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May 11, 2020

Via Email and U.S. Mail
Catherine Chiccine, Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region VII
11201 Renner Blvd
Lenexa, KS 66219
chiccine.catherine@epa.gov

RE: **OPPD'S Response to EPA's General Notice Letter Regarding the Citizens Gas & Electric Former Manufactured Gas Plant, Council Bluffs, IA**
EPA File: IAD984569093

Dear Ms. Chiccine:

As you know, this firm represents Omaha Public Power District ("OPPD") of Omaha, Nebraska. This letter and enclosed documentation serves as OPPD's response to the March 26, 2020 General Notice Letter regarding the Citizens Gas & Electric Company Former Manufactured Gas Plant Site located in Council Bluffs, Iowa (the "Site"). We appreciate your agreement to provide us with some additional time to respond. OPPD is providing this response to the General Notice Letter to reiterate OPPD's position that is not, nor has it ever been, a corporate successor of Citizens Gas & Electric Company, as alleged by EPA in the proposed Administrative Settlement Agreement and Order on Consent. There is no credible evidence that OPPD owned, operated, or controlled any Iowa-based assets, or is a corporate successor to any entity that did when the Site was operational as a manufactured gas plant ("MGP"). Accordingly, EPA's claim that OPPD is liable for cleanup costs of the Site under CERCLA lacks the necessary evidentiary support, and OPPD respectfully declines to enter into the requested Settlement Agreement and Order on Consent.

Background.

In 2003, OPPD received an inquiry from the Iowa Department of Natural Resources ("IDNR") regarding the Site. We provided a letter to IDNR, dated May 15, 2003, wherein we articulated OPPD's position in detail that OPPD is not liable for investigation or cleanup of the

Site as an alleged corporate successor (the "2003 Letter"). Fifteen years later, on August 27, 2018, OPPD received a CERCLA Section 104(e) request for information from EPA Region 7 regarding the Site. Specifically, EPA sought information concerning OPPD's "ultimate acquisition" of the stock and/or assets of the Nebraska Power Company. OPPD responded on September 25, 2018, and provided a copy of the 2003 Letter and historical records to support OPPD's position. On June 3, 2019, EPA requested supplemental information from OPPD, and OPPD responded on June 27, 2019, by providing other records from Black Hills Energy (f/k/a Aquila) and MidAmerican Energy regarding the Site that were in OPPD's possession.

Our review of EPA records reveals that EPA notified the Council Bluffs Chamber of Commerce on or around March 31, 2000 that it planned to take no further action at the Site, essentially deeming the Site "NFRAP" (No Further Remedial Action Planned). Then, in 2007, EPA unilaterally archived the Site from CERCLIS. It was subsequently unarchived by EPA in 2010 following IDNR's request for EPA to take over the review of the Site. As of April 27, 2020, EPA's CERCLIS Inventory reveals a designation of this Site as NFRPAP and notes that it does not qualify for the National Priorities List based on "existing information." It is unclear to OPPD why EPA has continued to pursue action at this Site.

EPA's Purported Factual Findings.

In the General Notice Letter, EPA has alleged that OPPD is liable as a corporate successor of a previous owner and/or operator of the Site, pursuant to 42 U.S.C. § 9607(a). In Paragraphs 15 - 16 of the Proposed Administrative Settlement Agreement and Order on Consent, EPA asserts that the following facts support its claim against OPPD:

> *15. The initial manufactured gas plant was owned by Council Bluffs Gas Light Company from the early 1870s to the early 1890s. Sometime in the 1890s, Council Bluffs Gas Light Company reincorporated into Council Bluffs Gas and Electric Company. Citizens Gas and Electric Company of Council Bluffs (CGE) leased the gas plant from Council Bluffs Gas and Electric Company from 1900 to 1904. In 1904, CGE bought the plant and continued to operate it until 1928. Council Bluffs Gas Company (CBGC) purchased the plant from CGE in 1928 and continued operating it until at least 1932.*
>
> *16. In 1929, CGE changed its name to Citizens Power & Light Company. In 1937, Citizens Power & Light Company merged into Nebraska Power Company. In 1946, Omaha Public Power District (OPPD) acquired all issued and outstanding common stock of Nebraska Power Company, and Nebraska Power Company was later liquidated into OPPD. OPPD is therefore a corporate successor to CGE, an owner and operator of the Site at the time of disposal.*

EPA's conclusion that OPPD is a corporate successor of Citizens Power & Light Company (formerly Citizens Gas and Electric Company), which allegedly operated the MGP until 1928, at which time the Site was sold to Council Bluffs Gas Company, is based on an

assumption that Citizens merged into Nebraska Power Company in 1937 and an allegation that Nebraska Power Company was "later liquidated into OPPD."

