STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD

IN THE MATTER OF THE APPLICATION OF THE CITY OF NELIGH, NEBRASKA, TO MODIFY THE EXISTING RETAIL SERVICE AREA AGREEMENT 400 BETWEEN NELIGH AND ELKHORN RURAL PUBLIC POWER DISTRICT.	))))))	SAA 400-16-A **ORDER**

On the 27th day of January, 2017, the above-captioned matter came on for final consideration before the Nebraska Power Review Board ("the Board"). The Board, being fully advised in the premises, and upon reviewing said application and the evidence presented to the Board, HEREBY FINDS AS FOLLOWS: (references to testimony are designated by a "T" followed by the volume, transcript page, then the lines upon which the testimony appears, while references to exhibits are designated by "Exh." followed by the exhibit number and, where applicable, the page number.

FINDINGS OF FACT

1. That on July 13, 2016, the City of Neligh (Applicant) filed an application with the Nebraska Power Review Board (the Board) requesting to acquire the retail service area rights to territory that had been annexed by Applicant. The Applicant also requested that the Board determine the total economic impact of the service area transfer on the utility that held the service area rights to the annexed territory. (Exh. 1).

2. On July 14, 2015, the City of Neligh enacted Ordinances No. 578 and 579, which were then recorded on July 15. (Exh. 1, pages 5-8; Exhs. 5 and 6). Ordinance 578 annexed territory on the northwest edge of the City, while ordinance 579 annexed territory on the southeast edge of the City. (Exh. 1, pages 10-13; Exh. 5, page 4; Exh. 6, page 4). Neither Protestant nor Intervenor brought an action to challenge the validity of the annexations in court.

3. The Elkhorn Rural Public Power District (Protestant) holds the service area rights to provide electric service at retail to customers in the annexed territory. On July 15, 2016, the Board mailed, via certified U.S. mail, written notice of the application to Protestant. (Exh. 2). On August 4, 2016, Protestant filed a Protest opposing approval of the application and notifying the Board that Applicant and Protestant had not agreed on the total economic impact of the transfer on Protestant. (Exh. 3).

4. On August 15, 2016, the Battle Creek Farmers Cooperative filed a Petition for Intervention in the proceeding. (Exh. 4). Applicant opposed the intervention. On August 26, 2016, the Board conducted a hearing to address the issue of whether Intervenor had standing to intervene in the proceeding. (Vol. I). On September 23, 2016, the Board issued an order granting the intervention.

5. On October 28, 2016, the Board conducted a hearing to accept oral arguments on the issue of what the Board's controlling standard of review is in situations where a municipal electric utility annexes territory and files a timely application with the Board to transfer the annexed territory into its retail service area. (Vol. II). In an order

issued November 2, 2016, the Board determined that Neb. Rev. Stat. § 70-1008 establishes the standard of review the Board must apply in such situations.

6. The dispute in this proceeding involves two separate areas that were annexed by separate ordinances. The area annexed by Ordinance No. 578 will be referred to as the "north annexation", while the area annexed by Ordinance No. 579 will be referred to as the "south annexation".

7. Due to the Board's decision regarding the controlling statutory standard of review, the only issue remaining for the hearing on the merits on January 27, 2017, was the total economic impact of the proposed transfer on Protestant, and the level of compensation Applicant would be required to pay to Protestant in order to acquire the customers, facilities, and service area rights to the annexed territories and the nonbetterment cost to construct any facilities necessary to reintegrate Protestant's system outside the area being transferred after detaching the annexed territories. See Neb. Rev. Stat. § 70-1010(2).

8. Applicant, Protestant and Intervenor stipulated that Applicant owes Protestant $490,445.90 for the loss of the service area, customers, and facilities inside the south annexation. (Vol.III, 61:9 to 64:1; Exh. 16). Applicant and Protestant agreed on a significant portion of the compensation for the loss of the service area, customers, and facilities in the north and south annexations. (Exh. 7). Exhibit 7, page 12 provides details on the computation of the $490,445.90, but the $262,138.38 figure is incorrect and needs to be updated to $265,073.33, which changes the total to $490,445.90. (Vol. III,

60:13 to 61:13; 62:19 to 63:3). Two issues remain over which Applicant and Protestant disagree: 1) whether Applicant must compensate Protestant for two customers located in the north annexation that are currently and for some time have been served by Applicant, and 2) whether Applicant must pay a portion of the costs to relocate a substation owned by Protestant located outside the south annexation.

