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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

THOMAS & DERRELL WILKES,
Complainants,

v.

OHIO EDISON COMPANY,
Respondent.

Case No. 09-682-EL-CSS

**MEMORANDUM OF OHIO EDISON COMPANY CONTRA MOTION TO ORDER
OHIO EDISON TO MOVE 69 kV LINES TO COMPORT WITH NATIONAL
ELECTRICAL SAFETY CODE BY THOMAS & DERRELL WILKES**

I. INTRODUCTION

From the outset, Complainants Thomas and Derrell Wilkes ("Complainants") have sought to use this case to evade legitimate state court orders, all without disclosing those orders (or even the existence of that litigation) to the Commission. The Mahoning County Court of Common Pleas, enforcing the plain terms of an easement covering Complainants' property, ordered Complainants to move their above-ground pool and shed to the required distance from Respondent Ohio Edison's 69 kilovolt ("kV") transmission line by February 17, 2011.¹ That Order moots any need for the Commission to consider whether the line should be moved.

Rather than getting to work on moving the structures, however, Complainants instead filed the instant "Motion to Order Ohio Edison to Move 69 kV Lines to Comport with National Electric Safety Code" ("Motion"). As set forth below, the Motion is both procedurally and substantively flawed. The Commission has no jurisdiction over this case, and the Mahoning

¹ On February 4, 2011, the Seventh District Court of Appeals denied Complainants' motion to stay the common pleas court order.

County court, which does have jurisdiction, already has decided the sole issue purportedly before the Commission here. In any event, Complainants have no reasonable grounds for their dispute. Complainants seek to have Ohio Edison move *its* line because of violations of the National Electric Safety Code ("NESC") that ***Complainants caused*** when they placed their pool and shed too close to the lines. Having built their facilities under and near Ohio Edison's lines, and having been ordered by a court to move those facilities because they interfere with Ohio Edison's easement rights, Complainants seek to have the Commission ignore all that and order Ohio Edison to move its lines. For all of these reasons (indeed, for any of them alone), this case should be dismissed.

II. FACTS

On August 5, 2009, Complainants filed the Complaint in this action, alleging that the distances between Ohio Edison's 69 kV transmission line and Complainant's backyard pool and storage shed violate the NESC. The Complaint requested an order that Ohio Edison move its 69 kV line. Compl., p. 1. In seeking that relief, Complainants neglected to mention that Ohio Edison's line was located in an easement over Complainant's property ("Easement"). Complainants also declined to tell the Commission that they had sought precisely the same relief (i.e., an order that the lines be moved) in a state court action then pending in the Mahoning County Court of Common Pleas. *See Ohio Edison v. Wilkes*, Case No. 2009-CV-1280 (Mahoning Cty. Ct. Cm. Pl.) ("Mahoning Cty. Case") (docket sheet attached as Ex. A). Nor did Complainants mention that at the time they filed the Complaint here, the state court litigation was in the midst of summary judgment briefing, or that just two months earlier, the court had enjoined Complainants from using the swimming pool and from interfering with Ohio Edison's right to inspect and service the 69 kV line. *See id.*

On August 30, 2010, following an eight-month stay of discovery in this proceeding, Complainants sought to revive this case by filing a "Request for Ruling" on Ohio Edison's previous Motion to Dismiss, again requesting an order that Ohio Edison move its 69 kV line. In that filing, Complainants failed to mention that only two weeks earlier, the Mahoning County magistrate had granted Ohio Edison's motion for summary judgment: (1) finding that the easement's plain language was dispositive; (2) noting that the Complainants had built their facilities under Ohio Edison's lines well after the easement was established and the lines were built; and (3) ordering Complainants to relocate their pool and shed to a safe distance from Ohio Edison's 69 kV line. *See Mahoning Cty. Case, Magistrate's Dec. dated Aug. 16, 2010 (attached as Ex. B) (finding Complainants' pool and shed to be a "continuing nuisance that wrongfully interferes with Ohio Edison's right to operate the Boardman-Pidgeon South 69kV transmission line in a safe and reliable manner, in violation of Ohio Edison's rights under the easement")*.

The Complainants filed objections to that order in state court, continuing to press their argument that Ohio Edison should instead be required to move its transmission line. On October 21, 2010, the Court overruled Complainants' objections and ordered Complainants to move the pool and shed by February 17, 2011. *See Mahoning Cty. Case, Judgment Entry dated Oct. 21, 2010 (attached as Ex. C)*. On December 1, 2010, the trial court judge denied Complainants' motion to stay that order. *See Ex. A*.

On February 7, in another effort to use the Commission to "un-do" the Mahoning County court's decisions, Complainants filed the instant Motion, asking the Commission to *immediately* order Ohio Edison to move its 69 kV line (rather than wait to do so until the hearing process concludes). Consistent with Complainants' past practices, they failed to inform the Commission of the reason for this sudden sense of urgency: on February 4, 2011—three days before

Complainants filed the instant motion—the Seventh District Court of Appeals denied Complainants’ motion to stay the trial court order.² *See Ohio Edison Co. v. Wilkes*, No. 10 MA 174 (7th Dist. App.), Judgment Entry dated Feb. 4, 2011 (attached as Ex. D). As a result, there is a final and valid state court order compelling Complainants to move the pool and shed by no later than February 17, 2011.

III. ARGUMENT

Complainants’ Motion is fatally flawed, both procedurally and substantively. As an initial matter, the Commission lacks jurisdiction to hear this case, especially in light of the Mahoning County Court of Common Pleas’ recent final judgment in state court litigation regarding an identical issue. Moreover, even putting that aside, their motion essentially seeks summary judgment, a procedural vehicle the Commission has repeatedly confirmed does not exist in Commission proceedings. Still further, Complainants fail to state reasonable grounds for complaint (and thus are not entitled to the dispositive order they seek). Accordingly, the Motion should be denied and this case should be dismissed.

A. Because The Commission Lacks Jurisdiction Over The Complaint, Complainants’ Motion Should Be Denied And This Case Should Be Dismissed.

1. The Commission lacks jurisdiction over the Complaint.

The Commission should deny this Motion (and dismiss the case) because, as set forth more fully in Ohio Edison’s Motion to Dismiss and related filings, the Commission lacks jurisdiction over this dispute. *See Ohio Edison Mot. to Dismiss* dated Aug. 25, 2009; *Ohio Edison Reply in Support of Mot. to Dismiss* dated Sept. 11, 2009; *Ohio Edison Notice of Supp. Authority* dated Sept. 1, 2010; *Ohio Edison Supp. Mem.* dated Nov. 23, 2010; *Ohio Edison*

² Counsel for Ohio Edison advised counsel for Complainants of this decision in a letter dated February 8, 2011, and inquired whether Complainants intended to comply with their obligation to relocate the pool and shed by February 17, 2011. *See Ex. E.* Complainants have not responded to that inquiry.

Reply dated Dec. 9, 2010. The basic issue here is one of contract law – what do the terms of the easement require? Under well-established Ohio law, the Commission has jurisdiction over such contract disputes only if its “administrative expertise” is required to resolve the issues presented. *See Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.* (2008), 119 Ohio St. 3d 301, 303; quoting *Pacific Indemn. Ins. Co. v. Illumin. Co.*, 2003-Ohio-3954 (Cuyahoga Cty. Ct. App.).

