evaluate the proposed merger, despite the fact that Central had no prior experience with mergers, nor any experience regarding the retail electric distribution business. Instead, much of the discussion was conducted in joint board meetings and in meetings of joint subcommittees comprised of board members and management of both districts, hardly conducive forums for frank and independent discussion by and among Central's directors regarding the wisdom of the proposed merger.

Nevertheless, the boards of Central and Dawson voted in a joint meeting to consolidate on October 24, 2022, despite myriad unanswered questions and many undecided issues. The vote was not unanimous for either district. Two Central directors, Robert Dahlgren and Roger Olson voted against consolidation. Neither Dahlgren nor Olson believed that the consolidation would provide any meaningful benefit to Central sufficient to justify the cost, risks and loss of control.⁴⁶ Central's Chairman, David Rowe, testified that a third Central "no" vote was cast for the vacant Phelps County director seat, which had been vacant since the previous director died in November of 2021.⁴⁷ By statute, Nebraska law unequivocally required Central's board to fill the Phelps County vacancy: "such vacancy *shall* . . . be filled by the board of directors."⁴⁸ Yet, Rowe testified that he

⁴⁶ Exhibit 48; Exhibit 49; Exhibit 72 (19:17-22; 25:24-26:5; 44:15-17); Exhibit 71 (15:3-19; 26:6-26:20; 33:20-25).

⁴⁷ (Rowe, 162:19-165:25)

⁴⁸ Neb. Rev. Stat. § 70-615(2)(emphasis added).

decided, without a board vote, to leave the seat vacant until voters elected a replacement in the next regular November 2022 election when the prior term expired.⁴⁹ The statute grants no such discretion to Central or its chairman. Rowe testified that his decision to not fill the vacant seat was driven by his that no replacement director chosen by the Board could get up to speed in time to deliberate and vote on the consolidation. Instead, Rowe assumed that any appointed replacement director would vote no.

But by leaving a Phelps County seat vacant, Central was deprived of the input and perspective of a third Phelps County director. Not only is Phelps County one of the core Tri-Counties where most of Central's irrigation water service is delivered, Central's headquarters is in Phelps County. Holdrege has been Central's headquarters since 1933. Since the Consolidation Plan and proposed amendments seek to relocate the headquarters of the Consolidated District to Lexington where Dawson maintains its headquarters, Phelps County should have been fully represented during deliberations and at the time of the consolidation vote. In contrast to Central's decision to vote on consolidation despite having an unfilled board seat, Dawson promptly filled a vacancy on its board by appointing Don Batie in May of 2022.⁵⁰

On day one following the merger, the Consolidated District will be bound by the amended charter proposed in the Petition to Amend. The newly constituted board will then pass new bylaws that will govern the Consolidated District. No bylaws have been agreed upon for the Consolidated District. Issues concerning the structure and organization of operating divisions and management remain to be decided following consolidation and then incorporated in the bylaws. In the meantime, the Consolidated District will operate with two co-equal general managers, two finance and accounting managers, two engineering & operation managers, and a combined board

⁴⁹ (Rowe, 162:19-165:25).

⁵⁰ (Batie, 1127:7-1128:15).

consisting of all current members of the two separate boards.⁵¹

THE HEARING

Central called two primary witnesses to testify in support of the consolidation. David Rowe stated that he believed that the consolidation was in the best interests of Central but struggled to articulate why. For example, Rowe testified that “the idea behind the merger is we get rid of [the] ebbs and flows” of the hydro revenues.⁵² However, the variability in Central’s hydro revenues is not due to fluctuating power costs, which are fixed by long term PPAs. The fluctuations are due to the variability of water flow.⁵³ Water flows will continue to fluctuate in the future as they have in the past and the Consolidated District will be unable to utilize energy from Jeffrey during periods when the water is not flowing. Rowe also expressed his belief that Central needs to “look to the future” and must not remain “stagnant.”⁵⁴ Rowe opined that the Consolidated District will be stronger and will have a bigger footprint.⁵⁵ Rowe posited that the Consolidated District will have more political power and warned that if Central does not merge with Dawson, “someone’s going to take it away from all of us.”⁵⁶

Devin Brundage, Central’s general manager, touted groundwater recharge as a key benefit of the merger, although he conceded that Central is already providing groundwater recharge and does not need to merge with Dawson for that purpose.⁵⁷ Central presented no testimony or evidence indicating that Central needed to merge with Dawson due to deteriorating financial conditions. To the contrary, Brundage testified that Central is in good financial shape and in not seeking to

⁵¹ Exhibit 22, § 2.2.1.

⁵² (Rowe, 152:23-153:1).

⁵³ (Rowe, 152:1-17; Brundage, 459:2-458:3; 461:7-21); Exhibit 36.

