

**BEFORE THE
OIL & GAS COMMISSION**

KEVIN J. SIMBALLA,

Appeal No. 1006

Appellant,

-vs-

Review of Chief's Order 2021-192
(Elkrun Wertz NE Unit; Hilcorp Energy Co.)

DIVISION OF OIL & GAS RESOURCES
MANAGEMENT,

Appellee,

ORDER OF THE COMMISSION
GRANTING MOTION
TO DISMISS

Appearances: Mary C. Simballa, Counsel for Appellant Kevin J. Simballa; Brian Ball, Gene Park, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; Gregory D. Russell, Thomas H. Fusonie, Mark A. Hylton, Counsel for Movant for Intervention Hilcorp Energy Co.

Date Issued:

2/10/2022

BACKGROUND

This matter came before the Oil & Gas Commission upon appeal by the Kevin J. Simballa ["Appellant"] from issuance of Chief's Order 2021-192 ["Order"] to Hilcorp Energy Company ["Hilcorp"] authorizing Hilcorp to conduct unit operations for the Elkrun Wertz Northeast Unit ["Unit"] on November 30, 2021. Appellant advanced several arguments in his Notice of Appeal claiming the Order was unlawful and unreasonable. The proposed well would be located in Columbiana County, Ohio.

The Order was issued on November 30, 2021. On January 3, 2022, Appellant filed a Notice of Appeal with the Oil & Gas Commission, contesting the issuance of the Order to establish the Unit. This matter has been assigned appeal #1006 and is the subject of the instant decision.

On January 10, 2022, Hilcorp Energy Co. filed a *Motion for Leave to Intervene* in this matter. On January 14, 2022, counsel for Appellant and counsel for Division indicated they would not oppose Hilcorp's intervention. Therefore, in advance of the Commission's ruling on Hilcorp's *Motion for Leave to Intervene*, Hilcorp was be allowed to participate in pre-hearing motion practice and in discovery.

On January 19, 2022, the Division filed a *Motion to Dismiss* appeal #1006, asserting that Appellant failed to file its appeal in a timely manner. The Division argued that this failure constitutes a jurisdictional defect, requiring dismissal of appeal #1006. Hilcorp separately filed a *Motion to Dismiss* appeal #1006 on substantially similar grounds. Appellant opposed these Motions. Each party has fully briefed the issues presented.

DISCUSSION

The Division's *Motion to Dismiss* asserts that the Commission lacks jurisdiction to hear and consider appeal number #1006. O.R.C. §1509.36 sets forth the method by which an appeal is perfected to the Oil & Gas Commission. That section of law provides *inter alia*::

The appeal shall be in writing and shall set forth the order complained of and the grounds upon which the appeal is based. **The appeal shall be filed with the commission within thirty days after the date upon which the person to whom the order was issued received the order and, for all other persons adversely affected by the order, within thirty days after the date of the order complained of.** Notice of the filing of the appeal shall be filed with the chief within three days after the appeal is filed with the commission.

O.R.C. §1509.36 requires that appeals to the Commission be filed within thirty days after the date upon which the order recipient received the order and, for all other persons adversely affected by the order, within thirty days after the issuance of the order.

The Chief expressly stated in the Order who it was issued to. That person is Hilcorp as the applicant and recipient of the Order who is directed to undertake or refrain from undertaking certain actions according to the Order. Appellant claims the subject order was issued to him because his “rights, duties, and obligations” are impacted by the Order. However, the Order was **only** issued to Hilcorp. Appellants along with more than twenty other entities received a letter from the Division which provided notice that the Order was issued. O.R.C. 1509.36 contemplates that a someone other than the order recipient may be adversely impacted by an Order and those adversely impacted are entitled to file a notice of appeal within thirty days after the issuance of the Order.