Here, the Commission’s expertise is not required to resolve this dispute, and the Commission thus lacks jurisdiction. Under Ohio Edison’s easement, the company retains the “right to clear and keep clear [its] right of way of trees, bushes and other obstructions within a distance of fifty feet of said right of way.” *See* Exhibit C to the Answer. As the court found, “[t]his language is broadly written to grant Ohio Edison the right to keep the right-of-way ‘clear’ of any structure or other obstruction that may be erected within fifty feet of the center line.” Mahoning Cty. Case, Magistrate’s Decision dated Sept. 14, 2010, ¶ 6, Ex. F. Thus, based on that plain language, and in order to remedy the “hazard and potential for injury” posed by Complainants’ pool and shed, the Mahoning County Court of Common Pleas ordered Complainants to relocate those structures away from the line. *See* Mahoning Cty. Case, Judgment Entry dated Oct. 21, 2010; *see also* Magistrate’s Decision dated Sept. 14, 2010, ¶ 11

Complainants seek to invoke jurisdiction by claiming that Commission expertise is necessary to interpret the NESC rules. *See, e.g.,* Complainants’ Opp. to Mot. to Dismiss dated Sept. 3, 2009, p. 4 (alleging that Complaint “specifically relates to PUCO’s expertise and enforcement of the NESC”). ***But there simply is no dispute regarding the NESC.*** The parties do not dispute that the NESC prescribes minimum clearances between 69 kV lines and structures like Complainants’ pool and shed. *See* Compl. at Ex. A (Complainants citing *Kozy Aff.*), ¶ 3. They do not disagree about the proper way to calculate those clearances, or that such calculation

must be based on the position of the line as if it were operating at the maximum allowable operating temperature of 212°F. *Id.* at ¶ 5. They do not dispute that in this case, the NESC requires minimum clearances of 25.7 feet from Complainants' pool and 13.2 from the roof of Complainant's shed. *Id.* at ¶¶ 10, 11. And they do not disagree that under the NESC, Complainants' structures are too close to the line. *See* Compl., p. 1 (acknowledging that pool is five feet too close to line and shed is 3.2 feet too close). The parties agree on every relevant aspect of interpretation and application of the NESC in this case, and they agree that the proximity of Complainants' structures to the 69 kV line violates those standards. There is no NESC analysis or calculation left for the Commission to do. Rather, the only issue in this case is the appropriate *remedy* for the undisputed NESC violation—*i.e.*, whether to require Ohio Edison to move the 69 kV line, or to require Complainants to move the pool and shed.

As the Mahoning County Court of Common Pleas already has decided, that is a question that must be determined ***based on the terms set forth in Ohio Edison's easement***. The NESC establishes minimum clearances between structures and electrical facilities; it provides no guidance as to whether the structure or the facility should be moved if the clearance is not met. Complainants do not (and cannot) allege otherwise. Thus the Commission lacks jurisdiction.

2. The two cases Complainants cite do not support jurisdiction.

In previous filings, Complainants cited two cases in an effort to establish jurisdiction. But both citations miss the point. First, Complainants cite *Corrigan v. Illuminating Co.* (2009), 122 Ohio St. 3d 265, for the general proposition that the Commission has broad jurisdiction over service-related disputes. *See* Mot. to Order, pp. 2-3. Complainants are certainly correct that the Commission has broad jurisdiction, but Complainants ignore the critical portion of the *Corrigan* holding (and the key distinction from this case). In *Corrigan*, the Court noted that:

[T]his case is not about an easement. There is no question that the company has a valid easement and that the tree is within the easement. . . . It is clear from the record that ***the Corrigan's are not contesting the meaning of the language of the easement*** but rather the company's decision to remove the tree instead of pruning it. . . . Therefore, the Corrigan's complaint with the decision to remove the tree is really an attack on the company's vegetation management plan.

Corrigan at 269 (emphasis added).

In stark contrast, this case has ***everything*** to do with an easement. The sole dispute between the parties is whether, under the terms of the easement, Ohio Edison must relocate the 69 kV line or whether instead Complainants must relocate their pool and shed. The Mahoning County court resolved that question by reference to the easement's language, finding that Ohio Edison has a right to insist on the relocation of "obstructions" in its right-of-way, a term that the Mahoning County court correctly determined includes the pool and shed.

Likewise, Complainants' citation to *State ex rel. Illuminating Company v. Cuyahoga County Court of Common Pleas* (2002), 97 Ohio St. 3d 69, offers them no support. There, a utility had sued a commercial customer in state court to collect on unpaid electric bills. *Id.* at 69-70. The customer counter-claimed for violations of Commission rules regarding establishment of electric service, procedures for obtaining an account guaranty, and billing requirements. *Id.* In granting the utility a writ of prohibition, the Court upheld the Commission's exclusive jurisdiction ***over counter-claims that are based on those rules.*** *Id.* at 73 (but holding that other counter-claims regarding indefiniteness and lack of consideration were within state court's jurisdiction). Again in contrast, here, there is no dispute regarding the Commission's rules (or the proper interpretation of the NESC). Rather, the only issue is whether the transmission line or Complainants' structures should be moved, and that issue turns squarely on the easement.

3. The Commission should deny Complainants' Motion and dismiss this case because the Mahoning County Court of Common Pleas properly has exercised jurisdiction over the subject matter of this dispute.

Where a court properly exercises jurisdiction over a dispute, it has the authority to “adjudicate upon the whole issue and to settle the rights of the parties,” *to the exclusion of all other tribunals*. *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St. 2d 279, syll. ¶ 1; *see Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Division of State Fire Marshal* (2007), 115 Ohio St. 3d 375, 380 (observing that “collateral or indirect attacks [on judgments of other courts] are disfavored”); *B-Dry Sys., Inc. v. Kronenthal*, Nos. 17130, 17619, 1999 Ohio App. LEXIS 3080, *18 (2d App. Dist. June 30, 1999) (holding that where tribunal properly asserts jurisdiction over a dispute in the first instance, other tribunals have no jurisdiction over subsequently-filed suits involving same dispute). Here, the Mahoning County Court of Common Pleas already has decided the issue presented by this case: the appropriate remedy under the easement for the undisputed NESC violations created by the proximity between the Complainants’ structures and the 69 kV line is to move those structures. The only basis the Complainants put forth in support of their request that the line be moved was the NESC violation. But the court’s order, by requiring the Complainants to move their pool and shed, resolves that NESC violation, and thereby moots this case. Because the Mahoning County Court of Common Pleas properly exercised jurisdiction over the very dispute at issue here, the Commission should dismiss this case.

Moreover, contrary to Complainants’ argument, the Commission is not allowed to collaterally attack court judgments. Specifically, Complainants argue that “collateral attacks are permissible in the PUCO,” citing only *Western Reserve Transit Authority v. Public Util. Comm’n.* (1974), 39 Ohio St. 2d 16. But that case is irrelevant. There, a party complained when its Commission case was dismissed without hearing on the basis of a decision in *another*

Commission case. See id. at 18 (noting *sua sponte* Commission dismissal based on prior Commission proceeding). In that context, the Court noted that R.C. 4905.26 contemplates collateral attacks on prior Commission orders in subsequent Commission cases. *Id.* It did not, however, hold that a party may collaterally attack a prior *court* order in a Commission case (especially where the Commission lacks jurisdiction, as it does here). *Western Reserve* does not support Complainants' use of this administrative proceeding as an end-run around the Mahoning County court's final judgment.