⁵⁴ (Rowe, 130:3-11; 131:1-21).

⁵⁵ (Rowe, 131:1-21).

⁵⁶ (Rowe, 139:17-140:8).

⁵⁷ (Brundage, 569:24-470:20).

consolidate due to any financial problems.”⁵⁸

Rowe and Brundage conceded that many material decisions regarding the structure, management and operation of the Consolidated District remain to be worked out and decided after the merger is completed. Rowe testified that in the meantime, he expected that “Dawson will run Dawson’s stuff” and Central “would run Central’s stuff . . . until we figure out as a board and as the governing body how we would run it in the future.”⁵⁹ The Consolidation Plan provides little additional guidance.⁶⁰ Brundage testified that the Consolidation Plan outlines the intent of the parties to provide guidance for the new board when it sits down to implement the consolidation.⁶¹ Brundage conceded “there is a lot of work to be done,” including decisions regarding management and operations, the structure of operating divisions and financial reporting groups, and bylaws.⁶²

Central did not present any testimony regarding potential risks or estimated costs of the consolidation. Dawson presented testimony regarding its options for refinancing its substantial debt but provided no evidence or estimates regarding the anticipated refinancing costs. Central did not provide any evidence or testimony regarding the value of its assets but conceded that it will cede its existing exclusive control over those assets if the consolidation is approved.⁶³

Protestants called Don Wendell, a retired CPA and former electric utility executive with considerable experience implementing mergers and acquisitions.⁶⁴ Wendell testified that whether public or private, any board charged with the duty of managing an organization has a duty to conduct reasonable due diligence to understand the costs, benefits and risks associated with any

⁵⁸ (Brundage, 471:13-472:6; 531:3-532-1).

⁵⁹ (Rowe, 178:9-14).

⁶⁰ Exhibit 44.

⁶¹ (Brundage, 352:8-24).

⁶² (Brundage, 522:14-23).

⁶³ (Brundage, 483:13-484:9; 502:8--504:3).

⁶⁴ Exhibit 63.

significant transaction.⁶⁵ Wendell testified that proper due diligence is critical to allow board members to make fully informed decisions.⁶⁶ After reviewing the Phase 2 Report and the depositions of directors and management of Central and Dawson, Wendell concluded that Central did not conduct adequate due diligence, including a proper risk-benefit analysis of the consolidation.⁶⁷

Wendell also opined that Central did not conduct a proper analysis of the costs of consolidation, including the anticipated costs of refinancing Dawson's debt.⁶⁸ The Petitioners submitted evidence regarding how Dawson's debt might be refinanced, but submitted no evidence of the anticipated costs of refinancing the debt.⁶⁹ In fact, Parker Schenken, the bond lawyer called by Dawson, testified that refinancing costs cannot be quantified until it is decided how the debt will be refinanced and the prevailing interest rates at the time the debt is refinanced is determined.⁷⁰ Dawson's debt is currently financed at very low interest rates ranging from 1.0% to 3.5%, which will undoubtedly have to be refinanced at higher rates given the prevailing increase in interest rates.⁷¹ Even a one percent increase in interest rate would dramatically increase the Consolidated District's debt service expense. Thus, the costs incurred due to the consolidation when realized could rapidly deplete or even fully consume the \$1.6 million projected annual savings of the consolidation.

Wendell also testified about a conversation he had with Central director Dudley Nelson shortly after Central voted to consolidate. Wendell testified that Nelson told him that he voted for the merger because Central's financial situation was deteriorating and that Central "needed to do

⁶⁵ (Wendell, 840:840:25-842:16); Exhibit 62.

⁶⁶ Exhibit 62, § 2.2, at 6

⁶⁷ Id.

⁶⁸ (Wendell, 854:8-17; 855:6-12); Exhibit 56.

⁶⁹ Exhibit 38; Exhibit 39.

⁷⁰ (Schenken, 727:13-728:20; 729:2-730:16; 741:2-743:9).

⁷¹ Exhibit 22, § 5.3.1.2, at 55; Exhibit 44, Ex. E & F.

something drastic or take significant action.”⁷² Wendell testified that Nelson’s statements were surprising. Wendell is a Central water service customer and was unaware of any financial issues at Central and that Nelson’s comments prompted him to begin an investigation into Central’s financial position even before he was engaged by Protestants.⁷³ After reviewing Central’s financial statements, Wendell could find no support for Nelson’s warning that Central was facing a dire, deteriorating financial situation.⁷⁴ To the contrary, Wendell determined that Central is and will continue to be financially sound, an opinion underscored by his review of the Phase 2 Report and supporting modeling and financial data produced by Central in these proceedings.⁷⁵

