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September 30, 1988

Stuart A. Treby, Esq.
Assistant General Counsel
for Rulemaking and Fuel Cycle
U.S. Nuclear Regulatory Commission
White Flint North 16-D-3
Washington, D.C. 20555

Re: Docket No. 50-285
Docket No. 50-298

Dear Mr. Treby:

On December 2, 1987, the Commission granted to Nebraska Public Power District and Omaha Public Power District ("the Districts") schedular exemptions from the requirements of 10 C.F.R. § 50.54(w)(1). 52 Fed. Reg. 46543, 46544 (1987). The Commission recognized that the Districts were seeking a declaratory ruling from the Nebraska Supreme Court that would permit them to purchase additional property insurance necessary to comply with the Commission's regulations. Accordingly, the Districts were given a schedular exemption for a period of one year from December 5, 1987, to obtain any needed court rulings.

I am now advised that the Nebraska Supreme Court, in an opinion filed on September 9, 1988, had denied the Districts' request for a declaratory judgment. A copy of the court's opinion is enclosed. On September 15, the Districts filed a motion for rehearing with the Nebraska Supreme Court. A copy of that motion is also enclosed.

As a result of these recent developments, it appears unlikely that the Districts will be able to obtain the necessary favorable court orders prior to December 5, 1988.

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If you or other members of the Commission's staff have any questions concerning this matter, please feel free to contact me.

Sincerely,

Harry H. Voigt

HHV/ls
Enclosure
cc: John McClure, Esq.
Stephen G. Olson, Esq.

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

Omaha Public Power District, a political subdivision of the State of Nebraska, et al., Appellants,
v.
Nuclear Electric Insurance Limited, a company registered in the Islands of Bermuda, et al., Appellees.

Case Caption

Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd.

Filed September 9, 1988. No. 87-888.

Appeal from the District Court for Lancaster County: Bernard J. McGinn, Judge. Affirmed.

Stephen G. Olson and Amy S. Bones, of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., and John McPhail for appellants.

Robert M. Spire, Attorney General, and Elaine A. Catlin for appellees Robert Kerrey et al.

OMAHA PUB. POWER DIST. V. NUCLEAR ELEC. INS. LTD.

NO. 87-888 - filed September 9, 1988.

1. Declaratory Judgments: Parties. A declaratory judgment action is applicable only where all interested persons are made parties to the proceedings.

2. Declaratory Judgments. A requisite precedent condition for obtaining declaratory relief is that the parties seeking declaratory relief have a legally protectible interest or right in the controversy.

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

GRANT, J.

This is an appeal from the district court for Lancaster County. It is the second appearance of the matter in this court. Plaintiffs-appellants, Omaha Public Power District (OPPD), as owner and operator of the Fort Calhoun nuclear generating station, and Nebraska Public Power District (NPPD), as owner and operator of the Cooper nuclear generating station, brought this action pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), seeking a declaratory judgment that the plaintiffs' purchase of excess property insurance from Nuclear Electric Insurance Limited (NEIL) would not violate Neb. Const. art XI, § 1, or art. XIII, § 3. Plaintiffs commenced this action in July 1985, in light of a proposed federal Nuclear Regulatory Commission (NRC) amendment which would require the districts to increase their nuclear liability insurance. The district court dismissed plaintiffs' petition, after finding that no case or controversy existed. The district court also held that even if plaintiffs' action was properly brought as a declaratory judgment, plaintiffs' proposed purchase of insurance would violate Neb. Const. art. XI, § 1.

Plaintiffs then filed their first appeal to this court. We remanded the cause to the district court for further proceedings because the proposed NRC amendment, considered contingent at the time of the district court's first order, had been adopted by the NRC. On September 21, 1987, the parties informed the district

court by stipulation that the NRC amendment had been adopted and was to take effect on October 5, 1987, and the case was resubmitted to the district court on the same evidence adduced at the first trial. On September 23, 1987, the district court dismissed plaintiffs' petition, after determining that plaintiffs' proposed purchase of excess insurance did not involve either a contested issue or a positive denial of rights and that plaintiffs' actions, if properly brought as a declaratory judgment, would violate Neb. Const. art. XI, § 1. This second appeal follows.