Chief’s Order routinely define rights, duties, and obligations of the applicant when dealing with others, including those others possessing an interest or potential interest in a unit. This characteristic of a Chief’s Order does not mean an Order is issued to anyone possessing a right, duty or obligation affected by it. To hold otherwise would mean the distinction drawn by O.R.C. 1509.36 between “the person to whom the order was issued” and “all other persons adversely affect by the order” would be meaningless. The Commission believes this distinction was made to be meaningful.

Therefore, Hilcorp is the one Order Recipient. Appellant is properly classed as a person adversely affected by the Order. As a person adversely affected by the Order, Appellant has thirty days after the issuance of the order complained to perfect his appeal to the Commission.

In computing whether an appeal was timely filed, Commission Rule O.A.C. §1509-1-10(B) provides the act from which the designated period of time begins to run shall not be included and the last day of the period included. The act of issuing the Order occurred on November 30, 2021. Therefore, December 1, 2021 is first day used to calculate timeliness. Using this computation method mandated by Commission rules there are thirty counting days starting on December 1, 2021 and ending on December 30, 2021.

At the time of filing of this appeal, Commission Rule O.A.C. §1509-1-11 provides that in order for an appeal to be properly filed it shall actually be delivered to either the office address or fax number of the Commission. Appellant does not dispute that the Notice of Appeal was actually delivered to the Commission on January 3, 2022 which is four days after December 30, 2021.¹ Further, the same Commission Rule requiring actual delivery of the appeal cites failure to comply with filing requirement sufficient grounds for dismissing an appeal.²

The Oil & Gas Commission is a creature of statute. See O.R.C. §1509.35. Where a statute confers the right of appeal, adherence to the conditions imposed thereby is essential to the enjoyment of that right. American Restaurant and Lunch Co. v. Glander, 147 Ohio St. 147 (1946). And, this Commission has dismissed prior appeals for an appellant's failure to file a timely notice of appeal. See Andrew & Kristi Stalker v. Division & Chesapeake Exploration LLC, #844 (January 9, 2013); Robert W. Barr. aka Big Sky Petroleum v. Division, #728 (January 23, 2004); Thomas & Belle Blair v. Division, #791 (November 6, 2008); Hall & Horning Oilfield v. Division & Alan H. Coogan, et al., #787 (October 31, 2008).

It is not contested that the Order was issued on November 30, 2021 and Appellant, who is a person adversely affected by this Order, received notice of the Order. Thirty days after November 30, 2021 is December 30, 2021, which is the last date Appellant could have timely filed his appeal as an adversely affected person. It is also not contested that Appellant's ***Notice of Appeal*** was filed on January 3, 2022. Hence, Appellant's Notice of Appeal was filed **four days** beyond the mandatory time limit imposed by Ohio law. That means Appellant missed the statutory deadline set out in R.C. 1509.36. Consequently the Commission lacks jurisdiction to hear this appeal. Since the

¹ Appellant emailed the Oil & Gas Commission at 10:06 p.m. on December 30, 2021 and attached a version of the Notice of Appeal. The E-mail also indicated a hard copy of the Notice of Appeal had been placed in the mail on December 30, 2021 for expedited/overnight delivery. On January 3, 2022 Counsel for Appellant was informed of Commission rules requiring a Notice of Appeal to either be actually delivered or faxed. Later on January 3, 2022 the Commission received delivery of the hard copy of the Notice of Appeal and informed Appellant that the Notice of Appeal was filed with the Commission on January 3, 2022.

² OAC 1509-1-(1)(f) provides that “[f]ailure to comply with the provisions of section 1509.36 of the Revised Code governing the filing of appeals with the commission shall be sufficient basis for dismissing an appeal.”

General Assembly, by statute, has limited the time to file an appeal to thirty days, the Commission has no discretion to extend that time period or to accept an appeal filed more than thirty days after issuance of the Chief's Order.

