

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

ERIN DAHL,

Complainant,

v.

THE EAST OHIO GAS COMPANY D/B/A
DOMINION ENERGY OHIO,

Respondent.

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Case No. 17-1822-GA-CSS

**MEMORANDUM CONTRA OF THE EAST OHIO GAS COMPANY D/B/A
DOMINION ENERGY OHIO TO COMPLAINANT’S MOTION
FOR RELIEF FROM JUDGEMENT AND FOR A NEW TRIAL**

On September 26, 2019, the Commission dismissed Ms. Dahl’s complaint against The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO or the Company), with prejudice for failure to prosecute. The Commission’s Order catalogued Ms. Dahl’s failures to appear (two), her requests to reschedule settlement conferences (three), and her motions to continue hearing dates (four). The Commission’s Order also recounted its numerous, serious warnings to Ms. Dahl that her failure to appear would lead to the dismissal of her complaint with prejudice. And when Ms. Dahl filed her fifth motion for a continuance of the hearing date, on the Friday before the Monday hearing, and then did not show up for the hearing, the Commission justifiably did exactly what it warned Ms. Dahl that it would do: dismiss her complaint with prejudice.

Eight months later, Ms. Dahl has returned. And she now asks the Commission to give her what the Commission already denied her: yet another hearing date. Her request is too little, and far too late. R.C. 4903.10 states that any application for rehearing of a Commission’s order “shall be filed within thirty days after the entry of the order upon the journal of the commission.” In Ms. Dahl’s case however, 245 days passed between the Commission’s September 26, 2019 Entry and her motion seeking relief from the dismissal judgement and a new trial. Her untimely filing

is therefore fatally defective, and the Commission is left without jurisdiction to hear her request. Her complaint was dismissed with prejudice for failure to prosecute and she cannot now revive it after the rehearing deadline. For this reason, the Commission must deny Ms. Dahl's motion.

I. BACKGROUND

Nearly three years ago, on August 22, 2017, Ms. Dahl filed her complaint against DEO initiating this proceeding. *Dahl v. The East Ohio Gas Company d/b/a Dominion Energy*, Entry (Sept. 26, 2019) at ¶-4. A settlement conference was scheduled for October 25, 2017. *Id.* at ¶-6. Ms. Dahl failed to appear. The settlement conference was subsequently rescheduled three separate times, at Ms. Dahl's request, first on April 3, 2018, then on June 5, 2018, and lastly on June 20, 2018. *Id.* When the parties were unable to resolve the issues presented in the complaint, the matter was scheduled for hearing on August 30, 2018. *Id.* at ¶-8. Thereafter, pursuant to requests by Ms. Dahl, the attorney examiner rescheduled the hearing date four separate times, first for October 11, 2018, and then for November 9, 2018, January 31, 2019, and February 25, 2019, respectively. *Id.* In continuing the hearing to February 25, the attorney examiner cautioned Ms. Dahl that "that her failure to attend the rescheduled hearing in this case [would] result in a recommendation to dismiss her complaint for failure to prosecute." Entry (Jan. 28, 2019) at ¶-8.

On February 22, 2019, the Friday before the Monday hearing, Ms. Dahl filed her fifth motion for continuance. Entry (Sept. 26, 2019) at ¶-9. DEO opposed, arguing that Ms. Dahl had not shown "good cause" to be granted a fifth continuance and that the filing of such a motion so close to the hearing date unduly and unfairly prejudiced the Company. *Id.* The February 25, 2019 hearing convened as scheduled. *Id.* at ¶-11. Ms. Dahl did not appear. *Id.* DEO moved to dismiss Ms. Dahl's complaint with prejudice for failure to prosecute. *Id.* at ¶-12. And the Commission

granted the motion. *Id.* at 15. In doing so, the Commission found that Ms. Dahl was repeatedly informed that she must appear and present testimony in support of her complaint. *Id.*

However, as reflected by the docket in this case, Ms. Dahl has made repeated requests to continue the administrative proceedings in this matter and has ultimately failed to prosecute her case. Complainant was cautioned on three separate occasions, with each warning escalating in seriousness, regarding her failure to appear and prosecute the case. ... Furthermore, Ms. Dahl represented to the Commission that her January 22, 2019 motion for continuance was her last, “final” request to continue the hearing; yet, Complainant moved to continue her hearing for a fifth time on February 22, 2019, and ultimately failed to appear at the February 25, 2019 hearing.