On appeal, plaintiffs set out five assignments of error, which may be consolidated into three for the purposes of this appeal. Plaintiffs contend that the district court erred in finding that the constitutionality of plaintiffs' proposed action was not suitable for declaratory judgment in that there was no actual controversy among the parties before the court; that the district court erred in finding that even if plaintiffs' action was proper for a declaratory judgment, the participation of the plaintiffs in NEIL, a mutual company, would violate Neb. Const. art. XI, § 1; and that the district court erred in failing to address the issue of whether plaintiffs' participation in NEIL would violate Neb. Const. art. XIII, § 3. We affirm the lower court's holding that the plaintiffs' action was not suitable for a declaratory judgment.

The record shows that OPPD and NPPD are political subdivisions organized under Neb. Rev. Stat. ch. 70 (Reissue 1981 & 1986). As owners and operators of nuclear power plants,

plaintiffs are under the supervision of the NRC. The NRC is a federal agency which creates and enforces regulations, which, for the purposes of this appeal, include requirements for the minimum amount of nuclear liability insurance required for each station.

An NRC amendment to 10 C.F.R. § 50.54(w) (1988), effective October 5, 1987, requires commercial reactor licensees to increase the minimum amount of onsite insurance to $1.06 billion. Before this amendment, each plaintiff carried $585 million of property insurance. Plaintiffs' affidavits show that the only insurance carrier which could provide the excess insurance is NEIL, a mutual company organized under the laws of Bermuda. When first organized, NEIL had one class of membership. In March 1985, NEIL amended its bylaws to include a second class of "non-voting" members. Such a member would have no voting rights and would not receive a share of any distributions made by the company. However, nonvoting members would be entitled to a "premium refund" in lieu of a distribution by NEIL of its assets. Nonvoting members are subject to an assessment of retrospective premium adjustment to 7.5 times the annual premium on call by NEIL under certain circumstances.

On May 23 and June 6, 1985, plaintiffs separately submitted applications to NEIL for excess insurance coverage in response to the proposed new amendment. On June 28, 1985, NEIL informed both plaintiffs by separate identical letters that both of the applications for insurance had been received and accepted and that

> Neil has been advised that your counsel is unable to issue an unqualified opinion certifying the legality under

> Nebraska law of your District's participation in Neil. Accordingly you are advised that only upon receipt of a favorable decision by the Supreme Court of the State of Nebraska, clarifying in Neil's view your District's legal right to participate in Neil, will Neil issue an insurance policy to your District and submit an invoice for the coverage issued.

On July 1, 1985, the plaintiffs filed their petition for a declaratory judgment in the district court for Lancaster County. In their petition plaintiffs named as defendants: NEIL; Robert Kerrey, as Governor of the State of Nebraska; Robert Spire, as Attorney General for the State of Nebraska; and Ray A.C. Johnson, as Auditor of Public Accounts for the State of Nebraska.

The record shows that on August 30, 1985, the Governor, the Attorney General, and the Auditor of Public Accounts were served with summons. The record does not show, however, that NEIL was served, nor does the record indicate any praecipe for service on NEIL. NEIL did not file an answer, or make any appearance whatsoever. The Attorney General, on behalf of all other defendants-appellees, answered and asserted that they were "without knowledge or information sufficient to form a belief" as to plaintiffs' allegations, and further contended that plaintiffs' action was not ripe for judicial review.

In their first assignment of error, plaintiffs contend that the district court erred in finding that the constitutionality of plaintiffs' proposed action was not suitable for a declaratory judgment. Plaintiffs contend that even though NEIL has chosen not to participate in the action and has not taken any position

before this court, the State defendants are necessary parties to represent the interests of the State so that a final determination of the matter, binding on the State, may be had. The State defendants, on the other hand, argue that neither the State nor the named defendants have an interest in the proceedings and that they should have no responsibility to oppose the plaintiffs' application for insurance.

