

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DIANE AND BERT SCHOU,

Petitioners,

v.

IOWA UTILITIES BOARD,

Respondent.

No. CV-5994

MOTION TO DISMISS PETITION FOR
JUDICIAL REVIEW

COMES NOW the Respondent Iowa Utilities Board (Board) pursuant to I.R. Civ. P. 1.421(1) and 1.1602 moves the Court for an order dismissing the Petition For Judicial Review filed by Diane and Bert Schou (Petitioners) and in support of the motion states the following:

FACTS

1. On May 27, 2004, Cedar Falls Utilities (CFU) filed a petition with the Iowa Utilities Board (Board) requesting the Board issue a franchise to erect, maintain, and operate a portion of a 161 kV (kilovolt) electric transmission line located outside the city limits of Cedar Falls, Iowa, and therefore, within the jurisdiction of the Board pursuant to Iowa Code chapter 478.
2. On December 23, 2004, the Board issued an order assigning the petition to an Administrative Law Judge (ALJ) to establish a procedural schedule, set a hearing date, and conduct the proceedings.
3. Diane and Bert Schou (Petitioners) filed an objection to the granting of the petition and became parties to the proceeding.

4. On July 6, 2005, the ALJ issued a proposed decision and order granting the petition and franchise to CFU to erect, maintain, and operate the transmission line.

5. On July 21, 2005, Petitioners filed a timely notice appealing the ALJ's proposed order to the full Board. Petitioners filed an original and ten copies of the notice of appeal within the 15 days required by Iowa Code § 17A.15(3) and subrule 199 IAC 7.8(2)¹.

6. On September 21, 2005, the Board issued an order affirming the proposed decision of the ALJ granting the petition and franchise to CFU. Ordering Clause 10 in the September 21, 2005, order provided that the order would become final unless an application for rehearing was filed within 20 days of September 21, 2005. Petitions for rehearing were required to be filed by October 11, 2005.

7. On October 10, 2005, the Board received a facsimile copy of an application for rehearing from Petitioners. On October 11, 2005, the Board received a facsimile copy of an addendum to the application for rehearing from Petitioners. On October 13, 2005, Petitioners filed an original and ten copies of an application for rehearing and addendum.

8. On November 4, 2005, the Board issued an order denying the application for rehearing filed by Petitioners. The Board held that sending the facsimile copy to the Board did not toll the time for filing of an application for rehearing under Board rules or Iowa Code § 476.12 and the filing of the original

¹ This subrule has been renumbered effective 12/14/05 as subrule 7.26(2).

and ten copies on October 13, 2005, was outside the 20 days provided for timely filing.

9. On November 28, 2005, Petitioners filed a petition for reconsideration of the Board's order denying the application for rehearing.

10. On December 7, 2005, the Board issued an order denying reconsideration of the November 4, 2005, order. The Board concluded that it did not have jurisdiction to modify or change the order denying the application for rehearing.

11. On January 5, 2006, Petitioners filed a Petition For Judicial Review of the September 21, 2005, order granting a franchise to CFU to erect, maintain, and operate a transmission line.

**PETITIONERS FAILED TO FILE THE PETITION FOR JUDICIAL
REVIEW WITHIN THE STATUTORY TIME PERIOD**

12. Petitioners application for rehearing was denied by the Board in an order issued November 4, 2005. Petitioners did not file a petition for judicial review until January 5, 2006, more than 30 days after the order denying the application for rehearing.

13. Iowa Code § 17A.19(3) provides where a party to a contested case proceeding before an agency files an application for rehearing under Iowa Code § 17A.16, a petition for judicial review must be filed within 30 days after that application for rehearing has been denied or deemed denied. The application for rehearing is deemed denied if the Board does not take any action within 30 days of the filing of the application for rehearing. In this case the Board issued

an order denying the application for rehearing within the 30 days allowed by statute.

