STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD

IN THE MATTER OF THE COMPLAINT OF MARK DEBOER, Complainant,	)	**C - 55**
AGAINST	)	**ORDER ON RESPONDENT'S MOTION TO DISMISS**
CITY OF FAIRBURY, NEBRASKA Respondent.	)	

On the 9th day of November, 2020, the above-referenced matter came on for consideration before the Nebraska Power Review Board (the Board). Oral arguments were heard regarding Respondent City of Fairbury's Motion to Dismiss Complaint C-55. The Board, being fully advised in the premises, HEREBY FINDS AS FOLLOWS:

On October 21, 2020, Respondent City of Fairbury (the City) filed a Motion to Dismiss Complaint C-55 for lack of jurisdiction. The City asserts in its Motion that the Board has no authority beyond that which is specifically conferred upon it by statute or necessary to accomplish the purpose of the statute, and none of the allegations contained in the Complaint fall within the scope of the Board's jurisdiction. The City also argues that the Board lacks jurisdiction over matters relating to the general management of a utility. Finally, the City argues that the Complaint seeks relief that is contrary to the City's Municipal Code § 53.04, requiring that electric service installation expenses shall be paid by the customer.

The Complaint is brought under the provisions of Neb. Rev. Stat. § 70-1017 and the Board's Rules of Practice and Procedure set out in Nebraska Administrative Code, Title 285, Chapter 3, § 008. Section 70-1017 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.

The pertinent part of Chapter 3, § 008 of the Board's Rules of Practice and Procedure states:

> A complaint, where applicable, may be filed by a person, organization, or corporation. The complaint shall set forth the name of the party complainant, the name of the parties against whom the complaint is made, a concise description of the problem or alleged violation, and any other facts necessary.

The Complaint does not allege that the City has refused to provide service to Mr. DeBoer (Complainant), or that service has been denied within a reasonable time after the application was made. The Complaint is based on the language that "If the supplier and the applicant cannot agree upon any of the terms under which service is to be furnished, . . . the matter shall be submitted to the board for hearing and determination."

Complainant also argues in his brief following oral arguments on the Motion to Dismiss that the Board has jurisdiction under § 70-1017 based on the City not treating all customers and applicants fairly and without discrimination within the same rate class. It is true that the Board has jurisdiction over allegations that a power supplier is not treating all customers or applicants fairly or similarly. However, the Complaint does not allege that Complainant has been treated differently than any other similarly situated customer or applicant for service in the City's retail service area. The Board will not address issues that are not raised in the Complaint or reasonably inferred from the allegations. The Board can find nothing in the Complaint that can reasonably be viewed to imply that other customers in Complainant's rate class were being treated differently than Complainant or that he was being treated unfairly when compared to other customers facing the same or similar set of circumstances. Unless Complainant were to amend his Complaint, the Board finds it cannot address the issue of discrimination because it was not specifically raised in the Complaint or reasonably implied by the language therein.

The City's Motion to Dismiss is in essence a claim that the Board lacks subject matter jurisdiction over the allegations in the Complaint. In his brief, Complainant states that "Because Fairbury's Motion to Dismiss appears to be largely directed at the Board's jurisdiction, it is a motion to dismiss for lack of subject matter jurisdiction." Complainant's brief at 3. The Board agrees with this characterization.

Complainant argues that under Nebraska law the Board lacks the power to grant a prehearing motion to dismiss, citing to *Big John's Billiards, Inc. v. Balka*, 254 Neb. 528 (1998). In that case, the Nebraska Supreme Court found that "in the absence of a

statutory grant, an administrative agency does not have the authority to grant summary judgment in a contested case, as contested cases otherwise require notice and an opportunity for a full and fair hearing." *Id.* at 531. We find the *Big John's Billiards* case inapplicable to the present situation. In *Big John's Billards* the Court was addressing a motion for summary judgment, not a motion to dismiss based on lack of subject matter jurisdiction. Summary Judgment is an action that makes a finding that there is no genuine issue as to material facts based on the record before the tribunal, and the inferences that may be drawn from those facts, and the moving party is therefore entitled to judgment as a matter of law. See *Hobbs v. Midwest Ins., Inc.*, 253 Neb. 278, 282 (1997). A motion for summary judgment reviews the pleadings and evidence, taking them in the light most favorable to the non-moving party, and determines if the moving party is entitled to a judgment in its favor based on the facts. In this situation, the Board is reviewing the allegations only to determine whether the Board has jurisdiction over the type of issues raised by Complainant. The Board is not making a determination that judgment should be in favor of one of the parties based on the pleadings or the evidence.

