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Jay Holmquist, General Manager  
Nebraska Rural Electric Association  
800 South 13<sup>th</sup> Street  
P.O. Box 82048  
Lincoln, NE 68501

Dear Jay:

## **I. Service to New Large Power Customers:**

**Question 1.** May a public power district refuse to provide service, if a potential new large power customer refuses to pay the deposit, prepayment, contribution in aid of construction, letter of credit, etc. requested by a public power district?

**Response:** Possibly. *Neb. Rev. Stat.* § 70-1017 provides:

“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 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 applicant fairly and without discrimination within the same rate class, the matter shall be submitted to the board [Power Review Board] for hearing and determination.”

(Emphasis added).

Under this statute, a power supplier first must determine whether it is economically feasible to provide service and supply power to the applicant. In making this determination, the supplier should assess the costs and risks associated with supplying the power. In making this assessment, if the supplier determines that it is necessary that the applicant make a deposit, prepayment, contribution in aid of construction, or letter of credit, then it appears to me that a power supplier may reasonably request that the applicant make such deposit, prepayment, etc. If the applicant does not agree to these conditions, or alleges that the supplier is not treating all customers and applicant fairly and without discrimination within the same rate class, then the matter may be submitted to the Power Review Board for resolution under § 70-1017. The

power supplier may not unilaterally refuse service, if the applicant does not agree to the terms under which service is to be provided. If the parties cannot agree, then one party or the other is obligated to take the dispute before the Power Review Board.

It should be noted that the statutes that provide for denial or discontinuance of service, *Neb. Rev. Stat.* §§ 70-1601 to 70-1615 (“Discontinuance”), only apply to domestic subscribers. A domestic subscriber is a defined term. “Unless the context otherwise requires, domestic subscriber shall not include municipalities, cities, villages, political subdivisions, companies, corporations, partnerships, limited liability companies, or businesses of any nature.” (§ 70-1602). Therefore, the Discontinuance statutes do not apply to commercial or industrial customers unless the context otherwise requires.

It should also be noted that *Neb. Rev. Stat.* § 70-655 was amended by LB 243 during the 2001 Legislature session, which became effective May 26, 2001. The amendment modified (2) which now provides:

“(2) the board of directors may negotiate, fix, establish, and collect rates, tolls, rents, and other charges for users and consumers of electrical energy and associated services or facilities different from those of other users and consumers. Any negotiated rates, tolls, rents, and other charges for a commercial or industrial customer shall be effective for no more than five years and in no case shall such rates, tolls, rents, and charges be less than the cost of supplying such services if (a) such customer has entered an agreement with the state or any political subdivision to provide an economic development project pursuant to state or local law and (b) such economic development project has projected new or additional electrical load requirements greater than five hundred kilowatts and a minimum annual load demand factor of sixty percent during the applicable billing period. Any negotiated contract, or agreement entered into pursuant to this section shall contain a provision stating that any general retail rate increase approved by the board of directors shall include the parties to the contract or agreement for a discounted rate. This subsection shall also apply to any nonprofit corporation organized for the purpose of furnishing electric service pursuant to the Electric Cooperative Corporation Act or the Nebraska Nonprofit Corporation Act.”

The language of subsection (2) quoted above is not clear in so far as whether it applies solely to economic development or whether it is broader in scope to include negotiation with all customer over rates and other charges. My sense is that it is not that broad since the former subsection (2) dealt exclusively with a special rate to stimulate economic development for any project approved pursuant to the Quality Jobs Act. It appears that the amended section was intended to broaden the type of economic development project to include “any agreement with the state or any political subdivision to provide an economic development project pursuant to state or local law” and not to permit power districts to negotiate with customers over rates and charges which would fly in the face of subsection (1) of § 70-655 which requires that rates and charges be “fair, reasonable, nondiscriminatory, and so adjusted as in a fair and equitable manner . . . .”

**Question 2.** May a new large power customer be required to make a contribution covering the entire investment by the utility prior to receiving service?

**Response:** Possibly, if the power district determines that this is what it takes to make the service economical feasible. If the customer contests the power district decision, the Power Review Board must find that the power district's decision is fair and non-discriminatory. See response to question 1.