9. Protestant's position is that Applicant should pay $4,296.48 for the loss of revenue for the Baker residence located in the north annexation, $48,750.00 for the loss of revenue for the Bomgaars commercial customer in the north annexation, and $337,567.00 for the costs to reintegrate Protestant's substation 71-18 by relocating it so it can be fully utilized. (Exh. 16). Substation 71-18 is not located inside south annexation, but a portion of the substation is currently dedicated to providing service to customers inside the south annexation. (Vol. III, 80:7-12; 172:12-16; Exh. 7, page 10).

North Annexation

10. There are only two customers located in the north annexation: the Baker residence and the Bomgaars commercial property. (Vol. III, 64:21 to 65:1; Exh. 7, page 14; Exh. 13; Exh. 16). Both customers are currently served by Applicant. (Vol. III, 65:3-25; 179:11-15). The Baker property was at one time a dairy operation, but it is not clear if it is currently an active dairy or only a residence. (Vol. III, 182:9-15).

11. Applicant has been providing electric service to the Baker and Bomgaars customers, or their predecessor entities at the same location, and receiving revenue from them for a considerable period of time. These are the two customers in the north

annexation over which the parties dispute whether Applicant owes Protestant compensation for the loss of the customers. Applicant is uncertain exactly when it established service to the customers in the north annexation, but the evidence indicates Applicant has been serving them and collecting revenue from the sale of electricity since at least 1980, but it is possible the services were established prior to 1980. (Vol. III, 91:11 to 94:1; Exh. 9). Service to the Baker residence and dairy may have been established in 1971. (Vol. III, 197:22-25). Protestant was aware that Applicant was providing electric service to the two loads in the north annexation. (Vol. III, 179:16-22).

12. It is not disputed that the territory annexed in the north annexation where the Baker and Bomgaars customers are located is currently part of Protestant's certified service area, and Protestant has the right to provide electric service to all new customers in that area unless it waives such rights to another utility such as Applicant. (Vol. III, 183:16-20).

13. There is no evidence that Applicant and Protestant had any agreement to allow Applicant to serve the two customers outside Applicant's service area in what is now the north annexation. (Vol. III, 65:22 to 66:17; 177:22 to 178:2). Although Applicant had been serving customers in Protestant's service area in what is now the north annexation, Protestant had never filed a complaint or taken other formal action requesting the Board to enforce Protestant's service area rights and require Applicant to relinquish the customers to Protestant. (Vol. III, 191:15 to 194:10; Exh. 9, paragraph 6). The Board notes that the reference in Exhibit 9, paragraph 3, to the "Public Service

Commission" was a misstatement and should instead refer to the Nebraska Power Review Board. (Vol. III, 69:7-13).

South Annexation (Relocation of Substation 71-18)

14. Applicant and Protestant stipulated that the compensation Applicant would pay to Protestant for the loss of net revenue for customers in the south annexation is $265,073.33. (Vol III, 49:12 to 50:5; Exh. 7, page 5).

15. Applicant and Protestant further stipulated that the compensation owed by Applicant to Protestant for Protestant's facilities located in the south annexation was $149,079.57. (Vol. III, 55:23 to 56:7; Exh. 7, page 8).

16. The electric service to one customer with a residence, feedlot and irrigation pivot (Hemenway) located outside the south annexation would be affected by the transfer of the south annexation from Protestant to Applicant. Due to the way the customer is connected to Protestant's system, Applicant and Protestant have agreed it would be necessary to remove the existing line and build a new line to serve the customer due to the service area transfer. The parties stipulated that Applicant would pay Protestant $76,293.00 for the costs to reintegrate the facilities to provide service to the Hemenway customer as a result of the south annexation transfer. (Vol. III, 57:3 to 60:11; Exh. 7, pages 9-11). The Hemenway property is likely the only load that will remain on the circuit in substation 71-18 that currently serves the south annexation once the service area transfer is completed. (Vol. III, 172:12-19).

