

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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NEBRASKA PUBLIC POWER DISTRICT)
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Docket No. 50-296

In the Matter of)
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OMAHA PUBLIC POWER DISTRICT)
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Docket No. 50-285

REQUEST FOR EXEMPTION

Introduction

Pursuant to 10 C.F.R. § 50.12(a)(2)(v), Nebraska Public Power District ("NPPD") and Omaha Public Power District ("OPPD") (collectively "the Districts"), each of which is a political subdivision of the State of Nebraska, hereby apply for a schedular exemption from the requirements of 10 C.F.R. § 50.54(w)(1), as amended by 52 Fed. Reg. 28963 (1987). The new requirements become effective on October 5, 1987, and the Districts will not be able to comply with them by that date or within 60 days thereafter.

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Background

The State of Nebraska is unique in that its entire supply of electricity comes from publicly-owned entities. Together with Lincoln Electric System, the Districts provide virtually the entire generating capacity for the State. NPPD owns and operates the Cooper nuclear generating station, with an accredited capacity of 778 megawatts.^{1/} During 1986, NPPD's share of Cooper represented 13.7% of NPPD's generating capacity. It has produced as much as 25% of NPPD's annual energy supply. OPPD owns and operates the Fort Calhoun nuclear generating station, with a net electrical capacity of 476 megawatts. During 1986, Fort Calhoun represented 24% of OPPD's generating capacity. Over the past 10 years, it has supplied about 44.4% of OPPD's total generation. Obviously, closing Cooper and Fort Calhoun would have a devastating effect on energy supply in Nebraska and on the economy of the entire State.

Each of the Districts currently maintains \$585 million of property insurance obtained through American Nuclear Insurers and the Mutual Atomic Energy Reinsurance Pool.

^{1/} By contract, 50% of the net power and energy of Cooper is made available to Iowa Power and Light Company.

Neither District is a member of Nuclear Electric Insurance Limited ("NEIL").

Under the provisions of the Nebraska Constitution, as interpreted by the Nebraska Supreme Court, there is considerable doubt as to whether the Districts may lawfully purchase insurance from NEIL, which is the only insurance available to comply with the Commission's new regulations.

The Nebraska Constitution provides in Article XI, Section 1 that:

No city, county, town, precinct, municipality, or other sub-division of the state, shall ever become a subscriber to the capital stock, or owner of such stock, or any portion of interest therein of any railroad, or private corporation, or association.

In Nebraska League of Savings and Loan Associations v. Mathes, 201 Neb. 122, 266 N.W. 2d 720 (1978) and again in Nebraska League of Savings and Loan Associations v. Johnson, 215 Neb. 19, 337 N.W. 2d 114 (1983), the Nebraska Supreme Court held that Article XI, Section 1 prohibits Nebraska political subdivisions from depositing funds in a mutual savings bank because the depositor becomes a member with voting rights and the right to share in profits.

The Nebraska Constitution further provides, in Article XIII, Section 3, that:

The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private institution in this state. Qualifications for and the repayment of such loans shall be as prescribed by the Legislature.

The Nebraska Supreme Court has held that the prohibition applies to political subdivisions, as well as the State itself, and forbids the lending of credit to a private enterprise, even though the enterprise is intended to serve the public good. E.g., State ex rel. Beck v. City of York, 164 Neb. 223, 82 N.W. 2d 269.

Effective on March 29, 1985, NEIL amended its charter and bye-laws to permit NEIL to accept non-voting members and to provide that such members would not share in any distributions made by NEIL, but instead would receive premium adjustments. In addition, NEIL proposed to issue endorsements to its standard Decontamination Liability and Excess Property Insurance Policy that would give non-voting members the right to prevent any pledge or assignment of their Retrospective Premium Adjustment obligations. The changes in NEIL's charter and bye-laws, together with the proposed policy endorsements, were designed to satisfy the limitations of Nebraska law discussed above. Based upon NEIL's actions, the Districts

submitted applications to NEIL for decontamination and property insurance.

