STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD

IN THE MATTER OF THE APPLICATION OF THE OMAHA PUBLIC POWER DISTRICT, HEADQUARTERED IN OMAHA, NEBRASKA, REQUESTING AUTHORITY TO CONSTRUCT A 450 MEGAWATT NATURAL GAS GENERATION FACILITY IN SARPY COUNTY, NEBRASKA, AND A 150 MEGAWATT NATURAL GAS GENERATION FACILITY IN DOUGLAS COUNTY, NEBRASKA.	)	**PRB-3931-G** **PRB-3932-G** **(consolidated)** **ORDER ON SIERRA CLUB'S PETITION FOR INTERVENTION**

References in this Order 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." For purposes of this Order, all references to the transcript are to Volume I. Some exhibits are marked with more than one page number. The applicable page numbers added by the court reporter for purposes of this proceeding appear in the lower right corner on each page of the exhibits.

On September 16, 2020, the Omaha Public Power District, headquartered in Omaha, Nebraska ("OPPD"), filed an application with the Nebraska Power Review Board ("the Board") requesting authority to construct a 450 megawatt (MW) natural gas simple-cycle combustion turbine generation facility and related facilities. (Exh. 1) The application was designated "PRB-3931-G". Also on September 16, 2020, OPPD filed an application with the Board requesting authority to construct a 150 MW natural gas reciprocating engine natural gas generation facility and related facilities to be located in

Douglas County, Nebraska. (Exh. 3) That application was designated "PRB-3932-G." OPPD considers both applications to be an "integrated portfolio" to address its generation needs. (Exh. 1, page 3; Exh. 3, page 3). The related facilities in both applications include a substation and dedicated interconnection transmission facilities. (Exh. 1, page 3; Exh. 3, page 3). Following issuance of the required notices, the hearing officer consolidated both applications for purposes of procedural matters and hearings.

On October 13, 2020, the Sierra Club filed a Petition For Intervention with the Board in opposition to the approval of applications PRB-3931-G and PRB-3932-G. (Exh. 11). On October 16, 2020, OPPD filed a Brief in Opposition to the Sierra Club's Petition for Intervention. In its brief, OPPD states four grounds upon which it argues the Sierra Club's Petition for Intervention should be denied. OPPD alleged: (1) Sierra Club is not a power supplier; (2) Neither Sierra Club, nor any member, established requisite standing to intervene; (3) Neither Sierra Club, nor any member, has established a "sufficient nexus" to intervene; and (4) Sierra Club's intervention would impair the prompt conduct of the proceedings. (OPPD Brief in Opposition to Intervention, page 2).

On October 19, 2020, the Board convened a hearing to address the issue of whether the Sierra Club has standing to intervene in the proceeding, and whether the Sierra Club's Petition for Intervention should be granted. 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 members

reserve the right to rule on matters such as motions to dismiss or standing. The Board is therefore issuing this ruling instead of the hearing officer.

INTERVENTION BY NON-POWER SUPPLIERS

OPPD's first challenge to the Sierra Club's intervention is that the Board's controlling statutes provide standing to become a party in a proceeding to determine whether to approve or deny an application for construction or acquisition of a generation facility only to consumer-owned or "public power" electric power suppliers. (OPPD Brief Opposing Intervention, pages 2 and 4; T68:7 to 69:24).

The Board notes that it has on previous occasions addressed the issue of whether an entity or person other than an electric power supplier has standing to participate in a hearing before the Board that will address the issue of approval of an electric generation or transmission facility. On those previous occasions the Board ruled that persons or entities that can show they are directly affected by the application, such as those owning an interest in land upon which a generation or transmission line will or could be located, or in the project area such as a corridor identified by an applicant as the area within which a transmission line will be located, generally have standing to participate in the Board's proceedings to consider whether or not to approve the proposed facility. See *In re Application of Nebraska Public Power Dist.*, 281 Neb. 350 (Neb. 2011).