Respectfully, these statements by EPA are conclusory, lack evidentiary support, and omit what we believe to be relevant facts. Further, for the reasons set forth below, the statement that Nebraska Power Company was "liquidated" into OPPD is incorrect, and even if it was correct, Nebraska Power Company is not a corporate successor of Citizens Power & Light Company (f/k/a Citizens Gas and Electric Company, referred to below as "Citizens"). Finally, even if it could be established that Nebraska Power Company was a corporate successor of Citizens -- which it was not -- at the time of the OPPD- Nebraska Power Company transaction in 1946, the transaction *specifically excluded* Iowa properties east of the Missouri River (which includes Council Bluffs, Iowa, the location of the former MGP).

OPPD's Response to EPA's Factual Findings.

1. EPA allegation that in 1904, CGE bought the plant and continued to operate it until 1928.

The deed available appears to show that the Site was sold to Citizens Gas & Electric in 1904, assuming the deed is complete and accurate. However, there is no evidence that there was any release of hazardous substances at the Site during the period that Citizens allegedly operated the Site until it was sold to Council Bluffs Gas Company ("CBCG") in 1928.

2. EPA allegation that Council Bluffs Gas Company (CBGC) purchased the plant from CGE in 1928 and continued operating it until at least 1932.

The available records show that CBGC purchased the MGP Site for the purpose of continuing the manufacturing and distribution of gas and overall operation of the Site. At the time that the MGP was sold to CBGC, all liabilities associated with the Site passed to CBGC under the CERCLA liability theory of substantial continuation. See *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1241, 1275-1276 (N.D. Iowa 1993) (citing *United States v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, 487 (8th Cir. 1992) (successor liability attaches for purposes of CERCLA when the successor corporation is merely a continuation of the predecessor corporation.) CBGC would have been responsible for any release of contamination at the Site from the date it acquired and continued the operation of the MGP. OPPD is not a corporate successor of CBGC. At this point, any alleged link OPPD has to the Site as a corporate successor is broken as of the date of this sale.

3. EPA allegation that in 1937, Citizens Power & Light Company merged into Nebraska Power Company.

Even if we continue past the 1928 sale of the Site by CGE to CBGC, based on all records available to OPPD as well as records provided by EPA, there is no evidence of the alleged merger of Citizens into Nebraska Power Company in 1937. A Moody's Manual of Investments

document refers to a June 1, 1937 "merger of a wholly-owned subsidiary" but it does not say which company Citizens merged into. Even if it could be established, however, that Citizens was a subsidiary of Nebraska Power Company during the time that Citizens owned the Site, there is no evidence whatsoever related to Nebraska Power Company's level of control or operation over the Site, much less its level of control over Citizens.

To support EPA's theory of corporate successor liability against OPPD, EPA would not only have to show that Nebraska Power Company controlled and/or owned Citizens *during the time Citizens operated the MGP* <u>*and*</u> *when a release of contamination occurred,* EPA *also* would have to establish that the corporate veil of Nebraska Power Company could be pierced. *United States v. Bestfoods*, 524 U.S. 51 (1998)(parent not liable for subsidiary's actions under CERCLA unless the corporate veil can be pierced, and parent can be held directly liable as an operator under CERCLA <u>only</u> where the parent itself was involved in operating the facility and involved in decisions regarding disposal of hazardous waste.)

Finally, even if this alleged 1937 merger of Citizens into Nebraska Power Company occurred, it would have been nine (9) years after the sale of the Site from Citizens to Council Bluffs Gas Company, leading to the logical conclusion that in no way did Nebraska Power Company operate or control the Site. (Further, the alleged merger was five (5) years after the Site allegedly became non-operational). Therefore, because there is no evidence to support that Nebraska Power Company is a corporate successor of an owner or operator of the Site, any alleged link OPPD has to the Site, *vis a vis* the 1946 transaction related to Nebraska Power Company's Nebraska assets, eliminates OPPD's alleged liability under CERCLA for cleanup of the Site.

