STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD

IN THE MATTER OF THE COMPLAINT OF MARK DEBOER, Complainant,	)	**C - 55**
AGAINST	)	**ORDER**
CITY OF FAIRBURY, NEBRASKA Respondent.	)	

On the 15th day of January, 2021, 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 testimony are designated by a "T" followed by the transcript page, then the lines upon which the testimony appears, while the references to exhibits are designated by "Exh." All testimony references are to Transcript Volume II):

FINDINGS OF FACT

1. That on September 28, 2020, Mark DeBoer (Complainant) filed a formal Complaint with the Board against the City of Fairbury (the City), specifically the Fairbury Light and Water Department, which is the City of Fairbury, Nebraska's municipal electric utility, pursuant to the provisions of Neb. Rev. Stat. § 70-1017 and the Board's Rules of Practice and Procedure, Title 285, Nebraska Administrative Code, Chapter 3, § 008. (Exh. 1; Exh. 5).

2. The Complaint was designated as "C-55."

3. That on October 21, 2020, Respondent filed a timely Reply to the Complaint. (Exh. 4).

4. On October 21, 2020, Respondent also filed a Motion to Dismiss the Complaint, alleging that the Board lacked jurisdiction over the matter. On November 9, 2020, the Board conducted a hearing at which it heard oral arguments concerning the Motion to Dismiss, and then accepted briefs from the parties. On December 4, 2020, the Board issued an Order finding that it does have subject matter jurisdiction over the issues raised in Complaint C-55 pursuant to Neb. Rev. Stat. § 70-1017, and denied the Motion to Dismiss.

5. That on January 15, 2021, the hearing on the merits of C-55 was held before the Board. Both parties submitted a brief following the hearing.

6. Complainant's property is outside both the corporate limits and the zoning jurisdiction of the City of Fairbury. (T24:24 to 25:10). It is uncontroverted that Complainant's property at issue in this proceeding is located in the City of Fairbury's retail service area. Based on this, Respondent is the power supplier that has both the right and obligation to provide electric service to customers in that area upon request.

7. In January 2020 Complainant purchased a quarter section of land that is to the southwest of the intersection of 708th Road and Highway 15. (T26:4-9). It is the northwest quarter of section 2, Township 1 North, Range 2 East in Jefferson County, Nebraska. (Exh. 7, page 1). Complainant determined that due to the additional acres of farmland he would need another grain bin. (T26:17-22; Exh. 23). Originally

Complainant intended to place the new bin either in the southeast corner of the newly purchased land, or at the homestead. (T31:12 to 32:11). In July 2020 Complainant contacted the City's electric department regarding obtaining electric service for the new grain bin. Complainant spoke with Jim Morehead, the City's electrical line superintendent at that time, about obtaining electric service for the grain bin. (T32:12-19). Although Complainant initially wanted to locate the bin on or near his homestead, extending three-phase service that far was expensive. The cost to extend three-phase service is approximately $700 to $800 per span of distribution line between poles for the materials. (T100:15 to 102:19). To avoid that much added cost, Complainant wanted to move the proposed location of the bin approximately one-half mile north so the City could serve the new bin by extending the three-phase line from the pole just south of 708th Road on the east side of Highway 15 where the three-phase service ends, across Highway 15 west to the new bin, which was to be located just south of 708th Road. (T104:8 to 105:11). A short time after their conversation, Mr. Morehead retired and was no longer with the City. (Exh. 1, page 2, paragraph 2; Exh. 4, page 2, reply 2). He retired on July 21, 2020. (T109:18-21; T122:16-19).

8. Later in July 2020 Complainant spoke with Jim Criner, a line foreman with the City's electric department, about obtaining electric service for his grain bin. Mr. Criner met Complainant at Complainant's property. (T224:22 to 225:5). Complainant has five grain bins at his homestead. Although there is room for additional grain bins on the homestead, Mr. Criner told Complainant it would be less costly to locate the new bin approximately one-half mile north of Complainant's homestead and existing grain bins.

This would be in the northeast corner of the newly purchased quarter section. The existing bins were served with single-phase power, and Complainant wanted to have the new bin served by three-phase power. The City's existing three-phase line in the area ended a short distance south of 708th Road. If the new bin were located on Complainant's homestead he would be responsible for paying all or most of the cost of extending the three-phase line from where the three-phase line ended south to his homestead. By moving the location approximately one-half mile north, it would avoid the need to build the three-phase line all the way to Complainant's residence and existing grain bins. Mr. Criner is not responsible for providing cost estimates, so he did not discuss specifics regarding routes or pricing with Complainant, but for the reasons stated above, Mr. Criner knew it would be less costly if the bin were located further north, closer to the existing three-phase service. (T26:1-3; T32:25 to 34:13; T224:22 to 226:17).

