

STATE OF NEBRASKA
NEBRASKA POWER REVIEW BOARD

IN THE MATTER OF THE APPLICATION)	SAA 400-16-A
OF THE CITY OF NELIGH, NEBRASKA,)	
TO MODIFY THE EXISTING RETAIL)	ORDER
SERVICE AREA AGREEMENT 400)	ON APPLICANT'S
BETWEEN NELIGH AND ELKHORN)	MOTION TO QUASH
RURAL PUBLIC POWER DISTRICT.)	SUBPOENA

On September 26, 2016, the Elkhorn Rural Public Power District (Protestant) filed an "Application for Subpoena" requesting that the Nebraska Power Review Board's (the Board) executive director and general counsel issue a subpoena to compel the attendance and testimony of Mike Jones in the above-referenced proceeding. Pursuant to Neb. Rev. Stat. § 70-1019 the Board has the authority to issue subpoenas to compel the attendance of witnesses in proceedings brought under the provisions of Chapter 70, article 10. Pursuant to the Board's Rules of Practice and Procedure, Title 285, Nebraska Administrative Code, Chapter 3, section 25, subpoenas requiring the attendance of witnesses will be issued by the Board through the Board's executive director, or other person designated by the Board. The subpoena was issued on September 27, 2016. On September 30, 2016 the City of Neligh (Applicant) filed a Motion to Quash the subpoena. Due to continuances in the proceeding, the hearing date on the merits has been set for January 27, 2017. On October 12, 2016 the Protestant submitted an "Opposition to Neligh's Motion to Quash." The ruling on the Motion to Quash was held in abeyance

until the Board's decision on the issue of the controlling standard of review in service area amendments based on municipal annexations. The Board's order on the standard of review in annexations was issued on November 23, 2016. The Board's executive director and general counsel, acting in his capacity as hearing officer, held a conference call with counsels for Applicant and Protestant to present arguments regarding the Motion to Quash on December 8, 2016.

The determination as to whether to quash a subpoena is left to the discretion of the decision-maker, in this case the Board's executive director and general counsel serving as the hearing officer. "A motion to quash a subpoena is left to the sound discretion of the trial court." 98 C.J.S. *Witnesses* § 25, (2013) citing Downs v. State, 572 So. 2d 895 (Fla. 1990).

When reviewing a Motion to Quash a subpoena, the burden of persuasion is borne by the recipient, or the moving party. 81 Am. Jur. 2d Ed., *Witnesses* § 12 (2015), citing Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44 (S.D.N.Y. 1996). "[T]he party seeking to quash a subpoena bears a heavy burden of proof" Irons v. Karceski, 74 F.3d 1262, 1264 (D.C. Cir. 1995), citing Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 403 (D.C. Cir. 1984). In this case, the burden is therefore on the Applicant to demonstrate that the subpoena should be quashed.

The subject of the subpoena is Mike Jones (Jones), an engineer with the Olsson & Associates engineering firm. It is uncontested that Jones was retained by Applicant as an independent contractor to perform analyses of Applicant's electrical system, including

preparation of cost estimates to provide electric service to the annexed territory, and perhaps other work. Jones' contract was subsequently terminated by the Applicant. The parties agree that Applicant has retained a new engineer (Peterson) as its independent contractor to perform the work or similar work previously performed by Jones. Counsel for Applicant informed the hearing officer that Peterson will testify at the hearing before the Board in this proceeding. See also Affidavit of Ted Hughes, attached to Applicant's Motion to Quash. Although Jones is an engineer and has some degree of familiarity with Applicant's electrical system, Protestant's counsel informed the hearing officer that the Protestant does not intend to call Jones as an expert witness. See also Protestant's "Opposition to Neligh's Motion to Quash", paragraph 5. Protestant instead wishes Jones to testify regarding the reasonableness of the Applicant's cost information. The Applicant does not plan to ask him to render an opinion.

During the oral arguments conducted by telephone on December 8, Applicant's counsel stated that Jones is also needed to testify to the contents of a conversation between himself and the Applicant's city attorney. Protestant asserts that Jones' testimony is needed because no one else was privy to the conversation. Applicant objects to that line of questioning, claiming that the contents of the conversation are protected under the attorney-client privilege. The parties disagree whether the conversation concerned preparations for the present proceeding. Protestant believes that the city attorney in some fashion urged Jones to modify his findings regarding the reimbursement that would need to be paid to Protestant for the service area and customers in the annexed

area. Jones refused to modify his numbers, leading to the termination of his contract. Applicant contests Protestant's characterization of the conversation and argues that the contents of the conversation are not relevant to the proceeding. Protestant believes that testimony regarding the substance of the conversation is necessary in order demonstrate the questionable accuracy of the total economic impact figures that Applicant will present at the hearing on the merits.

