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IN RE APPLICATION OF NEBRASKA PUBLIC POWER DISTRICT.
JAMES CHOQUETTE ET AL., APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT, APPELLEE.

798 N.W.2d 572

Filed April 15, 2011. No. S-10-707.

1. **Nebraska Power Review Board: Appeal and Error.** A decision of the Nebraska Power Review Board will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal.
2. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
3. **Nebraska Power Review Board: Electricity.** The Nebraska Power Review Board is required under Neb. Rev. Stat. § 70-1014 (Reissue 2009) to determine whether the applicant before it can economically and feasibly supply the electric service resulting from the proposed construction.
4. **Nebraska Power Review Board: Administrative Law.** The Nebraska Power Review Board, as an administrative board, has no power or authority other than that specifically conferred upon it by statute or by construction necessary to accomplish the purpose of the act.
5. **Administrative Law: Due Process.** In administrative agency decisions, due process requires neutral and unbiased decisionmakers.
6. **Administrative Law: Presumptions.** Administrative decisionmakers serve with a presumption of honesty.
7. **Administrative Law: Due Process.** Although due process requires disqualification when an administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue.

Appeal from the Power Review Board. Affirmed.

Adam D. Pavelka, of Sullivan, Shoemaker, Witt & Burns, P.C., L.L.O., for appellants.

John C. McClure and Bonnie J. Hostetler, of Nebraska Public Power District, and Kile W. Johnson and Cameron E. Guenzel, of Johnson, Flodman, Guenzel & Widger, for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and CASSEL, Judge.

MILLER-LERMAN, J.

NATURE OF CASE

The Nebraska Public Power District (NPPD) filed an application with the Nebraska Power Review Board (PRB) requesting authorization to construct an electric transmission line. A group of people who described themselves as residents and owners of farms and ranches in close proximity to the proposed line filed a protest and were permitted to intervene. The PRB granted NPPD's application. The protestors appeal. We affirm.

STATEMENT OF FACTS

On March 3, 2010, NPPD filed application PRB-3617 with the PRB, seeking authority to construct an approximately 53-mile, 345-kilovolt transmission line in Kearney and Franklin Counties, Nebraska. The construction would be part of a project to build a 225-mile transmission line from NPPD's Axtell, Nebraska, substation to Spearville, Kansas. The remainder of the transmission line would be built in Kansas by another company. NPPD asserted that the purpose of the project was to relieve system congestion on the transmission grid in western Nebraska and western Kansas and that the project would enable more efficient utilization of NPPD facilities and benefit NPPD customers with low rates and enhanced system reliability. Construction of the project was planned to commence in the winter of 2011 to 2012, to be completed by December 2012, and to cost approximately $78 million.

Several people who described themselves as residents and owners of farms and ranches located in close proximity to the proposed transmission line filed a protest and petition for intervention. The petition to intervene was granted. The protestors asserted that the line would not serve the public convenience and necessity of Nebraskans and that NPPD would not most economically and feasibly supply electric service resulting from the line. They asserted that the line would primarily benefit the interests of Kansas and that NPPD and its customers would bear a disproportionate amount of the costs of the transmission line project.

The PRB held a hearing on NPPD's application on May 14, 2010. NPPD presented the testimony of three witnesses who were NPPD employees and offered numerous exhibits into evidence. The protestors presented the testimony of two witnesses: one of the protestors and a consultant with knowledge of engineering issues related to powerlines. The protestors offered several exhibits into evidence.

Following the hearing, the PRB approved NPPD's application. In an 18-page order dated June 14, 2010, with citations to the record of the hearing, the PRB made the following findings: Southern Power District, in whose service area the proposed line would be located, had consented to approval of NPPD's application. After required consultations with the Nebraska Game and Parks Commission and the U.S. Fish and Wildlife Service, NPPD selected the easternmost of the alternate routes it was considering for the location of the line, because that route would pose the least threat to endangered species and the species' habitats. The Game and Parks Commission and the U.S. Fish and Wildlife Service did not object to the selected route but would have objected to the other proposed routes. It was estimated that selecting the easternmost route to accommodate such concerns increased the cost of the project by at least $14 million.

