

LEGISLATURE OF NEBRASKA
ONE HUNDRED SECOND LEGISLATURE
FIRST SESSION
LEGISLATIVE BILL 208
Final Reading

Introduced by Langemeier, 23.

Read first time January 10, 2011

Committee: Natural Resources

A BILL

1 FOR AN ACT relating to the Nebraska Power Review Board; to amend
2 sections 70-1015 and 76-3001, Reissue Revised Statutes of
3 Nebraska, and sections 70-1001.01, 70-1013, and
4 70-1014.02, Revised Statutes Cumulative Supplement, 2010;
5 to provide waiver and injunctive relief powers to the
6 board as prescribed; to redefine terms; and to repeal the
7 original sections.
8 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 70-1001.01, Revised Statutes
2 Cumulative Supplement, 2010, is amended to read:

3 70-1001.01 For purposes of sections 70-1001 to 70-1027,
4 unless the context otherwise requires:

5 (1) Board means the Nebraska Power Review Board;

6 (2) Certified renewable export facility means a facility
7 approved under section 70-1014.02 that (a) will generate electricity
8 using solar, wind, biomass, or landfill gas, (b) will be constructed
9 and owned by an entity other than a municipality, a registered group
10 of municipalities, a public power district, a public power and
11 irrigation district, an electric cooperative, an electric membership
12 association, or any other governmental entity, and (c) has a power
13 purchase or similar agreement or agreements with an initial term of
14 ten years or more for the sale of at least ninety percent of the
15 output of the facility with a customer or customers located outside
16 the State of Nebraska and maintains such an agreement or agreements
17 for the life of the facility. Output sold pursuant to subdivision (2)
18 (a)(iv) of section 70-1014.02 shall not be included when calculating
19 such ninety percent. Certified renewable export facility includes all
20 generating equipment, easements, and interconnection equipment within
21 the facility and connecting the facility to the transmission grid;

22 (3) ~~Electric~~ Except as expressly provided in section
23 70-1014.02, electric suppliers or suppliers of electricity means any
24 legal entity supplying, producing, or distributing electricity within
25 the state for sale at wholesale or retail;

1 (4) Regional transmission organization means an entity
2 independent from those entities generating or marketing electricity
3 at wholesale or retail, which has operational control over the
4 electric transmission lines in a designated geographic area in order
5 to reduce constraints in the flow of electricity and ensure that all
6 power suppliers have open access to transmission lines for the
7 transmission of electricity;

8 (5) Representative organization means an organization
9 designated by the board and organized for the purpose of providing
10 joint planning and encouraging maximum cooperation and coordination
11 among electric suppliers. Such organization shall represent electric
12 suppliers owning a combined electric generation plant capacity of at
13 least ninety percent of the total electric generation plant capacity
14 constructed and in operation within the state;

15 (6) State means the State of Nebraska;

16 (7) Stranded asset means a generation or transmission
17 facility owned by an electric supplier as defined in subsection (1)
18 of section 70-1014.02 which cannot earn a favorable economic return
19 due to regulatory or legislative actions or changes in the market
20 and, at the time an application is filed with the board under such
21 section, either exists or has been approved by the board or the
22 governing body of an electric supplier as defined in such subsection;
23 and

24 (8) Unbundled retail rates means the separation of
25 utility bills into the individual price components for which an

1 electric supplier charges its retail customers, including, but not
2 limited to, the separate charges for the generation, transmission,
3 and distribution of electricity.

