

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	)	<b>ORDER</b>
SERVICE AREA AGREEMENT 400	)	<b>ON PROTESTANT’S MOTION</b>
BETWEEN NELIGH AND ELKHORN	)	<b>FOR REHEARING AND</b>
RURAL PUBLIC POWER DISTRICT.	)	<b>RECONSIDERATION</b>

On March 27, 2017 the Nebraska Power Review Board (the Board) issued its final written decision in the above-captioned proceeding. On April 6, 2017, the Elkhorn Rural Public Power District (Protestant) filed a timely Motion for Rehearing and Reconsideration, asking the Board to reopen the record, receive additional testimony and/or documentary evidence, and reconsider its decision. Protestant presented its argument in support in its motion, along with two exhibits. The City of Neligh (Applicant) submitted a brief in opposition to Protestant’s motion. For the reasons set forth below, the Board denies Protestant’s Motion.

On the topic of motions for reconsideration and newly discovered evidence, the Nebraska Supreme Court has stated: “[a] Motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the [tribunal] to consider exercising its inherent power to vacate or modify its own judgment.” *Breeden v. Nebraska Methodist Hospital*, 257 Neb. 371, 375, 598 N.W.2d 441, 444 (1999), quoting

*Bechtold v. Gomez*, 254 Neb. 282, 288, 576 N.W.2d 185, 189-90 (1998). In this case, the Board declines Protestant's invitation to reopen the hearing and reconsider its decision.

As a general rule, "Reconsideration is not appropriate as a vehicle to bring to [a tribunal's] attention evidence that was not presented, but was available, in connection with the initial argument." *J.P v. Smith*, 444 N.J. Super. 507, 520, 134 A.2d 977, 986 (N.J. Super. Ct. App. Div. 2016); see also *Cho v. Hawaii*, 115 Haw. 373, 384, 168 P.3d 17, 28 (Haw. 2007) ("Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." (quoting *Sousaris v. Miller*, 92 Haw. 505, 513, 993 P.2d 539, 547 (2000))). According to Protestant's Motion and the affidavit in support (Exhibit B), Protestant wishes to present additional information pertaining to the background of how substation 71-18 came to be built in its present location and history regarding the Battle Creek Farmers Cooperative. The additional information is apparently primarily in the minutes from Protestant's meetings. The Board points out that the applicable minutes from Protestant's board meetings, although admittedly from decades ago, would have been available to the Protestant prior to the January 27, 2017 hearing. As Applicant points out, the Nebraska Supreme Court has found that "[N]ewly discovered evidence is not a ground for new trial where the exercise of due diligence before the trial would have produced it." *Miles v. Box Butte County*, 241 Neb. 588, 605-06, 489 N.W.2d 829, 841 (1992); *Hansl v. Creighton University*, 243 Neb. 21, 23, 497 N.W.2d 63, 65 (1993). See also *Maddox v. First Westroads Bank*, 199 Neb. 81, 96, 256 N.W.2d 647, 656, (1977)

“Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence.”) Under the above standards, the Board does not believe that the additional evidence Protestant seeks to offer qualifies as “newly discovered evidence.”

Protestant also alleges that at least some of the Board’s questions, specifically those pertaining to considerations that went into the siting of Substation 71-18 and changes to the loads served by the substation, were “outside the scope of the statutory reintegration calculation.” (Protestant’s Motion, page 2). Protestant asked the Board to find that Applicant must pay a portion of the reintegration costs to move substation 71-18, which is located outside the annexed territory, to a different location outside the annexed territory that will better serve Protestant’s remaining loads after the service area transfer is accomplished. The Board fails to see how questions pertaining to substation 71-18 and its location are outside the scope of review set out in Neb. Rev. Stat. § 70-1010(2). The Board has fairly broad authority to determine what factors are involved in the “total economic impact” of an annexation. When the total economic impact is in dispute between the two involved electric power suppliers, the statute states that the Board “shall determine the total economic impact on the selling supplier and establish the price accordingly based on, *but not limited to*, the following *guidelines*: . . . .” (emphasis added). By the plain language in the statute, the criteria are guidelines, and the Board can take into account additional factors. Although the Board generally adheres to the

guidelines, even if the Board took into account a factor not specifically listed, the Board is permitted to do so if it is relevant and probative.

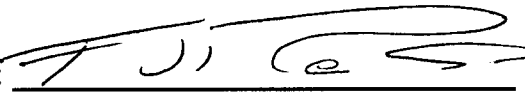
Although the Board continues to believe that costs associated with relocating substation 71-18 would constitute a betterment, the issues surrounding the initial location and construction of substation 71-18 were not the sole basis for the Board's decision. As Applicant correctly points out in its brief in opposition to the motion for rehearing and reconsideration, the Board took into consideration that Protestant constructed its substation 19 years ago, prior to the location of some of the loads in the south annexation, the substation is not physically located in the annexed territory, and Applicant agreed to pay for the customers in the south annexation Protestant would lose as a result of the service area transfer. (Applicant's brief, page 5).

Finally, the Board wishes to briefly address Protestant's assertion that by filing the Motion for Rehearing and Reconsideration the 30-day appeal deadline is stayed or tolled. Protestant cites *Allied Mut. Ins. Co. v. City of Lincoln Genesis Ins. Co.*, 269 Neb. 631, 694 N.W.2d 832 (2005) in support of its proposition. Although admittedly not within the Board's purview, the Board wishes to point out that the issue in the *City of Lincoln Genesis* case involved a motion for reconsideration of a district court's decision, which the Court held would be treated as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329. Neb. Rev. Stat. § 25-1912(3) specifically provides that "The running of the time for filing a notice of appeal shall be terminated as to all parties . . . (b) by a timely motion to alter or amend a judgment under section 25-1329." Appeals of

final decisions issued by a state agency, on the other hand, are controlled by the Nebraska Administrative Procedure Act (absent specific exceptions such as the appeal venue specified in Neb. Rev. Stat. § 70-1016). Applicant points out the controlling standard in its brief at page 6. In a case dealing with whether a motion for reconsideration filed with an administrative agency tolls the statutory appeal period, the Nebraska Supreme Court held that “§ 84-917 makes no provision for reconsideration of the State Racing Commission’s final decision so as to toll the 30-day appeal time within which appellants had the opportunity to avail themselves of a judicial challenge of the Commission’s decision.” *B.T. Energy Corp. v. Marcus*, 222 Neb. 207, 211, 382 N.W.2d 616, 619 (1986). *See also Morris v. Wright*, 221 Neb. 837, 843, 381 N.W.2d 139, 143 (1986) (“[T]he power of an administrative agency to reconsider its decision exists only until the aggrieved party files an appeal or the statutory time has expired.”), citing *Bockbrader v. Department of Insts.*, 220 Neb. 17, 367 N.W.2d 721 (1985). The Board therefore does not believe the motion tolls the 30-day period in which an appeal would need to be filed.

IT IS THEREFORE ORDERED that Protestant’s Motion for Rehearing and Reconsideration is hereby DENIED.

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

BY:   
Frank J. Reida  
Board Chairman


DATED: April 18, 2017.

**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 PROTESTANT'S MOTION FOR REHEARING AND RECONSIDERATION** has been served on the following persons at the addresses indicated via certified U.S. mail to the following parties on the 19<sup>th</sup> day of April, 2017.

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