The Board acknowledges that a reading of the statutes pertaining to the Board seem to anticipate that participants in hearings before the Board will be electric power suppliers. However, the Board has previously determined that nothing in the statutes or the Board's rules of practice and procedure preclude participation by a person or entity

that is not a power supplier, so long as the party wishing to participate files the appropriate pleadings and can show a sufficient nexus to the subject matter to create standing for that party. Once intervention is granted, a party must present evidence that is related to the Board's approval criteria set out in Neb. Rev. Stat. § 70-1014(1) when dealing with an application for a generation or transmission facility. OPPD asserts that because the statute does not explicitly provide for non-public power entities to intervene in such proceedings, intervention by entities such as a national environmental organization is not allowed. OPPD argues that the Board has only that authority which is granted by the Legislature. Thus, without statutory language specifically authorizing other parties to participate in Board proceedings under § 70-1014, the Board lacks the authority to allow parties other than electric power suppliers to intervene in generation applications. (OPPD Brief Opposing Intervention, page 4).

The Sierra Club pointed out during oral arguments that the controlling statutes pertain to an application and participation by power suppliers in the resulting proceeding. The Board's statutes in chapter 70, article 10, particularly § 70-1013, do not specifically address interventions, and do not preclude non-utilities from requesting intervention. (T28:22 to 30:20). The applicable statutory provisions pertaining to intervention is in the Administrative Procedure Act, specifically § 84-912.02.

Since at least 2002 the Board has allowed parties other than electric power suppliers to intervene in hearings pertaining to generation and transmission line applications if they could demonstrate that they meet the requirements for standing. In PRB-3355, involving an application for a generation facility filed by OPPD, the Nemaha

County Development Alliance (NCDA) was allowed to intervene. (Exh. 11, pages 22-26). The NCDA was a private entity and not an electric power supplier. At that time the hearing officer for Board proceedings was authorized to rule on pre-hearing issues and granted the NCDA's intervention. The hearing officer stated that he was unwilling to find that the public or an association is precluded from participation in Board proceedings simply because they are not a power supplier. It is worth noting that in the PRB-3355 proceeding, it appears it was a case of first impression for the hearing officer and Board in addressing whether an entity other than a power supplier could file a petition for intervention in a Board proceeding addressing approval of a generation facility. (Exh. Exh. 11, page 23).

Although the Board's statutes do not explicitly state that persons or entities other than electric power suppliers can intervene in Board proceedings, neither do they limit participation to power suppliers. Neb. Rev. Stat. 70-1013 requires the Board to provide ten days' notice by mail to those power suppliers the Board deems affected by an application. The statute goes on to state that "Any parties interested may appear, file objections, and offer evidence." OPPD apparently reads this phrase restrictively as referring only to any interested power suppliers. But the Legislature chose not to state "any interested power suppliers." Without such limiting language, the Board declines to read the language narrowly to restrict the ability of other parties directly affected by an application from having the ability to file a Petition for Intervention in a proceeding to determine whether to approve a generation or transmission application.

The Board points out that since the ruling in 2002, and other subsequent similar instances allowing non-power supplier interventions, the Legislature has taken no action to limit the Board's ability to allow parties other than electric power suppliers to intervene in its proceedings. The Legislature, or at least some of its members, was aware of the Board's determination on this topic. See Op. Att'y Gen. No. I-13004 (Neb. 2013); (Exh. 12). "Generally, where a statute has been construed and that construction has not evoked an amendment, it will be presumed the Legislature has acquiesced in the court's determination of its intent." *Mayfield v. Allied Mut. Ins. Co.*, 231 Neb. 308, 313 (1989). Although the Board fully acknowledges the difference between a court decision and administrative tribunals, the Board also points out that it is the state agency responsible for carrying out the provisions in article 10, chapter 70. It would seem if the Legislature believed the Board's interpretation was incorrect, it certainly could have acted to correct the misreading.

