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**To:** PUCO Docketing Division      **Date:** June 22, 2009  
**Firm:**      **From:** Kathy J. Kolich, Esquire  
**Fax #:** 614-466-0313      **Pages:** 10 (including cover page)

**Subject:** *Post Hearing Brief of Ohio Edison Company*  
*Case No. 08-1146-EL-CSS*

**Comments:** Following is the Post Hearing Brief of Ohio Edison Company regarding the above case. The original and the required number of copies will be sent via overnight mail for delivery Tuesday, June 23, 2009. Please call me if you have any questions. Thank you.

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*Via Federal Express  
and Facsimile (614-466-0313)*

June 22, 2009

Ms. Renee J. Jenkins  
Director, Administration Department  
Secretary to the Commission  
Docketing Division  
The Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215-3793

Dear Ms. Jenkins:

*Re: Post Hearing Brief of Ohio Edison Company  
Case No. 08-1146-EL-CSS*

Enclosed for filing, please find the original and twelve (12) copies of Ohio Edison Company's Post Hearing Brief. Please file the enclosed Post Hearing brief in the above-referenced docket, time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kathy J. Kolich".

kag  
Enclosures

cc: Parties of Record

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

<b>Dane L. Mazzitti,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>vs.</b>	)	<b>CASE NO. 08-1146-EL-CSS</b>
	)	
<b>Ohio Edison Company,</b>	)	
	)	
<b>Respondent.</b>	)	

**POST HEARING BRIEF OF OHIO EDISON COMPANY**

**June 22, 2009**

**Kathy J. Kolich (Reg. No. 0038855)  
Senior Attorney  
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**On behalf of Ohio Edison Company**

## I. INTRODUCTION.

This is a case in which Complainant is more than willing to trade his neighbor's electric service reliability and safety for an order preventing Ohio Edison Company ("Company" or "Ohio Edison") from trimming a line of evergreen trees that even Complainant's expert witness believes are in need of trimming. Pursuant to the Attorney Examiner's instructions at the conclusion of the evidentiary hearing, which was held on May 20, 2009, Ohio Edison now submits its post hearing brief explaining why such trimming is necessary in order to maintain the safety of its workers and customers, as well as the integrity of its distribution system.

## II. BACKGROUND.

On or about October 3, 2008, Complainant, Dane L. Mazzitti, filed a complaint against Ohio Edison in which he alleged that the Company improperly trimmed two large maple trees in his front yard. He also sought to preclude the Company from trimming a line of evergreen trees, ranging in height from between 25 and 35 feet (Tr. p. 9), that have grown into the Company's 12.5 kV distribution line that serves Complainant's neighbors, Mr. and Mrs. Anthony Piecenski. (Id.; Complaint, unnumbered p. 2.)<sup>1</sup> The parties settled all issues related to the trimming of the maple trees located in the front of Complainant's yard, leaving only the issue of whether the trimming of any of the evergreen trees bordering Complainant's property with his neighbor's is necessary. (Tr. p. 15.)

As Mr. Mazzitti explained during his testimony, a 12.5 kV distribution line that serves only his neighbor runs through this line of evergreen trees. (Tr. p. 11; Co. Exh 1, p. 4.) As shown on Exhibits APR-1 and APR-2, which are attached to Mr. Alan P. Rehbein's pre-filed testimony (Co. Exh. 1), the trees have grown well into the Company's distribution line, which was placed into service in 1972. (Co. Exh. 1, p. 4.) Complainant seeks to have this distribution

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<sup>1</sup> There is some confusion as to the identity of Complainant's neighbors. While Complainant alleged in his complaint that the Piecenskis are his neighbors at 2567 Choctaw Drive (Complaint, p. 1), at the evidentiary hearing, he presented a woman (who interestingly enough never testified), introduced as Ms. Bockey, who he also claimed was his neighbor at the same location. (Tr. p. 9.)

line "exempt" from tree trimming. (Id. at 12.) It is Complainant's position that it is not necessary to trim the 75 foot tree line in order to maintain safety or service reliability (Tr. pp. 18-19) – a position with which Complainant's expert does not agree. (Tr. p. 52.)

