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In re Application of City of Minden, Nebraska. City of Minden, Nebraska, appellant, v. Southern Public Power District, appellee, and Brian Petersen and Barb Petersen, intervenors-appellees.

811 N.W.2d 659

Filed December 23, 2011. No. S-10-1055.

1. **Nebraska Power Review Board: Appeal and Error.** An appellate court will affirm a decision of the Nebraska Power Review Board if the evidence supports the decision and it is not arbitrary, capricious, unreasonable, or otherwise illegal.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
3. **Nebraska Power Review Board: Judgments: Appeal and Error.** When it appears that the Nebraska Power Review Board has complied with the controlling statutes and the evidence is sufficient to support its findings of fact, an appellate court may not substitute its judgment for that of the board, and the action of the board will be sustained.
4. ____: ____: ____. An appellate court cannot interfere with a decision of the Nebraska Power Review Board unless there is no evidence to sustain the action of the board, or, for some other reason, the record shows the action of the board is arbitrary and unreasonable.
5. **Public Utilities: Rates.** The filed rate doctrine specifies that a filed tariff has the effect of law governing the relationship between the utility and its customers, operates across the spectrum of regulated utilities, and applies where state law creates a state agency and a statutory scheme pursuant to which the state agency determines reasonable rates.
6. **Public Utilities: Rates: Presumptions.** The filed rate doctrine conclusively presumes that both the utility and its customers know the contents and effect of published tariffs.
7. **Actions: Public Utilities: Rates.** The filed rate doctrine acts to bar suits against regulated utilities involving allegations concerning the reasonableness of the filed rates.

Appeal from the Power Review Board. Affirmed.

Andrew S. Pollock, David J.A. Bargen, and Mark R. Richardson, Senior Certified Law Student, of Rembolt Ludtke, L.L.P., for appellant.

David A. Jarecke, of Blankenau Wilmoth, L.L.P., and Mathew T. Watson, of Crosby Guenzel, L.L.P., for appellee.

No appearance for intervenors-appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The City of Minden, Nebraska (Minden), filed an application to construct a subtransmission line with the Nebraska Power Review Board (the Board). Southern Public Power District (Southern) objected to the application. The Board denied the application, finding that Minden's proposal was not the most economical and feasible means of supplying electrical services and also that its proposal would unnecessarily duplicate Southern's existing line. Minden appeals. Because the evidence supports the Board's decision and it is not arbitrary or unreasonable, we affirm.

BACKGROUND

In April 2010, Minden filed an application to construct an electric subtransmission line. The line consisted of about 2.12 miles of overhead line and about .04 miles of underground line. The overhead line was to have insulation that would support a voltage of 69 kilovolts, but Minden would operate it at only 34.5 kilovolts. The underground portion's insulation would support a voltage of only 34.5 kilovolts.

The proposed line would begin at a Nebraska public power district (NPPD) substation, which is outside of Minden, to the northeast. From that point, the proposed line was to proceed south before turning to the west and entering Minden. The proposed line would then connect with a substation on the north side of Minden.

Minden planned to construct this line as a replacement to an aging underground line. The underground line was about 30 years old and was reaching the end of its useful life. The existing underground line went along the same route as Minden's proposed line.

Minden initially estimated the project's cost at $750,000. Minden, however, later revised and lowered its estimate to $500,000. Minden admitted that this was just an estimate and that it could not know what the line would actually cost until it received bids. The cost could potentially vary by 20 percent.

Minden claimed that the ratepayers would not pay this cost because it had been setting aside money for several years in preparation to build the line.

Southern protested Minden's application. Southern argued that it had an existing 34.5-kilovolt line, built about 20 years after Minden had constructed its original underground line. Southern stated its line could accommodate the load that Minden hoped to carry on its proposed line. Southern's line was originally built to provide power to a nearby ethanol plant; it apparently was not initially designed with the aim of serving Minden. This line would be directly adjacent to Minden's proposed line. Southern argued that because the proposed line would duplicate and also compete with its existing line, it was contrary to Nebraska public policy regarding powerlines.

