

TATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: CEDAR FALLS UTILITIES	DOCKET NO. E-21647
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ORDER DENYING APPLICATION FOR REHEARING AND REOPENING RECORD

(Issued November 4, 2005)

PROCEDURAL BACKGROUND

On May 27, 2004, Cedar Falls Utilities (CFU) filed a petition requesting that the Utilities Board (Board) issue a franchise to erect, maintain, and operate a 161 kV (kilovolt) electric transmission line, a portion of which would be located outside the city limits of Cedar Falls, Iowa, and within the jurisdiction of the Board pursuant to Iowa Code chapter 478. On December 23, 2004, the Board assigned the docket to an administrative law judge (ALJ) to establish a procedural schedule, set a hearing date, and conduct proceedings.

On January 11, 2005, the ALJ issued an order establishing a procedural schedule and setting a hearing. The hearing was held on April 15, 2005, and on July 6, 2005, the ALJ issued a proposed decision and order granting the petition and franchise to CFU. A timely appeal was filed by Bert and Diane Schou. On August 2, 2005, the Board issued an order establishing the issues to be addressed on appeal, a briefing schedule, and denying the request for oral argument.

On September 21, 2005, the Board issued an order affirming the proposed order of the ALJ, addressing certain motions filed by CFU, and granting the appearance of Carol A. Overland as counsel for the Schous. Ordering clause number 10 provided that the order would become final unless a petition for rehearing was filed within 20 days of the date of the order. Pursuant to the order, petitions for rehearing were required to be filed on or before October 11, 2005.

On October 10, 2005, the Board received a facsimile copy of an application for rehearing. On October 11, 2005, a facsimile copy of an addendum to the application was sent to the Board. The original application for rehearing and addendum were received and filed with the Board on October 13, 2005.

On October 20, 2005, CFU filed a resistance to the application for rehearing. On October 24, 2005, the Consumer Advocate Division of the Department of Justice filed an opposition to the application for rehearing.

APPLICATION FOR REHEARING

Iowa Code § 478.32 provides that any person aggrieved by an order of the Board is entitled to the rehearing procedure in Iowa Code § 476.12. Section 476.12 provides that any party to a contested case before the Board may within 20 days after the issuance of the final decision by the Board apply for a rehearing. The Board then has 30 days to either grant or deny the application for rehearing or may, after notice and an opportunity to be heard, abrogate or modify its order.

Subrule 199 IAC 1.8(1) provides that pleadings and other papers required to be filed with the Board shall be filed in the office of the Executive Secretary within the time limit, if any, for the filing. The subrule then provides that all documents are officially filed upon receipt at the office of the Board. Paragraph 199 IAC 1.8(1)"d" requires that an original and ten copies of the document filed must be provided at the time of filing.

The Board finds that the application for rehearing filed by the Schou's was not filed within the statutory time limit of 20 days, did not comply with Board rules, and cannot be considered on its merits. The "Order Affirming Proposed Order, Addressing Motions, And Granting Permission To Appear" was issued on September 21, 2005. The application for rehearing was due on October 11, 2005. The application for rehearing was not received and filed in the Board's Records and Information Center until October 13, 2005.

Sending a facsimile copy of the pleading to the Board did not toll the time for filing of the original and ten copies of the application under Board rules or the time limit established by statute. The Board cannot waive the time for filing applications for rehearing established by statute. Further, the Board does not accept facsimile filings in lieu of the original and ten copies required by the Board's rules. Procedural rules are designed to bring finality to a proceeding and a party must meet the procedural requirements for the Board to consider the party's position on the merits

of an issue. In this instance, the application was not timely filed and the Board cannot consider the arguments made by the Schou's in support of that application.

REOPENING RECORD

The Board finds that the record in this proceeding should be reopened because of a significant public interest issue that was not addressed in the petition or the hearing and the failure of CFU to comply with Board rules in filing the petition. This issue involves the existence of an airport, Whitcombe Field, within one mile of the proposed route of the electric transmission line. The Board has independently verified the location of the airport adjacent to the intersection of Union Road and Ridgeway Avenue by calling the Iowa Department of Transportation and on the Internet at www.hometownlocator.com/City/Cedar-Falls-Iowa.cfm. The airport is located at Latitude 42.47194 and Longitude -92.495.

CFU did not indicate the existence of this airport or the owner of the airport in Exhibit F of the petition as required by 199 IAC 11.2(1)"b"(8). Accordingly, CFU did not give written notice of the proposed route to the owner as required by subrule 199 IAC 11.5(4). In addition, the Board engineer assigned to review the petition and the route did not consider the location of the airport in his report and no evidence was presented at the hearing concerning the existence of the airport.

In the application for rehearing, the Schou's raised the issue of the existence and location of Whitcombe Field. As indicated earlier, the Board has independently verified the existence of the airport. Even if the Board were not denying the Schou's

application for rehearing as not timely filed, the Board would not grant the Schou's application for rehearing on the basis of the existence of the airport, since the Schou's are not the owners of the airport or the land on which the airport is located. The Schou's do not have standing to object based upon the location of the airport on someone else's property.

The Board has the authority and obligation to reopen the record in this instance even though it has issued the order affirming the proposed order. Pursuant to 199 IAC 7.1(1), the Board has specifically provided that the provisions regarding reopening the record under 199 IAC 7.7(15) do not apply to proceedings involving petitions for electric transmission lines. This allows the Board to reopen the record to ensure that all public interest issues have been considered and properly addressed before a franchise for an electric transmission line is granted. The safety of the transmission line is a significant public interest issue and under Iowa Code § 478.3(2)"h" the Board is required to determine if the proposed line would cause inconvenience or undue injury to property owners affected by the proposed electric transmission line. The owner of Whitcombe Field is an affected property owner and should have received notice of the proposed electric transmission line route.

There is not sufficient information in the record for the Board to determine if the location of the airport is a material fact that could alter the Board's decision granting a franchise for the proposed transmission line. To obtain the information required by Board rules, CFU will be required to file an addendum to the petition with

the information required by 199 IAC 11.2(1)"b"(8) and to send a letter to the owner of the airport in compliance with 199 IAC 11.5(4). CFU will be required to make an additional filing with the Board providing the information required by subrule 11.5(4).

CFU shall send a letter to the owner of the Whitcombe Field that includes a map showing the location of the proposed transmission line and informs the owner that the owner has ten days from the date the letter is mailed to file an objection to the proposed transmission line with the Board. The notice shall also include the Board's address and telephone number and the name and telephone number of a contact person from CFU. CFU shall then file a copy of the letter and the map with the Board and indicate the date it was mailed. The Board will also direct the staff engineer who prepared the original report to file an addendum to the report concerning the location of the airport to the proposed route and including any revision he wishes to make to his report.

The Board will wait until CFU has filed the notice, the engineer has filed the addendum to the report, and after the ten days for filing an objection has expired to determine whether additional proceedings or a hearing are required.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The application for rehearing filed by Bert and Diane Schou on October 13, 2005, is denied.

2. Cedar Falls Utilities shall send notice to the owner of Whitcombe Field as required by 199 IAC 11.5(4) and include the information described in this order.

3. Cedar Falls Utilities shall file a copy of the notice sent to the owner of Whitcombe Field with the Utilities Board and the information described in this order.

4. The Safety and Engineering Section of the Utilities Board shall have an engineer file a report as described in this order within 14 days of the date of this order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Sharon Mayer
Executive Secretary, Assistant to

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 4th day of November, 2005.