The Board also points out that Nebraska courts have been aware that the Board has allowed intervention by entities other than electric power suppliers. In *In re Application of Neb. Pub. Power Dist.*, 281 Neb. 350 (2011), the Nebraska Supreme Court reviewed an appeal of a Power Review Board decision involving a transmission line application approved under Neb. Rev. Stat. § 70-1014. In that proceeding, the Court set out in its statement of facts that "Several people who described themselves as residents and owners of farms and ranches located in close proximity to the proposed transmission line filed a protest and petition for intervention. The petition for intervention was granted." *Id.* at 351. The Court did not question the right of the intervenors, as non-power suppliers, to

intervene in the proceeding, even though the application involved the same approval statute as the present proceeding. Admittedly, the Court in that decision was not specifically addressing the issue of the intervenors' standing, but the Board believes it is noteworthy that the Court did not question the right of the intervenors to participate. "Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding." *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 948 (1996) (emphasis added). See also *Griffith v. Nebraska Dept. of Correctional Services*, 304 Neb. 287, 291 (2019). If the Board's interpretation of the statutes in chapter 70, article 10 were as clearly incorrect as it appears OPPD believes, the Nebraska Supreme Court could have corrected the issue on previous appeals where parties other than electric power suppliers intervened in Board proceedings to address the approval or denial of an application for generation or transmission facilities.

After again examining the issue, the Board finds no reason to depart from its precedents and reaffirms its prior decisions that a person or entity other than an electric power supplier is allowed to file a Petition for Intervention in a proceeding addressing whether to approve an application for a generation or transmission facility under Neb. Rev. Stat. §§ 70-1012 and 70-1014.

SIERRA CLUB STANDING

The Sierra Club asserts that it has the right to intervene under the provisions of Neb. Rev. Stat. § 84-912.02. It asserts that it advocates for policies that keep electricity costs down for consumers, including Sierra Club members. (Exh. 11, page 2). It also

"advocates for robust renewable energy and energy efficiency investments that produce safe and sustainable jobs, while reducing electric system costs for both utilities and ratepayers by reducing reliance on increasingly non-competitive fossil-fired power plants." (Exh. 11, page 3). To those ends, the Sierra Club has intervened in or provided testimony in proceedings in Nebraska and numerous other states. (Exh. 11, page 3). It argues that it has members that live in OPPD's service area, two of which live in close proximity to the proposed facility in Douglas County near the intersection of 120th Street and Military Road. (Exh. 11, pages 4, 16 and 19). The Sierra Club believes that its members, particularly those that are OPPD ratepayers, have an interest in whether the facilities are constructed, and the Sierra Club is uniquely positioned to represent the interests of its members. (Sierra Club Brief in Support of Intervention, pages 2-3).

In its second and third challenges to the Sierra Club's intervention in this proceeding, OPPD argues that neither the Sierra Club, nor any of its members, established the requisite standing to intervene, and, likewise, that neither Sierra Club, nor any of its members, have established a "sufficient nexus" to allow intervention.

Although the Board allows a person or entity to file a Petition for Intervention in a proceeding to determine whether to approve or deny an application filed under § 70-1014, 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. I-13004 (Neb. 2013); (Exh.12). 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).

In 2013, two state senators asked the Nebraska Attorney General's office for an opinion pertaining to the requirements for standing in proceedings before the Nebraska Power Review Board. Op. Att'y Gen. No. I-13004 (Neb. 2013); (Exh. 12). One question the senators asked was "[M]ust a person or entity show a particular interest such as land ownership in the vicinity of a proposed general [sic] or transmission line in order to have standing?" The Attorney General's office determined "[I]t appears to us that interested parties in such a proceeding would have to meet the requirements for common-law standing, i.e., they would have to show an injury in fact, and that injury would have to be special and apart from any general injury common to all members of the public." *Id.* at page 6. The opinion engaged in a thorough examination of what parties seeking to intervene in a Board proceeding would have to show in order to establish standing to participate in the proceedings as a party, whether they would need to show injury or potential injury specific to that party, and whether power supplier ratepayers could intervene based on an allegation of the facility's impact on rates. Both the Sierra Club and OPPD cite to the opinion in their briefs addressing the issue of standing. (OPPD Brief Opposing Intervention, Exhibit A; Sierra Club Brief in Support of Standing, Exhibit 2).

