

FILE

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Brian Tomlin,

Complainant,

v.

Columbus Southern Power Company,

Respondent.

PUCO

Case No. 02-46-EL-CSS

**COMPLAINANT'S APPLICATION FOR REHEARING
OF THE COMMISSION ENTRY OF FEBRUARY 11, 2003**


Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35(A), Ohio Administrative Code, Brian Tomlin, the complainant herein, hereby applies for rehearing of the Commission's February 11, 2003 entry in this docket granting the January 13, 2003 application for rehearing of the respondent, Columbus Southern Power Company ("CSP"), for the limited purpose of allowing itself additional time to consider the issues raised. Complainant respectfully submits that the Commission's February 11, 2003 entry is unreasonable and unlawful on the following ground:

Although Section 4903.10, Revised Code, contemplates that the Commission may limit the scope of rehearing to particular matters raised in an application for rehearing, the Commission has no authority to extend the statutory time limit for acting on rehearing applications by granting rehearing for the limited purpose of according itself additional time to consider the matters issues raised so as to avoid the denial of the rehearing application by operation of law.

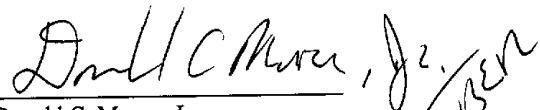
Accordingly, complainant respectfully submits that the Commission's February 11, 2003 entry is a nullity and that, pursuant to Section 4903.10, Revised Code, the CSP application for rehearing was denied by operation of law on February 12, 2003. A memorandum in support is attached hereto.

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Respectfully submitted,



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BEFORE
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**MEMORANDUM IN SUPPORT
OF
APPLICATION FOR REHEARING**

By its opinion and order in this docket of December 12, 2002, the Commission granted, in part, the above-captioned complaint of Brian Tomlin. Specifically, the Commission found, as alleged in the complaint, that respondent Columbus Southern Power Company ("CSP") had violated certain provisions of the National Electrical Safety Code ("NESC") by failing to inspect and maintain the crossarm from which a CSP distribution line had detached, injuring Mr. Tomlin and killing a passenger in the combine Mr. Tomlin was operating (Opinion and Order, 25). The Commission further found, as complainant contended, that CSP had also violated the NESC by failing to maintain the records necessary to assure compliance with the applicable NESC provisions governing facility maintenance and inspection (*id.*). The Commission found for CSP in connection with the count of the complainant alleging a violation of the NESC vertical clearance standards (*id.*).

On January 13, 2003, CSP filed an application for rehearing pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35(A), Ohio Administrative Code, by which CSP contended that

the Commission's December 12, 2002 opinion and order was unlawful in four particulars.

Complainant filed a memorandum contra pursuant to Rule 4901-1-35(B), Ohio Administrative Code, on January 23, 2003.

Section 4903.10, Revised Code, specifically provides that, if the Commission does not grant or deny a rehearing application within thirty days from the date of filing, the application is denied by operation of law. On February 11, 2003, the twenty-ninth day after the filing of the rehearing application, the Commission issued an entry wherein the Commission found that "CSP's application for rehearing should be granted that for the limited purpose of allowing the Commission additional time in which to consider the issues raised on rehearing" (Entry on Rehearing, 2). Complainant respectfully submits that the Commission has no authority to grant itself an extension of a statutory deadline and thereby prevent denial of a rehearing application by operation of law.

It is axiomatic that the Commission, as a creature of statute, may exercise no authority beyond that conferred upon it by the legislature. *See, e.g., Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, at 537 (1993). The Commission's authority to grant rehearing applications challenging reasonableness and lawfulness of its orders is set forth in Section 4903.10, Revised Code, which provides, in pertinent part, as follows:

* * *

Where such application for rehearing has been filed, the commission may grant and hold such rehearing *on the matter specified in such application*, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

* * *

(Emphasis supplied).

As the foregoing provisions make clear, the Commission is empowered to grant rehearing only as to matters raised in the rehearing application under consideration. Although the language of third paragraph cited above clearly contemplates that the Commission may grant rehearing for specific purposes (*i.e.*, the reconsideration of some issues raised in the rehearing application, but not others) and may limit the scope of the rehearing (*e.g.*, the Commission may find that no additional evidentiary hearing is required before resolving the issues raised), nothing in Section 4903.10, Revised Code, authorizes the Commission to grant the application for rehearing simply to extend the thirty-day deadline. Indeed, the finding that the CSP rehearing application should be granted to afford the Commission additional time to consider the issues raised is a total non sequitur because the rehearing application contains no such request.