9. Complainant next spoke with the City's interim electrical line superintendent, Mitch Siebe. Mr. Siebe is a line foreman, but replaced Mr. Morehead as the City's line superintendent for approximately one month from July to August 2020 while the City went through the process of hiring a new permanent line superintendent. (T47:22 to 48:9; T131:2-15; T133:25 to 134:19; T266:4-13). Mr. Siebe was interim line superintendent on August 11, 2020. Complainant and Mr. Siebe discussed the proposed project on one or more occasions, including where the new grain bin should be located. They agreed it would be better to locate the bin in the northeast part of the newly purchased quarter section. These conversations occurred prior to August 11. (T48:10-

17; Exh. 1, page 2, paragraph 3; Exh. 4, page 2, reply 3). During one of the conversations to negotiate the terms of the new electric service, Mr. Siebe told Complainant that the City would provide the pole and transformers at no cost to Complainant, and Complainant would be responsible for the costs to bore under Highway 15. (T50:5-10). Mr. Siebe prepared a work order dated August 3, 2020, based on information provided to him by Jim Criner, that listed the materials and labor necessary to install the service to Complainant's grain bin. This would follow the route marked as Estimate 1 on Exhibit 29, page 2. (T267:1 to 269:6; Exh. 9)

10. Prior to September 1, 2020, the City for many years had a Board of Public Works (BOPW). The chain of command in the City was that the City Council was the primary authority. Under the Council was the BOPW. Under the BOPW, or at least providing reports to it, was the city administrator. Under the city administrator was the electrical line superintendent, as well as the other city employees. (T161:9-16). The BOPW had authority to direct the activities of the line superintendent and employees under the superintendent's control. (T117:9 to 118:13).

11. On August 11, 2020, the City's BOPW held a public meeting. Complainant's application for electric service to the new grain bin was one of two electric service requests on the agenda items to be acted on at the meeting. (T280:12-21). The work order dated August 3, 2020 prepared by Mitch Siebe was presented to the BOPW at the meeting. (T269:3 to 270:8). The work order did not specifically address the costs associated with boring under Highway 15 and on to the grain bin. (293:4-11). The BOPW discussed Complainant's requested electric service and voted to approve a

motion that the project be completed at no cost to Complainant. (T136:22 to 139:22; T141:17 to 142:1; T143:6-18; T213:25 to 214:24; Exh. 1, page 2, paragraph 3; Exh. 4, page 3, reply 3; Exh. 12; Exh. 26). In fact, both applications for electric service on the August 11 meeting agenda were approved at no cost to the applicants. (T281:6-13).

12. Mr. Siebe, as interim electrical superintendent, was in attendance at the August 11 BOPW meeting. (T136:22-25). After the vote, the chairman of the BOPW gave an instruction to either Mr. Siebe or the city administrator, saying: "So you can go tell him it doesn't cost him anything to do that." (T139:16-22). After the BOPW meeting ended, Mr. Siebe, in his capacity as the City's interim electrical line superintendent, called Complainant as instructed and told him the BOPW had approved the project to provide service to the new grain bin at no cost to Complainant. (T48:18 to 49:11; T51:24 to 52:8; T140:18 to 141:1; T276:7 to 278:7; 281:21 to 282:11; T287:12 to 288:18). Although there is testimony that one or more city employees believed Complainant's application involved a secondary line and therefore in their opinion should not be considered a "line extension" under Policy C, it is not entirely clear if the BOPW heard or understood the City employee's concern. As previously mentioned, the BOPW voted to approve Complainant's request for service, at no cost to Complainant. (T280:12 to 281:13; T290:3 to 291:13).

13. After Mr. Siebe notified Complainant of the decision made by the City's BOPW, Complainant ordered the new grain bin and secured contractors to erect the bin. Complainant also hired a contractor to install a level pad, which included hauling in dirt for leveling purposes and digging footings. (T49:12-25; Exh. 1, page 2, paragraph 4).

Complainant had arranged for concrete to be poured at the new grain bin site on September 15. (T53:13-20).

14. At its public meeting held September 1, 2020, one of the City Council's agenda items was to consider an ordinance repealing all previous ordinances creating the Fairbury BOPW and to have the City Council reassume the authority previously delegated to the BOPW. (Exh. 15, page 2). At the September 1 meeting the Fairbury City Council voted to approve Ordinance 3090, dissolving the Fairbury BOPW. (Exh. 16, page 4; Exh. 4, page 3, reply 5).