4 Sec. 2. Section 70-1013, Revised Statutes Cumulative
5 Supplement, 2010, is amended to read:

6 70-1013 Upon application being filed under section
7 70-1012, the board shall fix a time and place for hearing and shall
8 give ten days' notice by mail to such power suppliers as it deems to
9 be affected by the application. The hearing shall be held within
10 sixty days unless for good cause shown the applicant requests in
11 writing that such hearing not be scheduled until a later time, but in
12 any event such hearing shall be held not more than one hundred twenty
13 days ~~from~~after the filing of the application and the board shall
14 give its decision within sixty days after the conclusion of the
15 hearing. Any parties interested may appear, file objections, and
16 offer evidence. The board may grant the application without notice or
17 hearing, upon the filing of such waivers as it may require, if in its
18 judgment the finding required by section 70-1014 or subdivision (2)
19 (a) of section 70-1014.02 can be made without a hearing. Such hearing
20 shall be conducted as provided in section 70-1006. The board may
21 allow amendments to the application, in the interests of justice.

22 Sec. 3. Section 70-1014.02, Revised Statutes Cumulative
23 Supplement, 2010, is amended to read:

24 70-1014.02 (1) For purposes of this section: ~~, electric~~
25 (a) Electric supplier means a public power district, a

1 public power and irrigation district, an individual municipality, a
2 registered group of municipalities, an electric membership
3 association, or a cooperative; and -

4 (b) Electric supplier does not have the same meaning as
5 in section 70-1001.01.

6 (2)(a) The board shall conditionally approve an
7 application for a certified renewable export facility if it finds
8 that only the criteria described in subdivisions (a)(i) through (iv)
9 of this subsection are met: (i) The facility will provide reasonably
10 identifiable and quantifiable public benefits, including economic
11 development, to the residents of Nebraska or the local area where the
12 facility will be located; (ii) the facility meets the requirements of
13 subdivisions (2)(a) and (b) of section 70-1001.01; (iii) the facility
14 has a memorandum of understanding or other written evidence of mutual
15 intent to negotiate a power purchase agreement or agreements with a
16 purchaser or purchasers outside the State of Nebraska for at least
17 ninety percent of the output of the facility for ten years or more;
18 and (iv) the applicant offers electric suppliers serving loads
19 greater than fifty megawatts at the time the initial application is
20 filed an option to purchase in the aggregate an amount of power up to
21 ten percent of the output of any facility with greater than eighty
22 megawatts of nameplate capacity contingent upon the applicant and
23 electric suppliers negotiating in good faith a power purchase
24 agreement and any other necessary agreements. Such electric suppliers
25 shall be entitled to a minimum of their pro rata share based on the

1 load ratio share of Nebraska electric load served among those
2 electric suppliers eligible under this subdivision (iv). If an
3 electric supplier declines to contract for some or all of its pro
4 rata share, the remaining eligible electric suppliers may share the
5 balance on a pro rata basis. The ten percent may be above the total
6 generation amount proposed in the application for a certified
7 renewable export facility and shall require no separate approval by
8 the board. Any transmission studies, additions, or upgrades due to
9 participation by electric suppliers serving loads greater than fifty
10 megawatts shall be the responsibility of the participating electric
11 supplier. Upon receiving the initial application under this section,
12 the board shall notify electric suppliers identified in this
13 subdivision (iv) of a pending application with a nameplate capacity
14 greater than eighty megawatts. Such suppliers shall have forty-five
15 days following the date of the board's notice to notify the applicant
16 of an interest in exercising the option to purchase power, except
17 that such suppliers may withdraw their option to purchase power once
18 the costs of the transmission additions and upgrades are determined.
19 Electric suppliers withdrawing their option to purchase power are
20 responsible for their pro rata share of any costs resulting from
21 their participation in and withdrawal from the generation
22 interconnection and transmission delivery studies.

23 (b) Following the board's conditional approval of an
24 application under subdivision (a) of this subsection, the applicant
25 shall notify the board within eighteen months that it is prepared to

1 proceed to consideration of the criteria in subdivision (c) of this
2 subsection. The board may extend such eighteen-month deadline not
3 more than twelve additional months for good cause shown. If the
4 applicant fails to notify the board within such time that it is so
5 prepared, the conditional approval granted under this subdivision is
6 void.