17. Protestant requests to be compensated for a portion of the costs to relocate substation 71-18 due to the loss of load served by the substation after the transfer of the south annexation. Protestant's position is that it is statutorily entitled to payment for a portion of the costs to relocate and reintegrate the substation that is necessitated by Applicant's annexation and resulting service area transfer. (Vol. III, 84:5-14; Protestant's post-hearing brief at 2-6). Protestant believes $337,567.00 in costs to relocate the substation are attributable to Applicant's annexation and transfer of the service area for the south annexation. (Protestant's brief at 4-7). Protestant acknowledges that a majority of the cost associated with relocating the substation could be viewed as betterment costs, so it is not seeking payment from Applicant for the entire $935,000 cost to relocate the substation. (Vol. III, 115:24 to 116:3). Applicant denies that Protestant is entitled to any compensation for relocating substation 71-18. (Vol. III, 217:17 to 218:6).

18. Substation 71-18 is located outside the south annexation, although it is near the southeast edge of the annexed territory. (Vol. III, 79:1 to 80:6 and 112:16 to 113:3; Exh. 7, page 10.)

19. Substation 71-18 is approximately 19 years old, which would mean it was constructed by Protestant during or close to 1998. (Vol. III, 116:17-20; 119:13-16). The substation could be expected to have a life cycle of approximately 50 years. (Vol. III, 152:17-23; Exh. 12, page 6). The substation serves approximately four megawatts of load. (Vol. III, 120:14-20). The substation has three circuits with which to serve that load. (Vol. III, 80:3-9, 119:17-20). One of the circuits is used primarily or entirely to

serve the load in the south annexation. (Vol. III, 80:10-12). Protestant believes approximately one megawatt of load is derived from customers in the south annexation and will be lost with the south annexation transfer. (Vol. III, 81:8 to 82:7, 119:25 to 120:20; 124:20 to 125:3; Exh. 12, page 1). Applicant's engineering witness estimated that the substation would lose approximately 26 percent of its load due to the loss of the south annexation, meaning that 74 percent of its current load would continue to be served by the substation after the transfer. (Vol. III, 96:11 to 97:1). Protestant's witness agreed that approximately one megawatt of load, which represents about 25 percent of the substation's capacity, is currently used to serve the loads in the south annexation. (Vol. III, 144:23 to 145:1). In its current location the substation would continue to function and serve loads, even after the loss of the loads in the south annexation, albeit not at its full capacity. (Vol. III, 116:21 to 117:1).

20. Protestant retained an engineering firm to conduct a study to determine where the new load center would be located for the substation after the loss of the loads in the south annexation area. The new load center would be approximately two and one-half miles to the northeast of the substation's current location. This location would allow the substation to serve the same amount of load for which it currently is responsible. (Vol. III, 112:7-14; 117:12-16; Exh. 12, page 1). The firm recommended the substation be relocated to the new position to better serve the remaining loads once the south annexation transfer is completed. To accomplish this move, two and one-half miles of new transmission line would need to be constructed, at a cost of $500,000. (Vol. III,

117:25 to 118:9; Exh. 11). The firm calculated that "96 [kilowatts] in loss savings over the remaining useful life of the existing substation (31 years) would come to $337,567." (Exh. 12, page 7). Although the relocated substation would not be designed with increased capacity, relocating the substation two and one-half miles to the northeast could potentially increase the capacity of the substation. (Vol. III, 145:16-19; 148:15-17).

21. Another option to avoid relocating substation 71-18 would be to reduce its capacity by removing the current transformers and replacing them with smaller transformers, and relocating the larger transformers to a different substation, assuming there are locations available to which the existing transformers could be moved. (Vol. III, 118:10-18). It is not clear that there are any such locations available.