15. On September 14, 2020, Nate Francis, the City's new electrical line superintendent, contacted Complainant and informed him that he would need to pay $4,701.80 for the project to provide service to the new grain bin, in accordance with municipal code § 53.04. (T52:9 to 54:12; T305:18 to 306:9; T313:19 to 314:8; Exh. 30; Exh. 1, page 2, paragraph 5; Exh. 4, page 3, reply 5). Originally the estimate had been for $5,109, but Mr. Francis was able to reduce the estimate slightly by pricing used transformers. (T187:18 to 188:15; T300:20 to 302:18; Exh. 31). The quote on the estimate from Mr. Francis dated September 10, 2020 (Exh. 30) included materials, labor and truck use. Although Policy C states that these expenses would not be charged to the customer for a line extension, the City took the position that the service to Complainant's grain bin was not an "extension", and therefore Complainant would be charged for all the expenses. (T189:1-23). The estimate in Exhibit 30 was prepared consistent with the City's policy that became effective on August 25, 2020. (313:19 to 314:11).

16. Complainant then received a letter dated September 16, 2020, from Mary Renn, the City Administrator for the City of Fairbury. The letter informed Complainant that although he had asserted he should not have to pay any costs for the electrical service to his new grain bin "due to information from the Board of Public Works and based on information you state was told to you by a City employee", City Code § 53.04 required the customer to pay the "expense of installation and equipment from the City's electrical transmission line to point of service". In the letter Ms. Renn stated that the proposed new service in not an extension of the City's transmission line. The letter informed Complainant that he would have to pay the estimate of $4,701.80 for the installation of the line. The estimate was valid for 30 days from the date of the estimate. (T61:18 to 62:21; Exh. 17).

17. By the time Complainant received the letter from Ms. Renn, he had already had the site for the grain bin leveled and the concrete pad had already been poured. Complainant testified that had he known his cost to install the electric service to the grain bin would be $4,701.80, he would have located the new bin at his homestead and not at the location approximately one-half mile north, near the intersection of 708th Road and Highway 15. (T62:22 to 63:4).

18. On or about September 21, Complainant, an electrician Complainant had hired, and Nate Francis met on Complainant's property to discuss options to install electric service to the new grain bin. (T76:16 to 77:2; T306:11-15). Mr. Criner may have also been present at this meeting. (T249:1-20). They briefly discussed the option of installing a line that is represented by "Estimate 2" on Exhibit 29, page 2. Complainant

was unhappy about the situation and wanted to talk about the City's policies more than the route or cost. (T318:14-19). Complainant's electrician proposed that it would be less expensive to follow what is represented by "Estimate 1" on Exhibit 29, page 2. (T306:21 to 307:22). Mr. Francis then provided Complainant with another estimate for $9,049.56. The new estimate was dated September 23, 2020. (Exh. 18). The new estimate outlined the costs to provide service to the new grain bin by constructing a line on the north side of 708th Road. This is the line represented by "Estimate 2" on Exhibit 29, page 2. The City would consider part of the project in the new route to be a line "extension". The September 23 estimate was prepared in accordance with City policies that were adopted after August 25, 2020. (T190:6-15; T191:6 to 192:24; T314:13 to 315:1).

19. The City's existing line in the area is a three-phase distribution line that comes from the north along the east side of Highway 15. It crosses 708th Road and continues as three-phase for only one span (one additional pole). At the end of the one additional span south of 708th Road the three-phase distribution line proceeds east to serve other customers. From the end of the one span south of 708th Road the distribution line continues to the south, but it becomes single-phase line. Complainant's homestead and existing grain bins are served from this single-phase line. (T35:5 to 37:2; Exh. 23; Exh 29). On Exhibit 29, pages 1 and 2, the north-south road is Highway 15, and the east-west road is 708th Road. The black vertical line just east of Highway 15 is the City's distribution line in the area. It is three-phase on the north side of 708th Road. The three-phase service continues to the pole just south of 708th Road, indicated by a black dot. Then the three-phase service continues one span to a pole indicated by a black dot near

the bottom center of the aerial map. This is the end of the City's three-phase service, and where the single phase line proceeding to the south begins. (T26:18 to 229:18; T250:22 to 251:14). On Exhibit 29, page 2, it shows two estimates. The red dashed line marked "Estimate 1" would connect to the City's three-phase line that is one span south of 708th Road. It would be underground from the City's line to the yard pole near the grain bin. It is slightly over 350 feet in length, but less than 500 feet. (T254:5-9). This is the estimate presented to the BOPW when it approved Complainant's service request on August 11 at no cost to Complainant. The line to serve Complainant's grain bin shown as "Estimate 1" on Exhibit 29, page 2, could be installed as overhead, but this option was not pursued because it would require the City to obtain permission from another landowner to place anchors and guy wires on the east side of the City's three-phase line to support the line that would proceed west. Since Complainant did not own the property on the east side of Highway 15, the City preferred to avoid trying to get permission from the owner of that land. (T273:1 to 274:12). The green line just north of 708th Road would also connect to the City's existing three-phase line, but the connection would be on the north side of 708th Road. It would proceed west 250 feet with overhead line. After 250 feet the line would angle toward Complainant's grain bin and be trenched underground through 708th Road, then proceed to Complainant's grain bin. The green line indicates what the City believes is a primary line that would be at the City's expense because it could be used to serve other customers further west. The angled red dashed line would be approximately 190 feet in length. The City considers this portion to be

secondary line because it is dedicated to serving only Complainant's property. (T230:16 to 232:12).

