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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

KURT WIMMER / WIMMER FAMILY TRUST,	)	
Complainants,	)	**Case No. 09-777-EL-CSS**
v.	)	
OHIO EDISON COMPANY,	)	
Respondent.	)	

MEMORANDUM OF RESPONDENT OHIO EDISON COMPANY CONTRA APPLICATION FOR REHEARING OF COMPLAINANTS KURT WIMMER AND THE WIMMER FAMILY TRUST

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I. INTRODUCTION

In their Application for Rehearing ("Application"), Complainants Kurt Wimmer and The Wimmer Family Trust ("Complainants") mostly offer the same arguments and unsupported allegations that the Commission already has rejected. To the extent that they offer anything new, Complainants insert issues that are simply beside the point. For example, Complainants argue that the Commission erred by failing to discuss Ohio easement law. (App., p. 5.) But in *Corrigan v. The Illuminating Co.* (2009), 122 Ohio St. 3d 265, the Ohio Supreme Court held that an easement nearly identical to the one here was "unambiguous," and ruled that the case therefore was "not about an easement." *See* p. 3, *infra*. In light of that ruling, there simply was nothing about the easement left for the Commission to interpret here. Consistent with *Corrigan*, the Commission properly analyzed the sole issue before it: whether Ohio Edison reasonably determined that Complainants' vegetation "may interfere with or endanger" its transmission line. *See* Op. and Order dated Jan. 27, 2011 ("Order"), p. 9.

Complainants suggest other analytical "standards" and "tests" that have no basis. On rehearing, they suggest for the first time that the Commission should require Ohio Edison to demonstrate a "reasonable probability" of tree/line interference. *See* p. 7, *infra*. That standard appears nowhere in any statute, Commission rule or other authority. In any event, the proposed removals here easily meet it. Complainants also suggest that Ohio Edison's easement across their property ("Easement") requires a "balancing" between their private property rights and Ohio Edison's right to control vegetation. This is nonsense. The Easement authorizes Ohio Edison to remove incompatible vegetation—period—without any need for "balancing." Moreover, by agreeing to the Easement (and receiving $5,000 in return), Complainants voluntarily accepted certain restrictions on the use of their property. Thus, the Commission rightly rejected their complaints about enforcement of those restrictions here.

For good measure, Complainants also attempt to foist the burden of proof in this proceeding on Ohio Edison. *See* p. 8, *infra*. But under well-established precedent, the complainant bears the burden of proof in all complaint proceedings. Complainants here are no different. The Commission properly found that they failed to meet ***their*** burden.

Complainants' Application is notable not only for the irrelevant, previously-rejected arguments it includes, but also for what it doesn't include. Complainants do not once discuss or account for the unrebutted evidence showing that all of the vegetation at issue will, by virtue of its species, grow tall enough to interfere with Ohio Edison's overhead line. Nor do Complainants discuss evidence of frequent off-cycle maintenance of their vegetation, which was necessary to keep that vegetation at a safe distance from the overhead line. Nor do Complainants discuss the evidence showing that just days before hearing, and despite this off-cycle maintenance, three of their trees were discovered to be dangerously close to the line—one to within four feet of the line. Nor do Complainants discuss any provisions of Ohio Edison's utility vegetation management ("UVM") program, or account for evidence demonstrating the reason for Ohio Edison's increased emphasis on removal of vegetation—the lessons learned from the August 2003 blackout and the subsequent industry-wide effort to reclaim rights-of-way. In fact, ***Complainants' Application does not include a single citation to the record.***

This is telling. In order to challenge the Order, and as demonstrated below, Complainants have ignored swaths of undisputed evidence, without pointing to any evidence supporting their own positions. They have not remotely met their burden on rehearing to demonstrate that the Order is "unreasonable or unlawful." R.C. 4903.10; *see* Rule 4901-1-35(A), O.A.C. The Commission should reject all of Complainants' assignments of error and deny the Application.