7 (c) Upon finding that the criteria described in
8 subdivisions (c)(i) through (viii) of this subsection have also been
9 met by the applicant and after the board has fulfilled the
10 requirements of subsection (3) of section 37-807, the board shall
11 grant final approval of an application for a certified renewable
12 export facility:

13 (i) The facility will not have a materially detrimental
14 effect on the retail electric rates paid by any Nebraska ratepayers,
15 except that, notwithstanding subdivisions (c)(v) and (vi) of this
16 subsection, the determination of a materially detrimental effect on
17 rates shall not include regional transmission improvements dictated
18 by a regional transmission operator or transmission improvements
19 required due to participation by an eligible entity pursuant to
20 subdivision (2)(a)(iv) of this section;

21 (ii) The applicant has obtained the necessary generation
22 interconnection and transmission service approvals from and has
23 executed agreements for such generation interconnection and
24 transmission service with the appropriate regional transmission
25 organization, transmission owner, or transmission provider;

1 (iii) There has been no demonstration that the proposed
2 facility will result in a substantial risk of creating stranded
3 assets;

4 (iv) The applicant has certified that it has applied for
5 and is actively pursuing the required approvals from any other
6 federal, state, or local entities with jurisdiction or permitting
7 authority over the certified renewable export facility;

8 (v) The applicant and the electric supplier owning the
9 transmission facilities to which the certified renewable export
10 facility will be interconnected, along with any electric supplier
11 which owns transmission facilities of one hundred fifteen thousand
12 volts or more and is required to receive notice pursuant to section
13 70-1013, have entered into a joint transmission development agreement
14 on reasonable terms and conditions consistent with and subject to the
15 notice to construct or other directives of any regional transmission
16 organization with jurisdiction over the addition or upgrade to
17 transmission facilities or, for any electric supplier that is not a
18 member of a regional transmission organization with which the
19 facility will interconnect, covers the addition or upgrade to
20 transmission facilities required as a result of the certified
21 renewable export facility. Such joint transmission development
22 agreement shall include provisions addressing construction,
23 ownership, operation, and maintenance of such additions or upgrades
24 to transmission facilities. The electric supplier or suppliers shall
25 have the right to purchase and own transmission facilities as set

1 forth in the joint transmission development agreement;

2 (vi) The applicant agrees to reimburse any costs that are
3 not covered by a regional transmission organization tariff or that
4 are allocated through the tariff to the electric suppliers as a
5 result of the certified renewable export facility or not covered by
6 the tariff of a transmission owner or transmission provider that is
7 not a member of a regional transmission organization, costs incurred
8 by any electric supplier as a result of adding the certified
9 renewable export facility, including, but not limited to, renewable
10 integration costs, and costs which allow the interconnected electric
11 supplier to operate and maintain the transmission facilities under
12 reasonable terms and conditions agreed to by the parties within the
13 joint transmission development agreement;

14 (vii) The applicant shall submit a decommissioning plan.
15 The applicant or owner of the facility shall establish
16 decommissioning security by posting an instrument, a copy of which is
17 given to the board, no later than the tenth year following final
18 approval of the facility to ensure sufficient funding is available
19 for removal of the facility and reclamation at the end of the useful
20 life of such facility pursuant to the decommissioning plan. The owner
21 of the certified renewable export facility shall be solely
22 responsible for decommissioning. If the applicant or any subsequent
23 owner of the facility intends to transfer ownership of the facility,
24 the proposed new owner shall provide the board with adequate evidence
25 demonstrating that substitute decommissioning security has been

1 posted or given prior to transfer of ownership. The requirements of
2 this subdivision (vii) shall be waived if a local governmental entity
3 with authority to create requirements for decommissioning has enacted
4 decommissioning requirements for the applicable jurisdiction; and

5 (viii) The facility meets the requirements of
6 subdivisions (2)(a) through (c) of section 70-1001.01.