20. There is a pole located just to the west of Highway 15 and south of 708th Road. The pole is directly to the west of the pole that is just south of 708th Road. The pole on the west side of Highway 15 is not used to conduct electricity. Its purpose is to anchor the pole with three-phase line south of 708th Road. (T85:11 to 87:15). It is possible to extend three-phase service from this pole to Complainant's new grain bin. (T87:16 to 88:23; T93:3 to 95:10; Exh. 20). Although it is possible, there is a difference of opinions among the witnesses whether using the pole to extend a line west would be a wise choice due to the pole already having numerous wires and attachments on it. Some witnesses referred to it as a "busy" pole. (T234:8 to 237:11).

21. The City's position is that the customer is responsible for the costs to install secondary line, and the City will install primary line at its own expense. Secondary line is designed to serve only one customer or load, and could not normally be extended further to serve any other customers. Primary line is distribution line owned by the City. Primary line can be used to serve other customers, or is capable of being extended to do so. (T256:3-24).

22. The City had a written policy setting out how costs for new electric services that would follow a public road are to be allocated. The Policy is titled "Application for Electric Line Extension". The part of the policy applicable to this proceeding is subtitled "Policy C Extension of Primary Along A Public Road", which is referred to as "Policy C". Under Policy C, the City will not charge the applicant or customer for the costs

associated with installing the first 500 feet of line for a new electrical service. (T109:24 to110:18; T12-:14-24; Exh. 6).

23. If a customer requested a new service and the necessary line would be less than 500 feet in length, it was the City's longstanding practice that no written agreement or application was required. For many years, apparently decades, agreements for new services were made verbally between the City and an applicant, including the City's notification that the customer's request for service was approved. (T111:18 to 113:18). It was also a longstanding practice of the City not to require a deposit from an applicant requesting a new service that involved less than 500 feet of line. (T113:20 to 114:13).

24. The Fairbury Municipal Code includes a provision addressing allocation of expenses for a new electric service. Section 53.04 of the City's Municipal Code (§ 53.04) is titled "Installation Expense" and states the following:

> The expense of installation and equipment from the city's transmission line to the point of service shall be charged to the customer under a policy adopted by the Board of Public Works and approved by the City Council. The installation and purchase of the meter loop shall be the expense of the customer. The meter shall be provided and installed by the City at the expense of the City. The customer shall pay all other expenses beyond the meter to the place of use. Nonresident customers shall have service extended to the yard pole on the property to be served. (Neb. RS 19-201) Penalty, see § 10.99

(Exh. 24, page 6). Policy C was the policy, or one of the policies, adopted by the

BOPW and approved by the City Council as referenced in § 53.04. (T172:2 to 174:4). Although there may have been other policies at one time pertaining to electric line installation costs prior to August 25, 2020, Policy C was the only policy of which the City had a record that had been adopted under the provisions of § 53.04. (T174:11 to 175:6). It appears there may have been a Policy A and Policy B, but those dealt with temporary line installations. (T193:13 to 194:22). It is the City's position that the line to serve Complainant's new grain bin would not be a line extension, but rather would be characterized as an attachment to the City's line. The City's employees define an extension as a line that extends the City's primary electric line that is able to provide electric service to more than one customer. The City views an attachment as secondary line that attaches to the customer's equipment or the meter. (T177:9 to 178:10). The City's administrator and line superintendent searched the City's records, but could not find any City policy that deals with what the City refers to as attachments. (T210:3 to 211:6).

CONCLUSIONS OF LAW

25. Pursuant to Neb. Rev. Stat. section 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 [for electric service] 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." The Board's jurisdiction over the issues alleged in Complaint C-55 is set out in detail in the Board's Order On Respondent's Motion To Dismiss issued December 4, 2020.

26. It is uncontested that the City is the supplier of electricity that holds the retail service area rights to the property owned by Complainant. The City therefore has the exclusive right to provide electric service to Complainant's property, including the location where Complainant located his new grain bin. Complainant requested that the City provide electric service for a new grain bin. (T207:11 to 208:8). The testimony indicated that it was the City's longstanding practice not to require applicants to submit a formal written application or a deposit in order to request electric service. (See paragraph 23 of this Order). The Board therefore finds that Complainant is an applicant that requested electric service from his supplier of electricity for purposes of Neb. Rev. Stat. § 70-1017.

