

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Kurt)	
Wimmer/Wimmer Family Trust,)	
)	
Complainant,)	
)	Case No. 09-777-EL-CSS
v.)	
)	
Ohio Edison Company,)	
)	
Respondent.)	

OPINION AND ORDER

The Commission, considering the complaint filed by Kurt Wimmer/Wimmer Family Trust and the evidence admitted at the hearing, hereby issues its Opinion and Order.

APPEARANCES:

Lester S. Potash, 55 Public Square, Suite 1717, Cleveland, Ohio 44113, on behalf of complainant Kurt Wimmer/Wimmer Family Trust.

Jones Day, by David A. Kutik and Grant W. Garber, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114, and Ebony L. Yeboah-Amankwah, 76 South Main Street, Akron, Ohio 44308, on behalf of the Ohio Edison Company.

OPINION:

I. BACKGROUND AND HISTORY OF THE PROCEEDINGS

On September 4, 2009, Kurt Wimmer/Wimmer Family Trust (WFT) filed a complaint against the Ohio Edison Company (OE), concerning OE's planned removal of trees on complainants' property. According to the complaint, for years OE maintained the vegetation within the right-of-way granted to OE through an easement, but recently notified WFT that OE plans to remove the trees. WFT challenges OE's assertion that the trees must be removed, and asserts that OE relied upon subjective factors when determining that the trees need to be removed. While maintaining that the easement does not give OE the right to remove the trees, WFT also contends that it should have the right to maintain the trees. WFT alleges that OE's vegetation management policy violates the terms of the easement as well as Rule 4901:1-10-27, Ohio Administrative Code (O.A.C.).

On September 24, 2009, OE filed its answer, denying the material allegations of the complaint, and a motion to dismiss.

A settlement conference was held on November 20, 2009; however, the parties were unable to resolve the matter. An evidentiary hearing was held in this matter on March 26, 2010. Both parties filed post-hearing briefs on April 23, 2010. The complainant filed a reply brief on May 13, 2010, while OE filed its reply brief on May 14, 2010.

II. APPLICABLE LAW

OE is a public utility by virtue of Section 4905.02, Revised Code, and an electric light company as defined by Section 4905.03(A)(3), Revised Code. CEI is, therefore, subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code.

Section 4905.22, Revised Code, requires, in part, that a public utility furnish necessary and adequate service and facilities. Section 4905.26, Revised Code, requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any regulation, measurement, or practice affecting or relating to any service furnished is unjust or unreasonable.

In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189. Therefore, it is the responsibility of a complainant to present evidence in support of the allegations made in a complaint.

III. SUMMARY OF EVIDENCE

The WFT property is located at 34440 Chestnut Ridge Road, North Ridgeville, Ohio. The property is shaped like a triangle, with the longest side on its western edge. The residence on the property lies on the eastern side, while the western, or back, side is lined with trees. A small stream and railroad tracks lie adjacent to the western edge of the property. Kurt and Noelle Wimmer have resided at the property since 1974. On May 11, 1983, the Wimmers granted an easement and right of way to OE, granting OE the right to install electric transmission and distribution lines on the western side of the property. The power lines OE installed on complainants' property are part of a 69 kilovolt (kV) transmission line called the Abbe-Johnson No. 1 line. In relevant part, the easement states:

The easement rights herein granted shall include the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and along the . . . right-of-way across said premises all the necessary structures,

wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current . . . and the right of reasonable ingress and egress, upon, over and across said premises for access to and from said right-of-way, and the right to trim, remove or control by any means at any and all times such tress, limbs, and underbrush within or adjacent to said right-of-way as may interfere with or endanger said structures, wires or their appurtenances, or their operation.

The Grantors reserve the right to use the ground between said structures and beneath said wires, provided that such use does not interfere with or obstruct the rights herein granted...

A. WFT

Noelle Wimmer testified that she is a trustee of the Wimmer Family Trust, the owner of the property in question (Tr. 8). She stated that ever since OE obtained the easement, it has trimmed the trees every five to seven years to keep the transmission line clear (*id.* at 8-9). She contends that she and her husband have never refused to give the company access to the property in order to maintain the trees (*id.* at 10). However, she testified that after the 2003 blackout, an OE representative informed her that trees would be cut down (*id.* at 12-13). Mrs. Wimmer stated that, after 2003, there were no changes to the easement giving OE greater rights to manage or remove trees, nor was there any difference in the growth of the trees (*id.* at 13-14). According to Mrs. Wimmer, there has never been any interference with the transmission line due to the trees (*id.* at 14). She additionally testified that OE rebuffed the offer she and her husband made to maintain the trees on their own (*id.* at 15).