B. The Complainants' Motion Seeks Summary Judgment, Which Is Not Available In Commission Proceedings.

The Commission repeatedly has noted that its rules do not provide for summary judgment. *See, e.g., Weir v. Ohio Edison Co.*, No. 89-486-EL-CSS, Entry dated May 1, 1989, ¶ 5 (denying summary judgment motion because R.C. 4905.26 "makes no provision for the dismissal of actions based upon affidavits and other evidence submitted prior to the onset of a hearing"); *Hershberger v. The East Ohio Gas Co.*, No. 87-1513-GA-CSS, Entry dated Oct. 27, 1987, ¶ 7. Yet, that is for all practical purposes exactly what Complainants seek here. Their Motion seeks the very relief—"an order compelling Ohio Edison to move their lines"—that Complainants sought in their Complaint. The Complainants thus ask the Commission to issue a summary ruling that would dispose of this case without a hearing. *See Compl.*, p. 1 (requesting that the Commission "require Ohio Edison to move their transmission lines. . ."). That is the very definition of summary judgment.

The Commission has made it clear that it acts *after* a hearing, and the Complainants should not be allowed to bypass that process. Even if the requested relief were warranted, and it is not, Complainants' Motion is the wrong vehicle to seek that relief, and the motion should be denied.

C. Because Complainants Fail To State Reasonable Grounds For Complaint, Their Motion Should Be Denied And This Case Should Be Dismissed.

Even putting aside the jurisdictional failings and the Complainants' attempt to use an improper vehicle, the Motion should still be denied, and this case should still be dismissed, because Complainants fail to state reasonable grounds for complaint. "Reasonable grounds for complaint must exist before the Public Utilities Commission, either upon its own initiative or upon the complaint of another party, can order a hearing, pursuant to R.C. 4905.26" *Ohio Util. Co. v. Pub. Util. Comm'n* (1979), 58 Ohio St.2d 153, syl. ¶ 2. Where allegations, even if assumed to be true, do not set forth a cognizable claim, the complaint must be dismissed. *E.g.*, *Lucas Cty. Comm'nrs v. Pub. Util. Comm'n* (1997), 80 Ohio St.3d 344, 347. *See also Miljkovic v. Network Enhanced Technologies, Inc.*, No. 09-26-TP-CSS, Entry dated Feb. 11, 2010, ¶¶ 11-12.

Complainants purport to bring two claims here: (i) Ohio Edison wrongfully has failed to move its 69 kV line in violation of the NESC; and (ii) Ohio Edison wrongfully has discriminated against Complainants in seeking the relocation of their pool and shed. Neither of these allegations set forth a legitimate claim.

As set forth in Ohio Edison's Motion to Dismiss, Complainants fail to state reasonable grounds for complaint regarding Ohio Edison's refusal to relocate its 69 kV line. *See Ohio Edison Mot. to Dismiss* dated Aug. 25, 2009, p. 5. Complainants do not allege that Ohio Edison's refusal to move the line is unjust, unreasonable or unlawful. *See id.* Nor could they. There is no statute, Commission rule or precedent, tariff provision and/or portion of the NESC that requires Ohio Edison to move transmission lines after customers build new structures in dangerous proximity to those existing lines.

In fact, if anything, relevant authority requires the relocation of subsequently-built structures, *not* the lines. In *Columbia Gas Transmission Corp. v. Large*, 63 Ohio Misc. 2d 63 (Licking Cty. Ct. Common Pleas 1992), for example, the court granted a mandatory injunction ordering residential customers of a gas utility to move a swimming pool they had placed seven feet from a gas transmission line, in violation of the utility's 25-foot easement. *Id.* at 65.

That rule only makes sense, especially on the facts here. It would cost considerably more to move the 69 kV line than it would to move the above-ground pool and shed. And there is no reason to impose that cost on Ohio Edison, given that the line was there when Complainants elected to erect the structures. Indeed a rule that would allow those who owned property over which Ohio Edison had easements to build new structures close to existing lines, and then force Ohio Edison to move their lines (or pay the property owner to avoid that result), would open troubling possibilities for opportunistic behavior, with the costs of that opportunistic behavior eventually imposed on Ohio Edison's other customers.

Complainants also fail to state reasonable grounds for complaint regarding alleged "discrimination" in Ohio Edison's enforcement of easements against Complainants and their neighbors. *See* Complainants' Opp'n to Mot. to Dismiss dated Sept. 3, 2009, pp. 4-5. This allegation is too little, too late. Under the Commission's rules, "[i]f discrimination is alleged [in a complaint], the facts that allegedly constitute discrimination must be stated with particularity." Rule 4901-9-01(B). Complainants' allegations do not remotely meet this standard. Not only did they fail to plead discrimination with particularity, they did not plead discrimination *at all*. The Complaint contains not one mention of alleged discrimination, much less any facts supporting such a claim.

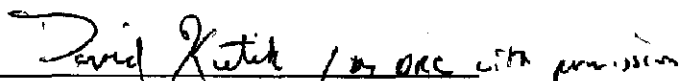
Even when Complainants' belatedly raised their discrimination "claim" (in response to a motion to dismiss), they still failed to allege any facts. Their entire discrimination "claim" consists of one sentence: "Although the location of the Wilkes' swimming pool and storage shed may be a technical violation of the NESC, so are the location of their neighbors' structures along this same 69 kV transmission line and Ohio Edison has not sought to enforce the NESC upon those neighbors." Mem. Contra dated Sept. 3, 2009, p. 4. Complainants do not allege (i) what those "structures" are; (ii) where those "structures" are located (i.e., whether they are located within Ohio Edison's easement); (iii) the distance between those "structures" and the transmission line; (iv) whether those distances violate the NESC; or even (v) who the neighbors are. Complainants' conclusory, one-sentence allegation of discrimination, offered in an opposition to a motion to dismiss, is not remotely adequate to sustain this case.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny Complainants' Motion and dismiss this case.

DATED: February 16, 2011

Respectfully submitted,


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ATTORNEYS FOR RESPONDENT
OHIO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Ohio Edison Company
Contra Motion to Order Ohio Edison to Move 69 kV Lines to Comport with National Electrical
Safety Code by Thomas & Derrell was delivered to the following person by first class mail,
postage prepaid, this 16th of February, 2011:



An Attorney For Respondent
Ohio Edison Company

Brett M. Mancino
1360 E. Ninth Street
1000 IMG Center
Cleveland, Ohio 44114

COI-1454582v4

EXHIBIT A



General Inquiry



New Search...

Summary

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Docket Search

50 2009 CV 01280 OHIO EDISON COMPANY -vs- WILKES, THOMAS E et al JCE

Search Criteria

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Search Results

69 Docket(s) found matching search criteria.

Docket Date	Docket Text	Amount	Amount Due	Images
01/10/2011	RECORD ON APPEAL TRANSMITTED TO THE COURT OF APPEALS	0.00	0.00	
12/16/2010	Issue Date: 12/16/2010 Service: COPIES OF 12/1/10 JE Method: (CP) REGULAR MAIL Cost Per: \$ 0.44 OHIO EDISON COMPANY c/o ATTY: FUNK, STEPHEN W. 222 SOUTH MAIN STREET SUITE 400 AKRON, OH 44308 Tracking No: R000499510 WILKES, THOMAS E c/o ATTY: MANCINO ESQ, BRETT M 1350 E NINTH ST 1000 IMG CENTER CLEVELAND, OH 44114 Tracking No: R000499511 WILKES, DERRELL C 8230 GARDENWOOD PLACE YOUNGSTOWN, OH 44512 Tracking No: R000499512	1.32	1.32	
12/16/2010	COPIES ISSUED OF 12/1/10 JE	0.30	0.30	
12/01/2010	JE>THIS MATTER CAME BEFORE THE COURT ON DEFTS' MOTION TO STAY THE EXECUTION OF JUDGEMENT AND PLTF'S MEMORANDUM IN OPPOSITION TO DEFTS' MOTION TO STAY EXECUTION OF JUDGEMENT PENDING APPEAL. DEFTS' MOTION TO STAY EXECUTION OF	2.00	2.00	