27. It is uncontested that the City had a duly constituted Board of Public Works, created by the City Council. It is not entirely clear exactly when it was created, but the apparently the BOPW had been in existence for a considerable period of time prior to Complainant's request for electric service. During that time it was the City's practice for the BOPW to consider approval of requests to establish new electric services, and to approve the cost at which those services would be provided, within certain parameters.

28. It is uncontested that the City's BOPW voted to approve Complainant's request to provide electric service for his new grain bin during its public meeting held

August 11, 2020. It is also uncontested that the BOPW approved the service at no cost to Complainant. However, the City asserts that the BOPW acted ultra vires when it approved Complainant's application or request for the new service. Despite this assertion, the City could not identify any official action taken by the City since August 11 to challenge the validity of or nullify the BOPW's action to approve Complainant's application at no cost to Complainant. Likewise, the City has not made any public allegations that the BOPW failed to faithfully perform its duty when it voted on Complainant's request for electric service to serve a new grain bin. (T214:25 to 218:10). There is no evidence that any City official requested that the BOPW reconsider its vote to approve Complainant's new service at no cost to Complainant, nor if there was an official procedure to do so.

29. An ultra vires action is one that is "Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." Black's Law Dictionary 1662 (9th ed. 2009). It is not a new or recent doctrine. In an early case dealing with ultra vires actions, the Nebraska Supreme Court examined an allegation that the actions of the mayor and city council of Omaha, Nebraska to change the grade of a road were ultra vires because state law provided that a petition signed by a majority of the owners of property abutting the road was to be filed prior to making the grade change. In examining the issue, the Court stated:

> The power to change the grade of the street was vested by statute in the mayor and city council. No new legislation was necessary to authorize such action. The power to change the grade is conferred by section 109, ch. 12a, Comp. St. 1903.

> Said section and the ones immediately following prescribe the manner of exercising this power. As long as the city was authorized to change the grade of the street under the legislation then existing, it cannot be properly said that, because the manner of exercising that power laid down by the statute was not strictly followed, the action of the mayor and council was *ultra vires*. Properly speaking, *ultra vires* contracts of a municipal corporation are such as the corporation has no power to make under any circumstances or for any purpose.
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> Where the municipal corporation has the power to make the contract, but fails to follow the procedure laid down by the law for making of the contract, it cannot properly be said to be ultra vires and void, but is merely irregular.

Rogers v. Omaha, 80 Neb. 591, 592 (1908). In a more recent case dealing with allegedly ultra vires acts of governmental bodies, the Nebraska Supreme Court used language very similar to that in the *Rogers* case. In *Jeffrey Lake Development, Inc. v. Central Neb. Pub. Power & Irrigation Dist.*, 5 Neb. App. 974 (1997) the Court explained that "An ultra vires contract of a municipal corporation is one which the corporation has no power to make under any circumstances or for any purpose." *Id.* at 982, quoting *Warren v. County of Stanton*, 145 Neb. 220, 226-27 (1944). The Court noted that "The doctrine of ultra vires has, with good reason, been applied with greater strictness to municipal bodies than to private corporations . . . ." *Id.* at 982, quoting Am. Jur. 2d Municipal Corporations, etc. § 503 at 554-55 (1971). (See also the City's post-hearing brief, page 12). In the present case, the power to approve requests for electric service and determine the cost

allocation was ultimately within the power of the Fairbury City Council. The City Council delegated that authority to the BOPW in Municipal Code §§ 32.004 and 53.04. The City's argument is essentially that certain language created a condition precedent that makes the BOPW's action ultra vires. Under the Court's reasoning in the *Rogers* and *Jeffrey Lake Development* cases, the pertinent question would be whether the BOPW had the authority to approve electric service line connections, including the cost allocation. The Board finds the evidence shows the answer to that question is "yes". Thus, the BOPW's action to approve Complainant's service line connection and the associated costs during its August 11, 2020 meeting was not ultra vires. At best, the BOPW's approval would be irregular, not ultra vires. The Board believes that not only was the BOPW's action not ultra vires, but that it was not irregular.

30. The City argues that because the BOPW's approval was ultra vires, estoppel cannot be used. In support of its argument, the City cites to the following language from an 8th Circuit decision: "In fact, 'in the absence of affirmative misconduct by the government, not even the temptations of a hard case . . . justify applying an estoppel against the [government].'" *Harrod v. Glickman*, 206 F.3d 783, 793 (8th Cir. 2000). (City's post hearing brief, page 12). The Board believes the City's argument that estoppel cannot used against the City is misplaced. The City has not demonstrated that the BOPW's action regarding Complainant's service request was an ultra vires act, so it is not necessary to examine whether the doctrine of estoppel could be applied against the City.