Under cross-examination, Mrs. Wimmer conceded that the easement gives OE the right to cut down trees, and clarified that, while never denying OE access to trim the trees or conduct a survey of the property, she and her husband did deny OE access when OE came to the property to cut down the trees (*id.* at 26, 33, 38-40). She also testified that her husband complained when OE inspected the transmission line by helicopter (Tr. 28). Finally, Mrs. Wimmer noted that she and her husband let OE enter the property the week before the hearing to trim one tree and, during that visit, also gave permission to trim two other trees (Tr. 40).

B. OE

OE's utility vegetation management (UVM) transmission plan and specifications, filed with the Commission in January 2001, defines "vegetation control" as the removal of

vegetation that has the potential to interfere with the safe and efficient operation of the transmission system (OE Ex. C at 6). The UVM plan places emphasis on controlling all incompatible vegetation within the transmission clearing zone corridor, and defines "incompatible vegetation" as any vegetation that will grow tall enough to interfere with overhead electric facilities (*id.*). Rebecca Spach, manager of vegetation management for FirstEnergy Services Company (FES), which provides support services to OE, stated the transmission clearing zone corridor equates to the width of an easement (Tr. 168). She explained that if vegetation is of a species that at maturity will grow tall enough to reach a transmission line, the vegetation would be deemed incompatible and removed (Tr. 119). According to Ms. Spach, the rationale for determining whether to remove vegetation based on its species rests on the fact that when a species has the genetic ability to grow tall enough to interfere with the power lines, "it's just a matter of when [the vegetation] will interfere" (Tr. 127). She clarified that the UVM plan calls for removal of incompatible species regardless of current height, so that vegetation that is only eight feet tall, but that could eventually grow tall enough to interfere with overhead power lines, would be removed under the plan (Tr. 130).

In applying the requirements of the UVM plan to the WFT property, Ms. Spach explained that the vegetation OE seeks to remove consists of tree and brush species that will grow to a mature height of 30 to 80 feet (OE Ex. C at 12-16). Ms. Spach testified that the average heights-at-maturity and growth rates for each species was collected from the Ohio Department of Natural Resources' Ohio Trees Index and The Ohio State University's "Ohioline" database, both of which are authoritative, well-respected sources (*id.* at 11). Ms. Spach stated that this vegetation will create the risk of a direct contact with the transmission lines or else will encroach upon the clearance zone established by the UVM plan (*id.*). She also testified that it is not reasonable to rely upon pruning in order to maintain this vegetation, as the vegetation grows too fast to be maintained on the five-year maintenance cycle under the UVM plan (*id.* at 16). Ms. Spach explained that the growth rate of trees can be unpredictable, and pointed out that OE has had to visit the WFT property multiple years in a row to prune the trees (Tr. 148, 151). Stating that maintenance of the vegetation through pruning is "really playing the odds," Ms. Spach confirmed that OE trimmed three trees on the WFT property the week before the hearing even though OE had been to the property to prune vegetation as recently as May 31, 2006 and August 19, 2008 (OE Ex. C at 11).

Ms. Spach testified that once the incompatible vegetation is removed, the vegetation adjacent to the right-of-way on complainants' property could be maintained by pruning and inspections for structural soundness in accordance with OE's normal five-year cycle (Tr. at 155). In response to complainants' contentions that there have not been any tree contacts with the power lines crossing complainants' property, nor has OE been cited for a violation of any rule governing vegetation management, Ms. Spach argued that the

purpose of the vegetation management program is to ensure safe and reliable transmission service with the goal of maintaining vegetation so that it never interferes with the power lines (Tr. at 151). While complainants' suggest that they should be allowed to assume responsibility for maintenance of the vegetation in the easement, Ms. Spach testified that allowing individual landowners to maintain the vegetation in easements granted to OE would be unworkable, especially given the risks of outages to large numbers of customers and the potential danger to individuals and property (OE Ex. C at 16).