14. Petitioners were required by statute to file a petition for judicial review of the Board's November 4, 2005, order denying the application for rehearing on or before December 4, 2005. The filing of the application for reconsideration on November 28, 2005, and the Board's order denying reconsideration issued December 7, 2005, did not toll the time for filing the petition for judicial review. Once the Board issued the order denying the application for rehearing, it no longer had jurisdiction over the case. Petitioners only recourse at that time was to file a petition for judicial review within the 30 days provided by statute.

15. The Iowa Supreme Court has held that judicial review of an administrative proceeding is a right conferred by statute and where the right is statutory, the procedure prescribed, by the statute must be followed. Ford Motor Company v. Iowa Department of Transportation Regulations Board, 282 N.W.2d 701, 703 (Iowa 1979); Kerr v. Iowa Public Service Company, 274 N.W.2d 283, 287 (Iowa 1979); Iowa Public Service Company v. Iowa State Commerce Commission, 263 N.W.2d 766 (Iowa 1978); Richards v. Iowa State Commerce Commission, 270 N.W.2d 616 (Iowa 1978).

16. In the Ford Motor Company case, the Court was presented with facts requiring the interpretation of Iowa Code § 17A.16(2) (1977) which provided that an application for rehearing shall be deemed to have been denied unless the agency grants the application within 20 days of filing. The agency in

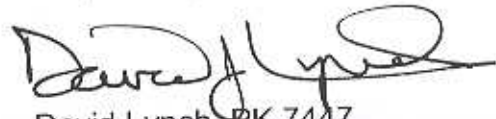
the Ford Motor Company case issued a written decision denying the application for rehearing after the 20 days provided by statute had elapsed. A petition for judicial review was then filed within 30 days of the date the written decision was issued, but beyond 30 days of the date the application for rehearing was deemed denied by statute.

17. The Iowa Supreme Court held that the district court was without jurisdiction to consider the petition for judicial review since it was not filed within the statutory period measured from the date the application for rehearing was deemed denied. The Court stated that the operation of the statute may seem harsh, but parties to the proceedings have a need for and a right to a prompt decision of a dispute. Ford Motor Company at 703.

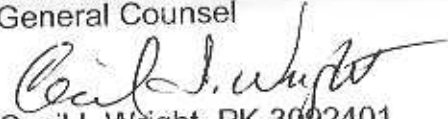
18. Iowa Code § 17A.19(3) (2005) provides if a party files an application for rehearing with the agency, the petition for judicial review must be filed within 30 days after that application is denied or deemed denied. Petitioners filed this petition for judicial review on January 5, 2006, more than 30 days after the Board issued the order denying the application for rehearing on November 4, 2005. The petition is clearly filed outside of the time period provided by statute and must be dismissed.

WHEREFORE, the Iowa Utilities Board respectfully requests that the Iowa District Court of Polk County dismiss the Petition For Judicial Review filed by Petitioners Diane and Bert Schou and assess the costs of this action to Petitioners.

Respectfully submitted,



David Lynch PK 7447
General Counsel



Cecil I. Wright PK 3092401
Assistant General Counsel

Iowa Utilities Board
350 Maple Street
Des Moines, IA 50319-0069
Phone: (515) 281-6104
Fax: (515) 242-5081

cecil.wright@iub.state.ia.us

ATTORNEYS FOR
IOWA UTILITIES BOARD

Original filed with Polk County Clerk of Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by First Class U.S. Mail to the following counsel of record this 25th day of January,

2006:

Ivan T. Webber
Ahlers & Cooney, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309-2231

John F. Dwyer
Officer of Consumer Advocate
310 Maple Street
Des Moines, IA 50319

Troy M. DeJoode
General Counsel
Cedar Falls Utilities
Utility Parkway
P.O. Box 769
Cedar Falls, IA 50613

Lorraine Joens
6512 W. Ridgeway Ave.
Cedar Falls, IA 50613

Carol A. Overland
402 Washington St. So.
Northfield, MN 55057


Cecil I. Wright
Assistant General Counsel