JUDGEMENT PENDING APPEAL IS
HEREBY OVERRULED. ALL THIS
UNTIL FURTHER ORDER OF THE
COURT (EVANS)

11/22/2010	OHIO EDISON'S MEMORANDUM IN OPPOSITION TO DEFT'S MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL FILED	0.00	0.00
11/19/2010	CIVIL DOCKETING STATEMENT FILED	0.00	0.00
11/19/2010	PRAECIPE FOR TRANSCRIPT FILED	0.00	0.00
11/19/2010	NOTICE OF APPEAL FILED BY DEFTS	0.00	0.00
11/19/2010	Issue Date: 11/19/2010 Method: (CP) REGULAR MAIL Cost Per: \$ 0.44 OHIO EDISON COMPANY c/o ATTY: FUNK, STEPHEN W. 222 SOUTH MAIN STREET SUITE 400 AKRON, OH 44308 Tracking No: R000493466 WILKES, THOMAS E c/o ATTY: MANCINO ESQ, BRETT M 1350 E NINTH ST 1000 IMG CENTER CLEVELAND, OH 44114 Tracking No: R000493467	0.88	0.88
11/19/2010	COPIES ISSUED OF 10/21/10 JE	0.40	0.40
11/18/2010	DEFT'S MOTION TO STAY EXECUTION OF JUDGMENT WITHOUT SUPERSEADES BOND FILED Attorney: MANCINO ESQ, BRETT M (71148)	0.00	0.00
10/21/2010	JE>THIS MATTER CAME BEFORE THE COURT PURSUANT TO OHIO RULES OF CIVIL PROCEDURE RULE 53(E)(3) ON THE MAGISTRATE'S DECISION FILED AUGUST 16, 2010. THE COURT FURTHER FINDS THAT DEFTS' THOMAS AND DERRELL WILKES FILED OBJECTIONS TO MAGISTRATE'S DECISION ON AUGUST 24, 2010 ALONG WITH A REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW. PURSUANT TO OHIO RULES OF CIVIL PROCEDURE RULE 53(D)(3)(A) THE MAGISTRATE ISSUED A FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF THE AUGUST 16, 2010 MAGISTRATE'S DECISION ON SEPTEMBER 14, 2010. ON SEPTEMBER 23, 2010 DEFTS' THOMAS AND DERRELL WILKES FILED SPECIFIC OBJECTIONS TO MAGISTRATE'S DECISION FILED SEPTEMBER 14, 2010. ON OCTOBER 4, 2010 PLTF FILED A RESPONSE TO	4.00	4.00



DEFTS' OBJECTIONS AND OBJECTED TO THE SCOPE OF PROPOSED INJUNCTION. FOLLOWING REVIEW OF THE ABOVE, THE COURT OVERRULES THE OBJECTIONS AND HEREBY AFFIRMS THE MAGISTRATE'S DECISION. THE MAGISTRATE'S DECISION IS THEREFORE ADOPTED AND MADE THE ACTION AND JUDGEMENT OF THIS COURT AS FOLLOWS: PLTF, OHIO EDISON'S MOTION FOR SUMMARY JUDGEMENT IS GRANTED. DEFTS' MOTION FOR SUMMARY JUDGEMENT AND MOTION TO DISMISS ARE DENIED. DEFTS ARE ORDERED TO REMOVE OR MOVE THE SWIMMING POOL AND STORAGE SHED IDENTIFIED IN OHIO EDISON'S VERIFIED COMPLAINT, UNDER OHIO EDISON'S SUPERVISION, FROM OHIO EDISON'S RIGHT OF WAY TO A LOCATION THAT IS MORE THAN 50 FEET FROM THE CENTER LINE OF THE BOARDMAN RIDGEON SOUTH 69K V TRANSMISSION LINE WITHIN 120 DAYS OF THIS ENTRY. THEREFORE, THE MAGISTRATE'S DECISION IS UPHELD. COSTS TO DEFENDENT (EVANS)

10/04/2010	PLNTF'S RESPONSE TO DEFT'S OBJECTIONS TO MAGISTRATE'S DECISION, AND OBJECTION TO SCOPE OF PROPOSED INJUNCTION FILED	0.00	0.00
09/23/2010	DEFT'S SPECIFIC OBJECTIONS TO MAGISTRATE'S DECISION FILED SEPTEMBER 14,2010 FILED	0.00	0.00
09/21/2010	DEFT'S RQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED BY DEFT	0.00	0.00
09/20/2010	Issue Date: 09/20/2010 Service: MAILED COPIES OF 09/14/10 MAGISTRATE'S DECISION Method: (CP) REGULAR MAIL Cost Per: \$ 0.61 OHIO EDISON COMPANY c/o ATTY: FUNK, STEPHEN W. 222 SOUTH MAIN STREET SUITE 400 AKRON, OH 44308 Tracking No: R000479444 WILKES, THOMAS E c/o ATTY: MANCINO ESQ, BRETT M 1350 E NINTH ST 1000 IMG CENTER CLEVELAND, OH 44114 Tracking No: R000479445 WILKES, THOMAS E 8230 GARDENWOOD PLACE YOUNGSTOWN, OH 44512	2.44	2.44

Tracking No: R000479446 WILKES,
DERRELL C 8230 GARDENWOOD
PLACE YOUNGSTOWN, OH 44512
Tracking No: R000479447

09/20/2010	COPIES ISSUED OF 09/14/10 MAGISTRATE'S DECISION	2.80	2.80
09/14/2010	DECISION OF MAGISTRATE (FEHR)	14.00	14.00
08/26/2010	PLNTF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED	0.00	0.00
08/24/2010	DEFT'S OBJECTION TO MAGISTRATES DECISION FILED	0.00	0.00
08/18/2010	Issue Date: 08/18/2010 Service: MAILED COPIES OF 08/16/10 MAGISTRATE'S DECISION Method: (CP) REGULAR MAIL Cost Per: \$ 0.44 OHIO EDISON COMPANY c/o ATTY: FUNK, STEPHEN W. 222 SOUTH MAIN STREET SUITE 400 AKRON, OH 44308 Tracking No: R000472839 WILKES, THOMAS E c/o ATTY: MANCINO ESQ, BRETT M 1350 E NINTH ST 1000 IMG CENTER CLEVELAND, OH 44114 Tracking No: R000472840 WILKES, DERRELL C 8230 GARDENWOOD PLACE YOUNGSTOWN, OH 44512 Tracking No: R000472841	1.32	1.32
08/18/2010	COPIES ISSUED OF 08/16/10 MAGISTRATE'S DECISION	0.90	0.90
08/16/2010	DECISION OF MAGISTRATE (FEHR)	6.00	6.00
08/13/2010	PLNTF OHIO EDISON'S REQUEST FOR A RULING ON PENDING MOTION FOR SUMMARY JUDGMENT FILED	0.00	0.00
09/15/2009	PLNTF OHIO EDISON'S REPLY TO DEFT'S MOTION TO DISMISS FILED	0.00	0.00
09/08/2009	DEFT'S MOTION TO DISMISS FILED Attorney: MANCINO ESQ, BRETT M (71148)	0.00	0.00
07/28/2009	AFFIDAVIT OF THOMAS E WILKES FILED	0.00	0.00
07/17/2009	DEFT'S BRIEF IN OPPOSITION TO PLNTF'S MOTION FOR SUMMARY JUDGMENT FILED	0.00	0.00
07/14/2009	Issue Date: 07/14/2009 Service: COPIES OF 6-19-09 JE Method: (CP) REGULAR MAIL Cost Per: \$ 0.44 OHIO EDISON COMPANY c/o ATTY: FUNK, STEPHEN W. 222 SOUTH MAIN STREET SUITE 400 AKRON, OH 44308 Tracking No: R000385792 WILKES, THOMAS E c/o ATTY: MANCINO ESQ, BRETT M 1350 E NINTH ST 1000 IMG CENTER CLEVELAND, OH 44114	1.32	1.32