By letters from NEIL dated June 28, 1985, the Districts were advised that their applications for non-voting membership and decontamination and property insurance had been accepted by NEIL, but that NEIL would not issue policies to the Districts until they had secured a declaratory judgment from the Nebraska Supreme Court that non-voting membership in NEIL and the issuance of policies with appropriate endorsements would not violate the Nebraska Constitution.

On July 1, 1985, the Districts jointly commenced an action for a declaratory judgment in the District Court of Lancaster County, Nebraska.

On December 1, 1986, the District Court issued its decision. The District Court declined to grant a declaratory judgment, stating that there is no actual controversy involved. The District Court went on to say that if a declaratory judgment were proper the Court would hold that membership by the Districts in NEIL would violate the Nebraska Constitution.

The Districts appealed the ruling of the District Court. The case has been fully briefed before the Supreme Court, and oral argument has been waived.

Recent Developments

On August 5, 1987, the Commission's amended regulations were published in the Federal Register. The Districts called to the attention of the attorneys for NEIL the Commission's assertion, at 52 Fed. Reg. 28966-67, that the adoption of the amended regulations would preempt state prohibitions against purchasing nuclear property insurance. The Districts inquired whether NEIL would go ahead and issue policies based upon the Commission's findings and conclusions. They were advised that NEIL was unwilling to rely upon the Commission's determination and that NEIL would require either a favorable ruling by the Nebraska Supreme Court in the litigation before it or a declaratory judgment by a Federal court upholding the Commission's assertion of preemption.

The Districts also submitted the Commission's amendments to the Nebraska Supreme Court and requested expedited consideration of the pending appeal. The Supreme Court responded by remanding the case to the District Court to permit the District Court to reconsider its opinion in light of the Commission's action. On August 24, 1987, the Districts asked the Nebraska District Court for expedited reconsideration. On September 23, 1987, the District Court issued a further opinion that essentially restated the holdings in its December 1, 1986 opinion. The Districts plan promptly

to renew their appeal to the Nebraska Supreme Court and ask the Supreme Court to expedite its consideration of the case.

Assuming that the Nebraska Supreme Court ultimately refuses to grant a declaratory judgment that the Districts may, consistent with Nebraska law, purchase insurance from NEIL, the Districts plan to commence an action for a declaratory judgment in the United States District Court in Nebraska and ask the Federal court to declare that the Commission's new regulations preempt any provisions of the Nebraska Constitution that may prevent the Districts from purchasing insurance from NEIL. Obviously, the necessity to obtain one or more final court decisions before the Districts can purchase the necessary insurance means that they will not be able to comply with the Commission's amended regulations in a timely manner.

Basis for Exemptions

The Districts have asserted, and the Commission has found, 52 Fed. Reg. 28966, that they are unable to provide equivalent protection in lieu of purchasing the NEIL coverage. The Districts have repeatedly stated to this Commission, and to the Nebraska courts, that they desire to purchase insurance from NEIL as a matter of prudent business judgment and good utility practice. The Districts in no way seek to avoid compliance with the Commission's regulations. Rather, they

find themselves in the position of being unable to comply unless and until a satisfactory final ruling can be obtained from either a state or Federal court. The Districts therefore require a schedular exemption to give them time to obtain such a ruling.

Request for Relief

The Districts request that the Commission issue a schedular exemption from the requirements of amended § 50.54(w)(1) to continue until a satisfactory final order from a state or federal court has been obtained and NEIL has issued the necessary policies to the Districts. To comply with the 60-day "grace period" in the Commission's regulations, it is further requested that the exemption be issued by December 5, 1987.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

By

Harry H. Voigt
Partner

1333 New Hampshire Avenue, N.W.
Suite 1100
Washington, D.C. 20036
202/457-7500

Attorneys for Nebraska Public
Power District and Omaha Public
Power District

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