31. Policy C is titled "Extension of Primary Along a Public Road." It is unclear what exactly the City defines as a line that runs "along a public road." The line approved by the BOPW (Estimate 1 on Exhibit 29, page 2) runs near and crosses Highway 15. The Board therefore has no reason to believe that the BOPW did not act in conformity with its understanding of what constitutes a line "along a public road."

32. After the BOPW approved Complainant's service, at no cost to Complainant, the City's interim line superintendent called Complainant and informed him of the decision. The evidence shows that this was the City's normal pattern and practice for notifying an applicant of an approval. Complainant relied on the City's approval and expended funds to hire contractors to take actions such as leveling the dirt in the area, pouring concrete, and erecting the grain bin.

33. The City emphasizes that one of the policies under which Complainant's application for electric service was approved is no longer in effect. Policy C (Exh. 6) is no longer in effect. (City's post-hearing brief, page 7). The City also points out that the BOPW was dissolved on September 1, 2020. New estimates for the cost to install Complainant's electric service were provided to Complainant on September 10 and September 23, and possibly on September 21 (Exh. 18; Exh. 30). The Board fails to see how the recission of Policy C or the dissolution of the BOPW is relevant in this proceeding. The critical inquiry is whether Policy C was a valid City policy on August 11, 2020, and whether the BOPW had the authority to approve applications for electric service, including the cost of the service. The Board finds the answer to both these questions is "yes". The Board understands that the policy or policies in effect at the time

Complainant's application for service was approved are now rescinded. This may be quite helpful for the City to clarify some issue regarding new electric services. However, the new policies adopted subsequent to the approval of Complainant's request for electric service are simply not relevant to the present proceeding. The new policies cannot be applied retroactively.

34. The City's Municipal Code § 32.004, enacted by the Fairbury City Council, was the enabling authority for the City's BOPW. Section 32.004(A) sets out the authority of the BOPW. In pertinent part, it states:

> It shall be the duty of the Board to operate any utility owned by the municipality and to exercise all powers to the same extent, and in the same manner, and under the same restrictions conferred by law upon the City Council of the municipality for the operation of utilities if no such board of public works existed, except that the Board shall not make an expenditure or contract any indebtedness other than for ordinary running expenses exceeding the amount of $10,000 without first obtaining the approval of the City Council.

(Exh. 24, page 3). The Fairbury City Council did not need to take action to approve Complainant's electric service for the new grain bin, as the City's estimate of the cost to establish service to Complainant's grain bin was less than $10,000. In § 32.004(B), the municipal code states that "The Board may purchase material and employ labor for the enlargement or improvement of the systems and works under the jurisdiction of the Board." (Exh. 24, page 3). The BOPW had the authority to authorize expenditures for

material and labor related to enlargement or improvement of the systems and works under the BOPW's jurisdiction. The service line to Complainant's grain bin would constitute an enlargement of the of the City's electrical distribution system, which was under the BOPW's jurisdiction. Obviously, the electrical department was one of the "systems and works" under the BOPW's jurisdiction. Under these provisions, the BOPW had the authority to approve Complainant's application for service.

35. Municipal Code § 53.04 requires that the expenses associated with the meter loop (the wires connecting the meter to the customer's electric load, or "place of use") shall be the expense of the customer. It is important to point out that the last sentence of § 53.04 states that "Nonresident customers shall have service extended to the yard pole on the property to be served." (Exh. 24, page 6). It is uncontroverted that Complainant is a "nonresident" of the City of Fairbury. Both his homestead and the property where the grain bin is located are outside the City's corporate limits and zoning jurisdiction. Based on this provision, Complainant has the right to have electric service extended to the yard pole on his property near where the grain bin is located.

36. Municipal Code § 53.04 authorized, and in fact required, the BOPW to adopt a policy setting out the details of how the expenses of installation and equipment would be charged to a customer. In compliance with this requirement, the BOPW adopted Policy C (Exh. 6), which was then approved by the City Council. Policy C provides that "the city will construct at its own expense the first 500' of overhead extension." By the City's own measurements, the distance from the three-phase distribution line running north-south along Highway 15 is less than 500 feet. This is true

for the line represented by "Estimate 1" on Exhibit 29, page 2, which is the one submitted to the BOPW when it approved Complainant's request for service. It is also true for the line represented by "Estimate 2" on Exhibit 29, page 2. It would also be true of the option to run the line from the "busy" pole just south of 708th Road straight west to Complainant's grain bin. The Board acknowledges that although this option is technically possible, the City's current electric department employees do not consider it to be advisable.