The PRB further found that with the installation of the proposed transmission line, NPPD would have excess baseload generating capacity that it could sell and the proposed transmission line would remove constraints preventing NPPD from moving most or all of its excess power to the market. The sale of excess power would reduce costs for NPPD ratepayers. The proposed transmission line would also facilitate NPPD's ability to purchase electricity when needed. The increased revenue from sales of excess power and the ability to purchase electricity when needed were expected to offset the cost to build the line. The PRB further found that the transmission line would relieve congestion in western Nebraska and western Kansas, relieve constraints by increasing transfer capability and reducing loading on NPPD's transmission system in central and eastern portions of Nebraska, and provide additional reliability in NPPD's transmission system for ratepayers in

western and south central Nebraska. The congestion that NPPD would relieve by building the transmission line could not be economically relieved by Omaha Public Power District or the Lincoln Electric System.

The PRB finally found that although the proposed transmission line would provide benefits to Kansas interests, serving those interests would not be the primary purpose of the line. The PRB found little or no evidence that the proposed transmission line would cause electricity generated in Kansas wind farms to be sold in Nebraska. In this regard, the PRB noted that NPPD had its own wind generation resources and access to areas in Nebraska with "good wind potential."

The PRB addressed the protestors' concerns about the route of the transmission line. The protestors claimed that the route was wasteful and chosen for the convenience of the Kansas power company. The PRB relied on *Lincoln Electric System v. Terpsma*, 207 Neb. 289, 298 N.W.2d 366 (1980), for the proposition that the utility rather than the PRB had the authority to select a particular route and that the PRB's authority was limited to either approving or disapproving the utility's application. The PRB noted that NPPD selected the easternmost route of the variations it had been considering because it posed the least threat to endangered species and that if NPPD had chosen one of the other routes, the PRB would have been constrained to deny the application on the ground that the transmission line threatened endangered species.

The PRB found:

> [T]he evidence shows the proposed transmission line will serve the public convenience and necessity[,]
>
> . . . the evidence demonstrates that [NPPD] can most economically and feasibly supply the electric service resulting from the proposed transmission line[,]
>
> [and] the evidence demonstrates that the proposed transmission line will not unnecessarily duplicate other facilities or operations.

The PRB therefore approved NPPD's application designated as "PRB-3617."

The protestors appeal the PRB's decision.

ASSIGNMENTS OF ERROR

The protestors claim, restated and summarized, that the PRB erred when it approved NPPD's application. The protestors also claim that the PRB was biased and made findings in favor of NPPD before the conclusion of the hearing.

STANDARDS OF REVIEW

[1] A decision of the PRB will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal. *In re Application of City of North Platte*, 257 Neb. 551, 599 N.W.2d 218 (1999).

[2] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010).

ANALYSIS

The PRB Did Not Err When It Found That NPPD Could Most Economically and Feasibly Supply the Electric Service Resulting From the Proposed Construction.

On appeal, the protestors assert that the PRB erred when it approved NPPD's application, because (1) NPPD's evidence failed to show "how the proposed transmission line compared to other alternatives" and was the most economic and feasible route, brief for appellants at 5, and (2) the PRB "took NPPD at its word with regard to what was the most economic or beneficial route" and failed to draw its own conclusion, *id.* at 8. We conclude that the protestors' first argument fails primarily because it is based on a misreading of the controlling statute, Neb. Rev. Stat. § 70-1014 (Reissue 2009), and that the second argument fails because it is based on a misunderstanding of the scope of the PRB's authority with respect to applications.

Section 70-1014 is central to our resolution of this appeal. Section 70-1014 provides that before the PRB can approve an application for construction of an electric generation facility or transmission line, the PRB "shall find that the application will serve the public convenience and necessity, and that

the applicant can most economically and feasibly supply the electric service resulting from the proposed construction or acquisition, without unnecessary duplication of facilities or operations."