The Protestants called James Yahn who manages irrigation districts located upstream on the South Platte River.⁷⁶ Yahn has more than thirty years of experience managing water, and from his perspective, could see no meaningful benefit to Central.⁷⁷ Certainly, no benefit that would justify surrendering exclusive control over management of the irrigation system.⁷⁸ Yahn also testified regarding the immense value attributable to an instream reservoir like Lake McConaughy. Yahn testified that McConaughy is literally irreplaceable, but if an instream reservoir of its size could be built today, the costs could be conservatively approximated in a range between \$6 and \$38 billion based on construction costs for off-stream reservoirs.⁷⁹

Gary Robison testified on behalf of Citizens in opposition to the consolidation.⁸⁰ Protestants also offered testimony and evidence from others opposed to the consolidation. Central’s Water Users Group, an independent organization comprised of Central customers, passed

⁷² (Wendell, 783:4-784:25).

⁷³ (Wendell, 783:4-784:25; 785:10-786:16).

⁷⁴ (Wendell, 795:8-24).

⁷⁵ (Wendell, 833:8-13); Exhibit 62.

⁷⁶ Exhibit 64.

⁷⁷ (Yahn, 1017:22-1020:7).

⁷⁸ Id.

⁷⁹ (Yahn, 1034:14-1037:9).

⁸⁰ (Robison, 927:23-930:17).

a resolution opposed to consolidation.⁸¹ Similarly, the Tri-Basin Natural Resources District (“Tri-Basin NRD”), which oversees groundwater management in Gosper, Phelps and Kearney counties, also passed a resolution opposed to the consolidation.⁸² Robison and Brad Lundeen testified that at the special meeting that the Tri-Basin NRD voted to oppose the consolidation, Central director David Nelson repeated the claim made by Dudley Nelson that Central needed to consolidate with Dawson due to Central’s allegedly deteriorating financial condition.⁸³

ARGUMENTS

For the reasons set forth below, the Petition and proposed amendments fail to comply with the requirements of Nebraska law and the Petition to Amend must therefore be denied. Furthermore, even if the Petition to Amend and proposed amendments were not fatally defective, the Board should deny the Petition because the proposed consolidation will not be in the best interests of Central and will jeopardize and impair the rights of water users, including Protestants and all of Central’s water users. Finally, the Petition to Amend should be denied because the voting subdivisions of the proposed territory will prejudice irrigation water service users.

I. THE PETITION TO AMEND AND PROPOSED CHARTER AMENDMENTS FAIL TO COMPLY WITH NEBRASKA LAW.

The Petition to Amend and proposed amendments fail to comply with Nebraska law because they do not contain a mandatory provision stating that the Consolidated District shall not have the power to issue general obligation bonds as required by Neb. Rev. Stat. § 70-604(5).

Nebraska law allows public power and irrigation districts to issue bonds backed by revenue streams derived from the operation of power plants and irrigation systems. However, Nebraska law denies public power and irrigation districts the power to levy taxes or issue general obligation

⁸¹ (Schwarz, 1086:8-1087:22).

⁸² (Lundeen, 1001:5-1002:10); Exhibit 58.

⁸³ (Robison, 951:15-952:6; Lundeen, 996:18-25); Exhibit 73.

bonds backed by tax levies.⁸⁴ Additionally, Nebraska law further requires any petition to create or amend a charter must contain a “statement that the district shall not have the power to levy taxes *nor to issue general obligation bonds.*”⁸⁵ The statute, Neb. Rev. Stat. § 70-604, makes clear that the requirements are mandatory: “The petition *shall* state and contain” each of the elements set forth therein.⁸⁶ Because the petition becomes the charter of a district when approved by the Board, the content of the petition is critical as it forms the district’s ultimate governing document.⁸⁷

Neither the Petition to Amend nor the proposed amendments conform to the requirements of Nebraska law. First, the Petition to Amend filed by Central fails to state that the Consolidated District shall not have the power to levy taxes or issue general obligation bonds. Instead, Paragraph 2 of the Petition to Amend merely recites the fact that Central is currently “engaged in the business of providing water for irrigation and for generating hydroelectric power and is without the ability to levy taxes or issue general obligation bonds.”⁸⁸ The Petition to Amend is defective because it fails to prospectively state that the Consolidated District, which will also be engaged in the retail sale and distribution of electricity, will not have the power to levy taxes or issue general obligation bonds. Second, the statement that Central “is without the ability to levy taxes or issue general obligation bonds” merely recites Nebraska law, since Neb. Rev. Stat. §§ 70-629 prohibits districts from levying taxes and Neb. Rev. Stat. § 70-631 prohibits districts from issuing general revenue bonds. Notwithstanding those sections, Neb. Rev. Stat. § 604(5) separately requires a petition to create or amend a charter to prospectively state that the district shall not have the power to levy taxes nor issue general obligation bonds.

⁸⁴ Neb. Rev. Stat. §§ 70-629; 70-631.