22. Substation 71-18 when originally constructed 19 years ago had three circuits. (Vol. III, 119:14-24). The Battle Creek Farmers Cooperative (Intervenor) facility is located in the south annexation. (Vol. III, 46:18 to 48:17; Exh. 7, page 2). Intervenor's current facility was completed in 2014. The record is not entirely clear, but it appears there may have been some electric load at Intervenor's location prior to 2014, but it is uncertain how large the load may have been. The record indicates it was considerably smaller than the current load. (Vol. III, 100:12-16; 120:21 to 121:14). Intervenor's current facility is a large commercial customer of Protestant. Intervenor can store two million bushels of grain, with the ability to dry 7,000 bushels of grain per hour. (Vol. III, 100:19-23). In fact, Intervenor's electric load is so large Intervenor expressed

considerable concern over whether Applicant has the ability to provide it with sufficient power. (Vol. III, 101:22 to 102:1).

23. When Protestant placed the substation in its current location 19 years ago, Protestant did not perform a load center calculation or system analysis to determine the best location for the substation. (Vol. III, 132:14 to 133:5).

24. Protestant wishes to have the ability to serve new loads in the far northern and eastern portions of the area served by substation 71-18. Protestant cannot feasibly do that by upgrading the voltage of the distribution lines involved due to issues with capacity and the line losses that would be incurred. In order to be able to serve loads further north and east, Protestant needs to relocate the substation further north and east. (Vol. III, 118:22 to 119:13; 147:16 to 148:14). According to the engineering study prepared for Protestant, moving the substation two and one-half miles to the northeast is necessary in order to avoid line losses to serve current and additional customers in the far northern and eastern portions of the area served by substation 71-18. (Vol. III, 143:24 to 144:16; 145:8 to 146:2; Exh. 12, pages 3-5). Moving the substation to the proposed new location would reduce the line losses from the current 182 kilowatts to 86 kilowatts, reducing the line losses by 96 kilowatts. (Vol. III, 146:25 to 148:9; Exh. 12, pages 3-4). To arrive at the amount Applicant should have to pay Protestant to relocate substation 71-18, Protestant's engineer calculated the value of one kilowatt, then took the annual savings of the 96 kilowatts over the expected remaining useful life of the substation (31 years) and arrived at $337,567. (Vol. III, 149:4 to 154:19; Exh. 12, pages 4-6).

CONCLUSIONS OF LAW

25. Pursuant to Neb. Rev. Stat. §§ 70-1008 and 70-1010 the Board has jurisdiction to conduct a hearing and approve applications to transfer retail service territory that is the subject of an annexation. Pursuant to § 70-1010(2), if the parties involved in a proposed service area transfer based on an annexation cannot agree on the value of the service area, facilities and customers in the annexed area, the Board has the jurisdiction to determine the total economic impact on the selling supplier and establish the price accordingly.

26. Since the annexations were not challenged in court proceedings, the Board will presume the annexations are valid.

North Annexation

27. Whether Applicant owes Protestant compensation for the loss of revenue for the two disputed customers in north annexation turns on whether the customers were "existing customers". Neb. Reb. Stat. § 70-1010(2)(c) requires that a municipal electric utility that annexes territory and wishes to acquire the service area rights to that territory must compensate the utility that would lose the territory and customers. If the parties cannot agree on the amount of compensation "then the board shall determine the total economic impact on the selling supplier and establish the price accordingly . . . ." The statute goes on to provide the Board with guidelines on how to determine the value, including that the municipal utility should pay "an amount equal to two and one-half times the annual revenue received from power sales to existing customers of electric

power within the area being transferred . . . ." The statute also provides a formula for greater compensation for commercial or industrial customers with peak demands of three hundred kilowatts or greater based on the twelve months preceding the filing with the Board. Applicant asserts that although the customers existed, § 70-1010(2) refers to existing customers served by the selling utility that will be transferred as a result of an annexation. (Applicant's post-hearing brief at 8). Protestant asserts that it is owed compensation for the loss of the rights to the customers, as the statute does not identify whose existing customer it must be. (Protestant's post-hearing brief at 9). The Board agrees with Applicant's position.