The record shows that Minden receives backup service from Southern. Minden pays Southern $4,000 a month for this service. The parties disputed whether Minden received backup power on a Southern line coming from the west side of town or on a Southern line on the east. But if Southern were to provide Minden's primary source of power, it would be through the eastern line, the one that would be adjacent to Minden's proposed line.

Southern had offered to transmit Minden's power. The price that Southern offered was one-half of Southern's usual subtransmission rate, or about $48,000 a year. Southern guaranteed this price for 5 years. After 5 years, the price would be one-half of whatever the subtransmission rate was at that time. Minden rejected this offer, apparently because it was concerned about the rate after 5 years and did not want to rely on Southern for its transmission.

The cost of transmitting the power was not the only cost to consider, there was also the cost of maintenance. Minden had a contract with NPPD under which NPPD provided Minden's maintenance on its system. Minden usually allocates between $250,000 and $300,000 a year for maintenance of its system. Representatives of Minden said that if Minden did not wish to have maintenance done, it simply did not allocate funds for it. The funds for maintenance are in addition to the cost of the power that Minden purchases from NPPD.

The record shows that if Minden built the proposed line, it planned to deenergize its underground line and cancel its backup agreement with Southern. This action would result in Minden's lacking a backup source of power. Conversely, if Minden were to leave the underground line energized, its exposure to maintenance costs would increase because it would have to maintain both the proposed aboveground and existing underground lines.

The Board issued its findings of fact and conclusions of law. The Board's factual findings are consistent with the facts we have already laid out. The underlying facts of this case do not appear to be in serious dispute. Instead, the parties have drawn their battlelines around the conclusions the Board drew from those facts.

Regarding those conclusions, the Board concluded that both Minden's proposal and the use of Southern's line would serve the public convenience and necessity. The Board based this conclusion on the age of Minden's underground line and the likelihood that failures would soon occur if Minden could not find a replacement.

But the Board concluded that Minden's proposal was not the most economical and feasible means of supplying the service. While the Board accepted Minden's $500,000 estimate to construct the line, it also noted that $750,000 was Minden's initial estimate. According to the Board, this deviation reflected the fluctuations of the prices of the materials needed and the difficulty of price estimates. The Board concluded there was no guarantee that the costs would not increase, requiring Minden's ratepayers to pay the overages for the cost of the project.

The Board was also concerned with Minden's failure to account for maintenance. Although the Board acknowledged it was possible that maintenance would not be needed, it was equally possible that a storm could cause significant damage resulting in Minden's paying the cost. The Board noted that Minden's exposure to maintenance costs would be greater if it built its own line than it would be if it used Southern's.

The Board concluded that at the current rate, Minden could use the $500,000 it had saved to receive power over Southern's

line for the next 10 years. The Board noted that Minden could pay for services even longer if it invested this money until it was needed to pay Southern. Summed up, the Board found that using Southern's line was the more economical and feasible choice for Minden.

In addition, the Board found that Minden's proposed line would be unnecessarily duplicative of Southern's. The Board noted that both lines would begin at the same place and both would be connected to the substation on the north side of Minden. Moreover, both lines would have the same voltage. And Southern's line had the capacity to carry both its load and the load that Minden wished to carry on its proposed line. In sum, the Board found that the new line would be unnecessarily duplicative of Southern's existing line.

ASSIGNMENTS OF ERROR

Minden assigns that the district court erred in

(1) determining that Minden's proposed subtransmission line was not the most economical and feasible means of providing electric service; and

(2) determining that Minden's proposed subtransmission line would constitute an unnecessary duplication of facilities.

