

**STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD**

IN THE MATTER OF THE COMPLAINT)	C - 51
OF CRAIG CARLSON,)	
Complainant,)	
)	
AGAINST)	ORDER
)	ON RESPONDENT'S
CONCORDE MANAGEMENT AND)	MOTION TO DISMISS
DEVELOPMENT, LLC,)	
Respondent.)	

On October 2, 2015, the above-captioned matter came on for consideration before the Nebraska Power Review Board (the Board). The Board, being fully advised in the premises, and upon reviewing the evidence **HEREBY FINDS AS FOLLOWS** (references to the transcript of the oral arguments is designated by a "T" followed by the transcript page, then the lines upon which the statement appears, while references to exhibits are designated by "Exh." followed by the exhibit number):

Lichter, Reida, Grennan, Haase and Morehouse, participating.

FINDINGS OF FACT

1. That on August 3, 2015, Craig S. Carlson (Complainant) filed a formal Complaint with the Board against Concorde Management and Development, LLC (Respondent). Complainant asserted, among other things, that Respondent was operating as a power supplier without authorization and that Respondent was unfairly allocating the costs of electric service for the common areas of a building at 1314 'O' Street, Lincoln,

Nebraska, in which the Lincoln Flats Condo Association, Inc. is located. (Exh. 1, pages 2-3 and 5).

2. The Complaint was designated as “C-51”.

3. That on August 31, 2015, Respondent filed a timely Reply to Complaint. (Exh. 3). On August 31, 2015, Respondent also filed a Motion to Dismiss and Motion for Continuance. (Exh. 4).

4. A continuance was granted allowing the Board to first address the Motion to Dismiss. (Exh. 5). Oral arguments addressing the Motion to Dismiss were held on October 2, 2015 via conference call. Both parties submitted a memorandum of law in support of their respective positions.

5. In the Motion to Dismiss, Respondent asserted that the Board lacks jurisdiction over the complaint and that Complainant lacks standing to bring the complaint.

6. 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.

7. Complainant essentially raises two allegations. The Board believes the allegations can be fairly restated as follows: 1) That by purchasing electric power from the Lincoln Electric System and then distributing it to both itself and to the Lincoln Flats Condominium Association, Inc. in the common areas of the property involved, Respondent was operating as a power supplier as defined by Nebraska law, and 2) That Respondent calculated and/or allocated the costs between the two entities (Respondent and Lincoln Flats Condominium Association, Inc.), using unfair and discriminatory allocation methods, causing Complainant to incur higher costs than he should have been required to pay as a member of the condominium association, for which a Complaint may be filed under the provisions of Neb. Rev. Stat. § 70-1017. (T32:2-8; T335-13; T44:16 to 45:9).

8. At the oral arguments both counsels acknowledged that Respondent is no longer the property manager for the property involved in this Complaint. (T11:23-25; T15:12-15; T19:7 to 20:18; T25:6-11; T33:20 to 34:1; T45:10 to 46:5). Although Respondent retains ownership of most or all of the commercial space on the first floor of the property involved, both parties agree Respondent is no longer operating as the property manager. (T23:9 to 24:3; T37:16-20).

9. In its Motion to Dismiss, Respondent alleges that “the Complaint is frivolous as a matter of law and is subject to sanctions that can be imposed under the Nebraska Administrative Procedure Act for frivolous filings.” (Exh. 4, page 2). Respondent requests that the Complaint be dismissed at Complainant’s cost, and

specifically that Complainant be assessed Concorde's attorney's fees and costs to the greatest extent permitted by law. (Exh. 4, page 3).

CONCLUSIONS OF LAW

10. Pursuant to Neb. Rev. Stat. § 70-1017 and the Board's Rules of Practice and Procedure, Title 285, Nebraska Administrative Code, Chapter 3, § 008, the Board has jurisdiction to conduct a hearing and render a determination on Complaints if certain issues are involved. Section 70-1017 provides that "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 [Power Review] board for hearing and determination."