Given Complainant's unreasonable position that the trees should not be trimmed at all (Tr. p. 16), the Company believes that it will be faced with a complaint once the trees are trimmed, regardless of how they are trimmed. Given this expectation, as well as the fact that the trees cannot be "un-cut" in the unlikely event that the Commission disagrees after the fact with the Company's actions, the Company asks the Commission to advise whether the Company should proceed to trim the trees consistent with its vegetation management program – a program that has been reviewed by the Commission's Staff.<sup>2</sup>

### III. ARGUMENT.

There is no question that the Company has the right to trim the trees that have grown into their wires. The line in question, having been placed into service in 1972, has been in place for more than the 21 year time period required for a prescriptive easement.<sup>3</sup> Indeed, the existence of such an easement is not at issue. Mr. Mazzitti, testifying as an expert, acknowledged this fact. (Tr. p. 8.)<sup>4</sup> Rather, the only questions to be resolved are (i) should the trees be trimmed; and (ii) if so, how should they be trimmed? As is discussed below, given the risk to the safety of those who come in contact with the trees, as well as to the reliability of service to Complainant's

<sup>2</sup> While the Company is generally opposed to the Commission providing advisory opinions, given that there is already an evidentiary record available, the Company, in the interest of judicial economy, asks that the Commission do so in this single instance. Otherwise, the Company moves for dismissal on the grounds that the issues presented in this action are not ripe for review.

<sup>3</sup> Under Ohio law, in order to obtain a prescriptive easement, a landowner using adjacent property must prove by clear and convincing evidence that such use was open, notorious, adverse to the neighbor's property rights, continuous and in place for at least twenty one years. *Hindall v. Martinez* (1990), 69 Ohio App.3d 580, 583, 591 N.E.2d 308, citing *J.F. Gioia, Inc. v. Cardinal American Corp.* (1985), 23 Ohio App.3d 33, 37, 491 N.E.2d 325.

<sup>4</sup> Complainant has more than 27 years of experience in the utility industry. While working for American Electric Power ("AEP"), Complainant held various management positions, including AEP's representative to the Ohio Power Siting Board, and serving with AEP's power siting committee "responsible for locating generation, transmission, and distribution facilities." (Tr. pp. 6-7.)

neighbor, the trees should be trimmed consistent with the Company's vegetation management program.

- A. The trees must be trimmed in order to protect the Company's workers and customers and to maintain the integrity of the Company's distribution system.

Mr. Alan P. Rehbein testified on behalf of the Company. Mr. Rehbein has more than 25 years of experience in the utility forestry area, holding jobs ranging from tree trimmer, to tree trimmer supervisor, to forestry specialist. He is certified by the International Society of Arboriculture as both a forestry specialist and an arborist. (Co. Exh. 1, p. 2.) According to Mr. Rehbein, the current situation creates a dangerous situation and jeopardizes the integrity of the Company's distribution system.<sup>5</sup> (Id. at 6.) Not only could one of the trees coming in contact with the line cause an outage to Complainant's neighbor, but it could cause a fire or cause a person to be shocked or electrocuted. As Mr. Rehbein explained, when trees touch the wires, an arc can occur which, if it does not immediately start a fire, starts to kill the living cells in the branch, thus drying it out and eventually killing it. The drier these branches become, the greater the chance of fire. (Co. Exh. 1, p. 7.) Further, such contact causes fuses to blow. Mr. Rehbein has seen this happen numerous times, even while he is getting ready to trim trees. (Tr. p. 59.) The potential for these occurrences is not disputed. As Complainant's expert witness testified, the effects of one of the trees coming in contact with the Company's wires "could range from anything." Such a contact "could range from the tree just burning itself in the clear to actually tripping the line...." (Tr. p. 50.) Moreover, because of this arc, if a tree is touching the primary line while someone is touching the tree, there is a distinct possibility that the individual will be

<sup>5</sup> Complainant, during his cross-examination of Mr. Rehbein, apparently does not view outages that would only affect his neighbor as jeopardizing the integrity of the Company's system. (Tr. pp. 59-61.) The Company, however, believes that *all* of its customers are entitled to reliable electric service and, as a result, it incurs the expense to trim trees that have grown into a wire, even when that wire only serves one customer. (Tr. p. 70.) If they didn't, the potential for an outage would be greatly increased (Tr. p. 72), and because the line only serves one customer, that customer would be very low on the priority list should an outage occur during a major storm. (Co. Exh. 1, pp. 4-5.)

shocked and could possibly be electrocuted. (Co. Exh. 1, p. 7.) Indeed, Mr. Rehbein has been shocked in similar situations (Tr. p. 62) and has indicated that the safety concerns related to the distribution line in question are so great that the tree trimming contractor who will be trimming the trees in question will do so only if the distribution line is first de-energized. (Co. Exh. 1, p. 7.) Further, because the trees at issue are evergreen trees, there are additional safety concerns due to the fact that they are easy to climb and are inviting to children. (Id.) Again, this is not speculation. Mr. Rehbein has been personally involved in such a situation in which a child was electrocuted. (Id.)

