

LEGISLATIVE BILL 208

Approved by the Governor February 22, 2011

Introduced by Langemeier, 23.

FOR AN ACT relating to the Nebraska Power Review Board; to amend sections 70-1015 and 76-3001, Reissue Revised Statutes of Nebraska, and sections 70-1001.01, 70-1013, and 70-1014.02, Revised Statutes Cumulative Supplement, 2010; to provide waiver and injunctive relief powers to the board as prescribed; to redefine terms; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

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

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

(1) Board means the Nebraska Power Review Board;

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

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

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

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

(6) State means the State of Nebraska;

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

(8) Unbundled retail rates means the separation of utility bills into the individual price components for which an electric supplier charges its retail customers, including, but not limited to, the separate charges for the generation, transmission, and distribution of electricity.

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

70-1013 Upon application being filed under section 70-1012, the board shall fix a time and place for hearing and shall give ten days' notice by mail to such power suppliers as it deems to be affected by the application. The hearing shall be held within sixty days unless for good cause shown the applicant requests in writing that such hearing not be scheduled until a later time, but in any event such hearing shall be held not more than one hundred twenty days from after the filing of the application and the board shall

give its decision within sixty days after the conclusion of the hearing. Any parties interested may appear, file objections, and offer evidence. The board may grant the application without notice or hearing, upon the filing of such waivers as it may require, if in its judgment the finding required by section 70-1014 or subdivision (2)(a) of section 70-1014.02 can be made without a hearing. Such hearing shall be conducted as provided in section 70-1006. The board may allow amendments to the application, in the interests of justice.

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

70-1014.02 (1) For purposes of this section:- electric

(a) Electric supplier means a public power district, a public power and irrigation district, an individual municipality, a registered group of municipalities, an electric membership association, or a cooperative; and.

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

(2)(a) The board shall conditionally approve an application for a certified renewable export facility if it finds that only the criteria described in subdivisions (a)(i) through (iv) of this subsection are met: (i) The facility will provide reasonably identifiable and quantifiable public benefits, including economic development, to the residents of Nebraska or the local area where the facility will be located; (ii) the facility meets the requirements of subdivisions (2)(a) and (b) of section 70-1001.01; (iii) the facility has a memorandum of understanding or other written evidence of mutual intent to negotiate a power purchase agreement or agreements with a purchaser or purchasers outside the State of Nebraska for at least ninety percent of the output of the facility for ten years or more; and (iv) the applicant offers electric suppliers serving loads greater than fifty megawatts at the time the initial application is filed an option to purchase in the aggregate an amount of power up to ten percent of the output of any facility with greater than eighty megawatts of nameplate capacity contingent upon the applicant and electric suppliers negotiating in good faith a power purchase agreement and any other necessary agreements. Such electric suppliers shall be entitled to a minimum of their pro rata share based on the load ratio share of Nebraska electric load served among those electric suppliers eligible under this subdivision (iv). If an electric supplier declines to contract for some or all of its pro rata share, the remaining eligible electric suppliers may share the balance on a pro rata basis. The ten percent may be above the total generation amount proposed in the application for a certified renewable export facility and shall require no separate approval by the board. Any transmission studies, additions, or upgrades due to participation by electric suppliers serving loads greater than fifty megawatts shall be the responsibility of the participating electric supplier. Upon receiving the initial application under this section, the board shall notify electric suppliers identified in this subdivision (iv) of a pending application with a nameplate capacity greater than eighty megawatts. Such suppliers shall have forty-five days following the date of the board's notice to notify the applicant of an interest in exercising the option to purchase power, except that such suppliers may withdraw their option to purchase power once the costs of the transmission additions and upgrades are determined. Electric suppliers withdrawing their option to purchase power are responsible for their pro rata share of any costs resulting from their participation in and withdrawal from the generation interconnection and transmission delivery studies.

(b) Following the board's conditional approval of an application under subdivision (a) of this subsection, the applicant shall notify the board within eighteen months that it is prepared to proceed to consideration of the criteria in subdivision (c) of this subsection. The board may extend such eighteen-month deadline not more than twelve additional months for good cause shown. If the applicant fails to notify the board within such time that it is so prepared, the conditional approval granted under this subdivision is void.

