

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Cynthia Wingo,)	
)	
Complainant,)	
)	
v.)	Case No. 16-2401-EL-CSS
)	
Nationwide Energy Partners, LLC,)	
)	
Respondent.)	

**NATIONWIDE ENERGY PARTNERS, LLC’S MEMORANDUM CONTRA TO
COMPLAINANT’S APPLICATION FOR REHEARING OF JANUARY 17, 2018 ENTRY
ON REHEARING**

I. INTRODUCTION

Having failed to perfect her December 22, 2017 application for rehearing, Complainant Cynthia Wingo (“Ms. Wingo”) again seeks to invoke the jurisdiction of this Commission to hear her argument that the Commission must accept a filing made after 5:30 p.m. through its e-filing system. Despite Ms. Wingo’s suggestions to the contrary, the Commission’s decision to not exercise jurisdiction over Ms. Wingo’s December 22, 2017 application for rehearing is supported by Ohio law, the Commission’s rules and the Supreme Court of Ohio’s rules on appellate procedure and e-filing (which is virtually identical to the Commission’s rule on e-filing by 5:30 p.m.). The Commission did not act unlawfully or unreasonably when finding that it could not exercise jurisdiction over Ms. Wingo’s untimely application for rehearing.

II. ARGUMENT

In order for the Commission to have jurisdiction over Ms. Wingo’s first application for rehearing, she was required by R.C. 4903.10 to “file” her application with the Commission on or before December 21, 2017. While Ms. Wingo electronically *submitted* her first application for

rehearing on that day, she did so after the Commission’s 5:30 p.m. filing deadline, and therefore, under the Commission rules, Ms. Wingo’s pleading was *accepted for filing* on the following day—which was outside the jurisdictional limit in R.C. 4903.10.

Ms. Wingo concedes that her first application for rehearing was submitted after the 5:30 p.m. deadline (a fact for which she continues to no offer explanation). She contends that notwithstanding the Commission’s e-filing rules, her pleading, having been transmitted through the Commission’s e-filing system on December 21, 2017 at 5:47 p.m., was still “filed” as of that day. In other words, Ms. Wingo argues that the Commission’s e-filing deadline should be 11:59 p.m. rather than 5:30 p.m. Her attempt to circumvent the Commission’s e-filing rules is unavailing.

As a function of its administrative responsibilities, the Commission has the authority to “adopt and publish rules to govern its proceedings.” R.C. 4901.13. The Commission’s rules, like other “[r]ules issued by administrative agencies pursuant to statutory authority[,] ***have the force and effect of law.***” *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 47, 554 N.E.2d 97 (1990) (emphasis added). Relevant to this proceeding, the Commission’s rules provide “that any e-filed document received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day.” Ohio Adm.Code 4901-1-02(D)(4).

In its January 17, 2018 Entry on Rehearing, the Commission explained this rule was issued to ensure fairness for all parties before the Commission. By statute, the Commission is required to be open between 8:30 a.m. and 5:30 p.m., Monday through Friday. R.C. 4901.10. “To abide by the traditional deadlines for paper filings set forth in R.C. 4901.10 and to create a level playing field for parties who may not have the resources to make e-filings,” the

Commission adopted a 5:30 p.m. e-filing deadline for same day acceptance in Ohio Adm.Code 4901-1-02(D)(4). (January 17, 2018 Entry on Rehearing at 4).

The Commission, of course, is not the only state body with an e-filing system. Notably, Ohio's courts are encouraged to adopt e-filing and a number of courts have done so. As part of those efforts, the Supreme Court of Ohio revised Rule 13 of the Rules of Appellate Procedure to allow for the adoption of e-filing systems, but required that such courts' local rules include a provision to:

... specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.

App.R.13(A)(2). The appellate rule thus recognizes that the time that a document is transmitted through e-filing is not necessarily the time that it is "filed," and to that end, it requires courts to indicate when such electronically-submitted documents "will be considered to have been filed."

The Commission may also note that the **Supreme Court of Ohio has in place a local rule, virtually identical to the Commission's**, which provides: "**documents received after 5:00:00 p.m. local observed time in Columbus, Ohio through the E-Filing Portal shall not be considered for filing until the next business day.**" Supreme Court Rule of Practice 3.02(A)(3)(e) (emphasis added). Notably, the Supreme Court of Ohio has refused to accept appeals that failed to comply with the Court's rules of practice. *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm.*, 105 Ohio St.3d 1211, 2005-Ohio-1023 (dismissing appeal when appellant's notice of appeal did not include certificate of filing required by the Court's rules).