II. ARGUMENT

A. Relying on Supreme Court Precedent, The Commission Properly Declined To Interpret The Easement.

Complainants allege that the Commission erred by not "respect[ing]" their "property rights," either as ostensibly set forth in the Easement or in Ohio law. (App., p. 1.) But the Commission properly identified the issue to be decided here—the reasonableness of Ohio Edison's conclusion that Complainants' vegetation "may interfere or threaten to interfere" with the overhead line—and properly declined to interpret the Easement or otherwise delve into Ohio property law. *See* Order, p. 9.

1. The Commission properly declined to interpret the Easement.

Even putting aside questions of whether the Commission has jurisdiction to decide questions of law regarding, easements, contracts or property rights,[1] the Commission properly declined to interpret the Easement in this case. As the Commission has noted, the Ohio Supreme Court already has interpreted an easement with nearly identical language. In *Corrigan v. Illuminating Co.* (2009), 122 Ohio St. 3d 265, the Court addressed the applicability of an easement authorizing the utility to "cut and remove" vegetation that "may interfere or threaten to interfere" with its lines. *Id.* at 269. The Court found that (i) the easement was valid; (ii) the vegetation at issue was within the easement right-of-way; and (iii) the easement "unambiguous[ly]" authorized the removal of any tree that "could pose a threat to the transmission lines." *Id.* Given this, the Court held that "this case is not about an easement." *Id.* Rather, the plaintiffs there, like Complainants here, disputed the utility's decision to remove the

[1] *See, e.g., Allstate Ins. Co. v. Cleveland Electric Illumin. Co.*(2008), 119 Ohio St. 3d 301, 302-303, *citing State ex rel. Dayton Power & Light Co, v. Riley* (1978), 53 Ohio St. 2d 168, 170; *New Bremen v.Pub. Util. Comm.* (1921), 103 Ohio St. 23, 30-31 (the Commission "is not a court and has no power to judicially ascertain and determine legal rights and liabilities").

vegetation pursuant to its vegetation management plan and, for that reason, the Court ordered that the case be heard by the Commission. *Id.*

The Court's decision in *Corrigan* squarely applies to this case. Here, the Easement authorizes Ohio Edison to "trim, remove or control" vegetation that "may interfere with or endanger" its lines. (OE Ex. D, p. 2; Order, pp. 2-3.) There is no dispute that the Easement is valid or that the vegetation at issue falls within the Easement's right-of-way. *See* Order, p. 9. For this reason, the Court remanded Complainants' state court appeal on the authority of *Corrigan*. *See Wimmer Family Trust v. FirstEnergy Corp.* (2009), 123 Ohio St. 3d 144. And consequently, as in *Corrigan*, "this case is not about an easement." Rather, as the Commission properly found, the sole issue to be decided is whether Ohio Edison's decision to remove Complainants' vegetation is reasonable. *See id.* Given the Court's interpretation of a nearly identical easement in *Corrigan*, there simply is no further interpretation left for the Commission to do. The Commission properly declined to interpret the Easement.[2]

2. The Commission properly relied on *Corrigan*.

Faced with binding Court precedent addressing nearly identical easement language (a characterization Complainants do not dispute), Complainants weakly object that the Commission wrongly relied on dicta in *Corrigan*. This objection easily can be dismissed. The Court's conclusion that *Corrigan* was "not about an easement" was not dicta. Rather, it was central to the holding of the case. *See Gissiner v. Cincinnati*, 2008-Ohio-3161, ¶ 15 (1st Dist. App.) ("Dicta includes statements made by a court in an opinion that are not necessary for the

[2] Notably, other courts have found the Easement here to be unambiguous. In *Wimmer Family Trust v. FirstEnergy Corp.*, 2008-Ohio-6870, the Ninth District Court of Appeals affirmed the trial court's decision that "it is within the sole discretion of Ohio Edison to determine which trees 'may interfere with or endanger' its lines." *Id.* at ¶ 10, *vacated on other grounds, Wimmer Family Trust v. FirstEnergy Corp.* (2009), 123 Ohio St. 3d 144. There, the appellate court held that the Easement language authorizing Ohio Edison to remove vegetation that "may interfere with or endanger its line" is "unambiguous." *Id.* at ¶ 16.

resolution of the issues.") In *Corrigan*, the operative holding was that the dispute presented a "service-related question within [the Commission's] exclusive jurisdiction." *Corrigan* at 270. But essential to this outcome was the Court's conclusion that the easement was "valid," "unambiguous" and not otherwise subject to dispute. *Id.* at 269. In fact, had the Court not reached this conclusion, and had it found instead that the parties disputed application of the easement, then the Court would not have ordered the dismissal of the state court proceeding in lieu of Commission jurisdiction. The Court's analysis of the nearly identical *Corrigan* easement was not dicta. Rather, it bears directly on the proper treatment of the Easement here, and the Commission properly relied on that analysis.[3]

3. The Commission properly declined to treat this case as one involving constitutional issues or broad notions of "property rights."

