

LEGISLATURE OF NEBRASKA

ONE HUNDRED SECOND LEGISLATURE

FIRST SESSION

**LEGISLATIVE BILL 208**

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 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.