

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 ON
SERVICE AREA AGREEMENT 400)	BATTLE CREEK FARMERS
BETWEEN NELIGH AND ELKHORN)	COOPERATIVE'S PETITION
RURAL PUBLIC POWER DISTRICT.)	FOR INTERVENTION

References in this Order to the transcript of the oral arguments held on August 26, 2016, 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." followed by the exhibit number and page. For purposes of this Order, all references to the transcript are to Volume I.

On August 4, 2016 the Battle Creek Farmers Cooperative (Intevenor) filed a "Protest to Neligh's Application" in opposition to the approval of Application SAA 400-16-A filed by the City of Neligh (Applicant). On August 15, 2016 Intervenor filed a Petition for Intervention in the proceeding. On August 23, 2016 Intervenor filed a Motion to Withdraw Protest. On August 26 the Nebraska Power Review Board (the Board) convened the hearing in SAA 400-16-A for the purpose of accepting oral arguments on the issue of whether Intervenor has standing to intervene in the proceeding. Oral arguments were heard and certain foundational documents were offered on the Board's own motion and accepted into evidence. Applicant and Intervenor submitted briefs addressing the standing issue. Although Neb. Rev. Stat. § 84-912.02 anticipates that the hearing officer will rule on interventions, the Board has previously instructed its

hearing officer that the Board reserves the right to rule on motions that would be dispositive or determinative against a party or the merits of the matter. The Board therefore is issuing this ruling instead of the hearing officer.

The issue of standing before the Nebraska Power Review Board was thoroughly analyzed in informal Attorney General's Opinion I-13004, dated February 6, 2013. Although the analysis in the opinion dealt with proceedings in an application to acquire or construct electric generation facilities or transmission lines under Neb. Rev. Stat. § 70-1012, the Board believes the criteria for standing in a contested administrative proceeding before the Power Review Board in the present proceeding would be exactly the same. Some of the analysis in that opinion is therefore directly on point in this situation and bears repeating in this order.

As was pointed out in Attorney General opinion I-13004, for a litigant to have standing before a court or an administrative tribunal, the litigant must assert that his or her own legal rights and interests would benefit by the relief to be granted, and the party cannot rest his or her claim on the legal rights and interests of a third party. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). Standing requires that a litigant have such a personal stake in the outcome of the controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. *Frenchman –Cambridge Irrigation District v. Dept. of Natural Resources*, 281 Neb. 992, 801 N.W.2d 253 (2011). The direct injury involved cannot involve a general interest or injury common to all members of the public. *See State ex rel. Reed v. Nebraska Game and Parks Com'n*, 278 Neb. 564, 773 N.W.2d 349 (2009); *Smith v. City*

of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005); *Hagan v. Upper Republican Natural Resources District*, 261 Neb. 312, 622 N.W.2d 627 (2001).

In the present situation, Intervenor alleges that pursuant to the policy set out in Neb. Rev. Stat. § 70-1101, it is entitled to “dependable electric service at the lowest practical cost to all of the citizens of the state, including the residence [sic] of cities and villages.” Intervenor’s Brief at 10. Intervenor therefore argues that when considering approval of application SAA 400-16-A “the Board must take into consideration the dependability of the service to the customers.” *Id.* Intervenor also asserts that “As the hearing officer stated at the hearing, the standard in determining the merits of the Neligh Application and Elkhorn’s Protest is that the electric service provider, Neligh, ‘cannot or will not’ provide adequate electric service.” Intervenor’s Brief at 8. In Neb. Rev. Stat. §70-1011, it provides that if the current power supplier cannot or will not provide adequate electric service, a transfer is warranted even though the customer is located inside another utility’s retail service area. Although Intervenor does not cite to it specifically, this is the standard set out in Neb. Rev. Stat. § 70-1011. Intervenor apparently argues the reverse in the present situation – that if an applicant attempting to acquire a customer cannot or will not provide adequate electric service, the Board should deny the application.

Applicant asserts that Intervenor has no standing because Intervenor has no legal right to the relief sought in the proceeding. It argues that Intervenor has no legal right to determine which utility supplies its electricity. Applicant goes on to argue that Neb. Rev. Stat. § 70-1008(2) provides an annexing municipality with the right to provide electric

service to all customers in an annexed territory — without limitation or qualification.

Applicant's brief at 2.

