UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 Renner Boulevard
Lenexa, Kansas 66219

VIA EMAIL

Stephen M. Bruckner
Katherine McNamara
Fraser Stryker PC LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102-2663

Re: Citizens Gas & Electric Company Superfund Site in Council Bluffs, Iowa (IAD984589093)

Dear Mr. Bruckner and Ms. McNamara:

Thank you for your May 11, 2020 response to the general notice letter EPA sent you on April 1, 2020, and for discussing your response with us via telephone on May 18, 2020. In our conversation, I explained that a non-time critical removal action is appropriate at the Citizens Gas & Electric Company Superfund Site (Site) because in 2015, EPA conducted a removal assessment at the Site concluding that elevated levels of contaminants in the soil and groundwater have migrated beyond the Site and present a risk to human health. Therefore, EPA believes that it is appropriate to negotiate an Administrative Settlement Agreement and Order on Consent (ASAOC) to conduct an Engineering Evaluation/Cost Analysis (EE/CA) to determine the proper response action at the Site.

As discussed in our May 18th conversation, EPA has reviewed your May 11th response and supporting documentation and believes that Omaha Public Power District (OPPD) is a potentially responsible party (PRP) for the Site. In your May 11th letter, you make a number of points to which EPA will respond in turn.

1. **Citizens Gas and Electric Company Operated the Site from at least 1904-1928.**

Your letter states that there is no evidence of a release of hazardous substances during the time that Citizens Gas and Electric Company (Citizens) operated the Site. From at least 1904-1928, Citizens owned and operated the Site as a manufactured gas plant. Gas was manufactured from coal using the coal carbonization gasification method, where coal was cooked in ovens or retorts to produce gas and various gas by-products. These gases required treatment to remove benzene, toluene, ethylbenzene, xylenes (collectively, BTEX), tar, ammonia, naphthalene, and sulfur compounds before use. In addition, a variety of oil-based feedstocks were used to produce gas, including kerosene, diesel oil and bunker C fuel oil. By-product tars were either refined into marketable products, such as creosote, road tars, fuels, and various pitches, or disposed of on-

Site. Contaminants and wastes typically associated with gas production include BTEX, polynuclear aromatic hydrocarbons (PAHs), oxide waste, tar residues, sludge, wastewater, ash, and phenolic and ammonia compounds.

When the Site was sampled, BTEX and PAHs were found ~~at the Site~~, and the highest levels of contamination were at the base of the gasometer structures that Citizens, and later, Council Bluffs Gas Company (CBGC), used to operate the Site. Due to the nature of the contamination, EPA has reason to believe that Citizens, which owned and operated the manufactured gas plant for over 20 years, contributed to contamination at the Site and therefore, its successors are liable as an owner or operator at the time of disposal under CERCLA § 107(a)(2).

2. **Regardless of the contamination that occurred after CBGC's purchase of the Site, Citizens' successors remain liable for the contamination that occurred during Citizens' period of ownership.**

In response to your second point, EPA does not dispute that Citizens sold the Site property to CBGC in 1928, and that CBGC's successors are liable for any release at the Site that occurred during CBGC's ownership of the Site. However, as discussed above, Citizens' successors remain liable for any disposal that occurred during Citizens' ownership and operation of the Site.

In your second point, you also discuss the CERCLA liability theory of substantial continuation. However, the substantial continuation theory does not apply here. The substantial continuation theory is a theory used to find an asset purchaser liable.[1] The Citizens-CBGC sale was not an asset purchase. Even if it was, CBGC did not hold itself out to the public as Citizens' successor.[2] Citizens and its successor, Citizens Power and Light Company, continued to operate for years after Citizens sold the Site property to CBGC.

3. **Citizens' successor, Citizens Power and Light Company, merged into Nebraska Power Company in 1937.**

Your third point in your letter states that there is no evidence that Citizens' successor, Citizens Power and Light Company (CPL), merged into Nebraska Power Company. However, multiple documents, including the Federal Power Commission's April 27, 1937 Order Approving Application for Sale of Facilities, the April 3, 1937 Lincoln State Journal article "Asks Consent to Merger," and the 1945 Moody's Manual Investments show that CPL did merge into Nebraska Power Company. While EPA does not have a copy of the merger agreement, the Federal Power Commission's Order states that "Nebraska Power Company shall assume all existing obligations of [CPL] and surrender for cancellation all the shares of the latter corporation's outstanding stock." Additionally, the "Asks Consent to Merger" article states that CPL and Nebraska Power Company "arranged for a consolidation" and Nebraska Power Company "would assume all obligations" of CPL stock it owned.

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[1] *See, e.g., U.S. v. Mexico Feed & Seed Co.,* 980 F.2d 478, 487 (8th Cir. 1992); *Interstate Power Co. v. Kan. City Power & Light Co.*, 909 F. Supp. 1241, 1275-77 (N.D. Iowa 1993).
[2] *Interstate Power Co.* at 1276-77.

With this merger, Nebraska Power Company assumed all assets and liabilities of CPL and its predecessor, Citizens.[3] Thus, your statement that Nebraska Power Company must have controlled and/or owned Citizens during the time Citizens operated the manufactured gas plant and when a release of contamination occurred is not true. Similarly, your statement that EPA would have to establish that the corporate veil of Nebraska Power Company could be pierced is false for the same reason – when CPL merged into Nebraska Power Company, Nebraska Power Company assumed all of CPL's assets and liabilities, and CPL was liquidated. There is no evidence of a parent-subsidiary relationship, so the *Bestfoods* analysis set forth in your letter is inapplicable.

4. **In 1946, OPPD acquired all remaining issued and outstanding common stock of Nebraska Power Company, and Nebraska Power Company was liquidated into OPPD.**

Your fourth point in your letter discusses the 1946 OPPD – Nebraska Power Company stock purchase and related transactions. Generally, in a stock purchase, the purchaser acquires ~~purchases~~ both the assets and liabilities of the seller.[4] Regardless of the amount of stock that OPPD purchased from Nebraska Power Company, when OPPD purchased stock from Nebraska Power Company, it received a representative portion of Nebraska Power Company's assets and liabilities. EPA is unaware of case law providing that a certain percentage of stock may represent a specific property, asset, or liability. The October 19, 1946 Stock Purchase Agreement between OPPD and Omaha Electric Committee regarding the sale of Nebraska Power Company's stock provides that Omaha Electric Company will organize a "new Iowa Company" and transfer a portion of the common stock to that company. The Omaha Electric Committee would then sell OPPD "all of the shares of common stock then remaining outstanding." So, regardless of OPPD's intent, when it purchased all remaining shares of Nebraska Power Company's stock, it also assumed all of Nebraska Power Company's remaining liabilities, regardless of the location of the property those liabilities stemmed from.

Accordingly, EPA believes that OPPD remains a ~~liable~~ PRP for the Site. Once the EE/CA determines the proper remedy for the Site, we will likely re-engage you when negotiating the ASAOC to implement that remedy. If you have any questions or would like to discuss further, please do not hesitate to contact me at 913.551-7917 or Chiccine.catherine@epa.gov.

Best regards,

Cathie R.M. Chiccine
Office of Regional Counsel

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[3] *E.g., Grand Laboratories, Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1281 (8th Cir.1994).
[4] 6 Ia. Prac. § 35.1 Corporate combination and acquisition transactions – introduction and overview; *see Blackinton v. U.S.*, 6 F.2d 147, 148 (8th Cir. 1925).