Id. For these reasons, the Commission found it reasonable to grant DEO’s motion to dismiss the complaint for failure to prosecute and to deny Complainant’s motion for a fifth continuance.

Ms. Dahl did not file a timely application for rehearing on the Commission’s September 26, 2019 Entry dismissing her complaint. Eight months passed. Then on May 28, 2020, Ms. Dahl filed a “Motion for Relief of Judgment and Request for a New Trial,” citing Rule 59 (New Trial) and Rule 60 (Relief From Judgment or Order) of the Ohio Rules of Civil Procedure.

II. ARGUMENT

After the Commission has entered an order, R.C. 4903.10 provides that a party “may apply for rehearing in respect to any matters determined in the proceeding.” R.C. 4903.10 requires, however, that any application for rehearing of a Commission’s order “shall be filed within thirty days after the entry of the order upon the journal of the commission.”

This statutory deadline is jurisdictional. The Supreme Court has held that “[t]he commission . . . has no power to entertain an application for rehearing filed after the expiration of such 30-day period.” *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 362 (1961); *In re Annual Reports for Calendar Year 2018 for the Fiscal Assessment of all Regulated Entities*, No. 19-01-AU-RPT, Entry on Reh’g., (Dec. 4, 2019) at 3 (finding that under the Ohio Supreme Court’s

precedent established by the *Greer* decision, the Commission is without jurisdiction to consider the untimely applications for rehearing). And the Commission has consistently recognized that it cannot consider filings made after this statutory deadline. *See, e.g., Tandy v. Cleveland Elec. Illuminating Co.*, Case No. 12-2102-EL-CSS, Entry on Rehg. (May 1, 2013) at 3 (“[T]he Commission notes that pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, O.A.C, Ms. Tandy's filing of April 9, 2013, was late and, therefore, should not be considered by the Commission.”); *Paquelet v. Ohio Edison Co.*, Case No. 11-4177-EL-CSS, Entry on Rehg. (Oct. 31, 2012) at 2 (“Upon review of Dr. Paquelet's application for rehearing, the Commission finds that it was not filed within the 30-day time requirement, and therefore, it is untimely filed. Accordingly, the Commission has no jurisdiction to consider Dr. Paquelet's application for rehearing.”); *Mustric v. Columbia Gas of Ohio*, Case No. 01-2472-GA-CSS, Second Entry on Rehg. (Mar. 25, 2003) at 2 (“The 30-day time period established by the Ohio General Assembly is jurisdictional and cannot be waived by the Commission. . . . Because the filing was untimely, the Commission is constrained to dismiss the application for rehearing.”).

Notably, this deadline cannot be evaded by calling an application for rehearing something else. *See, e.g., In re the Authorization of Norfolk S. Ry.*, Case No. 05-297-RR- FED, Entry on Rehg. (Jan. 18, 2006) at 2 (denying motions to stay and to dismiss upon “find[ing] that these should be considered applications for rehearing . . . that were not filed within the 30- day time requirement”); *In re the Commission’s Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry at 17 (Jan. 23, 2003) (denying motion to alter access-charge recovery upon finding “that it is in actuality an untimely and improper request . . . for the Commission to rehear our June 27, 2002 decision.”); *Robinson v. The Ohio Bell Tel. Co.*, Case

No. 89-87-TP-CSS, Entry, 1989 WL 1731888 (Oct. 3, 1989) (holding that the Commission was without authority to entertain complainant's motion objecting to dismissal of the complaint).

In this case, the Commission Entry dismissing Ms. Dahl's complaint with prejudice for failure to prosecute was entered in the journal on September 26, 2019. Ms. Dahl's latest motion, however, was not filed with the Commission until May 28, 2020, eight months or 245 days later. For the Commission to consider any application for rehearing concerning its September 26, 2019 Entry in this proceeding, Ms. Dahl would have needed to file that pleading before the end of October 2019. Yet, Ms. Dahl now effectively asks the Commission to reconsider the September 26, 2019 Entry in a pleading that was not even filed until the end of May 2020.