Complainants also attempt to invest this case with constitutional significance, arguing that it implicates "mandates" of the Ohio Constitution regarding the taking of private property. (*See* App., pp. 2, 4, 5-6.) But this argument, and the cases Complainants cite to support it, are irrelevant. Notably, Complainants do not allege a constitutional taking in this case (nor could they). (*See* App., p. 5 (suggesting taking issue only in the ***absence*** of the Easement).) More broadly, Complainants' arguments regarding an "inalienable" "bundle of property rights" are beside the point. Complainants admit that they were paid $5,000 in exchange for the Easement. (*See* Tr., 21:3-14, 23:25-24:3 (Noele Wimmer Cross).) And by agreeing to the Easement (in exchange for that payment), Complainants voluntarily altered whatever "inalienable" property rights they had by relinquishing, among other things, their right to keep on their property vegetation that "may interfere with or endanger" Ohio Edison's lines. Complainants attempt to

[3] Despite Complainants' problems with the Commission's use of "dicta," Complainants have no problem relying on dicta when it suits their purposes as shown by their citations—on the very next page of their Application—of a handful of Ohio Supreme Court cases for general propositions beyond the strict holding. (*See* App., p. 4; *see also id.* at pp. 5-6; Complainants' Br., pp. 1, 2.)

have it both ways: to receive money in exchange for voluntarily accepting restrictions on their use of portions of their property, while alleging a violation of their "inalienable" property rights when those restrictions are enforced. The Commission rightly declined to credit these arguments.[4]

B. The Commission Relied On Objective, Undisputed Facts In Determining That The Proposed Removal of Complainants' Vegetation Is Reasonable.

Complainants repeat previous arguments attempting to draw a hypothetical distinction between an "objective or subjective standard of reasonableness," and allege that the Order reflects mere "personal whim" and "subjective speculation." (App., pp. 6-7.) As with many of Complainants' arguments, such distinctions, to the extent that they exist, are beside the point.

There is nothing "speculative" about the evidence relied on by the Commission. Rather, in concluding that the proposed removal of Complainants' vegetation is reasonable, the Commission relied on objective, undisputed and unrebutted facts. For example, Ohio Edison witness Rebecca Spach testified to the species, average height at maturity and average growth rate for each of the trees and brush that will be removed. (OE Ex. C, pp. 12-15, OE Ex. RS-4.) It is an undisputed objective ***fact*** that all of the vegetation at issue will grow tall enough to reach Ohio Edison's line. Ohio Edison witness David Kozy testified to the objective ***fact*** that a tree contact along the line running above Complainants' property would result in an immediate outage to 13,000 customers, and possibly many more. (OE Ex. E (Kozy Dir.), p. 4.) Ohio Edison witness Stephen Cieslewicz testified to the ***fact*** that since August 2003, electric utilities

[4] The Commission also properly rejected Complainants' argument regarding "retained" property rights allegedly entitling them to maintain their own vegetation. Not surprisingly, Complainants cite no authority for this argument. And even under their notion of "retained" rights, Complainants acknowledge that they could not act in a way that "conflict[s] with the permission given the utility [in the Easement]," which permission "unambiguous[ly]" includes Ohio Edison's right to remove vegetation that may interfere with its line. (App., p. 5.) Moreover, it would be dangerous and unfair to Ohio Edison and its customers to allow Complainants to maintain their own incompatible vegetation under the line. *See p. 10, infra.*

across North America have increased their efforts to remove vegetation that threatens transmission lines. (Tr., 186:8-20 (Cieslewicz Cross).) Complainants offered no evidence to rebut that testimony. Complainants' vegetation must be removed not because Ohio Edison "says so," but because the undisputed, unrebutted facts show that this removal is reasonable and necessary to ensure continued safe and reliable service.

