

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: CEDAR FALLS UTILITIES	DOCKET NO. E-21647
-------------------------------------	--------------------

ORDER DENYING RECONSIDERATION

(Issued December 7, 2005)

On September 21, 2005, the Utilities Board (Board) issued an order affirming the proposed order of an Administrative Law Judge that granted a franchise to Cedar Falls Utilities (CFU) 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. On November 4, 2005, the Board issued an order denying, *inter alia*, the application for rehearing of the September 21, 2005, order filed by Bert and Diane Schou. The Board found that the application for rehearing filed by the Schous was not filed within the statutory time limit of 20 days, did not comply with Board rules, and therefore was not considered on the merits.

On November 28, 2005, the Schous filed a petition for reconsideration of the Board's order denying the application for rehearing. Attached to the petition was an affidavit of Carol A. Overland, their attorney. The Schous contend that their application for rehearing was timely filed since it was due on October 11, 2005, and their attorney sent a copy of the application by facsimile transmission to the Board on October 10, 2005. The Schous argue that the Board had accepted earlier facsimile

filings without comment and the Board's rules do not require the original and ten copies of an application for rehearing be filed on the same day as the filing is made. The Schous allege an employee of the Board's Records and Information Center informed them that a filing could be made by facsimile transmission if the paper copies were mailed the same day the transmission was sent. The Schous state that other jurisdictions accept facsimile filings and the Board's rules are not clear on whether facsimile filings are accepted.

On November 30, 2005, CFU filed a resistance to the petition for reconsideration. CFU argues that the Schous confuse the requirements in the Board's rules related to "service" upon other parties with the requirements for "filing" with the Board. "Service," CFU points out, is effective when mailed and "filing" is only effective when physically received by the Board. CFU states that facsimile transmissions are not authorized for either "service" or "filing." Finally, CFU argues that counsel for the Schous cannot shift responsibility to Board staff for the Schous' failure to comply with the Board's rules.

Iowa Code § 476.12 provides 20 days in which to file an application for rehearing of a final decision issued by the Board. The Board may then deny the application, grant rehearing, or if the Board takes no action within 30 days, the application is deemed denied. Iowa Code § 17A.19 provides that once the Board has issued an order denying the application for rehearing or lets 30 days elapse without an order, the Board no longer has general jurisdiction of the matter.

The Iowa Supreme Court has held that once the statutory time period has elapsed the agency is without jurisdiction to modify or change the final decision. In Kash v. Iowa Department of Employment Services, Division of Job Service, 476 N.W.2d 82, 83 (Iowa 1991) citing Franklin v. Iowa Department of Job Service, 27 N.W.2d 877, 881 (Iowa 1979). The Court in the Kash case held that once the 20 days for requesting rehearing had passed an Administrative Law Judge had no authority to vacate the earlier decision. Kash at 82. The Court stated that statutory law provides the time periods that control the outcome of a contested case and once an agency decision has become final, there is no statutory authorization for subsequent agency review. Id. at 83. The Court has consistently held that once the time periods have passed an agency is without further power to act. Id. The operation of the statute may seem harsh, but parties to the proceedings have a need for and a right to a prompt disposition of a dispute. Ford Motor Company v. Iowa Department of Transportation Regulations Board, 282 N.W.2d 701, 703 (Iowa 1979). Since the Board no longer has jurisdiction of this proceeding, the Board is without the authority to consider the Schous' petition and therefore the Board will deny the petition for reconsideration.

Even though the Board will deny the petition, it will address some of the Schous' arguments in an attempt to provide a further explanation of the Board's filing rules. The Board issued the final decision in this case on September 21, 2005, when it affirmed the proposed order of the ALJ. Pursuant to Iowa Code § 476.12, a party

may apply for rehearing in a contested case within 20 days of the issuance of the final decision. Applications for rehearing were, therefore, due on or before October 11, 2005. The Schous and Ms. Overland admit that they did not file the original and ten copies of the application for rehearing within the statutory time period. Since the application for rehearing was not filed within the 20 days provided by statute, the Board held that it had no jurisdiction to consider the merits of the application.

Contrary to the arguments of the Schous, Board rules do not allow for the filing of pleadings by facsimile transmission. Contrary to the affidavit of Ms. Overland, the Board's rules on filing pleadings do not contain any reference to facsimile transmission filings. The general rule for filing pleadings with the Board is found in 199 IAC 1.8(1). That subrule provides that all filings required to be filed with the Board shall be filed with the Executive Secretary of the Board within the time limit for such filing. Paragraph 1.8(4)"d" (incorrectly cited in the November 4, 2005, order as 1.8(1)"d") provides that an original and ten copies are required for most filings with the Board. Applications for rehearing are not among the listed exceptions to this requirement. These rules are not ambiguous and do not provide for filing of pleadings by facsimile transmission.

The Board has consistently enforced this rule and does not retain facsimile transmissions or record the date of the facsimile transmission as the "filed" date in the Board's official file. Because the rules require an original and ten copies, a

facsimile transmission could not meet the filing requirements. The recitation of the previous filings sent to the Board by the Schous by facsimile transmission did not create an exception to the Board's rules. A review of the filings listed in Ms. Overland's affidavit shows that in each instance the original and ten copies of the pleadings, except for the application for rehearing, were filed within the time period provided for responses in the Board rules. Since the original and ten copies of these pleadings were timely filed with each of these other pleadings, there was no reason for the Board to address receipt of the facsimile transmissions. As indicated above, the facsimile transmissions were discarded.

Looking at the dates of the pleadings cited by Ms. Overland, the Board's official record indicates that on September 1, 2005, the Schous filed an original and ten copies of a reply to a motion to strike filed by CFU on August 18, 2005. On September 8, 2005, the Schous filed an original and ten copies of a reply to a motion to strike the appearance of Ms. Overland filed by CFU on September 2, 2005. On September 12, 2005, the Schous filed an original and ten copies of a reply to a motion to strike exhibits filed by CFU on September 2, 2005. Each of these filings of the original and ten copies was filed with the Board within the 20 days provided for responses in 199 IAC 7.5(1) and was stamped with the date the original and ten copies were received, not the date the facsimile transmissions were received. Thus, there can be no reasonable claim that the earlier facsimiles established an exception to, or waiver of, the Board's rules.

IT IS THEREFORE ORDERED:

The petition for reconsideration filed on November 28, 2005, by Bert and Diane Schou is denied.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 7th day of December, 2005.