Section 25-21,159 provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . ." We have held that the statute authorizing a declaratory judgment action is applicable only where all interested persons are made parties to the proceeding. Baker v. A. C. Nelson Co., 185 Neb. 128, 174 N.W.2d 197 (1970); Marsh v. Marsh, 173 Neb. 282, 113 N.W.2d 323 (1962).

NEIL is the party with which the plaintiffs seek to contract for excess insurance policies. Our review of the record indicates that while NEIL was named a defendant in plaintiffs' petition, NEIL was not served with process, nor did NEIL participate in the proceedings. During trial, when questioned by the court concerning NEIL's absence, plaintiffs responded as follows:

> [PLAINTIFFS' COUNSEL]: They are not going to participate. They are an off-shore company. They take the position that they don't return to the United States for fear -- I don't know how to phrase this exactly. I don't understand the laws of the Islands of Bermuda. These off-shore companies don't want to voluntarily appear for fear they are going to get served or something to that effect

while they are in Nebraska or Iowa. So, they don't make appearances in any of the 50 states, except New York. They have an attorney in New York who represents them. I'm a little bit in the dark as to exactly why they refuse to do this, but they simply won't do it.

THE COURT: And they never have appeared in this case?

[PLAINTIFFS' COUNSEL]: No.

The crux of the plaintiffs' argument is that since NEIL has chosen not to participate in the proceedings, the State should be made an interested party. We do not agree. In their brief at 7, the State defendants set out that "[t]he state appellees do not believe that it is their responsibility to oppose the appellants' application for insurance . . . or to take NEIL's position merely because they were named as defendants in the lawsuit and because NEIL has refused to become involved in this lawsuit." We agree. The State cannot be made a substitute defendant.

The rendering of a declaratory judgment would not be binding on NEIL. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. Zarybnicky v. County of Gage, 196 Neb. 210, 241 N.W.2d 834 (1976); Arlington Oil Co. v. Hall, 130 Neb. 674, 266 N.W. 583 (1936); § 25-21,154.

NEIL was not before the district court and is not before this court. The only position that NEIL has taken, insofar as the record shows, is that NEIL will issue an insurance policy, in an unknown form, to plaintiffs, only if this court clarifies, to

NEIL's satisfaction, plaintiffs' right to participate in NEIL. We find it totally unnecessary to subject this court to the subjective test of a nonlitigant. We think it would violate our settled law and policy to attempt to conform with that unknown standard--NEIL's satisfaction with our clarification.

In addition, we are not persuaded by plaintiffs' contention that a contract is involved in their dispute with NEIL. Section 25-21,150 provides that "[a]ny person interested under a . . . written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." The only evidence in the record of a contract between the plaintiffs and NEIL is the separate letters dated June 28, 1985, which were sent by defendant NEIL to the plaintiffs in response to the plaintiffs' insurance applications. In those letters, NEIL stated that NEIL would issue an insurance policy "only upon receipt of a favorable decision by the Supreme Court of the State of Nebraska, clarifying in Neil's view your District's legal right to participate in Neil . . . ." There is also in the record an unsigned insurance policy form, but we see no evidence that NEIL would adopt that policy for plaintiffs. We cannot agree with the plaintiffs' contention that these letters constituted a contract within the meaning of § 25-21,150. The record shows, without dispute, that the parties have not yet entered into any contract. "A requisite precedent condition for obtaining declaratory relief is that the parties seeking

declaratory relief have a legally protectible interest or right in the controversy." Stahmer v. Marsh, 202 Neb. 281, 284-85, 275 N.W.2d 64, 66 (1979). See, also, Berigan Bros. v. Growers Cattle Credit Corp., 182 Neb. 656, 156 N.W.2d 794 (1968). Plaintiffs have no "legally protectible interest."