Tracking No: R000385793 WILKES,
DERRELL C 8230 GARDENWOOD
PLACE YOUNGSTOWN, OH 44512
Tracking No: R000385794

07/14/2009	COPIES ISSUED OF 6-19-09 JE	0.30	0.30
06/25/2009	COPY OF HEARING NOTICE SENT BY COURT TO PARTIES BY REGULAR MAIL FILED CIVIL ASSIGNMENT NOTICE Sent on: 06/25/2009 15:29:51	0.00	0.00
06/22/2009	AFFIDAVIT OF WALTER FLACH FILED	0.00	0.00
06/22/2009	PLNTF OHIO EDISON'S OPPOSITION TO DEFT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FILED	0.00	0.00
06/22/2009	PLNTF'S MOTION FOR SUMMARY JUDGEMENT FILED	0.00	0.00
06/19/2009	JE> THIS MATTER CAME TO BE CONSIDERED ON THE MAGISTRATE'S DECISION FILED 05/22/09. AFTER REVIEW, THE MAGISTRATE'S DECISION IS HEREBY ADOPTED & MADE THE ACTION & JUDGMT OF THIS COURT. IT IS HEREBY ORDERED THAT DEFTS THOS. E. & DERRELL C. WILKES ARE ENJOINED FROM TAKING ANY ACTION TO DENY PLNTF OH. EDISON CO. THE RIGHT TO ENTER SAID DEFTS' PROPERTY AT ANY TIME TO INSPECT, REPAIR OR SERVICE THE BDMN.-PIDGEON SOUTH 69kV ELECTRICAL TRANSMISSION LINE ON DEFTS' PROPERTY. IT IS FURTHER ORDERED THAT, PENDING A RULING ON PLNTF'S MOTION FOR A PRELIMINARY INJUNCTION, SAID DEFTS ARE HEREBY RESTRAINED FROM USING THE SWIMMING POOL ON DEFTS' PROPERTY, FROM ALLOWING ANY PERSON TO USE THE POOL. (EVANS) ALL THIS UNTIL FURTHER ORDER OF THE COURT. [DETAILS: J2376, P143]	2.00	2.00
06/15/2009	TRANSCRIPT OF PROCEEDINGS AND EXHIBITS FILED (EXHIBITS ATTACHED TO TRANSCRIPT)-[4-13- 09 HEARING]	0.00	0.00
06/09/2009	DEFT'S MOTION FOR SUMMARY JUDGEMENT AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED FILED	0.00	0.00

06/01/2009	PLNTF OHIO EDISON'S REPLY TO DEFT'S SUPPLEMENTAL BRIEF OF MAY 21,2009 FILED	0.00	0.00
05/28/2009	Issue Date: 05/28/2009 Service: MAILED COPIES OF 05/22/09 MAGISTRATE'S DECISION Method: (CP) REGULAR MAIL Cost Per: \$ 0.44 OHIO EDISON COMPANY c/o ATTY: FUNK, STEPHEN W. 222 SOUTH MAIN STREET SUITE 400 AKRON, OH 44308 Tracking No: R000375379 WILKES, THOMAS E c/o ATTY: MANCINO ESQ, BRETT M 1350 E NINTH ST 1000 IMG CENTER CLEVELAND, OH 44114 Tracking No: R000375380 WILKES, DERRELL C 8230 GARDENWOOD PLACE YOUNGSTOWN, OH 44512 Tracking No: R000375381	1.32	1.32
05/28/2009	COPIES ISSUED OF 05/22/09 MAGISTRATE'S DECISION	0.60	0.60
05/22/2009	DEFT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLNTF'S MOTION FOR TEMPORARY RESTRAINING ORDER FILED	0.00	0.00
05/22/2009	DECISION OF MAGISTRATE (FEHR)	4.00	4.00
05/21/2009	PLNTF'S REPLY TO COUNTERCLAIM FILED	0.00	0.00
05/18/2009	PLNTF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION FILED	0.00	0.00
05/18/2009	SUPPLEMENTAL AFFIDAVIT OF DONALD VARDON JR PROFESSIONAL SURVEYOR FILED BY PLNTF	0.00	0.00
05/18/2009	PLNTF'S NOTICE OF FILING SUPPLEMENTAL AFFIDAVIT OF DONALD VARDON JR PROFESSIONAL SURVEYOR FILED	0.00	0.00
05/18/2009	NOTICE OF OVERSIZED EXHIBITS TO THE SUPPLEMENTAL AFFIDAVIT OF DONALD VARDON JR, PROFESSIONAL SURVEYOR FILED BY PLNTF	0.00	0.00
04/29/2009	NOTICE OF SERVICE OF DISCOVERY TO PLNTF FILED BY DEFT'S THOMAS AND DERRELL WILKES	0.00	0.00
04/24/2009	PLNTF'S REPLY TO DEFT'S BRIEF IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION FILED	0.00	0.00
04/24/2009	DEFT'S ANSWER AND COUNTERCLAIM FOR MONEY	0.00	0.00

DAMAGES AND PERMANENT
INJUNCTION FILED (JURY DEMAND)

04/24/2009	MOTION TO CONTINUE HEARING ON PLNTF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF FILED BY DEFT'S Attorney: MANCINO ESQ, BRETT M (71148)	0.00	0.00
04/24/2009	MOTION FOR EXPEDITED DISCOVERY FILED BY DEFT Attorney: MANCINO ESQ, BRETT M (71148)	0.00	0.00
04/24/2009	DEPOSIT RECEIVED Attorney: MANCINO ESQ, BRETT M (71148) Receipt: 152156 Date: 04/24/2009	75.00	0.00
04/13/2009	BRIEF IN OPPOSITION TO PLNTF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINAR RESTRAINING ORDER AND PRELIMINARY INJUNCTION FILED BY DEFT-WILKES'	0.00	0.00
04/13/2009	SUCCESSFUL SERVICE Method : (CP) CERTIFIED MAIL Issued : 04/09/2009 Service : CIVIL SUMMONS Served : 04/10/2009 Return : 04/13/2009 On : WILKES, DERRELL C Signed By : THOMAS WILKES Reason : (CP) SUCCESSFUL Comment : Tracking #: 7160390198459365822	0.00	0.00
04/13/2009	SUCCESSFUL SERVICE Method : (CP) CERTIFIED MAIL Issued : 04/09/2009 Service : CIVIL SUMMONS Served : 04/10/2009 Return : 04/13/2009 On : WILKES, THOMAS E Signed By : THOMAS WILKES Reason : (CP) SUCCESSFUL Comment : Tracking #: 7160390198459365823	0.00	0.00
04/09/2009	COPY OF HEARING NOTICE SENT BY COURT TO PARTIES BY REGULAR MAIL FILED CIVIL ASSIGNMENT NOTICE Sent on: 04/09/2009 15:04:39	0.00	0.00
04/09/2009	Issue Date: 04/09/2009 Service: CIVIL SUMMONS Method: (CP) CERTIFIED MAIL Cost Per: \$ 0.00 WILKES, DERRELL C 8230 GARDENWOOD PLACE YOUNGSTOWN, OH 44512 Tracking No: 7160390198459365822 WILKES, THOMAS E 8230 GARDENWOOD PLACE YOUNGSTOWN, OH 44512 Tracking No: 7160390198459365823	13.84	13.84
04/09/2009	SUMMONS, COPY OF COMPLAINT, MOTION FOR TEMPORARY RESTRAINING ORDER	4.00	4.00

