

DIANE AND BERT SCHOU,

Petitioners,

v.

IOWA UTILITIES BOARD,

Respondent.

No. CV-5994

RESISTANCE TO FIRST
APPLICATION FOR LEAVE TO
PRESENT EVIDENCE

COMES NOW Respondent Iowa Utilities Board (Board) and files this resistance to the application filed by Petitioners to present new evidence in this proceeding, and states:

1. On January 5, 2006, Petitioners, Bert and Diane Schou, filed a Petition For Judicial Review of an order issued by the Utilities Board (Board) on September 21, 2005, affirming a proposed order issued by an Administrative Law Judge (ALJ) granting a franchise to Cedar Falls Utilities (CFU) to erect, maintain, and operate a transmission line in Black Hawk County, Iowa.

2. On January 25, 2006, the Board filed a motion to dismiss the petition for judicial review as not having been timely filed. On March 17, 2006, the Court heard oral argument on the Board's motion to dismiss.

3. On April 18, 2006, the Board was served by mail with a "First Application For Leave Present Evidence" in which Petitioners request the Court allow them to present additional evidence in this proceeding. It is the Board's position that it would be premature for the Court to consider the application to

present new evidence prior to the ruling on the motion to dismiss. Judicial efficiency and economy of resources weigh against consideration of whether the record before the Board should be reopened prior to a ruling on the motion to dismiss.

4. In addition, Petitioners have failed to comply with the provisions of Iowa Code § 17A.19(7) (2005) that provides the Court in a review of a contested case shall not itself hear any further evidence with respect to issues of fact whose determination was entrusted by Constitution or statute to the agency in that contested case proceeding. The Court may order that the additional evidence be taken before the agency only if the Court finds to its satisfaction that the additional evidence is material and that there were good reasons for failure to present the additional evidence in the contested case proceeding before the agency. Petitioners fail both of these tests.

5. Iowa Code chapter 478 authorizes the Board to conduct hearings and decide whether to grant or deny a franchise to construct an electric transmission line. Any additional evidence must be presented to the Board and the Court must therefore decide if the additional evidence offered by Petitioners is material and whether Petitioners have good reasons for not offering the evidence at the original hearing before the Board.

6. Petitioners are requesting the Court allow them to present evidence consisting of an electrical study performed by MAPP (Mid-Continent Area Power Pool) that shows that the transmission line for which a franchise was granted by the Board will have a capacity of 329 MVA (Summer Rating). The study also

contains a narrative that describes the transmission line as a 161kV transmission line. Petitioners argue that this additional evidence shows that the line will have ten times the capacity claimed by Cedar Falls Utilities (CFU) and that the evidence concerning EMI (electro-magnetic field) modeling presented by CFU was "off by a factor of ten" and thus the adverse health effects on Mrs. Schou would be greater than found by the Administrative Law Judge (ALJ) and the Board.

7. Petitioners have not met their burden of showing the additional evidence is material. First, the evidence concerning the capacity of the line is not new evidence since the petition that initiated the proceeding before the Board contained the size of the conductors to be used and those conductors indicate that the capacity of the line would be around the 329 MVA shown in the MAPP study. Second, the additional evidence is not material since the capacity of the transmission line was not in dispute at the hearing and the Schous only raised it as an issue after the record had been closed and the ALJ's proposed decision issued. Finally, the capacity of the line is not a determinative factor of the EMI levels that are generated. EMI levels are based upon the power actually transmitted over the line and not the capacity of the line. CFU presented evidence that the line would transmit 33 MW (megawatts) at peak load conditions. In addition, CFU presented modeling of EMI levels from 27.9 MW to 255 MW. CFU then presented evidence that there was no scientific evidence to show that the EMI levels found by the modeling, or at any level, caused health or other adverse effects in humans.

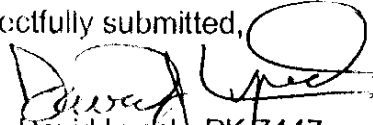
8. The ALJ found that the evidence did not support Petitioners' contention that the transmission line would have an adverse health effect on Mrs. Schou. The Board addressed this issue in its September 21, 2005, order affirming the proposed decision of the ALJ, and found that the evidence did not support Petitioners position on the health effects of EMF's. Petitioners have not met their burden of showing that the additional evidence is material since the capacity of the transmission line is not new evidence and it is not material or probative on the issue of whether EMF's at any level adversely affect Mrs. Schou's health.

9. Petitioners have also failed to show that there is good reason the additional evidence was not presented at the hearing before the ALJ. Petitioners claim that the failure was because the Petitioners are not electrical engineers, have no engineering experience, and were not represented by counsel. Petitioners had access to the petition and the prepared evidence filed by CFU and knew or should have know that they did not have the necessary expertise to evaluate the evidence concerning the transmission line and the EMF modeling. At any time during the proceedings they could have obtained an expert to review the evidence and to file testimony or help in cross-examination of CFU witnesses. The capacity of the transmission line was discernable from information filed by CFU and could have been offered into evidence at the hearing. Petitioner's lack of personal expertise is not a good reason for not offering the additional evidence in a timely manner.

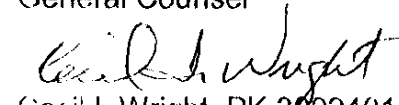
10. The failure of Petitioners to obtain counsel prior to the hearing is also not a good reason for not offering the additional evidence at the hearing. The ALJ in the procedural order issued January 11, 2005, at the beginning of the proceedings, informed Petitioners of their right to be represented by counsel. Petitioners chose to proceed to hearing pro se. Petitioners should not now be allowed to use that decision as a basis for reopening the record. Agency hearings should not be held hostage to a pro se party by allowing that party to reopen the record of an adverse decision by waiting to obtain counsel until after the hearing before the agency.

WHEREFORE, the Respondent Iowa Utilities Board moves the Court to dismiss the "First Application For Leave To Present Evidence" for failure to meet the requirements of Iowa Code § 17A.19(7), or in the alternative, to not rule on the application until after the Court has ruled on the motion to dismiss filed by the Board.

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 27th day of April, 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. DeJoodt
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

Diane and Bert Schou
P.O. Box 249
Cedar Falls, IA 50613

Brenda Myers-Maas
Attorney at Law
1025 Ashworth Rd., Suite 505
West Des Moines, IA 50265


Cecil I. Wright
Assistant General Counsel