The necessary parties for an appropriate determination of this controversy are not before this court. Plaintiffs' action presents no justifiable controversy suitable for a determination. The judgment of the district court dismissing plaintiffs' petition is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

IN THE SUPREME COURT OF NEBRASKA

OMAHA PUBLIC POWER DISTRICT, a political subdivision of the State of Nebraska; NEBRASKA PUBLIC POWER DISTRICT, a political subdivision of the State of Nebraska,	)	No. 87-888
Plaintiffs-Appellants	)	
vs.	)	MOTION FOR REHEARING
NUCLEAR ELECTRIC INSURANCE LIMITED, a company registered in the Islands of Bermuda; ROBERT KERREY, as Governor of the State of Nebraska; ROBERT SPIRE, as Attorney General for the State of Nebraska; RAY A.C. JOHNSON, as Auditor of Public Accounts for the State of Nebraska,	)	
Defendants-Appellees.	)	

COMES NOW Appellant, Omaha Public Power District, and asks the Court for a rehearing, pursuant to Nebraska Supreme Court Rule 13. An affidavit of counsel will be submitted in support of this Motion, along with Appellant's Brief in Support of its Motion for Rehearing.

OMAHA PUBLIC PUBLIC POWER DISTRICT,

By: Amy S. Bones

Stephen G. Olson #13142
Amy S. Bones #17253
FRASER, STRYKER, VAUGHN, MEUSEY, OLSON, BOYER & BLOCH, P.C.
500 Electric Building
Omaha, Nebraska 68102
(402) 341-6000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Motion for Rehearing was served upon John McPhail, Assistant General Counsel, Nebraska Public Power District, P.O. Box 499, Columbus, Nebraska 68061; Elaine Catlin, Assistant Attorney General for the State of Nebraska, Room 2115, State Capitol Building, Lincoln, Nebraska 68509; and Quentin Jackson, General Manager, Nuclear Electric Insurance Limited, P.O. Box HM2083 Hamilton 5, Bermuda, by certified mail service, this 15th day of September, 1988.

Amy S. Bones

/ljt
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87-888

In the Supreme Court of Nebraska

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OMAHA PUBLIC POWER DISTRICT, a political subdivision of the State of Nebraska; NEBRASKA PUBLIC POWER DISTRICT, a political subdivision of the State of Nebraska,

Plaintiffs-Appellants

vs.

NUCLEAR ELECTRIC INSURANCE LIMITED, a company registered in the Islands of Bermuda; ROBERT KERREY, as Governor of the State of Nebraska; ROBERT SPIRE, as Attorney General for the State of Nebraska; RAY A.C. JOHNSON, as Auditor of Public Accounts for the State of Nebraska,

Defendants-Appellees.

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APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Honorable Bernard J. McGinn, District Judge

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BRIEF IN SUPPORT OF MOTION FOR REHEARING

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Prepared and Submitted by:

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Amy S. Bo. es #17253
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INDEX

CASES CITED

CONSTITUTIONS, STATUTES, AND REGULATIONS CITED

MOTION FOR REHEARING

A copy of Appellants' Motions are attached to this Brief as Exhibit A_1 and A_2, and incorporated herein by this reference.

ASSIGNMENTS OF ERROR

1. The Supreme Court erred in holding that NEIL was not served.

2. The Court erred in refusing to render a declaratory judgment in this matter because NEIL chose not to participate in this action.

3. The Court erred in holding that Appellants have no legally protectible interest.

PROPOSITIONS OF LAW

I.

Failure to make proof of service or delay in doing so does not affect the validity of service.

Neb. Rev. Stat. § 25-507.01
Mindt v. Shavers, 214 Neb. 786, 337 N.W.2d 97 (1983).
State Furn. Co. v. Abrams, 146 Neb. 342, 19 N.W.2d 627 (1945).