Unable to overcome the evidence provided by these witnesses and by Ohio Edison's UVM program and the Easement, Complainants attempt to create a different standard for whether vegetation on their property should be removed. Specifically, they suggest—for the first time—a new standard: that there must be a "reasonable probability" of tree/line interference. (App. p. 7.) Two things are notable about this suggestion. First, Complainants cite nothing for the proposition that the Commission should assess removals under a "reasonable probability" standard. That language does not appear in any statute, Commission rule, the Easement or Ohio Edison's UVM program. It is Complainants' invention from whole cloth.

Second, the proposed removals meet that standard. As Ms. Spach testified, Ohio Edison has not been able to adequately maintain Complainants' vegetation during the typical five-year cycle. Rather, their vegetation has required frequent off-cycle maintenance—four separate instances of trimming in eight years alone. (*See* OE Ex. C (Spach Dir.), p. 11.) Moreover, three days prior to hearing, and despite Ohio Edison's special attention to this property, Ohio Edison was forced to perform emergency maintenance on a tree that had grown undetected to within three or four feet of the line, in violation of the National Electric Safety Code ("NESC"). (Tr., 65:7-15 (Kozy Re-Dir.), 166:18-167:2 (Spach Bench Cross).) While at Complainants' property that day, the Ohio Edison contractor discovered two additional trees that were dangerously close to the line. (Tr., 166:18-167:2.) If the presence of a tree to within three or four feet of a

transmission line does not suggest a "reasonable probability" of interference, it is hard to know what would. The evidence shows that the dangers and reliability hazards posed by Complainants' vegetation are not just "worst case scenarios." They are real, demonstrable threats to Ohio Edison's service.

C. The Commission Properly Found That Complainants Failed To Meet *Their* Burden Of Proof.

Complainants also allege that Ohio Edison failed to meet its purported "burden" to show, "to a reasonable probability," that Complainants' vegetation may interfere with the lines. (App., p. 9.) This argument fails procedurally and substantively. The Commission should deny rehearing on this point as well.

Procedurally, Complainants (as they have previously) confuse the nature of the burden in complaint cases before the Commission. (*See* Complainants' Br. dated Apr. 23, 2010, pp. 4, 5, 14.) In every such case, the complainant bears the burden of proof. *See Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1990), 49 Ohio St. 3d 123, 126; *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d 189, 190. Thus, as the Commission properly observed, Complainants—not Ohio Edison—bear the burden of proof here. Order, p. 2. The Commission properly rejected Complainants' attempt to foist that burden on Ohio Edison (much less according to a "reasonable probability" measure of proof pulled from thin air) and properly found that Complainants failed to meet their burden.

Substantively, Complainants attempt to point out deficiencies in the record, but they utterly ignore swaths of unrebutted evidence. Complainants allege that Ohio Edison failed to explain why their prior policy of trimming incompatible vegetation is now insufficient. That is not true. As Mr. Cieslewicz explained, the August 2003 blackout taught utilities across the country a hard lesson regarding vegetation management: the only effective way to prevent

tree/line contacts is to remove—not trim—vegetation that can grow tall enough to interfere with an electric line. (OE Ex. G (Cieslewicz Dir.), pp. 3-4; *see* Order, p. 6.) As a result, since August 2003, "every utility within the United States and Canada and portions of Mexico that have transmission lines have increased their efforts to reclaim right-of-ways and remove more trees." (Tr., 186:8-20 (Cieslewicz Cross).) The record shows why Ohio Edison increased its emphasis on removal of incompatible vegetation: the August 2003 blackout sparked a sea-change in the utility vegetation management industry. The Commission properly found that Ohio Edison's proposed removals here are reasonable.[5]