4. EPA allegation that in 1946, Omaha Public Power District (OPPD) acquired all issued and outstanding common stock of Nebraska Power Company, and Nebraska Power Company was later liquidated into OPPD.

Notably, EPA's recitation of alleged facts in the proposed Administrative Settlement Agreement and Order on Consent does not mention anything about the existence of the Omaha Electric Committee or the transfer of stock and Iowa properties by the Omaha Electric Committee to the Western Iowa Power Company. Further, EPA's claim that OPPD acquired all issued and outstanding common stock of Nebraska Power Company is not accurate, because a portion of the outstanding common stock of Nebraska Power Company was transferred to Western Iowa Power Company *specifically* to represent the Iowa properties, east of the Missouri River, and any liabilities associated with the Iowa properties. OPPD did *not* assume all of the outstanding common stock of Nebraska Power Company. In any event, when these stock transactions occurred, with a portion transferred to OPPD, and a portion transferred to Western Iowa Power Company, 18 years had passed since Citizens sold the Site to Council Bluffs Gas Company.

A closer review of the historical records of these transactions supports OPPD's position:

(A) The Stock Purchase Agreement between OPPD and Omaha Electric Committee.

The text of the Stock Purchase Agreement states the following:

- that Omaha Electric Committee is the owner of all of the outstanding common stock of the Nebraska Power Company;

- that Omaha Electric Committee will form a new Iowa Company (later known as Western Iowa Power) and own all of its common stock, and will transfer to Western Iowa Power a **portion of the common stock of Nebraska Power Company** in exchange for bonds to be issued by Western Iowa Power;

- the Omaha Electric Committee and Western Iowa Power will then vote for a *partial* liquidation of Nebraska Power Company to be accomplished **by a transfer of the Iowa properties now owned by the Nebraska Power Company and certain other assets and case existing as of the date of closing to Western Iowa Power.**

(See Attachment C to OPPD's 2018 104(e) response).

The Stock Purchase Agreement contemplated that the Iowa securities were then to be disposed of and the proceeds were to go to OPPD. Further, before OPPD purchased any stock from Omaha Electric Committee, the Committee was to follow the steps noted above and first transfer common stock of the Nebraska Power Company to Western Iowa Power to reflect ownership of the Iowa properties of Nebraska Power Company. OPPD never had any ownership in or business relationship with Western Iowa Power Company. All securities of Western Iowa Power Company were held by Omaha Electric Committee until they were sold to Iowa Power & Light Company on May 14, 1949. (Iowa Power & Light Company is now MidAmerican Energy).

(B) December 2, 1946 Deed of Property from Nebraska Power Company to OPPD.

This deed expressly excepts from conveyance "all properties of the Nebraska Power Company, whether real, personal, or missed, in the State of Iowa, which this day was conveyed by the Nebraska Power Company to the Western Iowa Power Company."

(See Attachment D to OPPD's 2018 104(e) response).

(C) OPPD's 1947 Official Statement.

- The 1947 Official Statement, issued in connection with the issuance of OPPD bonds, confirms that all properties in Iowa east of the Missouri River were transferred by Nebraska Power Company to Western Iowa Power, and that Omaha Electric Committee

retained the NPC stock (7.7%), which the parties agreed represented the ownership of the Iowa properties.

- The Official Statement notes that the Enabling Act for the creation of OPPD (Neb. Rev. Stat. Ch. 70, Article 6, 1943) does not authorize the ownership by a public power district of substantial properties situated outside the boundaries of Nebraska. See *State ex rel Johnson v. Consumers Public Power District*, 143 Neb. 753 (1943) (at the time of the 1946 stock transaction, OPPD was without power to engage in the business of distributing and selling power in a state other than Nebraska, and could not own properties in other states).

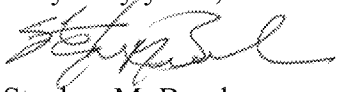
(See Attachment B to OPPD's 2018 104(e) response).

CONCLUSION

On the basis of the evidence summarized in this response, OPPD respectfully reasserts its position that it is not a corporate successor of Citizens Power & Light Company (formerly Citizens Gas and Electric Company) and denies any liability under CERCLA for this Site.

If you have any questions, or if you need any additional information, please do not hesitate to contact the undersigned.

Very truly yours,



Stephen M. Bruckner
Katherine A. McNamara
FOR THE FIRM

Enclosure
SMB/sac