7 (3) If the applicant does not commence construction of
8 the certified renewable export facility within eighteen months after
9 receiving final approval from the board under subsection (2) of this
10 section, the approval is void. Upon written request filed by the
11 applicant, the board may, for good cause shown, extend the time
12 period during which an approval will remain valid. Good cause
13 includes, but is not limited to, national or regional economic
14 conditions, lack of transmission infrastructure, or an applicant's
15 inability to obtain authorization from other required governmental
16 regulatory authorities despite the applicant's exercise of a good-
17 faith effort to obtain such approvals.

18 (4) The applicant shall remit an application fee of five
19 thousand dollars with the application. The fee shall be remitted to
20 the State Treasurer for credit to the Nebraska Power Review Fund. The
21 board shall use the application fee to defray the board's reasonable
22 expenses associated with reviewing and acting upon the application,
23 including the costs of the hearing. If the board incurs expenses of
24 more than five thousand dollars associated with the application, the
25 board shall provide written notification to the applicant of the

1 additional sum needed or already expended, after which the applicant
2 shall promptly submit an additional sum sufficient to cover the
3 board's anticipated or incurred expenses or shall file an objection
4 with the board. If, after completion of the application process and
5 any subsequent legal action, including appeal of the board's
6 decision, the board's expenses associated with processing and acting
7 upon the application do not equal the amount submitted by the
8 applicant, the board shall return the unused funds to the applicant
9 if the amount is fifty dollars or more. The applicant shall reimburse
10 the board for any reasonable expenses the board incurs as a result of
11 an appeal of the board's decision or shall file an objection with the
12 board. The board shall rule on any objection brought pursuant to this
13 subsection within thirty days. The applicant may request a hearing on
14 its objection, in which case the board shall hold such hearing within
15 thirty days after the request and shall rule within forty-five days
16 after the hearing.

17 (5) No facility or part of a facility which is a
18 certified renewable export facility is subject to eminent domain by
19 an electric supplier or by any other entity if the purpose of the
20 eminent domain proceeding is to acquire the facility for electric
21 generation or transmission.

22 (6) Except as provided in subsection (5) of this section,
23 only an electric supplier may exercise its eminent domain authority
24 to acquire the land rights necessary for the construction of
25 transmission lines and related facilities to provide transmission

1 services for a certified renewable export facility. The exercise of
2 eminent domain to provide needed transmission lines and related
3 facilities for a certified renewable export facility is a public use.
4 Nothing in this section shall be construed to grant the power of
5 eminent domain to a private entity.

6 (7) If any transmission facilities serving a certified
7 renewable export facility are proposed to cross the service area of
8 any electric supplier which owns transmission facilities of one
9 hundred fifteen thousand volts or more and is required to receive
10 notice pursuant to section 70-1013, then such electric supplier may
11 elect to be a party to a joint transmission development agreement for
12 such transmission facilities.

13 (8) If a certified renewable export facility no longer
14 meets the requirements of subdivisions (2)(a) through (c) of section
15 70-1001.01, the owner of the facility shall notify the board. An
16 electric supplier or a governmental entity with regulatory
17 jurisdiction over the certified renewable export facility may apply
18 to the board or the board may file its own motion to have the
19 certification of a certified renewable export facility revoked upon a
20 showing by the applicant for decertification that the facility no
21 longer meets the requirements of such subdivisions. Upon the filing
22 of such application and making of a prima facie showing by the
23 applicant for decertification that the facility no longer meets the
24 requirements of such subdivisions, the board shall set the matter for
25 hearing. The hearing shall be held within forty-five days unless an