In sum, the Company has a prescriptive easement that allows it to trim trees that grow into its distribution wires. Failure to do so in the instant situation creates a safety hazard to both the Company's workers and others who may come in contact with the trees. Moreover, if these trees are not trimmed, not only does such a situation create the potential for a fire or a blown fuse that would create an outage to Complainant's neighbor, but it also creates a greater possibility of the tree being brought down by broken branches during a snow or wind storm. And because the line only serves one customer, if such an outage occurred during a major storm, Complainant's neighbor would be given a very low priority for restoration, leaving them as one of the last customers to regain service. Complainant has failed to present any evidence to the contrary and, therefore, has failed to meet his burden of proof. While it is easy for Complainant to gamble with his neighbor's reliability, it is not so easy for the Company to do so, especially in this instance where the safety concerns are so great.

**B. The trees should be trimmed consistent with the Company's vegetation management policy that has been reviewed by the Commission's Staff.**

Assuming the Company is authorized to proceed with the trimming of the trees in question, the Company will trim them consistent with its vegetation management program, which requires that the trees be trimmed consistent with ANSI standards. (Co. Exh. 1, p. 8.) In this instance, because the trees are relatively fast growing trees (Tr. p. 36), conditions require the trees

to be trimmed to provide at least 15 feet of clearance. The trees were last trimmed in 2004 and it appears that they were side trimmed rather than "topped." However, due to the fact that the trees have matured significantly since they were last trimmed, side trimming is not a viable solution during the current trimming cycle. (Tr. p. 31.) Again, Complainant's expert does not disagree. As he explained, "[e]ach species is different. You have fast growing species, you have slow growing species so there is not one specific rule for tree trimming as such, but you definitely need to be to where you do not have primary contact." (Tr. p. 49.) Nowhere in this expert's testimony did he disagree with how the Company intends to trim the trees. As evident in the pictures attached to Company Exhibit I as Exhibits APR-1 and APR-2, the proposed fifteen feet clearance is not unreasonable given how much growth has occurred since the last trimming cycle in 2004.

Moreover, there is nothing in the record that would indicate that Complainant's neighbor does not want these trees to be trimmed. The Company has records (Co. Exh. 1, Exh. APR-5) of someone purported to be the owner of the property providing verbal approval to trim the trees in question. This approval was obtained in June, 2008 – well before the filing of this Complaint. While the Company cannot be certain that the authority was provided by the owner, such a conclusion is more probable than that presented by Complainant. First, Complainant cannot decide who his neighbor is. In the Complaint that was filed, Complainant indicated that his neighbors were Mr. and Mrs. Anthony Piecenski of 2567 Choctaw Drive. (Complaint, unnumbered paragraph 3.) He further alleged that "*Mrs. Piecenski* told [Complainant] that she *and her husband* have resided at her current address for 27 years and have never encountered any outage attributable to [the trees at issue.]" (Id. at unnumbered paragraph 4 (emphasis added.)) Yet, during the hearing, Complainant testified that "there are no Piecenski[s] as such. Ms. Bockey is the owner of the property." (Tr. p. 19.) And during the hearing, Ms. Bockey indicated that she was not married. Second, Complainant was accompanied to the hearing by a woman that Complainant introduced as Ms. Bockey. Yet, Complainant never had Ms. Bockey testify to explain the disparity in Complainant's testimony or to express her wishes regarding the trees.

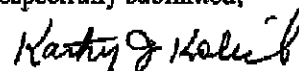


This disparity, as well as Complainant's failure to allow Ms. Bockey to testify as to her actual wishes, leaves one to wonder exactly who owns the property next to Complainant and whether such owner(s) are willing to gamble with their reliability as Complainant is so willing to do.

#### IV. SUMMARY AND CONCLUSION.

There is no question that the trees in question have significantly grown into the Company's 12.5 kV distribution line that serves Complainant's neighbor. Nor is there any question that the Company, by virtue of its prescriptive easement, has the right to trim the trees at issue, especially in this instance where there is a clear threat to the safety of anyone who comes in contact with the trees, as well as to the reliability of service provided to Complainant's neighbor. Complainant has presented no evidence to suggest otherwise. Indeed, nowhere in the testimony of Complainant's expert is there an indication that he disagrees with any of the evidence presented by the Company. Accordingly, in the interest of judicial economy, the Company respectfully asks the Commission, in this one instance, to provide the Company with guidance as to how the Commission would like the Company to proceed. Further, given that the tree trimming crews will be back in the vicinity of Complainant's property in early August, it asks that the Commission provide such guidance by the end of July so as to avoid duplicating costs by having to re-send a crew to the same area.

Respectfully submitted,




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On behalf of Ohio Edison Company

**CERTIFICATE OF SERVICE**

**THIS IS TO CERTIFY** that a copy of Ohio Edison Company's Post Hearing Brief was served upon Dane L. Mazzitti, 7365 Christie Chapel Road, Dublin, OH 43017, by regular U.S. Mail, postage prepaid, this 22<sup>nd</sup> day of June, 2009.

  
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Kathy J. Kolich, Esquire