David Kozy, manager of transmission engineering for FES, stated that the Abbe-Johnson No. 1 line extends for approximately 14.3 miles and is directly connected to five 138 kV and nine 69kV transmission lines (*id.* at 4). He explained that vegetation contact or interference with the Abbe-Johnson No. 1 line would result in failure of the line, causing an immediate loss of power to over 13,000 customers, including residential and commercial customers such as the Elyria Water Pollution Control facility, Lorain Community College, and Honeywell (*id.*). According to Mr. Kozy, while failure of the Abbe-Johnson No. 1 line should not directly result in outages beyond the initial customers, it is possible that failure of the line could also affect a much larger number of customers, possibly extending to the Medina and Sandusky areas, if another transmission line in the area is already off-line (*id.* at 5).

Mr. Kozy stated that vegetation contacts with a power line could cause tree or brush fires, which can spread to surrounding vegetation and structures, while also creating a risk that individuals standing near the lines or vegetation could be electrocuted. He also explained that there need not be an actual contact to start a fire, because sometimes electricity can "arc," or jump, from a transmission line to a nearby object. Mr. Kozy testified that, for a 69 kV line, arcing can occur to objects that are approximately three feet away from the line. (*Id.*).

Mr. Kozy also explained that because transmission lines are dynamic, and because trees can also grow and sway, it is critical to ensure that the proper clearance is maintained between the electric line and any nearby vegetation. Mr. Kozy stated that electric lines are not static but instead are constantly changing heights and positions due to a variety of factors, including ambient temperature, wind, and the amount of load going through the line. According to Mr. Kozy, the "sag," or droop, in the Abbe-Johnson No. 1 line can vary as much as six feet in a single day and as much as ten feet from season to season, while wind can blow a transmission line as much as five feet to the left or right of its natural position. Mr. Kozy noted that the amount of sagging on an electric line can vary over the course of a single day and occurs almost every day. (*Id.* at 6.) Mr. Kozy testified that, based on computer simulations, the Abbe-Johnson No. 1 line can sag as much as 12.38 feet at its maximum operating temperature (Tr. 50).

In addition, Mr. Kozy stated that the 2007 edition of the National Electrical Safety Code (NESC) prescribes a minimum horizontal clearance of 8.2 feet and a minimum vertical clearance of 8.7 feet between 69kV lines and vegetation. He argued that vegetation that is within 10 to 15 feet of a 69kV line will almost certainly interfere with the line, due to sagging and arcing. Based on the potential for growth of the vegetation within the easement, as well as his own personal inspection of the WFT property, Mr. Kozy opined that the vegetation at issue may interfere with the Abbe-Johnson No. 1 line and accordingly should be removed. (*Id.* at 6-8).

While admitting that he did not know how often the Abbe-Johnson No. 1 line operates at its maximum operating temperature, Mr. Kozy noted that OE is required to maintain clearance to account for operations at that temperature (Tr. 57-62). He also explained that the trimming on the WFT property the week before the hearing was necessary because the vegetation had encroached upon the NESC minimum clearances, even though less than two years had passed since OE had last trimmed vegetation on the site. Mr. Kozy acknowledged that, as of 2008, the vegetation had been maintained in accordance with the NESC minimum clearances. (Tr. 65-68).

Stephen Cielewicz, president and chief operating officer of CN Utility Consulting, explained that UVM standards nationally have changed since the blackout of August 14, 2003, including an emphasis upon removing incompatible vegetation from areas underneath power lines or within a utility's right of way (OE Ex. G at 5). Mr. Cielewicz testified that the investigation into the causes of the August 14, 2003 blackout showed that strictly relying on cyclical pruning could lead to problems with tree-related contacts and arcing (*id.* at 11).

IV. PARTIES' LEGAL ARGUMENTS

WFT contends that OE failed to prove that the trees on the WFT property interfere or endanger the Abbe-Johnson No. 1 line (WFT Brief at 5). In determining whether the trees may interfere or endanger the transmission line, WFT argues that a test of objective reasonableness must be applied, considering all relevant evidence, which WFT contends in this context includes past and present tree maintenance (*id.*). According to WFT, the most important fact for the Commission to consider is that for three decades the trees on the WFT property, while maintained by OE consistent with all statutory, regulatory, and industry protocols, did not interfere or endanger the transmission line (*id.* at 6). WFT contends that the trees have not changed, but OE's maintenance of the trees has (*id.*, citing Tr. 98). WFT maintains that the accelerated growth of the WFT trees after 2003 resulted from OE's decision to trim the trees more frequently, and argues that OE should not be granted the relief it seeks, the destruction of WFT's trees, for a condition created by OE (*id.* at 6-7).