28. The Nebraska Supreme Court has consistently held that statutory language will be given its plain and ordinary meaning. In such instances, no statutory interpretation is necessary, or even allowed. In a case involving the Board, the Court stated "In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct and unambiguous." *In re Application of City of Grand Island*, 247 Neb. 446, 449, 527 N.W.2d 864, 866-867 (1995) (citations omitted). In another case involving the Board, the Court similarly stated "In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning." *In re Application of City of Lincoln*, 243 Neb. 458, 464, 500 N.W.2d 183

(1993) (citations omitted). See also *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998), "When the words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning." *Id.* at 603, 578 N.W.2d at 426-427.

29. The plain language of Neb. Rev. Stat. § 70-1010(2) begins with the phrase "In the event of a proposed transfer of customers and facilities from one supplier to another . . . ." The statute goes on to say that the Board will determine the compensation level in the event the parties involved cannot come to an agreement as to "the value of the certified service area and distribution facilities and *customers being transferred*." (emphasis supplied). In § 70-1010(2)(c) it again refers to existing customers in providing a guideline that compensation should be in "an amount equal to two and one-half times the annual revenue received from power sales to existing customers of electric power within the area being transferred . . . ." The language in the statute is plain, direct, and unambiguous. The Board believes it is clear based on the plain meaning of the words and phrases involved that compensation for lost revenue for customers transferred as a result of service area lost as a result of an annexation is predicated on the actual transfer of a customer. Protestant is not currently receiving revenue from sales of electricity to the two customers in the north annexation. (Vol. III, 188:2-16). Without the loss of a customer that is a current, existing customer of the utility that will lose the annexed territory, there is no revenue being lost as contemplated in § 70-1010(2)(c). The Board believes the statutory language makes it clear the Legislature's purpose was to make the

utility losing the customer whole. Utilities make plans based on their customers' needs, and the Legislature wanted to provide compensation to the utility losing the customers and service area.

30. Protestant's position is that prior to the annexation it could have asserted its service area rights and required Applicant to transfer the customers in the north annexation to Protestant. (Vol. III, 191:15 to 194:10; Protestant's post-hearing brief at 8). In this instance, Protestant knew Applicant was serving the two customers in Protestant's retail service area and did not take any action to require Applicant to stop providing electric service to the customers in the north annexation area and transfer them to Protestant. (Vol. III, 179:16-22). However, whether Protestant was unaware of the services in its service area, should have known about them, or actually did know and did not take any action to serve them is not relevant to the point in question. The plain language of the statute establishes that the customers need to be current, existing customers served by the utility losing the service area and customers in order to be entitled to compensation for the loss of revenue from the customers.

31. The Board points out that prior to 1980, Neb. Rev. Stat. §70-1008 allowed a utility to serve new customers located within one-half mile of its distribution line located inside another utility's retail service area. The law was amended by the Legislature in 1979 to remove the language allowing an electric utility to serve additional customers along its distribution lines located inside another utility's service area in the absence of the consent of the utility in whose service area the line is located. As

Applicant correctly points out in its post-hearing brief, the Board has previously ruled that when a distribution line is located in another utility's service area, and it cannot be determined when service to a customer within one-half mile of that line was established, it is presumed that the service was established lawfully prior to the 1979 amendment. (*In the Matter of the Complaint of the Northeast Nebraska Public Power District v. Pierce Utilities, City of Pierce, Nebraska*, formal complaint C-45, Preliminary Conclusions of Law, April 14, 2011; Applicant's post-hearing brief at 9-10). The evidence in this proceeding demonstrates that the parties are unable to ascertain exactly when the two disputed services in the north annexation were established, only that Applicant had been serving the area involved since at least 1980. (Exh. 9). Therefore, the Board will presume that Applicant's service to the Baker residence and the Bomgaars store or its predecessor were established lawfully prior to the 1979 amendment, and Applicant's right to serve the customers were grandfathered. This conclusion refutes Protestant's assertion that it is entitled to compensation for losing two customers for which it had the right to provide electric service. Here, based on the Board's precedent, Applicant had the right to serve the two customers, and the customers are not actually being transferred in the usual sense, although the service area in which the customers are located is being transferred due to the annexation.