37. The City points out that Municipal Code § 53.04 states "The expense of installation and equipment from the city's transmission line to the point of service *shall* be charged to the customer under a policy adopted by the Board of Public Works and approved by the City Council." (Emphasis added). The City argues that the use of the word shall shows that a customer charge is mandatory. (City's post-hearing brief, pages 5-6). The Board believes the mandatory aspect of the first sentence in § 53.04 is a procedural reference, not a mandate for specific charges. The language requires the BOPW to adopt a policy establishing how expenses will be allocated, and requires that if charges are assessed against a customer, it will be done in accordance with the policy. Policy C is part of the policy adopted in compliance with § 53.04. The BOPW, at its August 11, 2020 meeting, followed the policy and determined how to allocate the costs for Complainant's service line pursuant to its understanding of the policy's provisions.

38. The City emphasizes that it does not consider the line approved by the BOPW to qualify as an "extension." It is the City's position that to be an extension, a line must be able to provide service to other customers, and not be a line dedicated to

serve one customer's electrical needs. The Board notes that although the City employees assert this definition, there is no such definition provided for the term "extension" in the City ordinances or policies. It is unclear if the BOPW approved Complainant's service request at no cost to the Complainant because the Board (who adopted the policy) disagreed with the definition used by the City's electric department employees, or if the BOPW even knew how the City's employees interpreted that term. The City would have the Board believe that the BOPW misunderstood the project by conflating it with another project approved at the same BOPW meeting. (City's post-hearing brief, pages 7-8). There is no clear evidence that the BOPW did not understand the project, only assumptions on the part of one or more City employees. The Board declines to base its decision on speculation. If the City officials believed the BOPW did not understand the project, they could have attempted to take some corrective action. The testimony indicates that no formal action was ever taken to rescind or otherwise challenge the validity of the BOPW's vote on Complainant's request for service. The Board notes that it could also be possible that the BOPW believed that the line to serve Complainant's grain bin represented by "Estimate 1" on Exhibit 29, page 2, was the functional equivalent of the option to build a mostly line straight west from the "busy" pole just south 708th Road, which would have been an "extension" under the City electric department employees' definition of that term.

39. The Board points out that § 53.04 of the City's municipal code provides that "Nonresident customers shall have service extended to the yard pole on the property to be served." Complainant's property is located outside the City's corporate limits and

the City's zoning jurisdiction. Complainant therefore would be a "nonresident customer." To be in compliance with its own code that was in effect at the time Complainant's application for service was approved by the BOPW, the City would need to construct a line to the yard pole on Complainant's property in the general vicinity where the new grain bin is located. The BOPW's approval appears to be in compliance with § 53.04. Estimate 1 (Exh. 29, page 2) would bring the service onto Complainant's property to an approximate location where a yard pole would be located.

40. The Board finds that it has the authority to order a Nebraska power supplier to comply with its own policies and to require it to implement its formal decisions made regarding an applicant's request for electric service. The applicable language in Neb. Rev. Stat. § 70-1017 states: "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 [Power Review] board for hearing and determination." As previously stated, Complainant is an applicant for electric service for his new grain bin, and the City is obviously the electric supplier for the area involved. Clearly, Complainant and the City cannot agree on the terms under which service is to be furnished. In *In re Complaint of Federal Land Bank of Omaha*, 223 Neb. 903 (1986), cited and discussed in the Board's Order on Respondent's Motion to Dismiss, the Power Review Board found that the Bank's applications for service were untimely because they were filed after the utility's deadline in an unwritten policy that controlled new service connections, and the Board had dismissed the Complaint. The Nebraska Supreme Court held that the utility's deadline policy did not apply to the Bank's situation, and reversed the Board's decision and directed the Board to order the power

supplier to approve the Bank's applications to establish electric service to the Bank's property. Based on this precedent, the Board believes it does have authority to order a power supplier to establish electric service to an applicant under certain circumstances. In the *Federal Land Bank of Omaha* decision the Court found the utility's unwritten policy did not apply to the Bank's situation. In the present proceeding, the Board finds that the utility has a written City Code, a written policy adopted under the correct procedure pursuant to the City's Code, that the City, through the City's BOPW (which is the body authorized at that time to review and approve requests for electric service) approved the customer's request for electric service at a duly constituted public meeting on August 11, 2020, the City informed the customer of the approval using its longstanding practice for notifications to applicants, and allowed Complainant to act in reliance thereon, and then subsequently reneged on its approval. The Board believes that based on the language in Neb. Rev. Stat. § 70-1017, the Legislature intended for the Board to be the State entity empowered to ensure that electric power suppliers in the State of Nebraska comply with their own policies and practices when establishing electric service pursuant to a request or application for service. The Board also believes it findings are in keeping with the Nebraska Supreme Court's holding in the *Federal Land Bank of Omaha* decision.