It is well-established that to have standing in a proceeding, a party must be able to demonstrate that the party will be directly harmed by the subject of the proceeding, that the interest is real and not merely speculative or conjectural, and that the interest cannot

be one common to all members of the public. "Before one is entitled to invoke a tribunal's jurisdiction, one must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, one must have some legal or equitable right, title or interest in the subject matter of the controversy. [citations omitted] The purpose of a standing inquiry is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted." *Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist.*, 250 Neb. 442, 447 (1996). "We have repeatedly held that in order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public." *Nebraskans Against Expanded Gambling, Inc. v. Nebraska Horsemen's Benevolent & Protective Ass'n.*, 258 Neb. 690, 693 (2000). In another case, the Nebraska Supreme Court stated:

> Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. . . . Specifically, a litigant first must clearly demonstrate that it has suffered an " ' "injury in fact." ' " That injury must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.

Central Nebraska Public Power and Irrigation Dist. v. North Platte Natural Resources Dist., 280 Neb. 533, 541-542 (2010).

In the present proceeding, the Sierra Club asserts that the "Nebraska Chapter of the Sierra Club, and its members who are Omaha Public Power District ("OPPD") ratepayers, are concerned the construction of the proposed facilities will increase OPPD ratepayers' electricity bills without corresponding benefit." (Exh. 11, page 3). The Sierra Club asserts that two of its "members live and own land in close proximity to the 120th and Military Site, Reciprocating Internal Combustion Engines proposed project." (Exh. 11, page 4). The Sierra Club states that the proposed facility in Douglas County would be "located in close proximity to residences, parks, and schools." (Exh. 11, page 4). "Sierra Club members who live and own property in close proximity to the 120th and Military Site are concerned the construction of these engines will adversely affect their health and the health of their families, as well as the value of their property." (Exh. 11, page 4). In its brief, the Sierra Club states that its legal interests include noise and air pollution, questions regarding the necessity of the facilities and whether they would lead to the unnecessary duplication of facilities, with concomitant rising rates. The Sierra Club asserts that it "has demonstrated that its members will be directly and substantially affected by OPPD's applications." (Sierra Club Brief in Support of Intervention, page 2.)

The Board finds that the Sierra Club has failed to demonstrate that the organization would be, or reasonably could be, directly affected by the approval of either of OPPD's proposed generation facilities. As the Sierra Club filed the Petition for Intervention, the Board must examine whether the Sierra Club itself would or could be directly harmed if the applications were approved. The Sierra Club is a national organization, incorporated under the laws of California, with a principal place of business

in Oakland, California. (Exh. 11, page 10; T23:6-19). Although it has a Nebraska Chapter, and Nebraska members, the Petition for Intervention was filed in the name of the national organization. (Exh. 11, page 2; T21:16 to 22:13; T101:23 to 102:8). As previously mentioned, the Sierra Club's Petition for Intervention states that it has years of experience working on energy and electric generation issues throughout the United States, including Nebraska, and it advocates for renewable energy resources that produce sustainable jobs while reducing reliance on increasingly non-competitive fossil-fired power plants . (Exh. 11, page 3). The Sierra Club also asserts that it and its members have an interest in whether OPPD is able to demonstrate that the construction of 600 megawatts of generation at a cost of $651,000,000 meets the criteria for approval set forth in Neb. Rev. Stat. § 70-1014. (Exh. 11, page 4). The fact that the Sierra Club may be actively involved in the area of electric generation resources, and generally opposes the construction of new fossil fuel facilities, does not convey jurisdiction. It shows that the organization is interested in the subject matter, but it does not demonstrate any direct or imminent harm to the organization if the generation facilities are approved. These are also issues which are common to the general public, or at least to all OPPD ratepayers, which in this case would be tantamount to the general public. The Sierra Club does not assert that the organization owns or rents the property where either of the proposed facilities would be located, that it owns property or facilities adjacent to or in the immediate vicinity of the locations, that its business operations would be directly impacted by the construction or operation of either of the facilities, or any other direct, identifiable, and imminent harm. Such assertions would be quite difficult given that the

organization's primary place of business is in California. The Sierra Club fails to identify any direct harm that would or could reasonably affect the organization. Therefore, the Board finds that the Sierra Club lacks standing to intervene in the proceedings.