32. Protestant points to the creation of retail service area agreement 418 (S.A.A. 418) as providing guidance or precedent in the current proceeding. In that situation, 18 customers located inside Applicant's retail service area were being provided

electric service by Loup River Public Power District (Loup River PPD). As part of the creation of S.A.A. 418, Loup River PPD acquired the right to serve the 18 customers and paid Applicant $72,537.41, which was two and one-half times the annual revenue for the 18 customers. In the S.A.A. 418 situation, Loup River PPD and Applicant agreed upon the amount of compensation. Nothing in the record indicates the Board was called upon to calculate or order payment. (Vol. III, 198:12 to 202:3; Exh. 15). The S.A.A. 418 situation also did not involve an annexation. (Vol. III, 204:15-18). The Board does not believe the creation of S.A.A. 418 provides guidance or precedent for the situation between Applicant and Protestant in the present proceeding.

South Annexation

33. Neb. Reb. Stat. § 70-1010(2)(b) provides a guideline that a municipal utility acquiring service area as the result of an annexation must pay cash compensation in "an amount equal to the nonbetterment cost of constructing any facilities necessary to reintegrate the system of the supplier outside the area being transferred after detaching the portion to be sold . . . ."

34. Protestant asserts that the statutory language in § 70-1010(2)(b) entitles it to compensation for relocating substation 71-18. Applicant argues that any effect on the total economic impact is captured by the compensation Applicant will pay to Protestant for the loss of the customers and facilities located inside the south annexation that will be transferred to Applicant. (Vol. III, 16:11-19). The Board agrees with Applicant's position.

35. It is uncontested that Substation 71-18 is not located within the south annexation, and Protestant will retain ownership and operation of the substation. It has been in its current location for 19 years. Applicant and Protestant have already agreed on the compensation for the loss of the customers located within the south annexation. The costs to relocate substation 71-18 do not involve moving the substation outside of the south annexation that will become Applicant's service area. The normal situation involved in relocating facilities is that the applicant does not want the current utility's facilities to remain located inside its new service area, or that it is not feasible for the facilities to remain inside the acquiring utility's service area, and so must be relocated and reintegrated into the system of the utility losing the service area. In this case, Protestant is requesting to be compensated to relocate a substation already located outside the annexed territory to essentially optimize its use. The parties have already agreed on the compensation due to Protestant for the customers Applicant will acquire as a result of the south annexation and any facilities that will be acquired.

36. Substation 71-18 was constructed 19 years ago with three circuits. The substation was built prior to many of the largest loads in the south annexation, including the Battle Creek Farmers Cooperative, or at least the Cooperative's current facility. Protestant now asserts that Applicant should pay approximately one-third of the costs to relocate the substation two and one-half miles to the northeast, which would allow it to serve approximately the same load that it serves now. As previously stated, Protestant built the substation long before it served some of the larger loads in the south annexation.

Protestant did not therefore build the substation counting on the same loads that Applicant will take over as a result of the south annexation. The Board does not believe the Applicant should bear a portion of the costs to relocate a substation that was not originally constructed to serve the loads that will be lost due to the annexation.

37. Substation 71-18 was and is located in the southwest portion of the area to which it provides service. (Exh. 12, page 2). As previously mentioned, it was located there prior to some of the loads, or at least prior to a major expansion of some of the loads, in the south annexation. The current location of the substation is not centered for its load. (Vol. III, 130:21-25). No system analysis or load center calculation was performed by Protestant prior to placing the substation in its current location. The evidence therefore supports a conclusion that the substation was not placed in the most central location to serve the area for which it provides service when it was initially constructed. It would be unfair to now, 19 years later, require Applicant to pay for a significant amount of the expense to relocate the substation to its best location. Admittedly, the south annexation will remove a portion of the substation's current load. However, the substation is still fully functional, and some of the loads in the south annexation were never part of Protestant's decision as to where the substation would be located, as they were not yet in existence when the substation was constructed. To now allow Protestant to relocate the substation 19 years later and require Applicant to pay a significant portion of the cost would be an improvement, making it a betterment. Compensation is not allowed in such instances under Neb. Rev. Stat. § 70-1010(2).