⁸⁵ Neb. Rev. Stat. § 70-604(5)(emphasis added).

⁸⁶ Id. (emphasis added); See, e.g., *D.I. v. Gibson*, 291 Neb. 554, 557-58, 867 N.W.2d 284, 287 (2015).

⁸⁷ *Custer Public Power Dist. v. Loup River Pub. P. Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956).

⁸⁸ Exhibit 1, Petition to Amend, ¶ 2.

Second, and more fundamentally, neither Central’s existing charter nor the proposed charter amendments contain the required language prohibiting the Consolidated District from issuing general obligation bonds. Paragraph 6 of Central’s existing charter states only that it shall not have the power to levy taxes.⁸⁹ Research conducted by the Executive Director confirmed that Central’s current charter lacks the required statement that it shall not have the power to issue general obligation bonds.⁹⁰ The research further determined that at the time Central’s original charter was granted in 1933, the statute did not require the statement regarding general obligation bonds; it required only that the charter contain the statement that the district shall not have the power to levy taxes.⁹¹ The Legislature later amended the statute in 1937 to add the charter *requirement* stating that the district shall not have the power to issue general obligation bonds.⁹² Central has amended its charter since it was created, most recently in 2004, but neglected to include the additional language mandated by Neb. Rev. Stat. § 70-604(5) pursuant to the 1937 statutory amendment.

The Petition to Amend currently before the Board again neglects to address or cure the defect contained in Paragraph 6 of Central’s existing charter, which states only that “Said district shall not have power to assess or levy any taxes.”⁹³ In fact, the Petition to Amend does not propose any changes to Paragraph 6 of the existing charter.⁹⁴ Similarly, the proposed charter amendments set forth on Exhibit E to the Petition to Amend fail to add the missing language necessary to cure the defect contained in Central’s existing charter.⁹⁵ The Petition to Amend and proposed amendment therefore fail to comply with Nebraska law.

⁸⁹ Exhibit 19; Exhibit 1, Petition to Amend, Exhibit E, ¶ (6).

⁹⁰ Exhibit 19.

⁹¹ Id.

⁹² Id.; Neb. Rev. Stat. § 70-604(5).

⁹³ Exhibit 1, Ex. E, § (6).

⁹⁴ Exhibit 1, ¶ 13.

⁹⁵ Exhibit 1, Ex. E, § (6).

Central's neglect to cure the defect in its existing charter in the Petition to Amend presently before the Board cannot be excused simply because other public power districts are not in compliance. Those districts do not have pending petitions before the Board asking for permission to amend their charters. Nor does the fact that neither Central nor the Consolidated District have the power to issue general obligation bonds save the Petition to Amend. The Legislature chose to require districts to affirmatively state in their petitions that they prospectively *shall not* issue general obligation bonds in their charters, notwithstanding the fact that the districts lack the statutory power to issue general obligation bonds.

The Board lacks authority to approve a petition that does not strictly conform to statutory requirements. The Nebraska Supreme Court has ruled that when reviewing a petition to create or amend a district charter pursuant to Neb. Rev. Stat. § 70-662, the powers and functions of the Board are limited by statute and the Board can exercise only the powers conferred therein:

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... It is the petition when approved that becomes the charter of a district. It is the petition when approved that is subject to amendment.⁹⁶

In *Custer Public Power District v. Loup River Public Power District*, the Nebraska Supreme Court held that the Board's predecessor agency exceeded its authority by approving a charter petition subject to certain conditions and limitations.⁹⁷ Accordingly, the Board is without authority to approve the Petition to Amend subject to any terms, conditions or limitations imposed by the Board. The Board may only approve or deny the Petition to Amend as filed. Because the Petition to Amend and proposed charter amendments fail to comply with Neb. Rev. Stat. § 70-604(5), the

⁹⁶ *Custer Public Power Dist.*, *supra*, 162 Neb. at 312-313, 75 N.W.2d at 627.

⁹⁷ *Id.*

Petition to Amend is fatally deficient as a matter of law and must therefore be denied.

II. THE PETITION TO AMEND SHOULD NOT BE GRANTED BECAUSE ADOPTION OF THE PROPOSED AMENDMENTS WOULD BE CONTRARY TO THE BEST INTERESTS OF CENTRAL.

The record before the Board demonstrates that the proposed consolidation would be contrary to the best interests of Central for several reasons: (1) Central failed to conduct the proper due diligence necessary to allow Central's board to make an informed decision before voting to approve the consolidation; (2) the parties deferred material decisions relating to the ultimate structure, operation and management of the Consolidated District, rendering a present evaluation of the merits of consolidation practically impossible; and (3) whatever speculative benefits that Central may gain from consolidation are considerably outweighed by the unmistakable costs and risks of the consolidation. The Petition to Amend should therefore not be granted pursuant to Neb. Rev. Stat. § 70-664.