The PRB's task in § 70-1014 furthers "the policy of this state to avoid and eliminate conflict and competition between public power districts [and other public utility entities] in furnishing electric energy to retail and wholesale customers [and] to avoid and eliminate the duplication of facilities and resources which result therefrom." Neb. Rev. Stat. § 70-1001 (Reissue 2009).

A final action of the PRB may be appealed to the appellate courts of this state. Neb. Rev. Stat. § 70-1016 (Reissue 2009). A decision of the PRB will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal. *In re Application of City of North Platte, supra*.

In connection with their insufficiency of the evidence argument, the protestors do not dispute the PRB's finding that NPPD's evidence satisfied the first portion of § 70-1014 and showed that the proposed transmission line "will serve the public convenience and necessity." Instead, the protestors focus on the second portion of § 70-1014 regarding whether "the applicant can most economically and feasibly supply the electric service resulting from the proposed construction" and claim that because NPPD's evidence failed to establish this second requirement, approval was not warranted. This argument misreads the statute and is without merit.

In making their insufficiency of the evidence argument, the protestors focus on the word "most" in § 70-1014 and assert that "most" is intended to describe the route identified in the application. According to the protestors' reading of § 70-1014, the PRB is required to find that the proposed transmission line is the "most" economic and feasible route and such determination can only be done after comparing the proposal to alternative routes. We reject this argument. We give the language of § 70-1014 its plain and ordinary meaning, see *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010), and a sensible construction,

see *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010). We conclude that "most" describes the word "applicant," the protestors misread § 70-1014, and the PRB correctly applied § 70-1014 to the facts of this case.

According to the plain language of § 70-1014, the PRB must first find that the application will serve the public convenience and necessity and then determine if the applicant can most economically and feasibly supply the resulting service. The word "most" qualifies the word "applicant," not the route in the application. Having found public convenience and necessity, the inquiry then proceeds to focus on the applicant and its ability to economically and feasibly provide the proposed service.

[3] We recognize that the comparative word "most" has its greatest application where there are competing applicants. See, e.g., *City of Auburn v. Eastern Nebraska Public Power Dist.*, 179 Neb. 439, 138 N.W.2d 629 (1965) (reviewing PRB's decision with regard to two competing applicants, City of Auburn and Eastern Nebraska Public Power District). We acknowledge that in the absence of competing applicants, the comparative word "most" in § 70-1014 is awkward. However, pursuant to § 70-1014, the PRB must nevertheless complete its task of evaluating an application regardless of whether competing applications by competing applicants exist. Giving § 70-1014 a sensible reading, we reject the protestors' argument that the PRB was tasked with finding the "most" economic and feasible route. Instead, the PRB was required under § 70-1014 to determine whether the applicant it had before it could economically and feasibly supply the electric service resulting from the proposed construction which it had found would serve the public convenience and necessity.

[4] Our reading of § 70-1014 is consistent with prior decisions of this court. In *Lincoln Electric System v. Terpsma*, 207 Neb. 289, 291-92, 298 N.W.2d 366, 368 (1980), we noted that the PRB, as an administrative board, had "no power or authority other than that specifically conferred upon it by statute or by construction necessary to accomplish the purpose of the act." And we concluded that the PRB had "no authority to select a particular route other than that selected by the utility."

Id. at 292, 298 N.W.2d at 368. We further stated that "[t]here is nothing in the pertinent statutes to suggest that the [PRB] has the power to determine that a transmission line shall be built along a particular route." *Id.* at 291, 298 N.W.2d at 368. The protestors' suggestion that the PRB affirmatively investigate other possible routes is contrary to the statute and the case law.