ASSOCIATIONAL REPRESENTATION

The Sierra Club's claims appear to primarily rest upon the interests of its Nebraska Chapter and its members in OPPD's retail service area, especially two members that live in "close proximity" to the location where one of the proposed facilities would be located. In *Central Nebraska Public Power and Irrigation Dist. v. North Platte Natural Resources Dist.*, 280 Neb. 533 (2010), the Nebraska Supreme Court examined whether a public power and irrigation district had standing to request judicial review under the Administrative Procedure Act (APA) in order to challenge a natural resources district's decision appropriating ground water rights. Central Nebraska Public Power and Irrigation District (Central) owns and operates a system of reservoirs and canals used for irrigation and other purposes. Central also operates Lake McConaughy, a reservoir on the North Platte River, and owns and operates a hydroelectric facility that uses water from the lake to generate electricity. Central asked a district court to reverse the natural resources district's ground water allocation. The district court found that Central was not a "person aggrieved" under the APA. The court found that since Central, as a surface water appropriator, was located entirely outside the NRD's jurisdiction, Central was not directly affected by the NRD's ground water appropriation. The Supreme Court affirmed the district court's decision. In its decision, the Supreme Court pointed out that, in order to confer standing, Central was largely attempting to assert the rights of its constituents

that had water rights in the applicable area. The court stated "And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties." *Id.* at 542. The Court went on to state:

> The shortcoming in Central's petition is its failure to specifically allege how it has suffered an injury in fact. In this case, Central has alleged that it has water use interests (although its water uses primarily benefit others). And Central has alleged injuries that have occurred to its constituents in its jurisdiction from the use of ground water in the NRD's jurisdiction. But it has not connected the two. Specifically, Central has not alleged how its particular water use interests, to the extent it has any, have been injured by the NRD.

Id. at 543. Central had asserted that it had to reduce the amount of water it delivered to irrigators due to a reduced water supply. The court stated "But those uses of water are quintessentially the legal rights or interests of third parties." It went on to state that "Central's purported interests in water use are, for the most part, derivative of the interests of others. . . . And it is well established, as discussed above, that Central cannot challenge the NRD's use of water based upon the interests of its constituents" *Id.* at 543. Here, it appears we similarly have an organization that asserts it is acting to protect its members' rights. Even though the individuals the Sierra Club wishes to represent are members of the organization, as opposed to "constituents" purchasing a commodity from

an entity such as a public power and irrigation district, it remains that the organization itself fails to show how it would or could be harmed by the outcome of the proceedings. The rights of the organization's members are separate from the organization itself. The two members the Sierra Club asserts will be directly impacted by the proposed facility in Douglas County did not file a Petition for Intervention.

In an early case dealing with the general issue of associational representation, the Nebraska Supreme Court dismissed petitions for intervention in an action brought under the uniform declaratory judgments act. In *Smithberger v. Banning*, 130 Neb. 354 (1936), Nebraska Petroleum Marketers, Inc. filed a petition for intervention. The organization was a corporation comprised of dealers licensed to sell vehicle fuels. The organization intervened on behalf of its members and anyone else similarly situated. In dismissing the petitions for intervention, the court stated:

> It does not allege in this pleading that as a corporate entity it is a dealer in gasoline, oils, etc., and thus subject to the terms of the statute, the validity of which it questions. Its complaint is wholly based on the fact that it is made up of constituent members who are, in their respective 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.

In *Nebraska Seedsmen Ass'n v. Dept. of Agriculture and Inspection*, 162 Neb. 781 (1956), the Nebraska Supreme Court again dealt with an action brought under the Uniform Declaratory Judgments Act. In that case, the Nebraska Supreme Court, *sua sponte*, raised the issue of the plaintiff's standing. The Nebraska Seedsmen Association was an unincorporated association formed to promote and improve the growing and marketing of agricultural seeds and similar purposes. The Supreme Court pointed out that the caption of the petition was simply "Nebraska Seedsmen Association, Plaintiff." *Id.* at 783. In finding that the Association lacked standing, the Court quoted the same language cited above from the *Smithberger* decision. It then quoted from a New Jersey Supreme Court case, in which a banking association brought suit in its own name and on behalf of its member banks. The New Jersey Supreme Court noted that the New Jersey Declaratory Judgments Act expressly authorizes an unincorporated association to invoke its provisions, but "proceedings thereunder are necessarily restricted by the general rule of law requiring the prosecution of all actions to be in the name of the real party in interest -- a person 'whose rights, status or other legal relations are affected'* * *." *Id.* at 785.