38. Protestant seeks to reduce the line losses incurred to transmit the electricity to more distant customers served by substation 71-18 in the northern and eastern portions of the area for which it provides service. (See paragraph 24 of this order). Relocating the substation to a more centralized location for the area it serves would substantially reduce the line losses in Protestant's distribution system in the area served by the substation (from 182 kilowatts to 86 kilowatts). (Vol. III, 147:4-9; Exh. 12, pages 3-4). It would also allow Protestant to serve additional loads in the northern and eastern portions of the area served by substation 71-18, and potentially new loads further north or east. While this is undoubtedly a sound business practice, it constitutes an upgrade in Protestant's distribution system. Substantial line losses exist today for Protestant when serving customers in the northern portion of the substation's coverage area, due to Protestant's placement of the substation, which is in the far southwest corner of the area it serves. (Vol. III, 146:25 to147:9; Exh. 12, pages 2-4). To reduce the line losses involved in the area served by the substation is a betterment of Protestant's distribution system. Protestant's witness admitted that relocating the substation involves some betterment to Protestant's distribution system, and tried to calculate the difference so that Applicant was not required to pay for the entire upgrade to Protestant's system. (Vol. III, 149:7 to 154:19). The Board appreciates that Protestant's engineer tried to allocate the costs for relocating the substation, but the Board believes that the costs to relocate the substation constitute an upgrade to Protestant's distribution system for which Applicant is not responsible under Nebraska law. Neb. Rev. Stat. § 70-1010(2)(b) specifies that a

municipal utility is only responsible for the "amount equal to the *nonbetterment cost* of constructing any facilities necessary to reintegrate the system of the supplier outside the area being transferred . . . ." (emphasis added). The Board finds that the compensation sought by Protestant constitutes betterment costs.

39. Although the substation when moved to the proposed new location is not intended for the purpose of increasing its capacity, relocating the substation two and one-half miles to the northeast could potentially increase the substation's capacity. This would be beneficial to Protestant, but it further indicates that the relocation would constitute a betterment, not merely a reintegration.

40. Based on the foregoing, the Board finds that the costs which Protestant wants Applicant to pay in order to relocate substation 71-18 constitute betterment costs. Relocating the substation is not necessary in order to reintegrate it into Protestant's distribution grid system. Applicant will compensate Protestant for the lost revenue of the customers in the south annexation in accordance with the statutory guideline. According to Neb. Rev. Stat. § 70-1010(2), Applicant should not be required to pay for a portion of the cost to relocate substation 71-18.

41. The Board notes that along with its post-hearing brief, Protestant attached Exhibit A. Exhibit A is an article from the *Neligh News and Leader* newspaper describing a power outage in the City of Neligh's service area. The Board does not allow exhibits to post-hearing briefs after the close of evidence. The hearing officer authorized no such attachments, and no motion to reopen the record was filed by Applicant to

receive such additional evidence. The Board therefore did not consider the exhibit when deliberating on this matter and the article played no role in the Board's decision.

ORDER

The City of Neligh has the right to acquire the retail service area rights, customers and facilities in the territory annexed by Ordinances 578 and 579.

The retail service area rights to the territory annexed by Ordinance 578 (north annexation) is hereby transferred from Elkhorn Rural Public Power District to the City of Neligh. The Baker and Bomgaars customers located in the annexed territory are already being lawfully served by the City of Neligh, and therefore no transfer of those two customers needs to take place. The City of Neligh is not required to provide any compensation to the Elkhorn Rural Public Power District for the loss of revenue for these two customers as a result of annexation 578, as the customers are not "existing customers" of Elkhorn Rural Public Power District under Nebraska law and the District has no revenues from sales of electricity to those customers.

The retail service area rights to the territory annexed by Ordinance 579 (south annexation) is hereby transferred from Elkhorn Rural Public Power District to the City of Neligh. The customers and distribution facilities in the territory annexed by Ordinance 579 shall be transferred from the Elkhorn Rural Public Power District to the City of Neligh upon payment of the sum of $490,445.90 by the City of Neligh to the Elkhorn Rural Public Power District. If the City of Neligh should fail to make payment within

one year after the date this order is issued, its right to acquire the existing customers and distribution facilities is waived.