With respect to the sufficiency of the evidence, the record shows that Southern Power District, in whose service area the proposed transmission line would be built, had consented to approval of the application and stipulated that NPPD could most economically and feasibly supply the service. There was also evidence that general notice of the application had been given through newspapers in the area and that specific notice of the filing had been given to one other potential supplier, the city of Minden, Nebraska. No other potential supplier filed a protest or a competing application. We also note that in its order, the PRB considered whether Omaha Public Power District or Lincoln Electric System might be appropriate entities to build a transmission line to alleviate congestion in the area and concluded that neither of those utilities was sufficiently impacted by the congestion such that it would be economical for either of them to construct a line. The PRB noted that in contrast to these two entities, NPPD owned and operated transmission lines in the surrounding area, had crews in the area, and was directly impacted by the constraint. The foregoing suggests that even in the absence of competing applications, the PRB gave consideration to potential other applicants and determined that NPPD could "most economically and feasibly supply the electric service resulting from the proposed transmission line."

As an additional argument, the protestors claim that "the PRB simply took NPPD at its word with regard to what was the most economic or beneficial route for the proposed transmission line" and failed to draw its own conclusion. Brief for appellants at 8. The protestors further suggest that we adopt standards from federal cases not repeated here to the effect that an administrative agency must exercise its own judgment and not cede deference to a private party on matters before the

agency. Given our statutes, these authorities are inapposite. We reject these arguments.

As discussed above, the PRB did not have the authority to substitute its selection of a route in lieu of NPPD's proposal. *Lincoln Electric System v. Terpsma, supra.* See § 70-1014. Instead, the PRB was to determine whether NPPD could economically and feasibly supply the service, and after examination, the PRB determined that NPPD could. The protestors' argument is without merit.

In accordance with our standard of review, we conclude that there was evidence to support PRB's decision to approve NPPD's application and that such decision was not arbitrary, capricious, unreasonable, or otherwise illegal.

The Record Does Not Indicate Bias on the Part of the PRB.

The protestors assert that the PRB decision should be reversed because the PRB made findings in favor of NPPD before the conclusion of the hearing. They assert that "certain members of the PRB had already made their mind up about certain facts and that they had already drawn conclusions regarding the application." Brief for appellants at 8-9. They argue that the PRB's decision cannot be affirmed, because members of the PRB showed "extreme bias" and "great deference and bias to NPPD and NPPD's initiatives, making the hearing inherently unfair" for the protestors. *Id.* at 9. As examples of the PRB's alleged bias, the protestors refer us to one member's questioning of the protestors' witness and another member's expression of knowledge and opinion regarding wind energy. We find no merit to this assignment of error.

[5-7] We have recognized that in administrative agency decisions, due process requires neutral and unbiased decisionmakers. See *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). Factors which may indicate partiality include a pecuniary interest in the outcome, a familial or adversarial relationship with one of the parties, and a failure to disclose a suspect relationship. See *id.* We have recognized that administrative decisionmakers serve with a presumption of honesty. See *id.* And "[a]lthough due process requires

disqualification when the administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue." *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 466, 513 N.W.2d 847, 865 (1994).

As an initial matter, the record does not show that the protestors sought to disqualify any decisionmakers. We do not read the identified portions of the record as indicating that members of the PRB either were biased, appeared to be biased, or had prejudged the application. Instead, the questioning of witnesses by the PRB indicated critical examination of testimony which included an opportunity for witnesses to provide explanations for what might be considered weaknesses in the protestors' position. While the expression by PRB members of knowledge or opinion regarding matters related to the application might not have been necessary to the hearing, it indicates the knowledge of the power industry a PRB member would necessarily develop rather than indicating bias on the part of the PRB member. We find no basis in the record to support the protestors' assertion of bias.

CONCLUSION

We conclude that there was evidence to support PRB's decision to approve NPPD's application PRB-3617 and that such decision was not arbitrary, capricious, unreasonable, or otherwise illegal. The record does not support the protestors' claim that the PRB was biased in NPPD's favor. We therefore affirm the decision of the PRB to grant NPPD's application.

AFFIRMED.

WRIGHT, J., not participating.