In support of its Motion to Dismiss, the City cites to language in a Nebraska Supreme Court case stating that "The Board has no power or authority not specifically conferred upon it by statute or by construction necessary to accomplish the purpose of the statute." *In re Complaint of Fed. Land Bank of Omaha*, 223 Neb. 897, 901 (1986). See also, *Lincoln Electric System v. Terpsma*, 207 Neb. 289, 291-292 (1980) and *City of Auburn v. Eastern Nebraska Public Power Dist.*, 179 Neb. 439, 446 (1965). The Board certainly agrees that the Board, like all administrative agencies, has only that authority

granted it by the Legislature through statutory law. The plain language in § 70-1017 provides the Board with authority over complaints where "the supplier and the applicant cannot agree upon any of the terms under which service is to be furnished . . . ." In the present case, we have a customer applying for a new electric service with the electric power supplier holding the retail service area rights to the applicable area. Clearly, the City is an electric power supplier. Likewise, it seems clear the Complainant qualifies as an "applicant" for a new electric service. It is obvious the City and Complainant have not and cannot come to an agreement. The decision therefore centers on what exactly is included in the phrase "the terms under which service is to be furnished."

In the *Federal Land Bank* case, a bank acquired the rights to agricultural land with two irrigation wells due to a bankruptcy. The bank applied to Midwest Electric Membership Corporation (Midwest Electric) to serve the two wells, and Midwest Electric denied the applications. Midwest Electric denied the applications for two reasons: 1) there were significant delinquent charges on the irrigation well services from the previous owner of the land and Midwest required the bank to pay the delinquent amount before service would be restored, and 2) the applications were filed after a deadline in an unwritten policy Midwest Electric had established by which customers not currently receiving service had to apply in order to receive electric service for the next irrigation season. The Power Review Board found the applications were untimely because they were submitted after Midwest Electric's deadline and dismissed the complaint. The Nebraska Supreme Court reversed and directed the board to order Midwest Electric to approve the bank's applications.

The Court pointed out that Midwest Electric's deadline policy had been established ten years prior to the bank's applications. The reason the deadline was established was that Midwest Electric at that time faced a backlog of three to four years in providing new services. However, the backlog had been eliminated by the time the bank submitted its applications. The evidence showed that absent the delinquent charges, the bank would not have had to reapply for service. The Power Review Board found the deadline policy was reasonable and economically feasible under § 70-1017 in order to control the growth of irrigation services and to regulate the utility's peak demands.

Regarding the delinquent charges, the Court upheld the Board's finding that it "properly declined to determine whether an electric supplier may refuse to supply electricity to a subsequent owner of land unless and until such subsequent owner pays the past-due electric use charges incurred by the prior owner of land, for the board does not have the power or authority to decide that question." *Federal Land Bank* at 900. The Court held that payment of another's past-due electric charges is not a term "under which service is to be furnished" under § 70-1017. The Court went on to state that:

> The 'terms under which service is to be furnished' relate to those matters for which the board exists; for example, the avoidance and elimination of conflict and competition among suppliers of electricity, the avoidance and elimination of the duplication of facilities and resources, and the facilitation of rate dispute settlements.

Regarding whether Midwest Electric had a right to enforce its application deadline,

the Court held that the Power Review Board's decision was not supported by the evidence, and was thus unreasonable and arbitrary. The Court explained that nothing in the record demonstrated that denial of the bank's applications had anything to do with competition, facilities, resources, or rate disputes. The Court pointed out that 1) except for the past-due charges, the bank would not have had to reapply for service, 2) the original reason the unwritten policy was created no longer existed, and finally, 3) that the bank was receiving electricity at the time of the deadline in the unwritten policy. The Court concluded the deadline did not apply to the bank's applications. As previously mentioned, the Court remanded and directed the Board to order Midwest Electric to approve the bank's applications.