(1) Central Failed to Conduct Adequate Due Diligence.

Central failed to undertake the efforts necessary to properly understand the costs, benefits and risks associated with the consolidation.⁹⁸ Central and Dawson jointly retained PSE to assess the feasibility of a consolidation. PSE acknowledged, while "utility mergers are not unique, amalgamations between an electric distribution provider and a hydroelectric producer and irrigation provider are less common."⁹⁹ PSE is an electric engineering firm with no expertise in water management or irrigation. PSE provided no further guidance regarding the challenges or risks attendant with such unusual mergers. Despite recognition of the uncommon nature of the proposed merger, Central did not seek guidance from other sources with proper experience.

⁹⁸ (Wendell, 840:840:25-842:16); Exhibit 62.

⁹⁹ Exhibit 22, at 6.

Instead, Central claims to have relied on its own expertise. Unfortunately, Central has no such “expertise.” Central has no prior experience regarding mergers and no expertise regarding the management or integration of a retail electric distribution business. Devin Brundage testified that Central conducted a single meeting with a representative of Loup Power for purposes of discussing how to integrate hydro resources with retail distribution.¹⁰⁰ He clarified that the meeting was not about integrating an irrigation district with an electric utility.¹⁰¹

Similarly, Central did not retain a power marketing consultant to provide guidance and necessary insight on current and future projected power prices or the value of its hydro units. Central’s expertise regarding the sale of wholesale power is plainly limited, confined to negotiating long term power purchase agreements when they expire every ten years. The last time Central was in the market to sell power from its hydro units was 2013. Central’s limited experience was clearly insufficient for purposes of evaluating evolving markets for green energy power generation resources like Central’s hydro units.

Central failed to conduct a proper analysis of the costs of consolidation, including the anticipated costs of refinancing Dawson’s substantial \$59 million debt.¹⁰² Central did not obtain a valuation of its assets. Nor did Central properly assess the risks inherent in consolidation, including additional unforeseen costs, integration issues, culture clash and overestimation of perceived synergies. Because Central’s Board did not conduct proper due diligence, it did not have sufficient information necessary to make an informed decision regarding Consolidation.

(2) Deferral of Key Decisions Renders Meaningful Evaluation Impossible.

Because Central and Dawson deferred many key decisions regarding the structure,

¹⁰⁰ (Brundage, 522:24-524:25)

¹⁰¹ Id.

¹⁰² Exhibit 56.

operation and management of the Consolidated District until *after* the consolidation occurs, the information before the Board is insufficient to allow the Board to determine whether consolidation is in the best interests of Central.

The parties agreed to the broad outlines of the Consolidated Plan, but as several witnesses testified, the parties deferred multiple material questions concerning the composition of operational and financial divisions, allocation of costs, allocation of the benefits of the merger, how conflicts between divisions and management will be resolved, and many other important decisions to be decided later. The lack of definition regarding the structure, management and operation of the Consolidated District was insufficient to allow Central's board to make a fully informed decision regarding consolidation, or even form the basis for a meaningful "meeting of the minds" between Central and Dawson when so many fundamental issues remain undecided. At best, the evidence and testimony establish that Central and Dawson loosely agreed in principle to consolidate and to figure out the details later.

The problem with Central and Dawson's approach is that the Petition to Amend must be evaluated based solely on information presently before the Board. In order for the Board to approve the Petition to Amend, it must appear from evidence and testimony that the consolidation will not be contrary to the best interests of Central. But the Board cannot evaluate whether the consolidation will be or will not be in the best interests of Central when so much of the material decisions relating to the proposed consolidation have yet to be decided. Central cannot so easily sidestep regulatory oversight mandated by statute. This Board will not have continuing jurisdiction over implementation of the consolidation. The Board's jurisdiction is limited to approving or denying the Petition to Amend based on the actual evidence currently before the Board.¹⁰³ In the absence

¹⁰³ *Custer Public Power Dist.*, *supra*, 162 Neb. at 312-313, 75 N.W.2d at 627.

of evidence as to how the consolidation will be implemented, as opposed to how it might be implemented, the Board has no basis for evaluating whether consolidation would be in the best interests of Central. The Petition to Amend should therefore be denied.

(3) *The Purported Benefits Outweighed by Costs and Risks of Consolidation.*

The purported benefits of the merger to Central fail to outweigh the costs and risks of consolidation. Central claims that the Consolidated District would create projected cost savings of approximately \$1.6 million in savings per year.¹⁰⁴ The majority of those cost savings would come from utilizing the Jeffrey Unit to serve native load.¹⁰⁵ The projected cost savings incorporate Central's assumption that if sold externally, the revenues realized would be twenty percent (20%) less than Central currently receives for power generated at Jeffrey under the existing PPA. If Central's unsubstantiated price assumption is not correct, the projected savings from Jeffrey will be substantially less and could vanish altogether. In fact, if the price for carbon free power were to exceed the price in Evergy PPA, then the lost revenues will quickly erode, if not entirely surpass, the savings from Dawson's avoided costs of power.