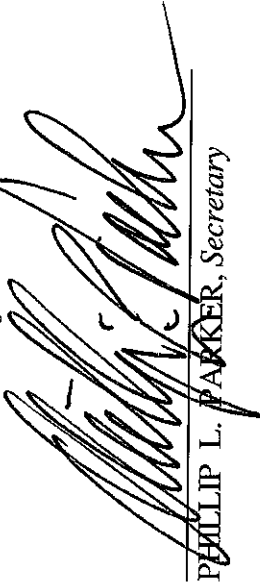
Appellants attempts to defend his untimely filing with a claim that a representative of the Division provided verbal instructions on the appeal process that he claims now support a claim of equitable estoppel. The Commission is not persuaded by this claim. Parties before the Commission are bound by a uniform set of laws and rules of practice and the Commission does not possess the authority to expand its jurisdiction based on the comments of an individual unaffiliated with the Commission. The Commission also notes that estoppel does not apply against the state.³

Jurisdiction is not a matter of choice; but rather is an expression of the power and authority of a body to act. If the Commission's jurisdiction has not been properly invoked, the Commission simply is without authority to act. The Commission finds that Appellant's Notice of Appeal, is untimely under O.R.C. §1509.36 and will not invoke this Commission's jurisdiction.

³ See *Childs v. Oil & Gas Comm'n*, 2000 Ohio App. LEXIS 1242 *1 (10th Dist. Mar. 28, 2000) citing *Sun Refining & Marketing Co. v. Brennan*, 31 Ohio St. 3d 306, 511 N.E.2d 112 (1987)

ORDER

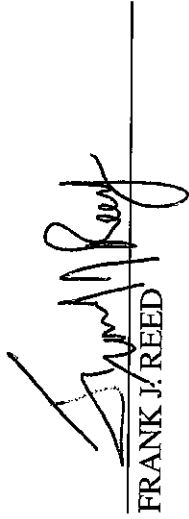
The Oil & Gas Commission has read and considered filings for the Appellee's ***Motion to Dismiss***, Hilcorp's ***Motion to Dismiss*** and the response of Appellant. The Commission has also reviewed its prior orders and decisions. The Commission finds the arguments of the Appellee well taken. WHEREFORE, the Commission **GRANTS** the Division's pending ***Motion to Dismiss*** on the basis that the appeal was not timely filed and **DISMISSES** appeal number #1006. Since the Commission has dismissed this appeal and will not invoke its jurisdiction, Hilcorp's ***Motion to Dismiss*** and ***Motion for Leave to Intervene*** are rendered **moot**.



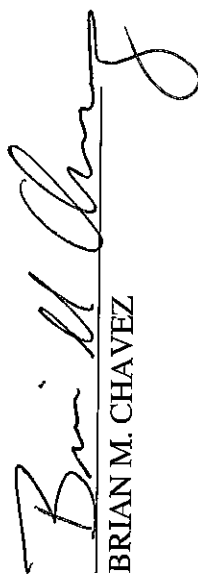
PHILLIP L. PARKER, Secretary



ANDREW R. THOMAS, Acting Chairman



FRANK J. REED



BRIAN M. CHAVEZ

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Common Pleas for Franklin County, within thirty days of your receipt of this decision, in accordance with Ohio Revised Code §1509.37.

DISTRIBUTION:

Mary Simballa, Via Certified Mail # 9488 8090 0027 6042 2415 58 & E-Mail [mary.simballa@gmail.com]
Brian Ball, Gene Park, Via Certified Inter-Office Mail #6920 & E-Mail [brian.ball@ohioattorneygeneral.gov; gene.park@ohioattorneygeneral.gov]
Greg Russell, Thomas Fusonic, Mark Hylton, Via Certified Mail #9488 8090 0027 6042 2415 65 & E-Mail [grussell@vorys.com; thfusonic@vorys.com; mahylton@vorys.com]
Kevin Simballa, Via Certified Mail # 9488 8090 0027 6042 2415 72
Eric Vendel, Via Certified Mail #9488 8090 0027 6042 2415 89
Hilcorp Energy Corp., Via Certified Mail # 9488 8090 0027 6042 2415 96