Comparing the *Federal Land Bank* decision to the present situation, Midwest Electric had a policy that all applications for service must be submitted by a certain date. Despite the presence of a policy, albeit unwritten, created by the management or board of directors of a utility, the Nebraska Supreme Court found that the Power Review Board had the authority to order the utility to approve a customer's service application. In order to do so, the Court found that Midwest had not complied with its own policy. Since the bank was receiving service at the time of the deadline, and the policy was that customers receiving service as of the deadline did not need to reapply, the policy was inapplicable to the bank's situation. The importance of the decision to the present situation is that the Board had the authority to hear the case and determine whether the policy applied to the bank as an applicant/customer under § 70-1017. Since the policy did not apply, the Court found the Board had the authority to order the utility to establish service to the

applicant/customer. The Board believes that the current proceeding is more analogous to the application deadline situation in the *Federal Land Bank* case than the requirement by an applicant to pay a third party's past-due charges.

In its Reply and in its Motion to Dismiss the City claims that the Board lacks authority to interfere with the decisions made by the management of a utility. The Board agrees that it lacks authority to become involved with the internal management decisions regarding how an electric utility operates, such as budgeting, personnel, handling of delinquent accounts, billing practices, shut-off procedures, etc. But according to the Nebraska Supreme Court in the *Federal Land Bank* decision, the Board has jurisdiction when applicants apply for new service, and to determine whether the service is actually "new", or if a utility is complying with its own policies. Otherwise, the Court would not have remanded the case to the Board with instructions to order the utility to approve the bank's applications.

The City cites to *Skeedee Independent Telephone Co. v. Farm Bureau*, 166 Neb. 49 (1958) for the proposition that administrative agencies lack authority to interfere with the general power of management of a utility. (City's Brief at 3). In that case, the Nebraska State Railway Commission ultimately approved a portion of a telephone company's requested rate increase, but made the approval subject to the condition that the funds from the rate increase be used to increase employees' wages. The Court held that the Commission overstepped its authority by directing the utility to expend funds for a particular purpose. In its decision, the Nebraska Supreme Court cited language from a

U.S. Supreme Court case that "while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership." *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 289 (1923). In the *Southwestern Bell Telephone* and *Skeedee Independent Telephone* cases, the issue was approval of a general rate increase for the telephone companies. In the present matter, the issue is localized, involving the application and terms of service for one individual customer. If the Board were to exercise jurisdiction and order the City to take some action with regard to the Complainant's electric service application, that would not constitute interference with the general management of the utility. The City argues that "providing Mr. DeBoer with the relief he seeks would require the Board to 'direct expenditure of funds for a particular purpose," such as the purchase and installation of specific equipment. (City's brief at 3). The Board does not agree with this conclusion. Complainant does not request that the Board order the City to use any particular equipment, only to establish electric service to a new grain bin in compliance with the manner allegedly already approved by City officials and the City's Board of Public Works, and whether that service will be overhead or underground. Such an order would hardly constitute the Board interfering with the utility's general management functions.

In its finding that the Board lacks jurisdiction over situations where a utility is requiring an applicant to pay a third-party's delinquent charges, the Nebraska Supreme Court in the *Federal Land Bank* case provided a non-exclusive list of subject matter

issues. The Court's language was " 'The terms under which service is to be furnished' relate to those matters for which the board exists; for example, ..." *Federal Land Bank* at 901 (emphasis added). In furtherance of the purpose of avoiding conflict and competition among suppliers of electricity, the Board is to regulate retail service area boundaries. As a result of the creation of retail service areas, every retail utility has an obligation to serve all applicants requesting electric service in a utility's service area. The first sentence in § 70-1017 states "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." (emphasis added). This language appears in the same statute as the phrase "terms under which service is to be furnished".