Even if Central's price assumptions are taken at face value, any benefits or synergies that could be realized from the Jeffrey Unit could be accomplished through a PPA rather than a merger, which would avoid the costs, risks and change in control that would be necessitated by consolidation.¹⁰⁶ In fact, Central offered Dawson a PPA for the Jeffrey Unit when the existing PPA expires later this year.¹⁰⁷ Furthermore, because Dawson remains obligated to purchase the rest of its power requirements from NEG&T through 2035, the Consolidated District will have to negotiate PPA's to sell the energy from the two Johnson Units anyway. A PPA would be far less

¹⁰⁴ Exhibit 22, § 1.2, at 1.

¹⁰⁵ Exhibit 22, § 3.5, at 15.

¹⁰⁶ Exhibit 22, § 1.2.2, at 2.

¹⁰⁷ (Brundage, 446:24-447:16).

complicated and risky than merging the districts. The meager cost savings which might be realized from the Jeffrey Unit simply do not justify the costs, risks and complications of merging an irrigation and wholesale power district with a retail electric utility.

Central does not need “rate stabilization.” In an October 10, 2022 letter to water service irrigation customers, Central claimed that consolidation would provide “greater revenue stability” for Central’s irrigation water service customers.¹⁰⁸ But Central does not need rate stabilization.¹⁰⁹ Central has proven it can efficiently manage its irrigation system and utilize revenues from hydro generating assets to maintain the irrigation works and maintain stable rates for irrigation water service. In fact, Central has successfully done so for more than eighty (80) years. Exhibit 36 demonstrates that notwithstanding the revenue volatility of wholesale power sales due to the variability of water supply, Central has consistently maintained stable water service rates.¹¹⁰ Central’s balance sheet, which reflects zero debt and reserves in excess of \$100 million, underscores that Central does not need to merge with a retail distribution utility in order to keep irrigation water service rates stable.¹¹¹

Central is not financially distressed. In the same letter, Central warned its water service customers warned that “[a]bsent the merger, Central’s long-range financial position is projected to deteriorate before the end of this decade because of decreased revenue from hydroelectric generation.”¹¹² Central made no such claim in evidence or testimony before the Board. To the contrary, Brundage testified that Central is in good financial shape and that the consolidation is not driven by any financial need for Central to merge.¹¹³ Central and Dawson witnesses uniformly

¹⁰⁸ Exhibit 47, at 1 (emphasis added).

¹⁰⁹ Exhibit 72, 31:3-18.

¹¹⁰ Exhibit 36.

¹¹¹ Exhibit 56.

¹¹² Exhibit 47, at 2.

¹¹³ (Brundage, 471:19-472:3).

testified that the merger was driven by prospective advantages, not current or imminent financial needs.

Yet, outside the hearing room, Central directors painted a different picture regarding Central's financial condition. When addressing constituents and the public at large, Central directors repeatedly claimed that Central "needs to merge" due to its deteriorating financial condition. In explaining his vote to consolidate, Central director Dudley Nelson's told Wendell that Central needed to merge due to financial pressures. On February 8, 2023, less than a week before the hearing in this matter began, Central director David Nelson stated at a public Tri-Basin NRD meeting that "survival for Central down the road is pretty bleak."¹¹⁴ David Nelson further warned that "ten years from now, Central could not be here."¹¹⁵ He then repeated that for Central, consolidation means "survival down the road."¹¹⁶ David Nelson's statements were not corrected by other Central directors and management who were present at the meeting, which included Brundage.¹¹⁷

The foregoing begs the question: why were Central directors claiming that Central needed to merge out of financial necessity when it was not true? Were Central's directors misinformed or mislead regarding Central's financial condition? Central director Roger Olsen testified that he recalled management presentations regarding projected decreases in Central's revenues during the period the consolidation was being considered.¹¹⁸ Nelson testified that whether the impression left was that Central needed to merge depended on how it was interpreted by individual directors.¹¹⁹ Neither Olson nor Dahlgren believed that Central was in financial trouble or needed to merge.¹²⁰

¹¹⁴ (Robison, 951:15-952:6); Exhibit 73

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Exhibit 71, 34:1-25.

¹¹⁹ Id.

¹²⁰ Exhibit 71, 33:17-19; Exhibit 72, 44:15-17; 50:18-22.