Both the Commission's and Court's rules on e-filing are supported by Ohio case law. For example, Ohio courts have been careful to note that filing can only occur if a pleading is actually delivered **and accepted** by the correct officer **during normal business hours**. *See, e.g.,*

Piper v. Burden, 16 Ohio App.3d 361, 362 (3d. Dist. 1984) (“[O]nly a notice of appeal left at the office of the clerk of courts with the clerk, himself, or with his deputy **while the office is open for business**, is required to be filed by the clerk.”) (emphasis added); *King v. Paylor*, 69 Ohio App. 193, 43 N.E.2d 313 (1st. Dist. 1942) (rejecting the filing of a notice of appeal as timely when the appellant delivered the notice to the clerk of courts outside of the clerk’s normal business hours and left the notice on the clerk’s desk); *Id.* at 196 (“[A] filing can only be accomplished by bringing the paper to the notice of the officer, so that it can be accepted by him as official custodian.”); *Karwan v. Schmidt*, 88th Dist. Cuyahoga No. 36465, 1977 Ohio App. LEXIS 7795 (pleading not filed when it was left on the desk of the filing clerk because “[the clerk] was extremely busy at the time”).

These cases emphasize the point that merely transmitting the document to the clerk’s office, whether by leaving it on an empty chair after hours, or e-filing it after-hours and outside the Commission’s same-day filing window, as Ms. Wingo did here, is not enough. Rather, the document must be timely transmitted *and accepted* for filing in accordance with the Commission’s rules in order to constitute a valid filing. And as Ohio courts have embraced e-filing, they have drawn a clear line between the time that an electronic document is transmitted through e-filing and when it is accepted by the clerk.

In a recent 8th District Court of Appeals decision, for example, the court held that a complaint submitted through the court’s e-filing system on the final day of the relevant statute of limitations, but rejected by the clerk for a technical deficiency, was untimely and should have been dismissed. *See Culler v. Marc Glassman, Inc.*, 8th Dist. Cuyahoga No. 101386, 2014-Ohio-5434. The appellate court noted that its e-filing rule “makes a distinction between a party’s

‘submission’ of a document, and the Clerk’s ‘acceptance’ of that document.” *Id.* at ¶ 16. *Accord Rutti v. Dobeck*, 8th Dist. Cuyahoga No. 105634, 2017-Ohio-8737 at ¶ 15.

Here, Ms. Wingo’s late-filed application for rehearing is the digital equivalent of leaving a pleading on the docketing clerk’s desk after hours. While her pleading may have been submitted through the Commission’s e-filing portal, she was put on notice through the Commission’s rule that because it was transmitted after 5:30 p.m., it would not be accepted for filing until the next morning. Accordingly, the Commission did not act unreasonably or unlawfully by following its rules and finding the application for rehearing untimely. The Commission’s action in not exercising jurisdiction is consistent with the Commission’s rules, Ohio courts’ understanding of the term “filed” in the context of both paper filing and e-filing and the Supreme Court of Ohio’s own e-filing rules.

Nor does it lead to an unfair or unreasonable result. Although Ms. Wingo was immediately apprised of her untimely submission through the e-filing portal’s automatically-generated submission receipt on December 21, 2017, she took no affirmative steps to attempt to remedy the issue with the Commission. And she did not acknowledge the untimeliness of her submission until **19 days later**, when she filed her unsanctioned reply in support of her application for rehearing. Moreover, instead of offering an explanation for her untimeliness (*e.g.*, computer issue, building closure, etc.), Ms. Wingo argued that the rule simply did not control in her circumstance.

Simply put, Ms. Wingo did not timely file her first application for rehearing. The Commission properly recognized that allowing her to disregard the Commission’s rules on electronic filing would challenge the Commission’s authority to prescribe rules around the filing

of documents in its system. *See* January 17, 2018 Entry on Rehearing at 13. The Commission's finding that it could not exercise jurisdiction was both lawful and reasonable.

III. CONCLUSION

Ms. Wingo's claim that she had until midnight to file her first application for rehearing is contrary to Ohio case law, the Commission's rules and the Supreme Court of Ohio rules on appellate procedure and e-filing. Ms. Wingo must follow the Commission's 5:30 p.m. deadline for e-filings just as she would have to follow the Supreme Court of Ohio's 5:00 p.m. deadline for e-filing.

Respectfully submitted,

/s/ Michael J. Settineri

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 26th day of February, 2018 upon all persons/entities listed below:

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Summary: Memorandum Contra to Complainant's Application for Rehearing electronically filed by Mr. Michael J. Settineri on behalf of Nationwide Energy Partners, LLC