41. The City argues that the Board lacks the authority to determine the specific route along which a transmission line should follow (City's post-hearing brief, pages 1 and 15). In support, the City cites the decision in *Lincoln Electric System v. Terpsma*, 207 Neb. 289 (1980). The Board does not dispute that the Nebraska Supreme Court in the *Terpsma* case found that the Board lacks authority to determine the specific route a

transmission line should follow. The Board points out that the Court was referring to transmission and distribution lines carrying over 700 volts, not a line extension onto a customer's property to provide electric service directly to a load (the end use facility or equipment where the electricity is used). Regardless, the argument is inapplicable to the present proceeding, as the Board is not attempting to determine the specific route or pathway the line extension to serve Complainant's grain bin should follow. In the present proceeding, the City presented several possible options regarding the pathway an electric line could follow to establish service to the grain bin. Estimate 1 and Estimate 2, shown on Exhibit 29, page 2, and straight west from the "busy" pole are all possibilities. Although the BOPW's approval was based on Estimate 1, based on the evidence at the hearing, it appears Complainant is concerned with establishing service to his grain bin, not the exact route to be followed. In finding that the City should abide by its actions approved by the BOPW, the Board believes the City could follow whichever route it wishes, so long as it is at no cost to Complainant, and connects to a yard pole in the immediate vicinity of the new grain bin. Due to this, the Board finds that the City's arguments regarding the Board's lack of authority to determine the exact route an electric line should follow are moot.

42. The City also argues that the present situation is similar to a contract dispute. It urges that there is no enforceable agreement because there was no unconditional acceptance on Complainant's part. (City's post-hearing brief, pages 2 and 14). The Board agrees with Complainant's position that the present situation is a dispute over the "terms of service", not a contractual dispute. (Complainant's closing argument

brief, pages 9-10). The Board believes the situation is more analogous to a scenario where a person requests a permit or approval from a governmental entity. Once the permit or approval is obtained, there is normally nothing further required of the applicant. They are free to install, build, or take whatever other action that the governmental entity authorized.

43. In the City's post-hearing brief, it incorporates and reasserts is argument that the Board lacks jurisdiction over Complaint C-55. The City acknowledges the Board's previous order addressing the jurisdictional issues, but notes that it raises the issues for purposes of preservation, and that the evidence presented at the hearing on the merits further demonstrate the applicability of the limitation of the Board's jurisdiction. (City's post-hearing brief, page 15). The Board acknowledges the City's preservation of the issue, but cites to its Order on Respondent's Motion to Dismiss dated December 4, 2020 as dispositive for the jurisdictional issues involved. The Board does not believe that the evidence adduced at the hearing on the merits provided any basis upon which to change or modify the Board's findings in its Order dated December 4, 2020.

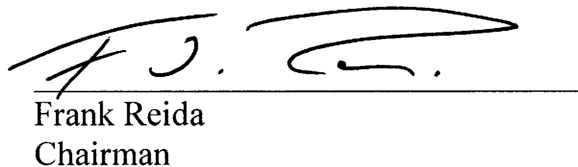
ORDER

IT IS THEREFORE THE ORDER OF THE NEBRASKA POWER REVIEW BOARD that the City of Fairbury, Nebraska, establish three-phase electric service to Mark DeBoer's grain bin located in the northwest quarter of section 2, Township 1 North, Range 2 East, in Jefferson County, Nebraska, which is just to the southwest of the intersection of 708th Road and Highway 15. The service line shall be established at no cost to Mr. DeBoer. This means the City shall be responsible for all materials,

equipment, and labor necessary. The service shall be established to a yard pole on Mr. DeBoer's property in the immediate vicinity of the grain bin. The exact location of the yard pole shall be at a location acceptable to both the City and Mr. DeBoer. The service shall be installed or constructed as expeditiously as possible, but in no event later than sixty (60) days following the issuance of this Order, unless Mr. DeBoer agrees in writing to a later date. The City of Fairbury may select the route the line will follow from among the options the City presented as valid options as discussed in this Order, which would be what is represented by "Estimate 1" or "Estimate 2" on Exhibit 29, page 2, or to extend the service straight west from the pole on the East side of Highway 15, just south of 708th Road. The City can install or construct the service line as either overhead or underground or a combination of the two, so long as Complainant is not responsible for any of the costs.

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

NEBRASKA POWER REVIEW BOARD



Frank Reida
Chairman

Dated this 15th day of March, 2021.

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** in C-55 has been served on the following persons at the addresses indicated, by mailing a copy of the same via certified United States mail, on the 15th day of March, 2021.

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