However, in a letter Dahlgren wrote to fellow directors in February 2022, Dahlgren sought to rebut the notion that that lower power prices or other financial pressures meant that Central needed to merge.¹²¹ Financial concerns, real or imagined, were clearly on the minds of Central's directors when they voted to consolidate with Dawson.

Due to the lack of any clear benefit from consolidation from Central's perspective, supporters of the consolidation appear to have resorted to scare tactics to rally support. At best, the foregoing demonstrates that Central directors were misinformed and therefore unable to make a properly informed decision regarding the merger.

In any event, the unnecessary costs, risks and uncertainties that will undoubtedly arise from consolidation are simply not justified based on the lack of any clear benefit or gain to Central. The costs of the consolidation are substantial. Central will cede the exclusive control it currently has over Central's considerable assets, operations, revenues, and resources. If the consolidation is approved, Central will contribute and share those assets, operations, revenues and resources with the combined Consolidated District. Perhaps the greatest cost to Central is that it will surrender sole control of the operation of the water irrigation system. The cost of surrendering control is incalculable from Central's standpoint. For the last eighty plus years, Central has effectively managed the water solely for the benefit of water users. If the consolidation is approved, the Consolidated District will have to balance the interests of water users and electricity customers and those interests do not always align. Central presented no concrete plan as to how conflicts between water users and electricity customers will be resolved when conflicts inevitably arise. To move forward with consolidation without a meaningful plan for resolving conflicts simply delays the inevitable. The consolidation is not in the best interests of Central and the Petition to Amend

¹²¹ Exhibit 48.

should therefore be denied.

III. THE PETITION TO AMEND SHOULD BE DENIED BECAUSE ADOPTION OF THE PROPOSED AMENDMENTS WOULD JEOPARDIZE AND IMPAIR THE RIGHTS OF OTHERS.

The Petition to Amend should not be granted because the proposed amendments would “jeopardize and impair” the rights of Protestants and other water service customers of Central.¹²² The terms “jeopardize and impair” are not further defined for purposes of Neb. Rev. Stat. § 70-664. However, in ordinary usage, the term “jeopardy” means “danger; hazard; peril.”¹²³ The term “jeopardize” is generally understood to mean threatened or risk of future harm.¹²⁴ The term “impair” means “[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.”¹²⁵ Thus, a plain and ordinary construction of Neb. Rev. Stat. § 70-664 does not require Protestants to prove actual harm or injury; but rather, that the proposed amendments would threaten to diminish and lessen their rights or put those rights at risk. For the reasons outlined below, the evidence before the Board demonstrates that the rights of water irrigation service customers will be jeopardized and impaired if the consolidation is approved.

First, Central is currently operated and managed exclusively for the benefit of Central’s ratepayers and other water users. That will forever change on day one following consolidation. Thereafter, the Consolidated District’s board will have to balance the interests of water service customers as well as electric rate payers alike. As noted, the interests of water service customers and electric ratepayers do not always align and the parties failed to address, let alone plan for how conflicts will be resolved when they inevitably arise. The loss of exclusive control threatens to diminish and impair the right of water users to have the operations, assets, revenues and resources

¹²² Neb. Rev. Stat. § 70-664.

¹²³ Black’s Law Dictionary (6th Ed), at 580.

¹²⁴ See e.g. *Central Platte Nat. Resources Dist. v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112 (1996).

¹²⁵ Black’s Law Dictionary (6th Ed), at 516.

managed solely for the benefit of water users.

Second, the water service customers of Central hold water service agreements which are very favorable to Central, and which reflect the extraordinary level of trust between Central and its water service customers. For example, the water service agreements require Central's customers to pay for allotted water, even if the allotted water is not delivered.¹²⁶ The water services agreements provide that they may be terminated at any time if Central provides ten years notice.¹²⁷ If terminated, the water services agreements provide that all water appropriation rights of the water service customers transfer over to Central upon termination.¹²⁸ So by virtue of the assignments contained within the agreements, Central customers are vulnerable to forfeiture of their water appropriations.

Why would any sane farmer holding appropriated surface water rights agree to such one-sided terms? Because surface water irrigation customers currently consider Central a partner.¹²⁹ Central has successfully managed the district for over 80 years exclusively for the benefit of water users. Central currently does not have to balance any countervailing interests which diverge from water service customers and currently has no motive to act against the interests of its customers. Central's water service customers therefore have no reason to feel insecure about their rights or Central's commitment to manage the irrigation system in a manner that best ensures present and future water deliveries.

However, all that will change following consolidation. The water service customers and the one-sided water agreements they hold will be placed in jeopardy upon the change in control. The Consolidated District will have to manage the combined entity for the benefit of both water

¹²⁶ Exhibit 34, § 1(B).

¹²⁷ Exhibit 34, § 4.

¹²⁸ Exhibit 34, § 7.