STANDARD OF REVIEW

[1] An appellate court will affirm a decision of the Board if the evidence supports the decision and it is not arbitrary, capricious, unreasonable, or otherwise illegal.[1]

[2] Statutory interpretation is a question of law that we resolve independently of the trial court.[2]

ANALYSIS

Neb. Rev. Stat. § 70-1001 (Cum. Supp. 2010) sets out the Board's policy in part as follows:

> In order to provide the citizens of the state with adequate electrical service at as low overall cost as possible,

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[1] *In re Application of Neb. Pub. Power Dist.*, 281 Neb. 350, 798 N.W.2d 572 (2011).

[2] See *id.*

> consistent with sound business practices, it is the policy of this state to avoid and eliminate conflict and competition between public power districts, public power and irrigation districts, individual municipalities, registered groups of municipalities, electric membership associations, and cooperatives in furnishing electric energy to retail and wholesale customers, to avoid and eliminate the duplication of facilities and resources which result therefrom, and to facilitate the settlement of rate disputes between suppliers of electricity.

Neb. Rev. Stat. § 70-1014 (Cum. Supp. 2010) guides our analysis. This statute provides that "before approval of an application, the board shall find that the application will serve the public convenience and necessity, and that the applicant can most economically and feasibly supply the electric service resulting from the proposed construction or acquisition, without unnecessary duplication of facilities or operations."

The Board found that Minden's application would serve the public convenience and necessity. The Board, however, found that Minden could not supply the electricity most economically and feasibly. The Board also found that Minden's line would be unnecessarily duplicative of Southern's. Minden argues that the Board erred in these two findings.

[3,4] But Minden's arguments buck a strong headwind: When it appears that the Board has complied with the controlling statutes and the evidence is sufficient to support its findings of fact, this court may not substitute its judgment for that of the Board, and the action of the Board will be sustained.[3] In other words, this court cannot interfere with a decision of the Board unless there is no evidence to sustain the action of the Board, or, for some other reason, the record shows the action of the Board is arbitrary and unreasonable.[4]

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[3] See *Cornhusker P. P. Dist. v. Loup River P. P. Dist.*, 184 Neb. 789, 172 N.W.2d 235 (1969).

[4] *Omaha P. P. Dist. v. Nebraska P. P. Project*, 196 Neb. 477, 243 N.W.2d 770 (1976).

Is Minden's Application the Most Economical and Feasible Means of Providing Electric Service?

Minden first argues that the Board erred in concluding that Minden could not supply the electricity most economically and feasibly. Minden argues that this is a "matter of simple arithmetic."[5] It contends that a one-time payment to construct the line is more economical for Minden over the long term than paying $48,000 a year for the use of Southern's line because the proposed line will, over time, pay for itself.

As part of this argument, Minden raises the filed tariff, or filed rate, doctrine. According to Minden, this doctrine, which it concedes we have never applied to an entity like Southern, prohibits Southern from offering it a lower rate than it offers to other customers. Minden argues that Southern must charge twice what Southern has offered, which would be the rate that Southern charges other customers. Once Southern charges Minden the full price, Southern's proposal will no longer be the best option for Minden.

> [5-7] The filed rate doctrine specifies that a filed tariff has the effect of law governing the relationship between the utility and its customers, operates across the spectrum of regulated utilities, and *applies where state law creates a state agency and a statutory scheme pursuant to which the state agency determines reasonable rates*.[6]

The doctrine conclusively presumes that both the utility and its customers know the contents and effect of published tariffs.[7] Accordingly, the doctrine acts to bar suits against regulated utilities involving allegations concerning the reasonableness of the filed rates.[8]

We decline to apply the filed rate doctrine in this case for two reasons. First, the touchstone of the filed rate doctrine—that rates be filed with a regulatory body with authority

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[5] Brief for appellant at 10.

[6] 64 Am. Jur. 2d *Public Utilities* § 62 at 469 (2011) (emphasis supplied).

[7] *Id.*

[8] *Id.*

to determine reasonable rates—is not present. Minden admits that "[t]he Board has no authority to determine retail rates. Suppliers need not file their tariff, ordinance or rate schedule with the Board. The Board does not have authority to review rates."[9] And Minden has not pointed us to any other regulatory body that has such authority.