WFT next argues that the testimony offered by OE's witnesses prove that the trees do not interfere or endanger the transmission line. WFT points out that Mr. Kozy stated that, in 2008, none of the trees fell within the clearance range of 8.2 to 8.7 feet required by the NESC (*id.* at 7, citing Tr. 52, 59-62). WFT also questions the "worst case" scenario calculating line sag at the maximum operating temperature for the transmission line. WFT notes that Mr. Kozy testified that he did not know how often the Abbe-Johnson No. 1 line reaches that temperature, nor did any other OE employee provide the missing information (*id.* at 8, citing Tr. 49, 57). WFT contends that the fact that over the past three decades the WFT trees have not created any problems with the transmission line shows that, with proper maintenance, the trees do not interfere or endanger the transmission line (*id.*) WFT suggests that, at the time of the most recent survey, only two trees were found to be within the NESC clearance range, with one tree just 0.2 feet within the range (*id.* at 8-9).

Finally, WFT contends that, as landowner, it retains all rights to manage and maintain its trees to assure that they do not interfere or endanger the utility's transmission line or its operation (*id.* at 11). WFT argues that the easement does not prohibit it from maintaining the trees, so long as it does so consistent with the easement proscription that the trees do not interfere or endanger the transmission line (*id.* at 12). WFT contends that the fact that OE does not approve of WFT's tree-maintenance activity is of no legal concern and of no legal effect (*id.*).

OE responds that, because the Commission already approved OE's UVM program, including its emphasis upon removal of incompatible vegetation, and because WFT have failed to show that this approval was in error, OE should be allowed to remove the incompatible vegetation from the WFT property (OE Reply at 2). While acknowledging that the vegetation was previously managed through trimming, OE argues that periodic trimming is no longer practical, reliable, or safe because the vegetation is now taller, grows more quickly, and is closer to the transmission line than before (*id.* at 3).

OE points out that Rule 4901-1-10-27, O.A.C., requires utilities to establish and submit to the Commission for approval written programs for right-of-way vegetation control. Since its UVM program was submitted for Commission approval in 2000, OE argues that it is required to comply with the program's guidelines. OE also states that Commission Staff has reviewed its UVM specifications during on-site audits. (*id.* at 8-9, citing OE Ex. C at 5.)

OE additionally argues that its policy of removing incompatible vegetation is reasonable. OE maintains that the best way to make sure that trees do not impact a power line is to make sure that the trees are not there, and removal of incompatible vegetation allows a property owner to plant other vegetation for aesthetic or other reasons (*id.* at 9). OE contends that eliminating the need for off-cycle maintenance and frequently-occurring

work around power lines reduces UVM expense and the risk of accident and injury while also improving system reliability (*id.* at 9-10). OE also asserts that permitting review of the Commission's prior approval of OE's UVM program in the context of an individual complaint case will undermine OE's UVM practices, as removal of incompatible vegetation would halt while each complaint case was litigated (*id.* at 10).

OE contends that the record evidence in this case shows that the vegetation at issue is incompatible, as defined by OE's UVM program, as the trees and brush OE seeks to remove will all grow tall enough to interfere with the Abbe-Johnson No. 1 line, and most will grow to between five and 35 feet taller than the line (*id.* at 11, citing OE Ex. C at 11-15). OE suggests that WFT did not challenge this evidence during the hearing and cannot dispute the fact that, if left unmaintained, the vegetation will interfere with the transmission line. In short, OE argues, WFT points to no evidence rebutting the conclusion that under OE's UVM program the vegetation at issue is incompatible and must be removed. (*Id.*)

OE maintains that WFT's claim that the potential for interference with the transmission line is an abstract possibility or imaginary concern is contradicted by the evidence, pointing specifically to the fact that emergency trimming was necessary only a few days before the hearing as three trees had grown perilously close to the transmission line (*id.* at 12). OE also argues that WFT's contention that the previous practice of trimming the vegetation should be continued fails to account for the fact that UVM industry practices have changed since the August 14, 2003 blackout and now call for removal of incompatible vegetation. According to OE, WFT also ignores the fact that the vegetation has grown in size and height and are therefore much closer to the transmission line. (*Id.* at 12-14.) OE contends that WFT's suggestion that removal is unnecessary because the vegetation has been trimmed to the NESC minimum standards should be rejected, as the NESC standards are minimum thresholds and it is not safe for vegetation to be near the threshold. OE argues that WFT's contentions ignore the purpose of the UVM program, which is to anticipate and prevent dangerous vegetative conditions before they occur. (*Id.* at 14-16.)