II.

The Nebraska Uniform Declaratory Judgments Act is to be liberally construed and administered.

Neb. Rev. Stat. § 25-21,160
Berigan Brothers v. Growers Cattle Credit Corp., 182 Neb. 656, 156 N.W.2d 794 (1968).

ARGUMENT

I.

The Supreme Court erred in holding that NEIL was not served.

In the Supreme Court's opinion in this case, the Court stated that the record does not show that NEIL was served, nor does the record indicate any praecipe for service on NEIL. (See

Supreme Court Opinion, p.4). This statement is incorrect. In the District Court file, there is not one, but two praecipes for service upon NEIL. (See Affidavit of Stephen G. Olson, a copy of which is attached hereto as Exhibit B).

As evidenced by Exhibit B, NEIL was served by express delivery and by certified mail service. While, by a regrettable oversight, the proof of service was not filed in the District Court until recently, this fact does not deprive the Court of jurisdiction over Defendant NEIL. Neb. Rev. Stat. § 25-507.01(3) specifically states "failure to make proof of service or delay in doing so does not affect the validity of the service." It is the fact of service, and not the proof thereof, which gives a court jurisdiction over a defendant. State Furniture Co. v. Abrams, 146 Neb. 342, 19 N.W.2d 627 (1945).

This situation is very similar to Mindt v. Shavers, 214 Neb. 786, 337 N.W.2d 97 (1983). The defendant in that case claimed that the district court did not acquire jurisdiction over his person, due to a defective affidavit of service on the out-of-state summons return. In discussing this issue, the Supreme Court stated that the defendant's contention regarding the return of service and the court's lack of jurisdiction was without merit. The court noted that a simple examination of the return of service made it abundantly clear that defendant was properly served. It held that it was not the service which was defective, but only the return of service. The court stated:

> We have frequently held that the court does not lose jurisdiction by reason of a defect in the return of service if proper service was made, and the return may, at any time, be amended to reflect the truth of the matter. Specifically, in State Furniture Co. v. Abrams, 146 Neb. 342, 346-47, 19 N.W.2d 627, 630 (1945), we said: "If service of the summons in a case is, in fact, made on the defendants, that gives the court jurisdiction to render a valid judgment, so far as the service of process is concerned, though the evidence of record, constituting the proof of service, may fail in essential particulars to establish that such service was in fact made. In cases where service was in fact had, the court has jurisdiction, and may after judgment permit an amendment of the record to

supply omissions necessary to show that the service was in fact made."

Neb. Rev. Stat. § 25-852 provides that the court may, either before or after judgment, in furtherance of justice, amend any pleading, process or proceeding . . . by conforming the pleading or proceeding to the facts proved. The District Court file contains two praecipes for service on NEIL, and the recently filed proof of service provides evidence that NEIL was served. When Appellants served NEIL, the court obtained jurisdiction over NEIL.

II.

The Supreme Court erred in refusing to render a declaratory judgment in this matter because NEIL chose not to participate.

As was established above, NEIL was served with process, but did not appear in the lawsuit. Given the fact that NEIL was under the jurisdiction of the Court and therefore bound by any decision rendered, simply because NEIL chose not to appear cannot be grounds for the Court to refuse to issue a declaratory judgment. If such were the case, defendants in declaratory judgment actions would have a new means of defending such suits--they would, after service, simply not make an appearance in the matter. Under the Supreme Court's rationale, the Court would then decide there was no case or controversy, and dismiss the lawsuit. Such a result is clearly to be avoided. The appearance or nonappearance of NEIL in this proceeding should not be dispositive of the important issue before the Court.

III.

The Court erred in holding that the Appellants have no legally protectible interest.