To the extent Jones would be called to testify regarding the reasonableness of Applicant's cost or economic impact information, I find that such testimony is not necessary. Both Applicant and Protestant are expected to call expert witnesses that will testify to the costs involved and the economic impact on Protestant for losing the annexed service area and the customers therein. Protestant will have the opportunity to cross-examine Applicant's witness or witnesses regarding the basis and reasonableness of their calculations. Protestant will also present its own witness to provide the Board with what Protestant believes are more accurate economic impact figures, and can argue why those figures are more reasonable during closing arguments, and possibly in briefs if the Board requests or allows them. I therefore find that Jones' testimony regarding the reasonableness of Applicant's economic impact figures would be cumulative and unduly repetitious, which is excludable under Neb. Rev. Stat. § 914(1) and the Board's Rules of Practice and Procedure, Chapter 3, section 023.

Although the allegations regarding the conversation between Jones and Applicant's city attorney would certainly be troubling if they were substantiated, neither

the hearing officer or the Board have jurisdiction to investigate or act on such allegations. Any investigation into the allegations would need to be conducted by an entity with authority to do so, such as the Nebraska Supreme Court's Counsel for Discipline. Assuming *arguendo* that the contents of the conversation are not privileged under the attorney-client rule, I find that the contents of the conversation are not relevant or necessary to the proceedings. Even if Protestant's version of the conversation were to be substantiated, it does not demonstrate that Peterson's calculations of the values involved and compensation level required has been tainted in any way. Since Jones is not being called by Applicant as an expert witness, there is no need to explore whether Jones' figures were modified or raise the disputed allegation that he was requested to do so but refused. I also find that any probative value of the contents of the conversation are outweighed by the danger of unfair prejudice, especially since at this point the allegations have not been investigated or substantiated.

Applicant informed the hearing officer that Peterson will testify at the January 27, 2017, hearing on the merits. The evidence presented by both parties will need to pertain to the total economic impact on Protestant for which Applicant will need to compensate Protestant. The impact will include the compensation owed to Protestant for the value of the certified service area, the distribution facilities in the area, and the loss of revenue for the customers to be transferred, in accordance with Neb. Rev. Stat. §§ 70-1008 and 70-1010. Peterson will be able to testify to these factors, as will Protestant's expert. Protestant will be able to cross-examine Peterson to determine the basis for his

calculations. If Protestant is concerned that Applicant's city attorney has attempted to urge Peterson to modify his calculations or opinion, Protestant would be able to ask Peterson during cross-examination if any such influence has been exerted on him. This will allow both parties to present an expert witness to address the appropriate compensation level, and both will be subject to cross-examination. If either party has a well-founded belief that someone attempted to exert improper influence on an expert witness, that issue could be explored during cross-examination during the hearing on the merits.

Protestant's expert will be able to thoroughly address the appropriate compensation level that Applicant will owe to Protestant. During the telephonic arguments addressing the Motion to Quash, Protestant conceded that Jones does not have specialized knowledge concerning Applicant's or Protestant's electrical system that Peterson would not. The testimony regarding the compensation level from two witnesses with the same basic knowledge and information available to them, called by the same party, would be cumulative.


Based on the foregoing I find that Applicant has met its burden.

IT IS THEREFORE ORDERED that the Motion to Quash the subpoena for Mike Jones is GRANTED. The subpoena previously issued to Jones to appear before the Power Review Board and testify in this proceeding is hereby rescinded.

It is noted that granting the Motion to Quash is at least partially based on the assumption that the Applicant will call as a witness the new engineer (Peterson) that

fulfills the contract engineering role previously held by Jones. If Peterson is not called to testify, the hearing officer and the Board reserve the right to continue this matter in order to issue a subpoena for Jones to testify, retain the services of an independent expert, or both.

Dated: December 15th, 2016.



Timothy J. Texel
Hearing Officer

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 APPLICANT'S MOTION TO QUASH SUBPOENA** has been served on the following persons at the addresses indicated via U.S. mail to the following parties on the 15th day of December, 2016.

David C. Levy, Esq.
Krista M. Eckhoff, Esq.
Baird Holm, LLP
1700 Farnam Street, Suite 1500
Omaha, NE 68102-2068

David A. Jarecke, Esq.
Ellen C. Kreifels, Esq.
Blankenau Wilmoth Jarecke, LLP
1023 Lincoln Mall, Suite 201
Lincoln, NE 68508-2817



Timothy J. Texel