Second, Minden overlooks Neb. Rev. Stat. § 70-655(2) (Reissue 2009). This section provides in part that "[t]he 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*." (Emphasis supplied.) In other words, the Legislature has explicitly allowed Southern to do what Minden asks us to forbid. We decline Minden's invitation. The filed rate doctrine has no application to the facts of this case.

Under § 70-1014, the Board must decide whether Minden can "most economically and feasibly supply the electric service."[10] That means Minden's proposal must be more economical and feasible than what Southern proposed. The Board found that it was not. We conclude that evidence supports that decision and that it is not arbitrary or unreasonable.

Although Minden estimated that the line would cost $500,000 to construct, it had not yet solicited bids and acknowledged that the actual cost could be as much as 20 percent higher. The Board noted that "[t]here is no guarantee that [Minden's] ratepayers will not have to provide additional funding for the proposed line." If the costs turned out to be more than Minden had set aside, then this project or other projects may have to be put on hold, Minden's ratepayers may see an increase, or Minden may have to issue bonds.

In contrast, Southern had offered to transport Minden's electricity to Minden for one-half of its normal subtransmission rate. For the first 5 years, it would be locked in at one-half of Southern's current rate. After that, it would be one-half of

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[9] Brief for appellant at 10.

[10] See *In re Application of Neb. Pub. Power Dist., supra* note 1.

whatever Southern's rate was. With the money that Minden had already set aside, it could pay for 10 years of transmission or perhaps even more.

Finally, the Board found that Minden's exposure to potential maintenance costs would likely be lower if it accepted Southern's offer. If Minden accepted Southern's offer, Minden could potentially have little or no exposure to maintenance costs. If, however, Minden did not accept the offer, it ran the risk of having to pay for any damage to the line.

In sum, the Board concluded that a locked-in rate of about $48,000 a year for 5 years followed by 5 years at one-half of Southern's then-existing subtransmission rate was more economical and feasible than constructing a line whose exact cost was unknown. Further, the Board concluded that reducing Minden's potential maintenance cost exposure also weighed in favor of Southern's proposal. As noted, when the Board has complied with the controlling statutes and the evidence is sufficient to support its findings of fact, this court may not substitute its judgment for that of the Board, and we will sustain the Board's action.[11] We conclude that there is evidence to support the Board's decision that Southern can more economically and feasibly transmit Minden's necessary power.

Would Minden's Proposed Line Result in Unnecessary Duplication?

Section 70-1014 also requires the Board to consider "unnecessary duplication of facilities or operations." The Board found that Minden's proposal would be unnecessarily duplicative of Southern's line. Minden argues that the Board erred in determining that Minden's proposed line would result in unnecessary duplication. Minden concedes that its proposed line would be duplicative of Southern's. But Minden argues that there is no unnecessary duplication.

The Board found that Southern's line and Minden's proposed line both began at the NPPD substation located outside of Minden and were connected to Minden's substation inside of town. The two lines would operate at the same voltage. Further,

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[11] See *Cornhusker P. P. Dist., supra* note 3.

the Board noted that it was uncontested that Southern's line had the capacity to service Minden's needs and that Southern would provide this service for a fee to Minden. To summarize, the two lines were to begin at the same place and both connected to Minden's substation. And only one line was needed to carry the load. The record shows sufficient evidence to support the Board's decision that Minden's line would be unnecessarily duplicative of Southern's line, and that decision is not arbitrary or unreasonable.

CONCLUSION

We conclude the Board did not err when it concluded that Minden's line was not the most economical and feasible line. Further, the Board did not err when it concluded that Minden's line would be unnecessarily duplicative of Southern's existing line. Accordingly, we affirm.

AFFIRMED.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY A. HESSLER, APPELLANT.

807 N.W.2d 504

Filed December 23, 2011. No. S-11-379.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.
5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
6. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.