Complainants allege that Ohio Edison did not explain "what has changed" about their vegetation to warrant removal now. Again, this is wrong. As Ms. Spach explained, when Ohio Edison previously trimmed Complainants' vegetation on a five-year maintenance cycle, much of that vegetation was shorter. But now, consistent with basic biology (and as the evidence here shows), Complainants' vegetation has grown. (*See* Tr., 99:3-9 ("[T]he trees continue to exist on the right-of-way and they are growing in size and in heighth and they're still there."), 100:6 ("My answer is the trees continue to grow."), 101:24 ("It was evident the trees had grown.") (Spach Cross).) Consequently, that vegetation is much closer to the line and thus requires ever-more vigilant, frequent and intensive trimming. This is especially true since, as further shown in the record, trees grow faster in response to trimming than they otherwise would; the more a tree is trimmed, the faster it grows. (OE Ex. C (Spach Dir.), p. 13.) The record shows why trimming here is no longer safe: Complainants' vegetation is now taller, growing more quickly, and much closer to the line than before.

[5] Notably, Complainants do not challenge the Commission's determination that this case "is not the proper forum for a review of [Ohio Edison's] UVM program, which the Commission previously approved in accordance with Rule 4901-1-10-27, O.A.C." Order, p. 9.

Complainants allege that Ohio Edison did not explain why Complainants could not arrange for trimming themselves. Aside from being inconsistent with the Easement (*see* p. 6, n.4, *supra.*), the record shows that this proposal is bad (and dangerous) policy. Ohio law requires Ohio Edison to provide safe and reliable service, and ensuring that transmission lines are free from vegetation interference is a critical part of this responsibility. *See* R.C. 4905.22; Rule 4901:1-10-27(D)(2). To do so, Ohio Edison arranges for certain vegetation management work to be completed by contractors who are subject to Ohio Edison's oversight in several key ways. (*See* OE Ex. C (Spach Dir.), pp. 16-17; OE Ex. RS-2 (Specifications), pp. 6, 11-16 (requiring contractors to follow specified pruning techniques and training), 9 (requiring contractors to follow schedule prescribed by Ohio Edison), 5 (authorizing Ohio Edison to remove poor-performing contractors), 22-23 (authorizing Ohio Edison to withhold payment for unsatisfactory work).) Were Complainants permitted to arrange for their own trimming, however, Ohio Edison would have no control over the frequency, method and timing of that maintenance, and no right to require correction of sub-standard work. The record provides a complete explanation for why Complainants should not be allowed to maintain their own incompatible vegetation.

Finally, Complainants allege that in allowing Ohio Edison to remove their vegetation, the Commission "relies solely on unreasonable possibilities . . . ." (App., p. 9.) This is nonsense. It is a biological fact that trees grow. It is also undisputed that Complainants' vegetation, by virtue of its species, may grow high enough to interfere with the overhead line. It is further undisputed that Complainants' vegetation has, because of its heighth and growth rates, required frequent off-cycle maintenance—four separate instances of trimming in eight years, over twice as frequently as the usual five-year cycle. (*See* OE Ex. C (Spach Dir.), p. 11.) And it is still further

undisputed that three days prior to hearing in this case, an Ohio Edison contractor performed emergency maintenance on three trees that had grown dangerously close to the line, including one that was within three or four feet of the line, in violation of the NESC. (Tr., 65:7-15 (Kozy Re-Dir.), 166:18-167:2 (Spach Bench Cross).) A contact between Complainants' vegetation and Ohio Edison's line is not a remote possibility—it very nearly happened, just days before the hearing.

By Complainants' reckoning, the growth of a tree to within four feet of the line—despite the special attention paid to their property—and the presence of some 39 others that are genetically predisposed to do the same does not raise a sufficient possibility of tree/line interference. As shown at hearing, this attitude toward vegetation management is unsafe and would threaten the reliability of Ohio Edison's service. The Commission properly found that Complainants' vegetation "may interfere with or endanger" the overhead line and therefore may be removed. Complainants' Application should be denied.

III. CONCLUSION

For the foregoing reasons, Ohio Edison respectfully requests that the Commission deny Complainants' Application for Rehearing.

Dated: March 4, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by first class U.S. mail, postage prepaid, and e-mail to the following person this 4th day of March, 2011:

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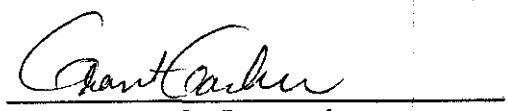

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