In *Concerned Citizens of Kimball County, Inc. v. Department of Environmental Control*, 244 Neb. 152 (1993), an organization (Concerned Citizens) filed a petition for declaratory relief to challenge the Nebraska Department of Environmental Control's (NDEC) issuance of a permit to build a hazardous waste incinerator. Concerned Citizens

alleged that its members were residents and landowners of Kimball County whose property was in close proximity to the proposed incinerator. Concerned Citizens asserted that its members would suffer diminished property values and health hazards if the permit were issued and the incinerator built. The Supreme Court found that Concerned Citizens' pleadings included several defects. However, the Court stated that "When a demurrer to a petition is sustained, a court must grant a plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that repleading will correct the defective petition." *Id.* at 160. The Court found that the district court had erred by dismissing Concerned Citizens' petition with prejudice. Citing to the *Nebraska Seedsmen* case, the Court stated "[A]ny defect regarding Concerned Citizens' standing to sue on behalf of its members is curable." The Court also cited to the *Smithberger* case for the proposition that an association which itself has no standing must plead authority to appear on behalf of its members. The Court reversed the dismissal of Concerned Citizens' petition with prejudice and remanded. As with the other cases that were found on this general topic, the *Concerned Citizens* case was filed in a district court under the Uniform Declaratory Judgments Act. The present proceeding was initiated before an administrative tribunal under the Administrative Procedure Act. The Board is unaware of any requirement under the Administrative Procedure Act that an administrative agency must provide a person or organization filing a Petition for Intervention the opportunity to amend its Petition to correct defects.

A review of federal caselaw on the issue indicates that there appears to be a doctrine allowing for associational representation. In a case involving the same party as

in the present case, the U.S. Supreme Court stated "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). But the Court went on to say that a "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the [federal Administrative Procedure Act]." *Id.* In that case, the Sierra Club sought a declaratory judgment and injunctive relief to stop federal officials from developing an area in the Sequoia National Forest into a ski resort. The Court pointed out that the pleadings did not contain any allegation that the Sierra Club members used the property involved. The fact that the Sierra Club and its members had a "special interest" in the subject was insufficient to create standing. Since there was no individualized harm to either the organization or its members, the Court held the Sierra Club lacked standing to bring its lawsuit.

In order for an association or group to have standing based on its members, the U.S. Supreme Court set out the test as follows:

> [W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

It does not appear that the federal view on associational representation is controlling, though. The Board did not find any caselaw where the Nebraska Supreme Court adopted the federal view on the topic. 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 requirements for standing.

The Sierra Club alleges that two of its members live in "close proximity" to the proposed generation facility in Douglas County. In her declaration, Sierra Club member Sharon Clawson states that "I live approximately 5 miles from the Military Road Site, where OPPD has proposed to construct gas-fired reciprocating engines with a total capacity of 150 MW." (Exh. 11, page 16). It is unclear from the declaration if she owns property or leases her residence. In Sierra Club member Annette Bloomquist's declaration, she states that she owns a home and lives approximately two miles from the Military Road site. (Exh. 11, page 19). As with Ms. Clawson, this is the location for the proposed 150 megawatt facility in Douglas County. There is no declaration from any Sierra Club members in the vicinity of the proposed facility to be located in Sarpy County, application PRB-3931-G.

Both Ms. Clawson and Ms. Bloomquist live miles away from the location where the proposed generation facility would be located. The primary method, although certainly not the only one, parties have used to demonstrate standing when filing a Petition for Intervention in Board proceedings involving generation or transmission facilities has been that the moving party owns property that is or could be directly affected by the facility. An owner of property that is within the project area for a

proposed generation or transmission facility is obviously directly affected by the application. Likewise, a person or entity owning property adjacent to the proposed facility's project area would likely have standing, as there is a significant possibility that such property could be the subject of eminent domain in order to allow easements for interconnecting transmission facilities, access roads, utility services, etc. A business that can show its operations will be directly impacted would also generally have standing. The Board finds that a person living or owning property miles away from the project area, without demonstrating that the proposed facility will have some direct impact on the person or their property, has interests that are too attenuated to establish standing. The interests of someone living or owning property multiple miles away from a proposed generation facility face the same general injuries common to all members of the public, whether in this case that is all persons, or all OPPD customers. Even under the federal test for associational representation the Sierra Club would lack standing, as the members relied upon would not have standing to file a Petition for Intervention in their own right.