The Board finds that Intervenor has sufficiently articulated an injury that would occur if application SAA 400-16-A were approved. Intervenor alleges that Applicant lacks the ability to provide it with adequate and reliable electric service, which would have serious operational and financial repercussions for Intervenor's business. Although it could be argued that Intervenor alleges harm that is speculative, the Board's understanding is that Intervenor alleges that Applicant's grid system is not capable of providing Intervenor with adequate electric service. Whether or not Applicant's grid system is capable of being upgraded to meet Intervenor's electric power needs is a factual issue that should be addressed at the hearing on the merits, not as part of a determination on standing. The injury alleged by a party need not have already occurred in order to confer standing. It is sufficient for purposes of establishing standing if the party seeking to bring an action (or in this case to intervene in an action) can "show that the party is in danger of sustaining direct injury as a result of anticipated action" *Hagan v. Upper Republican Natural Resources District*, 261 Neb. 312, 316, 622 N.W.2d 627, 630 (2001). The Board believes this threshold is met, at least for purposes of allowing Intervenor to participate in the proceedings in order to demonstrate that its argument is valid.

The Board finds that the alleged injury to Intervenor would be distinct from the general public, and from the other customers served by Applicant and Protestant (Elkhorn Rural Public Power District). Intervenor is an electric customer located in the annexed territory that would be transferred to Applicant if the application is approved. This creates a limited class of affected customers. The nature of Intervenor's load

characteristics and volume of its demand also differentiate it from most other customers served by either the Applicant or the Protestant.

Another requirement for standing is that “the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.” *In re Application A-18503*, 286 Neb. 611, 616, 838 N.W.2d 242, 246 (2013). In the present proceeding the alleged injury is directly related to approval of the application. If the transfer occurs, if Intervenor’s allegations are true the injury would follow in the form of inadequate electric service. It remains to be seen, however, whether the Board can grant the relief being sought by the Intervenor. To broadly summarize the parties’ positions, Applicant asserts that Neb. Rev. Stat. § 70-1008(2) controls and grants Applicant the right to absorb the annexed territory into its service area, along with all customers within that territory, leaving only the compensation level that Applicant must pay Protestant as an issue for the Board to decide. Intervenor asserts that Neb. Rev. Stat. §§70-1011 and 70-1101 require the Board to determine whether the Applicant has the ability to provide Intervenor with adequate and reliable service, and deny the transfer if it is determined Applicant cannot do so. To decide these issues at this point in the proceeding would essentially determine the ultimate question regarding whether Applicant can acquire the service area rights to the annexed territory and all the customers in that territory. Those issues deserve a full and fair debate at the hearing on the merits scheduled on October 28. The Board believes Intervenor should have an opportunity to argue its position on those points. If Intervenor’s position were to prevail, the Board can grant it the relief it requests. If Applicant’s position prevails, future parties in Intervenor’s position would lack standing because the relief sought is not within the

Board's authority. Intervenor's position could be slightly different from Protestant's due to fact that the utility's perspective may not exactly match Intervenor's perspective as a customer. Although in this case both Protestant and Intervenor are represented by the same legal counsel, it remains possible the two parties' could articulate at least slightly different positions, or certainly emphasize different aspects of the issue. As a case of first impression, the decision rendered by the Board on the issue of whether Neb. Rev. Stat. § 70-1008(2) or §§70-1011 and 70-1101 control will establish the precedent to be followed in future similar proceedings. The Board believes all parties should have the ability to present their positions on this topic at the hearing on the merits.

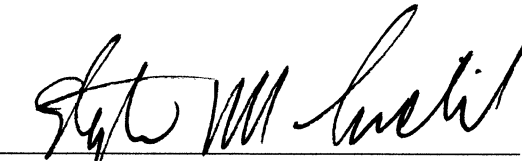
IT IS THEREFORE ORDERED that the Petition for Intervention filed by the Battle Creek Farmers Cooperative is GRANTED. Battle Creek Farmers Cooperative may hereafter be referred to as "Intervenor" in this proceeding. Intervenor has the right to participate in the hearing on the merits scheduled to be heard on October 28, 2016. There are no restrictions at this time placed on Intervenor's participation.

IT IS FURTHER ORDERED that Intervenor's Motion to Withdraw Protest is GRANTED.

Lichter (Chair), Reida (Vice Chair), Grennan, Haase and Morehouse, participating.

NEBRASKA POWER REVIEW BOARD

BY:



Stephen M. Lichter
Chairman

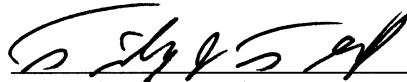
DATED: September 23, 2016

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 BATTLE CREEK FARMERS COOPERATIVE'S PETITION FOR INTERVENTION** has been served on the following persons at the addresses indicated, by mailing a copy of the same via United States mail on the 23rd day of September, 2016.

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Timothy J. Texel
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