¹²⁹ (Robison, 927:23-928:19).

service customers and retail electric customers. When the interests of water service customers do not align with the interests of retail electric ratepayers, the Consolidated District will have to decide winners and losers and the Consolidated District will hold all the cards. The appropriated water rights of Central's water service customers will be in the hands and at the mercy of directors elected from subdivisions with no ties to surface water irrigators or irrigation. The Consolidated District would hold contractual rights which would allow it to allocate water as it deemed fit, or release water during winter months to serve the needs of retail electric customers. Ultimately, if deemed to be in the best interests of the district, the Consolidated District could cancel water services agreements and take assignment of the appropriated water rights and repurpose the appropriations of water service customers.

Allowing a change in control of Central after the agreements were entered into unfairly jeopardizes and impairs the rights of water service customers. Those customers entered into binding water service agreements with a trusted entity dedicated to serving the interests of water users exclusively. The rights of water service customers should not be forced into jeopardy by virtue of the consolidation. The Petition to Amend should therefore be denied.

IV. THE PETITION TO AMEND SHOULD BE DENIED BECAUSE THE PROPOSED SUBDIVISIONS WILL PREJUDICE THE RIGHTS OF USERS OF IRRIGATION WATER SERVICE.

Lastly, the Amended Petition and proposed amendments should be denied because the voting subdivisions would be prejudicial to irrigation water users. Because the proposed amendments would subdivide the represented territory and voting districts of the Consolidated District by following precinct or county boundary lines without regard to population, the Board must determine whether the interests of users of irrigation water service will be prejudiced

pursuant to Neb. Rev. Stat. §70-612(1)(b)(ii).¹³⁰ The statute provides that a district may organize subdivisions in such fashion only “if in the judgment of the Nebraska Power Review Board the interests of the rural users of electricity or of users of irrigation water service in such district will not be prejudiced thereby.”¹³¹

Here, the proposed voting subdivisions of the Consolidated District will prejudice the interests of users of irrigation water service by diluting their represented voting power. More than 96% of Central’s surface water irrigation customers and irrigated acres lie within the Tri-Counties. Currently, voters in the Tri-Counties elect nine of Central’s twelve board seats, giving the Tri-Counties super-majority control of Central’s board. Following consolidation, the permanent Board of the Consolidated District will have fourteen (14) directors. Tri-County residents will elect just six of those directors, meaning that the Tri-Counties will lose its super-majority. The Tri-Counties will be in a minority position and unable to protect the operations, assets, revenues and reserves of an irrigation system built over eighty years. Nor will the Tri-Counties be in a position to protect the management of the water so crucial to farming in central Nebraska to ensure that it continues to be managed for the benefit of water users.

The dilution of Tri-County board membership and loss of majority control are clearly prejudicial to users of irrigation water service and the Board should therefore deny the Petition to Amend.

¹³⁰ Neb. Rev. Stat. § 70-612(1)(b).

¹³¹ Id.

CONCLUSION

For each of the reasons set forth herein, the Petition to Amend should be denied. Central's charter is legally deficient and the Petition to Amend and proposed amendments fail to address or cure the defects. The Board is without authority to grant a petition to create or amend a district which fails to conform to Nebraska law and the Petition to Amend should therefore be denied for that reason alone. Furthermore, because Central has failed to articulate any reason or benefit to Central sufficient to justify the costs and risks of the consolidation, especially the loss of exclusive control over Central's assets, operations, revenues and resources, the consolidation is simply not in the best interests of Central. The Petition to Amend should likewise be denied because the consolidation will jeopardize and impair the rights of Central's water service customers. Finally, the Petition to Amend should be denied because the proposed voting subdivisions and governorship changes will dilute the users of irrigation service of their voting power and relegate the surface water irrigation customers to a minority voice on the Consolidated District board. Protestants therefore respectfully request the Board to deny the Petition to Amend.

Respectfully submitted this 27th day of March, 2023.

CITIZENS OPPOSED TO THE MERGER, INC.,
a Nebraska Nonprofit Corporation, GREG HEIDEN,
LINDA HEIDEN, RICHARD WALLER and SUSAN
WALLER Protestants

By: 

Michael S. Degan #20372
Joshua S. Weiner, #25565
KUTAK ROCK LLP
The Omaha Building
1650 Farnam Street
Omaha, NE 68102-2186
(402) 346-6000
michael.degan@kutakrock.com
joshua.weiner@kutakrock.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of March, 2023, a true and correct copy of the above and foregoing was filed with the Nebraska Power Review Board and sent via electronic mail to the last-known address of the following:

David A. Jarecke
Blankenau Wilmoth Jarecke, LLP
dave@nebenergylaw.com

Kurth Brashear
Rembolt Ludtke LLP
kbrashear@remboltlawfirm.com

/s/ Michael S. Degan

Michael S. Degan