AND PRELIMINARY INJUNCTION
AND NOTICE OF ASSIGNMENT
MAILED BY CERTIFIED MAIL TO
DEFTS AT ADDRESSES ON
COMPLAINT

04/08/2009	MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION FILED Attorney: FUNK, STEPHEN W. (58506)	0.00	0.00
04/08/2009	CV-TECHNOLOGY FUND Receipt: 150826 Date: 04/08/2009	10.00	0.00
04/08/2009	CV-SPECIAL PROJECTS FUND Receipt: 150826 Date: 04/08/2009	50.00	0.00
04/08/2009	CV-COURT MEDIATION PROGRAM Receipt: 150826 Date: 04/08/2009	40.00	0.00
04/08/2009	COURT COMP. RESEARCH Receipt: 150826 Date: 04/08/2009	3.00	0.00
04/08/2009	CLERK COMPUTERIZATION FEE Receipt: 150826 Date: 04/08/2009	10.00	0.00
04/08/2009	LEGAL NEWS Receipt: 150826 Date: 04/08/2009	13.00	0.00
04/08/2009	LEGAL AID (TOSCV) FILED Receipt: 150826 Date: 04/08/2009	26.00	0.00
04/08/2009	COMPLAINT FILED	25.00	25.00
04/08/2009	DEPOSIT RECEIVED Attorney: FUNK, STEPHEN W. (58506) Receipt: 150826 Date: 04/08/2009	48.00	0.00

EXHIBIT B

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

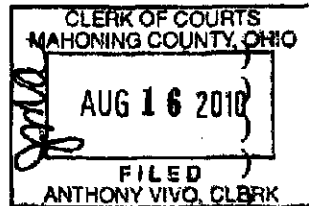
OHIO EDISON,

PLAINTIFF,

VS.

THOMAS E. WILKES, *et al.*,

DEFENDANTS.



CASE NO. 09 CV 1280

JUDGE JAMES C. EVANS

MAGISTRATE'S DECISION

Ohio Edison was granted an easement in 1949 to construct and operate electrical power lines at the location of the present Boardman-Pidgeon South 69kV transmission line. An above-ground swimming pool and a storage shed are both located within Ohio Edison's right-of-way upon Defendants' property, known as 8230 Gardenwood Place, Youngstown, Ohio 44512-5809. The pool and shed are both located in close proximity of the 69kV transmission lines in violation of the National Electrical Safety Code [NESC]. Specifically, the NESC minimum clearance for the pool is 25.7 ft. and the minimum clearance for the shed roof is 13.2 feet. The pool is located 20.7 feet from the conductors operating at 212° F and the roof of the shed is located 10 feet from the transmission lines operating at 212° F. The location of the above-ground pool and storage shed are a continuing nuisance that wrongfully interferes with Ohio Edison's right to operate the Boardman-Pidgeon South 69kV transmission line in a safe and reliable manner, in violation of Ohio Edison's rights under the easement. See *Wimmer v. Family Trust v. FirstEnergy Corp.*, 2008 Ohio 6870, (9th Dist. App. 2008); *Columbia Gas Transmission Corp. v. Large* (1992), 63 Ohio Misc. 2d 63.

Injunction is the appropriate remedy to compel the removal of an encroachment upon a utility easement. The pool and shed depicted in photographs appear to be moveable. See Affid. of Vardon, Exhibits A and B, attached to Plaintiff's motion for TRO and preliminary injunction. The hazard and potential for injury created by the location of the pool and shed within the right-of-way in proximity to the 69 kV transmission lines outweigh the hardship to the Wilkes associated with relocating the pool and shed. Ohio Edison has no other adequate remedy at law. Plaintiff is entitled to

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an injunction to compel the removal of the pool and shed to a safe distance from its transmission lines.

To the extent that Ohio Edison does not have an express easement, it has an implied easement and continuing and permanent right to maintain and safely operate the 69kV transmission lines. Likewise, to the extent that Ohio Edison does not have an express or implied easement, it has a prescriptive easement to maintain and safely operate the 69kV transmission lines by virtue of its open, notorious, adverse, continuous use of property for at 21 years.

Plaintiff's motion for summary judgment is granted. Defendants' motions for summary judgment and motions to dismiss are overruled. Judgment is entered in favor of Plaintiff Ohio Edison and against Defendants Thomas E. and Derrell C. Wilkes as to Counts One through Five of Plaintiffs Complaint. Judgment is further entered in favor of Ohio Edison as to the Wilkes' Counterclaims.

IT IS THEREFORE ORDERED that Defendants Thomas and Derrell Wilkes shall within thirty (30) days remove the above-ground pool and storage shed to a distance beyond the NESC minimum clearance for the pool and shed, to-wit: 25.7 ft. and 13.2 feet, respectively from the present Boardman-Pidgeon South 69kV transmission lines operating at 212° F. Both parties shall cooperate in determining the relocation of the pool or storage shed if either structure remains within the easement, but beyond the hazardous zone. Defendants shall communicate to Ohio Edison the details of their plans for removal of the pool and shed, in order to facilitate the safest possible removal of the structures.

Dated: August 13 2010



MAGISTRATE EUGENE J. FEHR

The parties shall have fourteen (14) days from the filing of this Decision to file written objections with the Clerk of this Court. Any such objections shall be served upon all parties to this action and a copy must be provided to the Court. Except for a claim of plain error, a party shall not assign as error on appeal of the Court's adoption of any finding of fact or conclusion of law, whether or not specifically designated as a finding of fact or conclusion of law, under Civ. R. 53(D)(3)(a)(ii), unless the party, as required by Civil Rule 53(E)(3)(b), timely and

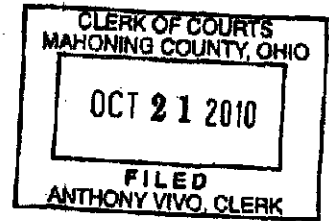
specifically objects to that finding or conclusion and supports any objection to a factual finding with a transcript of all evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. Any party may request the magistrate to provide written findings of fact and conclusions of law. In accordance with Civ. R. 53(D)(3)(a)(ii), this request must be made within seven (7) days from the filing of this Decision.

This is an appealable order and the Clerk of Courts shall serve copies of this Decision upon all Counsel and Defendants within three (3) days of the filing hereof.

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EXHIBIT C

THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
Case # 09 CV 1280



OHIO EDISON)

Plaintiff)

vs.)

THOMAS E. WILKES, et al.,)

Defendant)

JUDGE JAMES C. EVANS

JUDGMENT ENTRY

This matter came before the Court pursuant to Ohio Rules of Civil Procedure Rule 53(E)(3) on the Magistrate's Decision filed August 16, 2010.

The Court further finds that Defendants, Thomas and Derrell Wilkes filed Objections to Magistrate's Decision on August 24, 2010 along with a Request for Findings of Fact and Conclusions of Law.

Pursuant to Ohio Rules of Civil Procedure Rule 53(D)(3)(a) the Magistrate issued a Findings of Fact and Conclusions of Law in support of the August 16, 2010 Magistrate's Decision on September 14, 2010.

On September 23, 2010 Defendants, Thomas and Derrell Wilkes filed Specific Objections to Magistrate's Decision filed September 14, 2010.

On October 4, 2010 Plaintiff filed a Response to Defendants' Objections and objected to the Scope of Proposed Injunction.