OE disputes WFT's assertion that OE's frequent trimming created the possibility that WFT's vegetation might interfere with the transmission line. According to OE, off-cycle trimming was required because the vegetation continued to grow towards its mature heights and began to approach the transmission line and due to the biological fact that vegetation grows more quickly in response to trimming. (*Id.* at 16-17.) Finally, OE contends that WFT's suggestion that complainants should be permitted to maintain the vegetation on the WFT property should be rejected. OE maintains that WFT's proposal is simply bad and dangerous policy that would leave OE accountable for vegetation conditions that it would not be able to effectively remedy. Since OE is held accountable by

the Commission and OE's customers for vegetation-related problems, OE contends that it must be allowed control over implementation of its UVM program. (*Id.* at 17-20.)

DISCUSSION AND CONCLUSION

In *Corrigan v. Illuminating Company*, 122 Ohio St.3d 265, 2009-Ohio-2524, the Ohio Supreme Court addressed a dispute involving whether an easement gave a utility the right to remove vegetation that could potentially interfere with the utility's power lines. In that case, the Supreme Court found that there was no question that the easement was valid and that the vegetation sought to be removed by the utility was within the easement (*Corrigan* at ¶17-18). In addition, after finding the language of the easement unambiguous, the Supreme Court stated that the broad language of the easement granted to the company allows the utility to remove trees within its easement that could pose a threat to the company's transmission lines (*id.* at ¶19-20). The Supreme Court then held that the question of whether a utility company reasonably determined that vegetation interferes with or threatens to interfere with the utility's transmission lines is a service-related question within the Commission's exclusive jurisdiction (*id.* at ¶21).

The Commission notes that WFT asserts that the easement at issue in *Corrigan* is "virtually identical" to the easement under consideration in this proceeding, and WFT also did not challenge OE's assertion that the vegetation OE seeks to remove lies within the easement (WFT Reply at 4). Accordingly, the Commission finds that the facts in this case are analogous to the situation presented in *Corrigan*. The Commission finds that the Supreme Court's finding in *Corrigan* mandates a finding that the easement permits OE to remove any vegetation that may interfere or threaten to interfere with OE's transmission lines. In addition, the Commission finds that this proceeding is not the proper forum for a review of OE's UVM program, which the Commission previously approved in accordance with Rule 4901-1-10-27, O.A.C. As a result, the only issue left for our determination in this proceeding is whether OE reasonably determined that the vegetation in question may interfere or threaten to interfere with the Abbe-Johnson No. 1 line.

The Commission finds that, based on the undisputed facts in the record that the vegetation in question has the genetic disposition to grow to heights tall enough to potentially interfere with the Abbe-Johnson No. 1 line, OE reasonably determined that this vegetation may interfere or threaten to interfere with the transmission line and should be removed pursuant to OE's approved UVM program. WFT offered no evidence to contravert the testimony provided by OE witness Ms. Spach, who stated that, based on the average heights-at-maturity and growth rates for each species, as collected from authoritative sources, the vegetation at issue will grow tall enough at maturity to potentially interfere with the Abbe-Johnson No. 1 line (OE Ex. C at 11-16). While finding that OE's determination that the vegetation in question could potentially interfere with the

transmission line was not unreasonable, based on the facts in this case, the Commission reminds utilities of our expectation that they attempt to minimize the impact to property owners, to the extent possible and without sacrificing safety and reliability, when performing UVM activities.

The Commission, therefore, finds that this complaint should be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Kurt Wimmer/Wimmer Family Trust (WFT or complainant) filed a complaint against the Ohio Edison Company (OE), on September 4, 2009, contesting OE's planned removal of trees on complainant's property.
- (2) OE is a public utility as defined by Section 4905.02, Revised Code, and an electric light company, as defined in Section 4905.03(A)(3), Revised Code.
- (3) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Pub. Util. Comm*, 5 Ohio St.2d 189 (1966).
- (4) There is insufficient evidence to support a finding that OE unreasonably determined that the vegetation at issue may interfere or threaten to interfere with the Abbe-Johnson No. 1 line.

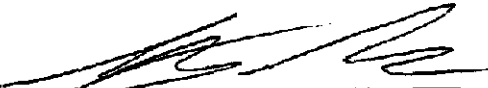
ORDER:

It is, therefore,


ORDERED, That the complaint be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO




Steven D. Lesser, Chairman



Paul A. Centolella



Valerie A. Lemmie




Cheryl L. Roberto

HPG/vrm

Entered in the Journal

JAN 27 2011



Renee J. Jenkins
Secretary