The Supreme Court ruled that there was no written contract between the parties, and for that reason, Appellants have no

legally protectible interest or right in the controversy. Here, Appellants are caught in a classic "catch 22" position. NEIL will not issue an insurance policy unless and until the Supreme Court of the State of Nebraska issues an opinion stating that the Appellants' participation in NEIL, a mutual insurance company, is not unconstitutional. The Supreme Court of the State of Nebraska will not issue such an opinion unless and until NEIL issues an insurance policy. Under this scenario, Appellants can never obtain the required insurance coverage, nor can they ever obtain a ruling from the State of Nebraska. Appellants are thus faced with an insurmountable dilemma; they are unable to comply with a licensing regulation of the Nuclear Regulatory Commission, and their nuclear plants could be shut down for their failure to so comply

In some respects, this matter is similar to Metropolitan Utilities District v. City of Omaha, 197 Neb. 609, 107 N.W.2d 397 (1961). In that case, the Metropolitan Utilities District brought suit against the City of Omaha. The action was in the nature of a declaratory judgment suit and was brought for the purpose of determining the validity of a contract entered into between the District and the City whereby the District agreed to collect for and remit to the City the sewer service charges which the City had imposed upon those using its sewer system. The parties prayed that if the court declared the contract to be valid, that it also determine the rights, powers, duties, and obligations of the parties thereunder, since they were unable to agree as to those rights, powers, and duties. The court framed the issue as follows:

> In view of that fact, they seek, as the contract provides they shall, to have the validity and enforceability thereof judicially determined before they put the contract into effect by operating thereunder. (Emphasis added).

In other words, while the parties in that case had a contract, they had agreed that they would not operate under the contract until the Supreme Court determined the validity of the

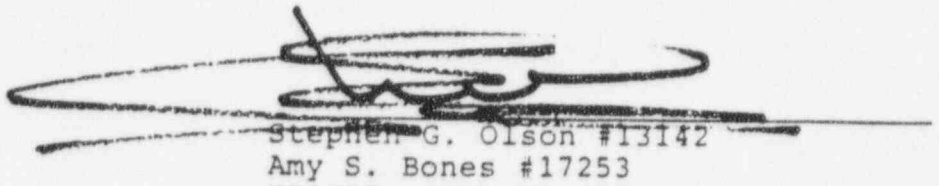
contract. That situation is no different than the case before this Court. In this case, the parties have agreed that if the Nebraska Supreme Court issues a favorable determination, they will enter into a contract, which is identical to the documents which comprise Exhibits 17, 18, and 19 in the Bill of Exceptions. Here, the parties know exactly what the policies of insurance will provide if policies are issued to the Districts. To say that Appellants would have a legally protectible interest if NEIL had issued the policies of insurance, but the parties had agreed that the policies would not become effective unless this Court issued a favorable ruling, would be to elevate form over substance.

The Court's ruling that Appellants have no legally protectible interest or right in the controversy, in light of the Declaratory Judgment Act, which provides that the Act must be liberally construed and administered, is a decision which should be reconsidered, in order that justice may be served.

Frankly, Appellants are at a loss to understand the Supreme Court's hesitancy in deciding this vital issue. The issue is simple--may a public power district join a mutual insurance company. Neb. Rev. Stat. § 25-21,153 expressly provides that the enumeration in §§ 25-21,150, 25-21,151, and 25-21,152 does not limit or restrict the exercise of the court's general power to declare rights, status, and other legal relations in any proceeding where declaratory relief is sought, and in which a judgment or decree will remove an uncertainty. The issue has never been framed as a contract case but a case to consider the constitutionality of a political subdivision of the State being a member of a mutual insurance company. This court decision will remove an uncertainty with regard to whether political subdivisions of this state may participate in a mutual insurance company. A definitive ruling in this case would be beneficial not only to Appellants, but to the citizens of the State of Nebraska. Appellants urge that this Court reconsider its decision.

CONCLUSION

For the reasons set out herein, Appellants request that the Supreme Court reconsider its decision of September 9, 1988.



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on behalf of:

OMAHA PUBLIC POWER DISTRICT and
NEBRASKA PUBLIC POWER DISTRICT

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