The City also argues that the Nebraska Supreme Court's ruling in *Lincoln Electric System v. Terpsma*, 207 Neb. 289 (1980) precludes the Board's jurisdiction in this matter. The City points out that in the *Terpsma* case, the Nebraska Supreme Court held that the Board lacked jurisdiction to approve the specific route of a proposed transmission line. Instead, it is "the utility which builds the line that has the power to select the route." *Id.* at 290. In the *Terpsma* case, the Board clearly had the authority to determine whether the application for a new transmission line will serve the public convenience and necessity. The question was if a determination regarding whether "a transmission line will service the public convenience and necessity carries with it the power to select the particular route the line must follow." *Id.* at 290. In Complaint C-55, the Board is not called upon to make a finding regarding the public convenience and necessity. In the present

scenario, the City holds the service area rights to the location involved, but is required to provide service to an applicant in its retail service area. The line involved is only a short extension of a distribution line, not the route a transmission line will take as it crosses the countryside. Based on the pleadings, the Board would not characterize the Complaint as asking the Board to designate a particular route for the distribution line extension. The Complaint states that the City and Complainant initially agreed on where the grain bin should be located (one-half mile north of Complainant's existing meter serving his residence and other grain bins), and which party should pay what costs (Complainant would cover the cost to bore under the highway, and the City would cover the cost for the pole and transformers). Complainant asserts that after the agreement was made, and subsequently approved by both the utility manager and the City's Board of Public Works, the City changed the terms. (Complaint, pages 1-2). The *Terpsma* case reviewed the Board's authority under Neb. Rev. Stat. § 70-1014, while Complaint C-55 is brought pursuant to Neb. Rev. Stat. § 70-1017. The two statutes have greatly differing standards. Complaints do not involve a finding of public convenience and necessity. The Board does not find the holding in the *Terpsma* case provides guidance regarding the jurisdictional issues involved in Complaint C-55.

Finally, the Board points out that in its Reply, the City claims that the existence of City Municipal Code § 53.04, which sets out what costs are to be paid by the City and what costs are to be paid by the applicant, bars the Board's jurisdiction over the matter. (Respondent's Reply, pages 2-3). If the existence of a utility policy, whether written or unwritten, bars the Board from making any decision not in accordance with the policy,

and even prohibits the Board from accepting jurisdiction of the complaint, the Board is unsure how to reconcile that with the *Federal Land Bank* decision. In that case, it was apparently uncontroverted that the utility had a policy, albeit unwritten, it had followed for many years regarding the deadline for filing an application for irrigation services. The Supreme Court found that the evidence showed the utility's policy did not apply to the situation presented in that case, and directed the Board to order the utility to approve the applicant's requests for service. The Court's finding was based on the evidence adduced during the hearing. Here, the City would have the Board find that it lacks subject matter jurisdiction to hold an evidentiary hearing to determine if the City's policy applies to the situation in Complaint C-55. That finding would be incongruous with the holding in the *Federal Land Bank* case. To follow the *Federal Land Bank* holding, both parties would need to be able to present their evidence regarding whether the City's policy applies in this situation, whether the City followed its own policy, and whether the City had already taken action to approve the new service, in order for the Board to reach a conclusion such as the one reached by the Supreme Court in that case.

Based on the foregoing analysis, in reviewing the allegations in the Complaint in the light most favorable to the Complainant, as the non-moving party, the Board believes it has subject matter jurisdiction over the issues raised in Complaint C-55 pursuant to the language in Neb. Rev. Stat. § 70-1017.

IT IS THEREFORE ORDERED by the Nebraska Power Review Board, that the Motion to Dismiss Complaint C-55, filed by Respondent City of Fairbury, Nebraska, be, and hereby is, DENIED.

Reida (Chair), Hutchison (Vice Chair), Grennan, Moen and Loutzenhiser, participating.

Dated this 4th day of December, 2020.

Frank Reida
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 Complaint C-55 has been served on the following persons at the addresses listed below, by mailing a copy of the same via United States mail, first class postage prepaid, and via email to the email addresses indicated below, on this 4th day of December, 2020.

Christopher M. Schmidt, Esq.
Baylor Evnen, LLP
Wells Fargo Center
1248 'O' Street, Suite 600
Lincoln, NE 68508
Email: cschmidt@baylorevnen.com

Stephen D. Mossman, Esq.
Mattson Ricketts Law Firm
134 S. 13th Street, Suite 1200
Lincoln, NE 68508
Email: sdm@mattsonricketts.com

Timothy J. Texel