Although Ms. Dahl stylizes her pleading as a motion "for relief from judgment," she requests "relief from the judgment filed on September 26, 2019, which dismissed my case stating a failure to prosecute." (Mot. at 5.) As for her request for "a new trial," it is the same request that the Commission also rejected in its September 26, 2019 Entry when it denied her motion for a fifth continuance. (*Id.*) Given that the stated purpose of Ms. Dahl's filing is to contest the conclusions of the Commission's Entry, it must be considered an application for rehearing, regardless of how it is styled. *Robinson v. The Ohio Bell Tel. Co.*, Case No. 89-87-TP-CSS, Entry, 1989 WL 1731888 (Oct. 3, 1989) ("Because an application for rehearing is the only procedure available to the complainant for contesting the Commission's decision at this stage of the case, the Commission shall presume that the complainant's motion was intended to be an application for rehearing.")

Furthermore, any procedural recourse afforded under the Ohio Rules of Civil Procedure does not cure the untimeliness of Ms. Dahl's motion. *In re Davis*, Case No. 14-1891-TR-CVF, Entry (Nov. 20, 2014) at 4 ("Respondent's motion for leave to file an application for rehearing

was docketed on October 24, 2014, nearly nine months after the Commission issued the Finding and Order. Therefore, the Commission has no jurisdiction to consider the arguments raised in Respondent's motion. Likewise, we find that consideration of Respondent's alternative request for relief from judgment, pursuant to Ohio Civ.R. 60(B), would be contrary to the rehearing process set forth in R.C. 4903.10 and, in any event, the Commission is not bound by the Ohio Rules of Civil Procedure.”) Neither Rule 59 nor Rule 60 of the Ohio Rules of Civil Procedure can extend the limits of the Commission’s jurisdiction, as defined by R.C. 4903.10.

For similar reasons, Ms. Dahl’s contention of a “clerical error” in the mailing of the September 26, 2019 Entry does not grant jurisdiction to the Commission to entertain her untimely motion. For starters, she has not shown that the Commission committed any error on this front. Ms. Dahl repeatedly listed her Phoenix, Arizona address on pleadings filed in the proceeding; the Commission had sent copies of the previous nine entries or orders in the proceeding to the Arizona address; none of those orders or entries were returned undeliverable; and Ms. Dahl never filed anything in the docket requesting a change of address. Even assuming Ms. Dahl did not timely receive the entry, she has not shown that this was the fault of the Commission.

Even if she could show that the Commission committed some “clerical error,” this still would not extend the Commission’s jurisdiction to entertain Ms. Dahl’s motion. As explained repeatedly above, R.C. 4903.10 is unambiguous, mandatory, and jurisdictional. The limits of the Commission’s jurisdiction do not depend upon Ms. Dahl’s personal receipt of the order. If it did, then any party could evade those limits indefinitely by simply claiming non-receipt. Unless the fact of receipt could be definitively proved, the right to seek rehearing might never expire. But

that is not the way in which the General Assembly wrote the Commission's rehearing statute, nor how it has been interpreted by the Supreme Court of Ohio.

III. CONCLUSION

For the foregoing reasons, the Commission must deny Complainant's motion. The Commission is without authority to entertain further challenges to its September 26, 2019 Entry in this proceeding, now that the rehearing deadline has long since passed. The Complainant is not entitled to relief from the Commission's dismissal of her complaint with prejudice and she is not entitled to yet a new hearing date and a revival of claims.

Dated: June 12, 2020

Respectfully submitted,

/s/ Christopher T. Kennedy

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served by U.S. mail to the following individual on June 12, 2020:

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/s/ Lucas A. Fykes
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Summary: Memorandum Memorandum Contra Complainant's Motion for Relief from
Judgement and a New Trial electronically filed by Christopher T Kennedy on behalf of The
East Ohio Gas Company d/b/a Dominion Energy Ohio