Upon making full payment to the Elkhorn Rural Public Power District for the customers and distribution facilities in the area annexed by Ordinance 579, the City of Neligh shall provide written certification to the Board, with a copy provided to the Elkhorn Rural Public Power District, that payment has been accomplished. The Board's staff will then update the Board's certified service area records to reflect that Neligh has acquired the applicable customers and facilities.

The City of Neligh is not required to pay compensation to the Elkhorn Rural Public Power District to relocate substation 71-18 as a result of the annexation in Ordinance 579.

Reida (Chair), Haase (Vice Chair), Lichter and Morehouse.

BY: _____
Frank J. Reida
Board Chairman

DATED: March 24, 2017.

Grennan, concurring in part and dissenting in part.

On the issue of compensation for the two customers in the north annexation, I concur with the findings and decision of the majority. I respectfully disagree with the findings of the majority on the south annexation.

On the north annexation, I agree with the majority's findings and decision that the two customers in the annexed territory are not "existing customers" as that term is used in Neb. Rev. Stat. § 70-1010(2). Since the date when service to those customers is unknown, according to the Board's precedent it is assumed the services were lawfully established prior to the 1979 statutory amendment.

However, I would emphasize that pursuant to Neb. Rev. Stat. § 70-1008(3), adjoining retail electric power suppliers "shall engage in joint planning with respect to customers, facilities, and services, taking into account the considerations specified in section 70-1007, including the possibility that an area may be annexed by a municipality within a reasonable period of time." The statute uses the mandatory "shall" in directing adjoining utilities to engage in joint planning. Despite this requirement, it appears the parties in this proceeding failed to engage in joint planning until the Applicant annexed the territories involved. To wait until an annexation is imminent or actually occurs largely defeats the purpose of joint planning. A municipality has a heightened duty to initiate joint planning, since the municipality has knowledge about its growth, changes in facilities and potential annexation activity to which an adjoining public power district or cooperative would not be privy. However, if the municipality does not initiate joint

planning, it is incumbent on the public power district or cooperative to do so. If one party refuses to participate in the joint planning process, the remaining power supplier should notify the Power Review Board. Such joint planning would ideally occur on a periodic basis, with both parties agreeing to meet at regular intervals. Joint planning would help identify situations like the customers in the north annexation served by Applicant in Protestant's service area that can be addressed to avoid the need for formal proceedings. I would therefore admonish both parties in this proceeding for what appears to be a lack of effort to engage in joint planning.

Regarding the south annexation, I would find that the failure of the parties to engage in joint planning helped lead to the point in which the parties now find themselves. Joint planning conducted years ago, perhaps more than a decade ago, could help avoid situations such as the one in which the parties in this proceeding find themselves.

Protestant will lose most of the load for one of the three circuits in substation 71-18 due to the annexation and resulting service area transfer. I believe the calculations, including the remaining 31-year expected life cycle for the substation, are reasonable. Substation 71-18 will lose approximately 26 percent of the load it serves due solely to Applicant's annexation and resulting service area transfer. Although the substation is not located inside Protestant's service area, Applicant's annexation and service area transfer will have a significant and direct impact on the substation's usefulness. To relocate the substation two and on-half miles to the northeast so all three circuits can be utilized is

therefore, in my opinion, not a betterment, but rather makes Protestant whole again. Protestant is not requesting Applicant pay for all expenses related to relocating the substation, but only for the portion attributable to the circuit that will become largely unused as a result of Applicant's annexation. I therefore believe Protestant's request is reasonable and authorized under § 70-1010(2).

For the reasons stated above, I would award Elkhorn Rural Public Power District the $337,567 it requests with which to relocate and reintegrate substation 71-18 into the District's distribution system.

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** has been served on the following persons at the addresses indicated via certified U.S. mail to the following parties on the 27th day of March, 2017.

David C. Levy, Esq.
Krista M. Eckhoff, Esq.
Baird Holm, LLP
1700 Farnam Street, Suite 1500
Omaha, NE 68102-2068

David A. Jarecke, Esq.
Ellen C. Kreifels, Esq.
Blankenau Wilmoth Jarecke, LLP
1023 Lincoln Mall, Suite 201
Lincoln, NE 68508-2817

Timothy J. Texel