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

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

(ii) The applicant has obtained the necessary generation

interconnection and transmission service approvals from and has executed agreements for such generation interconnection and transmission service with the appropriate regional transmission organization, transmission owner, or transmission provider;

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

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

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

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

(vii) The applicant shall submit a decommissioning plan. The applicant or owner of the facility shall establish decommissioning security by posting an instrument, a copy of which is given to the board, no later than the tenth year following final approval of the facility to ensure sufficient funding is available for removal of the facility and reclamation at the end of the useful life of such facility pursuant to the decommissioning plan. The owner of the certified renewable export facility shall be solely responsible for decommissioning. If the applicant or any subsequent owner of the facility intends to transfer ownership of the facility, the proposed new owner shall provide the board with adequate evidence demonstrating that substitute decommissioning security has been posted or given prior to transfer of ownership. The requirements of this subdivision (vii) shall be waived if a local governmental entity with authority to create requirements for decommissioning has enacted decommissioning requirements for the applicable jurisdiction; and

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

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

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

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

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

(6) Except as provided in subsection (5) of this section, only an electric supplier may exercise its eminent domain authority to acquire the land rights necessary for the construction of transmission lines and related facilities to provide transmission services for a certified renewable export facility. The exercise of eminent domain to provide needed transmission lines and related facilities for a certified renewable export facility is a public use. Nothing in this section shall be construed to grant the power of eminent domain to a private entity.

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

(8) If a certified renewable export facility no longer meets the requirements of subdivisions (2)(a) through (c) of section 70-1001.01, the owner of the facility shall notify the board. An electric supplier or a governmental entity with regulatory jurisdiction over the certified renewable export facility may apply to the board or the board may file its own motion to have the certification of a certified renewable export facility revoked upon a showing by the applicant for decertification that the facility no longer meets the requirements of such subdivisions. Upon the filing of such application and making of a *prima facie* showing by the applicant for decertification that the facility no longer meets the requirements of such subdivisions, the board shall set the matter for hearing. The hearing shall be held within forty-five days unless an extension is necessary for good cause shown. The applicant for decertification shall have the burden of proof. Within forty-five days after the conclusion of the hearing, the board shall enter an order to either reaffirm the facility's status as a certified renewable export facility or to revoke the certification. During the pendency of the application for decertification and before the board's final order on decertification, the facility may continue to operate if the electricity generated at the facility is sold to customers outside the State of Nebraska, or to an electric supplier pursuant to a power purchase agreement or similar agreement. The board shall retain jurisdiction over the decertification action for at least thirty days after entry of such an order. Within thirty days after a final order revoking certification, the owner of the facility may apply for recertification, with the time period for recertification being no longer than one year unless the board extends the time period for good cause shown. Such application for recertification shall extend the board's jurisdiction over the decertification action until the board completes its review of the application for recertification and enters an order granting or denying the application. If the applicant for recertification demonstrates to the board that it is working diligently and in good faith to restore its compliance with subdivisions (2)(a) through (c) of section 70-1001.01, the board shall not terminate the application for recertification. During the pendency of the application for recertification and before the board's final order on recertification, the facility may continue to operate if the electricity generated at the facility is sold to customers outside the state, or to an electric supplier pursuant to a power purchase agreement or similar agreement. If the board retains jurisdiction over the decertification action, the prohibition on eminent domain set forth in subsection (5) of this section shall remain in full force and effect. If the board enters an order decertifying a certified renewable export facility and such order becomes

final due to a failure to timely seek recertification or judicial review, the prohibition on eminent domain set forth in subsection (5) of this section shall no longer apply. Nothing in this section shall prohibit a decertified facility from being recertified in the same manner as a new facility.

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

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

(2) If any person owning or operating a certified renewable export facility violates any provision of Chapter 70, article 10, or violates or disobeys any requirement imposed by the board pursuant to the board's jurisdiction established in section 70-1014.02 or the board enters an order decertifying the facility and the order becomes final, further operation of the facility may be enjoined or otherwise limited or have conditions put upon it in an action brought in the name of the State of Nebraska until such person rectifies the violation or disobedience of the order or the facility becomes recertified.

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

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

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

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

Sec. 6. Original sections 70-1015 and 76-3001, Reissue Revised Statutes of Nebraska, and sections 70-1001.01, 70-1013, and 70-1014.02, Revised Statutes Cumulative Supplement, 2010, are repealed.