STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD

IN THE MATTER OF THE COMPLAINT OF RGR HOLDINGS B STREET, LLC, Complainant, AGAINST LINCOLN ELECTRIC SYSTEM, LINCOLN, NEBRASKA, Respondent.	)))))))	**C - 49** **ORDER ON RESPONDENT'S MOTION TO DISMISS**

On July 31, 2013, the Lincoln Electric System ("Respondent") filed a Motion to Dismiss the Complaint filed by RGR Holdings B Street, LLC ("Complainant") with the Nebraska Power Review Board ("the Board"). In its motion, Respondent requested that the Board "enter an Order finding that the Complainant is not an applicant within the meaning of the language in Neb. Rev. Stat. § 70-1017 in that the Complainant has been connected to the Respondent's electrical distribution system for several years and has been receiving electric energy from the Respondent at Complainant's location at 1419 B Street for several years, and further that the ownership of Lincoln Electric System is vested in the City of Lincoln and management of the Lincoln Electric System is vested in the Lincoln Electric System Administrative Board and that the Power Review Board is not the owner, manager or operator of the Lincoln Electric system and therefore does not possess the general power of management of the Lincoln Electric System incident to ownership and therefore has no authority to grant the relief sought by Complainant." (Exh. 3, page 5). (References to the transcript of the oral arguments on August 16, 2013,

are designated by a "T" followed by the transcript page, then the lines upon which the testimony appears, while references to exhibits are designated by "Exh.")

On August 6, 2013, the hearing officer met with counsels for Complainant and Respondent to determine how to proceed on the procedural issues related to addressing the Motion to Dismiss and the hearing on the merits. He informed them that the Board has previously told the hearing officer that the Board reserves the right to make rulings on matters that would determine a party's right to continue participating in a proceeding, such as Motions to Dismiss. Therefore, a hearing would need to be held before the Board on the jurisdictional issues raised in the Motion to Dismiss. That portion of the hearing would be held on August 16, 2013. Both counsels agreed that only the jurisdictional issues should be addressed at the hearing on August 16. Both parties could submit a brief at the conclusion of oral arguments on August 16. If the Board determined it lacked jurisdiction, the proceeding would be dismissed. If the Board determined it has jurisdiction, the Motion to Dismiss would be overruled and the hearing on the merits would be scheduled, likely for September 13, 2013.

On August 16, 2013 the Board heard oral arguments on the Motion to Dismiss, accepted briefs from the parties, and took the matter under advisement. For the following reasons, the Board finds that it does have jurisdiction over the Complaint.

The Complaint is brought pursuant to the provisions of Neb. Rev. Stat. § 70-1017. That statute states the following:

> Any supplier of electricity at retail shall furnish service, upon application, to any applicant within the service area of such supplier if it is economically feasible to service and supply the applicant. The electric

> service shall be furnished by the supplier within a reasonable time after the application is made. If the supplier and the applicant cannot agree upon any of the terms under which service is to be furnished, or if the applicant alleges that the supplier is not treating all customers and applicants fairly and without discrimination within the same rate class, the matter shall be submitted to the board for hearing and determination.

Respondent's position is that only new customers requesting initial electric service are "applicants" under the provisions of § 70-1017. (Exh. 3, page 2, paragraphs 2 and 3; T17:13-25). Respondent claims that Complainant does not qualify as an "applicant" because, although the Complainant's electric service is currently disconnected due to noncompliance with a policy regarding access to meters, Complainant had been receiving electric service from Respondent for at least several years. Respondent argues that Complainant is therefore an existing customer and the Board has no jurisdiction over the Complaint. (Exh. 3, page 2; Respondent's brief at 1-2; T44:5 to 45:2). It is uncontested that Complainant's property had been receiving electric service for some time prior to disconnection. (Exh. 1; Exh. 3, page 2, paragraph 1). Respondent points to the Board's decision in Complaint C-8 in support of its contention that the term "applicant" in § 70-1017 refers only to those applying to establish new electric service with a power supplier, and does not include existing customers. (Exh. 3, page 2, paragraph 2; Respondent's brief at 1-2; T10:6 to 11:3). Respondent also argues that Complainant has failed to state a claim upon which relief can be granted by the Board because the Complaint would have the Board invade the province of Respondent's management and determine whether the policies adopted by Respondent's management and governing body are appropriate. (Exh. 3, page 3, paragraph 4; Respondent's brief at 3-4). Finally, Respondent asserts that

if customers believe they are aggrieved by Respondent's actions or policies, their remedy is to take the matter to the appropriate District Court, not the Board. Respondent claims that Complainant therefore has an adequate remedy at law. Respondent cites the provisions of Neb. Rev. Stat. § 15-1201 et seq. in support of its contention. (Respondent's brief at 5-6; T16:19 to 17:2).