Following review of the above, the Court overrules the objections and hereby affirms the Magistrate's Decision. The Magistrate's Decision is therefore adopted and made the action and judgment of this Court as follows: Plaintiff, Ohio Edison's motion for summary judgment is granted. Defendants' motion for summary judgment and motion to dismiss are denied. Defendants are ordered to remove or move the swimming pool and storage shed identified in Ohio Edison's Verified Complaint, under Ohio Edison's supervision, from Ohio Edison's right-

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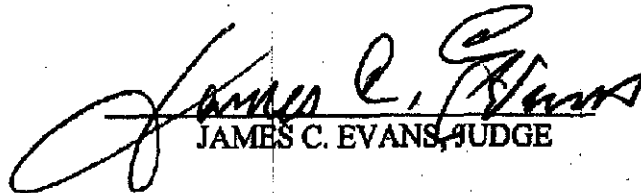
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of-way to a location that is more than 50 feet from the center line of the Boardman-Pidgeon South 69kV transmission line within 120 days of this Entry.

Therefore, the Magistrate's Decision is upheld.

Costs to Defendant.

October 20, 2010


JAMES C. EVANS, JUDGE

Clerk: copies to all parties and counsel

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EXHIBIT D

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STATE OF OHIO

IN THE COURT OF APPEALS OF OHIO

MAHONING COUNTY

)
)
) SS:

SEVENTH DISTRICT

OHIO EDISON COMPANY,

PLAINTIFF-APPELLEE,

VS.

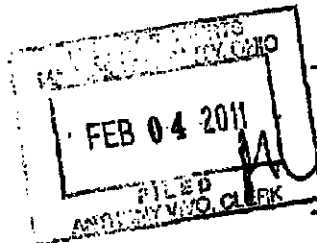
THOMAS WILKES, et al.,

DEFENDANTS-APPELLANTS.)

CASE NO. 10 MA 174

JUDGMENT ENTRY

On consideration of appellants' motion for stay of execution of judgment pending appeal and the appellee's brief in opposition, it is ordered that the motion for stay is denied.



Cybil White

Mary DeGenaro

JUDGES.



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EXHIBIT E



222 SOUTH MAIN STREET
AKRON, OHIO 44308
330.849.6602 DIRECT
330.376.2700 MAIN
330.376.4577 FAX
sfunk@ralaw.com

February 7, 2011

VIA FACSIMILE AND U.S. MAIL

Brett M. Mancino
Attorney and Counselor of Law
1360 East Ninth Street
1000 IMG Center
Cleveland, Ohio 44114

Re: Ohio Edison v. Wilkes, Case No. 2009-CV-1280

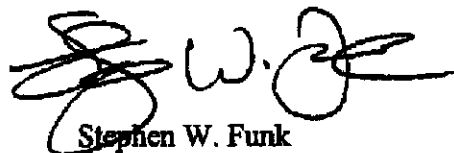
Dear Mr. Mancino:

As you know, the Court of Appeals issued an Order on February 4, 2011, denying your client's motion to stay execution of the trial court's judgment pending appeal. A copy is enclosed for your reference.

The trial court's judgment entry of October 21, 2010, ordered Defendants Thomas and Derrell Wilkes "to remove or move the swimming pool and storage shed identified in Ohio Edison's Verified Complaint, under Ohio Edison's supervision, from Ohio Edison's right-of-way" within 120 days of the judgment. Thus, both structures must be removed (or moved to a distance not greater than fifty (50) feet from the center line of the Boardman-Pidgeon South 69kV transmission line) on or before Friday, February 17, 2011.

Please advise on what actions your clients intend to take to ensure timely compliance with the trial court's judgment entry.

Sincerely,



Stephen W. Funk

SWF/mm
Enclosure

Rh

STATE OF OHIO

) IN THE COURT OF APPEALS OF OHIO
)

MAHONING COUNTY

) SS: SEVENTH DISTRICT

OHIO EDISON COMPANY,

) CASE NO. 10 MA 174
)

PLAINTIFF-APPELLEE,

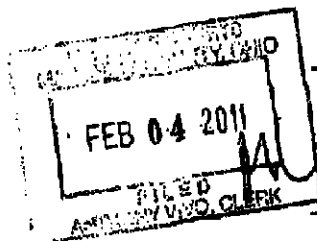
VS.

) JUDGMENT ENTRY
)

THOMAS WILKES, et al.,

) DEFENDANTS-APPELLANTS.)

On consideration of appellants' motion for stay of execution of judgment pending appeal and the appellee's brief in opposition, it is ordered that the motion for stay is denied.



[Handwritten signature]

[Handwritten signature: Mary DeGenaro]

JUDGES.

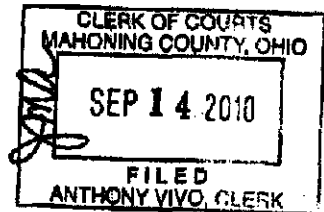


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EXHIBIT F

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO



OHIO EDISON,)
)
 PLAINTIFF,)
)
 VS.)
)
 THOMAS E. WILKES, *et al.*,)
)
 DEFENDANTS.)
)

CASE NO. 09 CV 1280
JUDGE JAMES C. EVANS
MAGISTRATE'S DECISION

Pursuant to Civ. R. 53(D)(3)(a), the following Findings of Fact and Conclusions of Law are issued in support of the Magistrate's Decision of August 16, 2010.

FINDINGS OF FACT

1. Plaintiff Ohio Edison Company ("Ohio Edison") was granted an easement in 1949 for the purpose of constructing and operating electrical transmission lines at the location of the present Boardman-Pidgeon South 69kV transmission line (the "Easement").

2. The Easement was recorded in 1950 with the Mahoning County Recorder's office and put to actual use by Ohio Edison, which constructed a readily observable 69kV transmission line along the northern boundary of Garver's property over 45 years ago in the early 1960s.

3. Defendants Thomas and Derrell Wilkes (the "Wilkes") are the present owners of real property located at 8230 Gardenwood Place, Youngstown, Ohio 44512-5809.

4. An above-ground swimming pool and storage shed are both located with Ohio Edison's right-of-way upon Defendants' property.

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5. The pool and shed are both located in close proximity of the 69kV transmission lines in violation of the National Electrical Safety Code ("NESC").

6. Specifically, the NESC prohibits the location of a storage shed within 13.2 feet of a 69kV transmission line, and prohibits the location of an above-ground swimming pool within 25.7 feet of a 69kV transmission line.

7. The pool is located 20.7 feet from the conductors operating at 212° F and the roof of the storage shed is located 10 feet from the transmission lines operating at 212° F.

8. Thus, the clearances for the pool and the storage shed both violate the NESC and constitute a continuing nuisance that wrongfully interferes with Ohio Edison's right to operate the Boardman-Pidgeon South 69kV transmission line in a safe and reliable manner.

9. Ohio Edison's use of the right-of-way for the transmission of electricity has been open, apparent, notorious, permanent, and continuous for over 45 years, well before the Wilkes purchased their Property and erected their above-ground swimming pool and storage shed in close proximity to the lines.

CONCLUSIONS OF LAW

1. This Court has the subject matter jurisdiction to hear and decide claims relating to the proper interpretation and enforcement of a public utility easement.

Corrigan v. Illuminating Co., 2009-Ohio-2524, ¶ 9-17, 122 Ohio St.3d 265 (2009).

2. "An easement is an interest in the land of another, created by prescription or express or implied grant, that entitles the owner of the easement, the dominant estate, to a limited use of the land in which the interest exists, the servient estate." *Crane Hollow, Inc. v. Marathon Ashland Pipe Line LLC* (2000), 138 Ohio App.3d 57, 66.