11. When addressing a Motion to Dismiss, a court or administrative agency will assume the facts alleged in the pleadings are correct and draw all reasonable inferences based thereon in favor of the nonmoving party. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). For purposes of this Motion to Dismiss, the Board will therefore assume that the factual allegations raised in the Complaint are accurate and correct and all reasonable inferences based on the pleadings will be drawn in favor of Complainant.

12. At oral arguments both parties acknowledged that Respondent is no longer the property manager for the building where Complainant resides as a member part of the Lincoln Flats Condominium Association, Inc. Although Complainant concedes this fact, he argues it is irrelevant. Complainant takes the position that his complaint is not an

equitable action to prevent Respondent from continuing its allegedly improper actions, but also to provide a determination and guidance to all other similarly situated parties whether Respondent's actions were prohibited. (T33:20 to 34:1; T46:6 to 47:2).

13. If the Board were to find that Respondent were a power supplier under Nebraska law, that Complainant was one of Respondent's customers, and that Respondent was not treating Complainant fairly and without discrimination when compared with other customers in the same rate class, the Board's finding would essentially be that Respondent, in its capacity as a power supplier, is in some way violating the provisions of Chapter 70, article 10 in its provision of electric service to the Complainant. The statutory remedy for serving customers in violation of Chapter 70, article 10 is for the Board to bring an action in court to enjoin the violation until such supplier has complied with the provisions of Chapter 70, article 10. Neb. Rev. Stat. § 70-1015(1). As Respondent is no longer the property manager overseeing the electric service in the building and no longer is responsible for allocating the costs of such service in the common areas of the building, the alleged violation has already ceased. The Board therefore finds that the Complaint is moot. Complainant does not cite any other statute empowering the Board with authority to provide any relief other than to enjoin further instances of a violation or an ongoing violation, and the Board is unaware of any. "An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act." *Brunk v. Nebraska State Racing Comm'n*, 270 Neb. 186, 193, 700 N.W.2d 594, 601 (2005). To

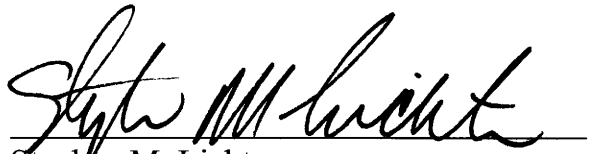
the extent that Complainant invites the Board to essentially provide an advisory opinion, the Board declines to do so.

14. Respondent alleges that “the Complaint is frivolous as a matter of law and is subject to sanctions that can be imposed under the Nebraska Administrative Procedure Act for frivolous filings.” (Exh. 4, page 2). Respondent fails to cite any statute or regulation authorizing the Board, or Nebraska administrative agencies in general, to impose sanctions on parties upon the finding that a filing is frivolous. The Board does not find that based on the information in the Complaint alone that the filing is frivolous.

15. Respondent also requests that the Complaint be dismissed at Complainant’s cost, and specifically that Complainant be assessed the costs for Concorde’s attorney’s fees and costs to the greatest extent permitted by law. Again, Respondent fails to cite any statute or regulation that permits the Board to assess attorney’s fees in this context. The Nebraska Administrative Procedure Act does allow administrative agencies to assess costs to the unsuccessful party in an administrative action when there has been a written request that the agency be bound by the formal rules of evidence in the proceeding. Neb. Rev. Stat. § 84-914(1). In the present proceeding, neither party requested that the Board be bound by the formal rules of evidence. The Board therefor finds it is unable to assess attorney’s fees or other costs to the Complainant.

IT IS THEREFORE ORDERED that the Motion to Dismiss is GRANTED, as the issues raised in the Complaint are now moot and the Board can provide no further relief to Complainant. Complaint C-51 is hereby DISMISSED. The evidentiary hearing scheduled for October 23, 2015 is cancelled.

Dated this 19th day of October, 2015.



Stephen M. Lichter
Chairman

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-51 has been served on the following parties at the addresses indicated, by mailing a copy of the same via certified United States mail, and by facsimile transmission to the numbers indicated below, on the 19th day of October, 2015.

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