For purposes of determining standing, the Sierra Club urges the Board to focus not on whether the asserted claims of the Sierra Club on issues such as emissions and rate increases have merit, but rather on whether the Sierra Club or any of its members are the appropriate parties to raise the issues. In support of this proposition, the Sierra Club cites to *Griffith v. Nebraska Dept. of Correctional Services*, 304 Neb. 287 (2012). (T34:13 to 36:3). In that case, two plaintiffs alleged that the Department of Correctional Services failed to comply with statutory and constitutional requirements when adopting a regulation setting forth how death sentences are to be carried out. The Nebraska

Supreme Court found that because the plaintiffs were not facing death sentences, their legal rights were not impaired or threatened. The plaintiffs therefore lacked standing to bring the claim, and the Supreme Court affirmed the district court's dismissal of the lawsuit. As the Sierra Club pointed out in oral arguments, in the *Griffith* case the Court stated: "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. Indeed, in considering standing, the legal and factual validity of the claim presented must be assumed." *Id.* at 291. In the present proceeding, the Board is doing precisely what the Sierra Club urges. For purposes of the standing inquiry, the Board assumes the validity of the factual claims of both the Sierra Club and its members. Among the other factual claims, the Board assumes that Ms. Bloomquist and Ms. Clawson are Sierra Club members, that they live within two and five miles, respectively, of the proposed site where the Douglas County generation facility would be located, that they are OPPD customers, and that they are concerned about their electricity rates, air pollution and other environmental issues. Although many of the concerns raised by the Sierra Club and its two members that live in or near Omaha may be outside the Board's jurisdiction, that is not the reason the Sierra Club and its members lack standing. The defect for standing purposes is that the Sierra Club has demonstrated no injury in fact, and that, even taking their factual allegations as true, the two listed Sierra Club members have not shown they are directly harmed in a way different from either the general public or a large portion of OPPD's ratepayers. The Court in *Griffith* stated "We have also phrased the standing inquiry as whether the plaintiff demonstrated a 'direct injury' as a result of the action or

anticipated action of the defendant and emphasized that it is generally insufficient for a plaintiff to have "merely a general interest common to all members of the public." *Id.* at 292.

The Sierra Club points to the fact that in a proceeding before the Board in 2002, the hearing officer allowed an organization called the Nemaha County Development Alliance (NCDA) to intervene in the proceeding. The NCDA was a non-profit community and economic organization based in Auburn, Nebraska. The purpose of the group, along with a subsidiary group, was to "initiate actions necessary to keep Cooper Nuclear Power Station operational in the long term." (Exh. 13, page 1). The organization filed a Petition for Intervention in the organization's name, based on its own merits, as opposed to asserting the rights of its individual members. (Exh. 13, page 1). Based on the order granting intervention, the primary issue involved when addressing whether the intervention should be granted was whether any parties other than electric power suppliers are authorized to file a Petition for Intervention in a proceeding before the Board addressing the approval or denial of a proposed generation facility. The Board does not view the NCDA intervention as standing for the proposition that associations or other groups can intervene in Board proceedings to represent the interests of their members or other third parties. The order granting intervention does not state that as a finding, and in that instance the NCDA was the named party. 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. 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. Any further reliance on the NCDA decision for precedent in the present proceeding is somewhat difficult due to the limited record of the context of that decision. It is not clear to the Board exactly what direct harm the hearing officer found the NCDA might face if application PRB-3355 were approved. It appears the attention of the parties and the hearing officer were focused on the issue of whether entities other than power suppliers were permitted to file a Petition for Intervention in Board proceedings under § 70-1014. After finding that such interventions were allowed, the examination turned to whether the hearing officer would exercise his discretion to allow the intervention under Neb. Rev. Stat. § 84-912.02(2), not an attempt to identify what harm the NCDA allegedly faced. It may be worth noting that the Nebraska Attorney General's decision I-13004 setting out the requirements for standing in Board proceedings for generation and transmission applications was issued in 2013, while the hearing officer's decision to grant the intervention of the NCDA was in 2002. Whether the Board believes the harm to the NCDA was sufficient to confer jurisdiction in PRB-3355 in the 2002 proceeding is a moot point at this juncture. The Board must examine the issue of the Sierra Club's standing on its own merits based on the record before it.