3. "When an easement is created by express grant, the extent and limitations upon the dominant estate's use of the land depends on the language in the grant." *Id.*; *Columbia Gas Transm. Corp. v. Bennett* (1990), 71 Ohio App.3d 307, 594 N.E.2d 1, 7-8.

4. "The grant of an easement includes the grant of all things necessary for the dominant estate to use and enjoy the easement." *Id.* "Thus, in determining the nature and extent of an easement, the court should construe the easement in a manner that permits the dominant estate to carry out its purpose." *Id.*

5. The plain language of the Easement grants Ohio Edison "the right to clear and keep clear" the right-of-way of all "trees, bushes, and other obstructions within a distance of fifty feet from the center of said right-of-way."

6. This language is broadly written to grant Ohio Edison the right to keep the right-of-way "clear" of any structure or other obstruction that may be erected within 50 feet of the center line. *See Columbia Gas Transmission Corp. v. Large* (1992), 63 Ohio Misc.2d 63, 64, 619 N.E.2d 1215, 1216.

7. A servient landowner has "no right to interfere with the reasonable and proper use of the easement or obstruct or interfere with the use of the easement." *Bayersdorfer v. Winkler*, 2003-Ohio-3296, 2003 WL 21456633, at ¶ 20, (Ohio App. 7 Dist. 2003).

8. Here, the location of the above-ground pool and storage shed violate the plain language of the Easement and constitute a continuing nuisance that wrongfully interfere with Ohio Edison's right to operate the Boardman-Pidgeon South 69kV transmission line in a safe and reliable manner. *Wimmer v. Family Trust v. FirstEnergy Corp.*, 2008-Ohio-6870, ¶ 15-16, 2008 WL 5387640 (Ohio App. 9 Dist. 2008).

9. Under Ohio law, a mandatory injunction is an appropriate and lawful remedy to compel the removal of an encroachment on another's property, including a utility easement. *See, e.g., Columbia Gas Transmission Corp.*, 63 Ohio Misc.2d at 64 (granting mandatory injunction to compel removal of a swimming pool from utility right of way).

10. The pool and storage shed depicted in the photographs appear to be movable. (Vardon Affidavit, Exhibits A and B, attached to Plaintiff's Motion for Temporary Restraining Order and Storage Shed).

11. The hazard and potential for injury created by the location of the pool and shed within the right-of-way in proximity to the 69kV transmission lines outweigh the hardship to the Wiles associated with relocating the pool and storage shed.

12. Ohio Edison does not have an adequate remedy at law.

13. Plaintiff therefore is entitled to a mandatory injunction to enforce its rights under the Easement and to enjoin the threatened and continuing nuisance by compelling Defendants to remove the pool and shed to a safe distance from its transmission lines.

14. To the extent that Ohio Edison does not have an express easement, it nevertheless has an implied easement and the continuing and permanent right to maintain and operate the 69kV transmission lines in their present location.

15. The existence of an implied easement means that Ohio Edison has the legal right to take any reasonable action necessary to use and enjoy the easement by ensuring the safe and reliable operation of the transmission lines. *See Columbia Gas Transmission*, 63 Ohio Misc.2d at 64 (granting a mandatory injunction ordering the removal of a swimming pool because the utility was entitled to a right-of-way of a sufficient dimension that was "reasonably necessary and convenient" to "maintain, operate and repair the pipeline").

16. Likewise, to the extent that Ohio Edison does not have an express or implied easement, it has a prescriptive easement to maintain and safely operate the 69kV transmission lines by virtue of its open, notorious, adverse, and continuous use of the property for more than 21 years. *See J.F. Glola, Inc. v. Cardinal American Corp.* (1985), 23 Ohio App.3d 33, 37; *EAC Properties, LLC v. Hall*, 2008 WL 5064949, 2008-Ohio-6224, at ¶ 7 (Ohio App. 10 Dist. 2008) (prescriptive easement can arise if a use of the property is (1) open, (2) notorious, (3) adverse to the neighbor's property rights; (4) continuous; and (5) at least 21 years).

17. Where, as here, a public utility "has maintained its electric lines and right of way across premises for more than 21 years," it "has acquired a prescriptive right to

maintain the same." *Shewell v. Board of Education of Goshen Union Local School Dist.* (1950), 88 Ohio App. 1, 3, 96 N.E.2d 323, 325 (Ohio App. 7 Dist. 1950).

18. Ohio Edison's use of the land is "adverse" because Ohio Edison has never recognized any authority in the Wilkes "to either permit or prevent" the continuance of the use of the right of way for the maintenance and operation of electrical transmission lines or to take any other action "to put an end to the use." *EAC Properties, LLC*, 2008-Ohio-6224, at ¶ 7.

19. Defendants' affirmative defenses lack merit. Ohio Edison's grant of an easement, either express or implied, is a property right that was designed to be perpetual and not subject to expiration due to the lapse of time. *Gannon v. Kockenga*, 2006-Ohio-2972, 2006 WL 1627122, at ¶ 24 (Ohio App. 9 Dist. 2006). Thus, "equity does not acknowledge the extinguishment of such an easement by recourse to estoppel or laches." *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska*, 2005-Ohio-3398, 2005 WL 1538259 at ¶ 50 (Ohio App. 11 Dist. 2005).

20. Similarly, Defendants' statute of limitations defense lacks merit. Defendants' swimming pool and shed constitute a continuing nuisance that presently interferes with the use and enjoyment of Ohio Edison's easement. Moreover, Ohio Edison's easement claim is based upon a present and continuing breach of the easement by Defendants.

21. Based upon the foregoing, the Court concludes that there are no genuine issues of material fact and that Ohio Edison is entitled to judgment in its favor and against Defendants Thomas E. and Derrell C. Wilkes on Counts One through Five of Plaintiff's Complaint as a matter of law.

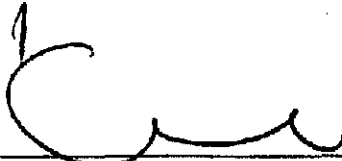
22. Further, Ohio Edison is entitled to summary judgment on all of the Wilkes' Counterclaims. The conduct alleged in Defendants' counterclaims arose from the lawful enforcement of Ohio Edison's legal rights under the Easement. Accordingly, Ohio Edison cannot be held liable for trespass, nuisance, or the intentional infliction of emotional distress as a matter of law.

ORDER

Plaintiff's motion for summary judgment is granted. Defendant's motions for summary judgment and motions to dismiss are overruled. Judgment is entered in favor of Plaintiff Ohio Edison and against Defendants Thomas E. and Derrell C. Wilkes as to Counts One through Five of Plaintiff's Complaint. Judgment is further entered in favor of Ohio Edison as to the Wilkes' Counterclaims. All court costs shall be borne by Defendants, with each party to pay its own attorneys fees.

IT IS THEREFORE ORDERED that Defendants Thomas and Derrell Wilkes shall within thirty (30) days remove the above-ground pool and storage shed to a distance beyond the NESC minimum clearance for the pool and shed, to-wit: 25.7 ft. and 13.2 feet, respectively from the present Boardman-Pidgeon South 69kV transmission lines operating at 212° F. Both parties shall cooperate in determining the relocation of the pool or storage shed if either structure remains within the easement, but beyond the hazardous zone. Defendants shall communicate to Ohio Edison the details of their plans for removal of the pool and shed, in order to facilitate the safest possible removal of the structures.

Dated: September 9, 2010



MAGISTRATE EUGENE J. FEHR