Complainant counters that when considering a statute's meaning, the Board must give proper consideration to the evil and mischief it seeks to remedy. Complainant asserts that the evil and mischief the Legislature intended to remedy by enacting § 70-1017 was the arbitrary terms of service, discrimination, and/or unfair treatment imposed on customers by Nebraska's electric utilities. (Complainant's brief at 3). Complainant also argues that a customer becomes an applicant when the utility disconnects a customer's electricity, and the customer requests reconnection of service. (Complainant's brief at 3; T47:23 to 48:2).

At oral arguments, the parties devoted a significant amount of time to the issue of whether the Complainant is an "applicant" as that term is used in § 70-1017. The section of the statute pertinent to this complaint is the sentence "If the supplier and the applicant cannot agree upon any of the terms under which service is to be furnished, or if the applicant alleges that the supplier is not treating all customers and applicants fairly and without discrimination within the same rate class, the matter shall be submitted to the board for hearing and determination." It is the Board's reading that this part of the statute creates two separate bases for the Board's jurisdiction over complaints brought by parties against electric power suppliers. The first is for complaints brought by applicants when

the applicant and the power supplier cannot agree on the terms of service. The second is for complaints brought by an applicant alleging that a power supplier is not treating its applicants and customers fairly and without discrimination within the same rate class. The inclusion and placement of the word "or" is of critical importance for this determination. The Nebraska Supreme Court has held that "When words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning." Cox Cable of Omaha v. Nebraska Dept. of Revenue, 254 Neb. 598, 603, 578 N.W.2d 423, 426-427 (1998). According to Webster's Dictionary, the definition of "or" is "a coordinating conjunction introducing: *a)* an alternative [red *or* blue] or the last in a series of choices *b)* a synonymous word or phrase [oral, *or* spoken]." (Emphasis in original). Webster's New World Dictionary 453 (4th ed. 2003). The plain and unambiguous meaning of "or" in the pertinent portion of § 70-1017 is that the second clause is an alternative to the first. The Board believes that this language clearly establishes two different bases upon which the Board's jurisdiction can be established. "If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning." State v. Jones, 258 Neb. 695, 701, 605 N.W.2d 434, 438 (2000).

In order for there to be jurisdiction over a complaint brought under the second clause in the last sentence in § 70-1017, a complainant must be an applicant and allege that the supplier is not treating all customers fairly and without discrimination. In its Complaint, Complainant alleges that "LES has not enforced its 'one-door access' policy uniformly and has arbitrarily chosen to enforce it at 1419 B Street." (Exh. 1, page 4, paragraph 15). Complainant also alleges that "LES has discriminated against RGR by

arbitrarily refusing to turn the power back on at 1419 B Street until such time as Reinke has provided one door access to his meters or moved his meters outside." (Exh. 1, page 5, paragraph 19). The Complaint therefore contains allegations that Respondent is not treating all customers fairly and without discrimination.

The remaining question is whether Complainant qualifies as an "applicant" under § 70-1017. The definitions for terms used in Chapter 70, Article 10 are set out in Neb. Rev. Stat. § 70-1001.01. The statute does not provide a definition of the term "applicant." Webster's dictionary defines the term as "One who applies, as for employment or help." The definition for "apply" relevant in this context is "to make a formal request." Webster's New World Dictionary 30 (4th ed. 2003). During oral arguments at the hearing it was discussed whether the term is limited to parties making a written application to a power supplier for initial service, or if any party not currently receiving electricity from a power supplier and asking to reestablish service is an applicant. As the Board understands it, Respondent's position is that once a power supplier initiates electric service to a party at a particular location, the party receiving that electricity permanently becomes a customer and the Board loses jurisdiction over any complaints the party may file based on that location, so long as the party does not have itself disconnected from the electric supplier or the electric grid entirely. (T42:21 to 45:2) The Board finds no basis to believe that the Legislature meant to restrict the term applicant to mean only a party who is not currently a customer of a power supplier that is filing a written or online document prepared by the power supplier in order to request initiation of electric service.

For purposes of § 70-1017, the Board finds that the term "applicant" is intended to mean any party requesting electric service from the retail power supplier holding the service area rights to a particular location. A party is an applicant whether the request is for initial service to an electric load or reestablishment to a load that was disconnected (such as for failure to make payments, safety code violations, or, as is the case in the present proceeding, due to alleged noncompliance with a power supplier's policies). The language in the second clause of the last sentence in § 70-1017 indicates that the Legislature intended to provide those persons or entities having or wishing to have electric service with an administrative avenue of redress when electric power suppliers fail to treat customers within the same rate class fairly and without discrimination. To find that the term applicant refers only to those parties that file written or on-line documents with a power supplier requesting initiation of a new electric service would put power suppliers in almost complete control of who could constitute an applicant. It would also mean that once service is established, there is no State administrative oversight protecting customers from a power supplier's discriminatory actions. The Board does not believe the Legislature intended to define the term that narrowly.