The Board points out that in some cases where a party seeks to invoke a court's jurisdiction, if judicial review is denied there may be no examination of the issue at all. Here, that is not the case. The Board has an independent duty to examine whether OPPD can present sufficient evidence to demonstrate that the two proposed facilities will meet the approval criteria in Neb. Rev. Stat. § 70-1014. This is true whether or not the Sierra Club is allowed to intervene. The Sierra Club's counsel correctly acknowledged this fact during oral arguments. (T51:20 to 53:4). The Board does not deny that there may be instances where a party affected by a proposed facility could bring additional information or viewpoints forward that would assist the Board in its decision. But in the present proceeding, the Board will conduct an evidentiary hearing on OPPD's applications and investigate whether sufficient evidence exists to support approval of the applications. To the extent that the Sierra Club's Petition for Intervention could be viewed as asserting that its intervention is necessary to represent the public interest, the Board denies that as a basis for intervention. The Board's controlling statutes do not confer standing on any third parties to represent the public interest. In fact, protection of the public interest is the Board's role. In the *Metropolitan Utilities District* case, *supra*, the Nebraska Supreme Court rejected the contention of the NRD that it should have standing to represent the public interest. The court pointed out that the director of the Department of Water Resources had a statutory duty to consider certain factors in determining if an appropriation for induced ground water is in the public interest. Since there was no statutory provision authorizing it, the court found the NRD did not have the power to represent the public interest in litigation in which it does not have standing. *Id.* at 450.

In the present situation, the Board has an independent duty to represent the public interest in its examination of the approval criteria in § 70-1014. There is no need (or right) for any other party to participate in order to ensure the protection of the public interest.

INTERVENTION UNDER § 84-912.02

Since the Sierra Club is unable to demonstrate standing as a prerequisite to intervention, it appears that the Board would not be required to conduct an analysis of whether a person or entity should be granted intervention under Neb. Rev. Stat. § 84-912.02. The Sierra Club's counsel during oral arguments acknowledged that a party seeking intervention under § 84-912.02(1) would first need to be able to meet basic common law standing requirements. (T93:21 to 99:13).

However, as both parties addressed the issue of intervention under the statute, the Board will briefly address it. Because the Petition for Intervention was filed at least five days prior to the hearing, with the appropriate service upon other parties in the hearing officer's notice, the Board finds that the provisions in § 84-912.02(1) would apply. Based on the discussion above, the Board finds that the Sierra Club failed to state facts demonstrating that its legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceedings, as is required under § 84-912.02(1)(b). Electric power suppliers that the Board deems to be affected by the applications qualify as intervenors as of right under § 70-1013, but the Sierra Club is not a power supplier. Therefore the Sierra Club does not qualify as an intervenor as of right under any provision of law. As the Sierra Club does not qualify for intervention under § 84-912.02(1)(b), it is unnecessary to address whether its participation would impair the

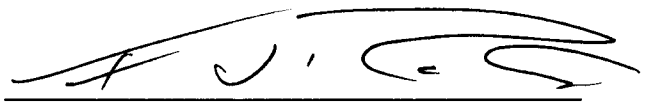
interests of justice and the orderly and prompt conduct of the proceedings under subsection (c).

IT IS THEREFORE ORDERED that the Petition For Intervention filed by the Sierra Club in applications PRB-3931-G and PRB-3932-G is DENIED.

Reida (Chair), Hutchison (Vice Chair), Moen and Loutzenhiser, participating.

Board member Grennan not participating.

Dated this 9th day of November, 2020.



Frank Reida
Board 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 on Sierra Club's Petition for Intervention** in PRB-3931-G and PRB-3932-G (consolidated) has been served upon the following parties by mailing a copy of the same to the following persons at the addresses listed below, via certified United States mail, on this 9th day of November, 2020.

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