The obvious purpose of the statutory provision deeming rehearing applications to be denied by operation of law if the Commission does not grant or deny the application within thirty days is to protect the appeal rights of a party adversely affected by a Commission order. Section 4903.11, Revised Code, provides, in pertinent part, as follows:

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if rehearing is had, of the order made after such rehearing.

Plainly, the legislature recognized that, in the absence of a provision automatically denying the rehearing application in instances where the Commission failed to act within a specified time, the Commission could frustrate a party's ability to appeal a Commission decision simply by sitting on the application for rehearing.¹ The Commission cannot circumvent the intent of this provision by purporting to "grant the application for rehearing" for the limited purpose of affording itself additional time to consider the issues raised. Such a measure leaves the process totally open-ended with nothing to compel the Commission ever to act on the application, a result which eliminates the trigger for taking an appeal. The Commission cannot rewrite statutes in this fashion. See *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St. 3d 1 (Commission's discretion does not extend to changing the statutory standard of proof in determining whether to issue a certificate of public convenience and necessity).

It is not only the party adversely affected by a Commission order that may be prejudiced by the Commission's attempt to extend the Section 4903.10, Revised Code, deadline for acting on a rehearing application. The thirty-day time limit also protects the prevailing party by guaranteeing the finality of the result where the Commission does not act on the application in a

¹ It should be noted that, except in instances where the application for rehearing is filed before the effective date of the order, a circumstance not in play here, Section 4903.10, Revised Code, provides that the filing of an application for rehearing does not stay the order that is the subject of the rehearing application without a special order of the Commission.

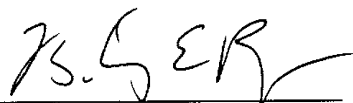
timely fashion. This is particularly important in a setting where, as here, the prevailing party may wish to rely on the Commission finding of a violation of its rules as the basis for seeking treble damages under Section 4905.61, Revised Code, in a related civil action. Although the order is not stayed pending Commission resolution of the issue raised by the rehearing application, the prevailing party's position in settlement discussions is obviously enhanced where a Commission decision in its favor is known to be final. Thus, the provision of Section 4903.10, Revised Code, deeming rehearing applications to be denied by operation of law where the Commission has not acted within the thirty-day period is also intended to protect the prevailing party.

Nothing herein should be taken to mean that complainant believes that, in purporting to extend the time limit for granting or denying the rehearing application, it was the Commission's objective to subvert the intent of Section 4903.10, Revised Code. Indeed, complainant is confident that the Commission's attempt to afford itself more time to consider the issues raised was, in fact, the result of the press of the number of cases and other business before it. However, complainant trusts that the Commission will recognize that, having invested considerable resources in preparing and prosecuting its complaint to a favorable conclusion, a complainant cannot sit idly by and allow the fruits of its labors to be jeopardized by the possibility that the Commission might ultimately attempt to amend or reverse a decision, which, by law, was final on February 12, 2003.² This is a particularly significant concern in a *David v. Goliath* scenario of the type presented here where an individual complainant is facing a fast-approaching trial date in the related civil action, the prosecution of which will further tax complainant's limited resources.

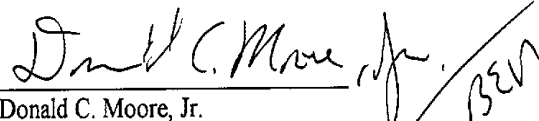
² Under Section 4903.10, Revised Code, complainant's filing of this rehearing application at this time is necessary to preserve its right to appeal.

WHEREFORE, complainant respectfully requests that the Commission grant its application for rehearing, find that application for rehearing filed herein by CSP on January 13, 2003 was denied by operation of law on February 12, 2003, and close this case as a matter of record.

Respectfully submitted,



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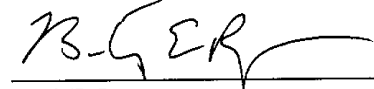


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Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the parties listed below by first class U.S. mail, postage prepaid, this 13th day of March 2003.


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