The Board believes the Legislature intended the language in the second clause of the last sentence in § 70-1017 to provide parties requesting service (whether initially or reconnecting) with an administrative remedy in the limited circumstances where there are allegations that a power supplier is treating its similarly situated applicants and customers unfairly and in a discriminatory manner.

Under this reading, the Board would not invade the province of a power supplier's governing body. Respondent asserts that management of the City of Lincoln's electric utility is vested in Respondent's Administrative Board. (Exh. 4, page 3, paragraph 4; Respondent's brief at 3-5). The Board agrees. Respondent correctly points out that an administrative agency such as the 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. Lincoln Electric System v. Terpsma, 207 Neb. 289, 291-292, 298 N.W.2d 366, 369 (1980). See also Centra, Inc. v. Chandler Ins., 248 Neb. 844, 855, 540 N.W.2d 318, 327 (1995), cert. denied 116 S.Ct. 1681 (1996). The Board lacks the authority to determine whether it agrees with a power supplier's policy or to review whether a policy's provisions are the best option for the power supplier's customers. Respondent is correct that such decisions are reserved to the governing bodies of Nebraska's power suppliers. In this instance, the Legislature provided the Board with specific statutory authority to provide an administrative remedy in limited circumstances that do not extend to policy matters. The Legislature provided Nebraska's power suppliers with the ability to implement whatever policies they believe are best for their ratepayers, subject to applicable legal and constitutional standards. However, they have no right to impose those policies in an arbitrary, capricious, or discriminatory manner against parties in the same rate class. If they do so, the Legislature provided an administrative remedy for applicants to challenge a power supplier's unfair and discriminatory actions.

Respondent argues that the appropriate venue for parties aggrieved by actions of power suppliers is the appropriate Nebraska district court. (Respondent's brief at 5; T15:23 to 17:2). The Board agrees that the Legislature certainly could foreclose an administrative remedy and require that parties seek relief through the courts, but the language in § 70-1017 demonstrates the Legislature did not choose to do so. Respondent claims that Neb. Rev. Stat. § 15-1201 *et seq.* provides the exclusive remedy for grievances such as those alleged by Complainant. But § 15-1201 is a statute dealing in a general and broad manner with the process to challenge actions taken by numerous governmental entities that are part of cities of the primary class. Municipal electric utilities are not even mentioned in § 15-1201. Meanwhile, § 70-1017 deals specifically with complaints brought against electric power suppliers. To the extent there is a conflict between two statutes on the same subject, the specific controls over the general statute. Sack v. Castillo, 278 Neb. 156, 160, 768 N.W.2d 429, 433 (2009). See also AMISUB, Inc. v. Board of County Commissioners of Douglas County, 244 Neb. 657, 663, 508 N.W.2d 827, 832 (1993). The Board points out that § 15-1201 provides a process for appeals from orders or decisions of a primary class city's officers, departments, or boards. There is no evidence before the Board that indicates Respondent issued an order or formal decision in this matter. In addition, the Nebraska Supreme Court has ruled that § 15-1201 applies only where the various bodies controlled by the statute act in their judicial or quasi-judicial capacity. Whitehead Oil Co. v. City of Lincoln, 245 Neb. 660, 663, 515 N.W.2d 390, 392 (1994); Copple v. City of Lincoln, 210 Neb. 504, 507, 315 N.W.2d 628, 630 (1982). It appears to the Board that the disconnection of Respondent's

electric service is an administrative action, not a judicial or quasi-judicial action from which Respondent can appeal to the District Court under the provisions of § 15-1201.

THE BOARD THEREFORE FINDS that it does have jurisdiction over the Complaint to address the issues relating to allegations that Respondent is not treating all customers and applicants fairly and without discrimination. Respondent's Motion to Dismiss is hereby overruled.

Notice is hereby given to both parties that the Board has scheduled a hearing on September 13, 2013, in the Liquor Control Commission Hearing Room, 5th Floor, Nebraska State Office Building, 301 Centennial Mall South, Lincoln, Nebraska, to begin at 9:30 a.m. or as soon thereafter as possible, to address the merits of Complaint C-49. At that time the Board will receive testimony and other evidence regarding the Complaint.

Dated this 4 day of September, 2013.

Michael Siedschlag
Board Chairman

Joining in this decision are Board members Lichter (Vice Chairman), Haase, Morehouse and Reida.

CERTIFICATE OF SERVICE

I, Timothy J. Texel, Executive Director and General Counsel for the Nebraska Power Review Board, hereby certify that a copy of the foregoing **Order On Respondent's Motion to Dismiss** in C-49 has been served on the following persons at the addresses indicated, by mailing a copy of the same via United States first class mail, and by hand delivery at the address below, on the 5th day of September, 2013.

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