**Question 3.** May a public power district require a contribution in aid of construction for future additions and replacements or require replacement insurance for the replacement of the facilities?

**Response:** It depends. I do not think there is authority for a power district to request payments for future additions and replacements if such request is made during the term of an existing contract. However, if it is required as a part of the determination of economic feasibility, then it appears to me that under the authority cited in the response to question 1, it can be required at the beginning of the term of a contract or at the beginning of the term or any renewal. If the customer does not agree, then either party may request that the Power Review Board resolve the dispute.

## **II. Existing Large Power Customers:**

**Question 4.** If an existing large power customer becomes delinquent in its payments to a power district, may a power district discontinue service for non-payment pursuant to *Neb. Rev. Stat.* §§ 70-1601 to 70-1615. If the customer, after his service has been discontinued, pays the delinquent amount, may a power district as a condition of reconnecting the service require deposits, prepayments, contributions, etc?

**Response:** Commercial and industrial customers are not ordinarily subject to the denial and discontinuance statutes, *Neb. Rev. Stat.* §§ 70-1601 to 70-1615 ("Discontinuance"). In the response to Question 1, reference is made to the language "unless the context otherwise requires." It is unclear to me how this language might be applied to the Discontinuance statutes to make a commercial or industrial customer a domestic subscriber. In any event, a commercial or industrial customer may have their service discontinued for nonpayment subject to a claim that such customer is a domestic subscriber. If such customer is determined to be a domestic subscriber then the notices and procedures of the Discontinuance statutes apply.

As a practical matter, any term or condition or other charge imposed on a customer, if out of the ordinary, should be agreed to at the time the application for service is made or at the beginning of a renewal term if the contract is renegotiable, unless it is a change in the rate classification or schedule. There appears to be no authority to impose additional terms and conditions or charges during a contract term, unless a rate classification or schedule is amended or changed. If however, service is terminated for failure to make payments and as a result the contract is terminated, then a public power district may be able to impose additional conditions upon reconnection based on economic feasibility, subject to the resolution of any dispute by the Power Review Board.

**III. Billing Periods and Due Dates:**

**Question 5.** May a public power district bill large power customers every two weeks or even a shorter time period, notwithstanding that residential and small commercial customers are typically billed on the basis of a 30-day period?

**Response.** Under the authority of § 70-655, I think a public power district has the authority to shorten the billing period, subject to a customer's right to challenge under § 70-1017. There is probably less risk if the rate classification and schedule is amended.

**Question 6.** May large power customers be required to pay bills in a shorter time period than residential or small commercial customers?

**Response.** See response to Question 5.

**Question 7.** May a public power district insist on collecting its bills from a large power customer via an automatic clearinghouse account or one in which the power district is automatically paid by a transfer from the large power customer's bank account to the power district?

**Response.** Possibly, if the procedures set out in the response to question 1 are followed.

**IV. Bankruptcies.**

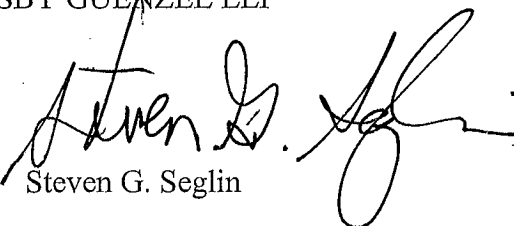
**Question 8.** If a public power district holds a deposit or a prepayment from a large power customer may it retain this deposit or prepayment if the customer files bankruptcy? In other words, is this deposit or prepayment an asset of the power district or the customer?

**Response.** Generally speaking, a deposit belongs to the customer. If the customer files bankruptcy, the deposit then becomes part of the Bankrupt's estate. A deposit implies that it does not belong to the person who is holding it. A public power district would need the permission of the Bankruptcy trustee to convert the deposit to the power district's own use. On the other hand, a prepayment probably belongs to the power district since this is a payment made in an advance for electric service. A prepayment is similar to a lease payment that is paid in advance. These are general answers and a more specific answer would depend on the facts of each case. It may be that the general answers given here might be different in a specific case if there was an agreement between the customer and the power district describing the treatment of the deposit or prepayment if certain events occur.

Very truly yours,

CROSBY GUENZEL LLP

By

  
Steven G. Seglin