1 extension is necessary for good cause shown. The applicant for
2 decertification shall have the burden of proof. Within forty-five
3 days after the conclusion of the hearing, the board shall enter an
4 order to either reaffirm the facility's status as a certified
5 renewable export facility or to revoke the certification. During the
6 pendency of the application for decertification and before the
7 board's final order on decertification, the facility may continue to
8 operate if the electricity generated at the facility is sold to
9 customers outside the State of Nebraska, or to an electric supplier
10 pursuant to a power purchase agreement or similar agreement. The
11 board shall retain jurisdiction over the decertification action for
12 at least thirty days after entry of such an order. Within thirty days
13 after a final order revoking certification, the owner of the facility
14 may apply for recertification, with the time period for
15 recertification being no longer than one year unless the board
16 extends the time period for good cause shown. Such application for
17 recertification shall extend the board's jurisdiction over the
18 decertification action until the board completes its review of the
19 application for recertification and enters an order granting or
20 denying the application. If the applicant for recertification
21 demonstrates to the board that it is working diligently and in good
22 faith to restore its compliance with subdivisions (2)(a) through (c)
23 of section 70-1001.01, the board shall not terminate the application
24 for recertification. During the pendency of the application for
25 recertification and before the board's final order on

1 recertification, the facility may continue to operate if the
2 electricity generated at the facility is sold to customers outside
3 the state, or to an electric supplier pursuant to a power purchase
4 agreement or similar agreement. If the board retains jurisdiction
5 over the decertification action, the prohibition on eminent domain
6 set forth in subsection (5) of this section shall remain in full
7 force and effect. If the board enters an order decertifying a
8 certified renewable export facility and such order becomes final due
9 to a failure to timely seek recertification or judicial review, the
10 prohibition on eminent domain set forth in subsection (5) of this
11 section shall no longer apply. Nothing in this section shall prohibit
12 a decertified facility from being recertified in the same manner as a
13 new facility.

14 Sec. 4. Section 70-1015, Reissue Revised Statutes of
15 Nebraska, is amended to read:

16 70-1015 (1) If any supplier ~~shall commence~~ commences the
17 construction or ~~finalize~~ finalizes or ~~attempt~~ attempts to finalize
18 the acquisition of any generation facilities, any transmission lines,
19 or any related facilities, or any customers are served in violation
20 of the provisions of Chapter 70, article 10, such construction,
21 acquisition, or service of such customers shall be enjoined in an
22 action brought in the name of the State of Nebraska, until such
23 supplier has complied with the provisions of Chapter 70, article 10.

24 (2) If any person owning or operating a certified
25 renewable export facility violates any provision of Chapter 70,

1 article 10, or violates or disobeys any requirement imposed by the
2 board pursuant to the board's jurisdiction established in section
3 70-1014.02 or the board enters an order decertifying the facility and
4 the order becomes final, further operation of the facility may be
5 enjoined or otherwise limited or have conditions put upon it in an
6 action brought in the name of the State of Nebraska until such person
7 rectifies the violation or disobedience of the order or the facility
8 becomes recertified.

9 Sec. 5. Section 76-3001, Reissue Revised Statutes of
10 Nebraska, is amended to read:

11 76-3001 For purposes of sections 76-3001 to 76-3004:

12 (1) Decommissioning security means a security instrument
13 that is posted or given ~~prior to construction~~ by the wind developer
14 to ensure sufficient funding is available for removal of a wind
15 energy conversion system and reclamation at the end of the useful
16 life of such a system; and

17 (2) Wind agreement means a right, whether or not stated
18 in the form of a restriction, easement, covenant, or condition, in
19 any deed, wind easement, wind option, or lease or lease option
20 securing land for the study or production of wind-generated energy or
21 any other instrument executed by or on behalf of any owner of land or
22 air space for the purpose of allowing another party to study the
23 potential for, or to develop, a wind energy conversion system as
24 defined in section 66-909.02 on the land or in the air space.

25 Sec. 6. Original sections 70-1015 and 76-3001, Reissue

1 Revised Statutes of Nebraska, and sections 70-1001.01, 70-1013, and
2 70-1014.02, Revised Statutes Cumulative Supplement, 2010, are
3 repealed.