

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

LEO JEFFERS, <i>et al.</i> ,	)	Case No. 10-430-EL-CSS
	)	
Complainants,	)	
	)	
v.	)	
	)	
THE TOLEDO EDISON	)	
COMPANY,	)	
	)	
Respondent.	)	
	)	
	)	

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**COMPLAINANTS' POST HEARING BRIEF**

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Kimberly A. Conklin (0074726)  
Steven D. Hartman (0074794)  
KERGER & HARTMAN, LLC  
33 S. Michigan St., Suite 100  
Toledo, Ohio 43604  
Telephone: (419) 255-5990  
Fax: (419) 255-5997  
Email: [kconklin@kergerlaw.com](mailto:kconklin@kergerlaw.com)

*Counsel for Complainants*

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## **I. Introduction**

Leo and Cindy Jeffers, along with Leo's mother Illene Jeffers, have brought this action to right a wrong. Or specifically 316 wrongs, which is the number of trees on their property that Respondent Toledo Edison chopped down for no other reason than the alleged *possibility* that these trees could *someday* interfere with their transmission line. The problem however is that Edison failed to take reasonable efforts to determine whether or not the Jeffers trees actually posed threat. Rather, Edison felt confident that its easement and approved Vegetation Management Plan was all the justification it needed.

Edison will attempt to convince the Commission that this case is about the safe operation of power lines, NESC standards, arching, sagging and may even point to the black out of 2003 as evidence of just how dire the situation is. But to allow Edison *carte blanche* to remove *any* tree taller than a bush is not only tantamount to throwing away the baby with the bath water, it is an excessive and unreasonable exercise of power.

Clear cutting is not the only way to protect power lines. Edison could enforce the pertinent clearance standards and safe zone's it hides behind *without* having to remove trees *before* they are a problem. So to be clear, this case is not about protecting power lines. It is about a large Utility exerting its massive authority over a small rural landowner in order to take the easiest path for itself.

## **II. Statement of Facts**

### **A. The Property and Easements**

The Jeffers' property is situated rural, western Lucas County at 11295 and 11351 Manore Road in Providence Township, Ohio. The property was originally one parcel, but upon the death of Glen Jeffers, Illene's husband and Leo's father, the property was divided into the parcels now owned and occupied by Illene and Leo Jeffers respectively. (Tr. 7.)

At some point in the late 1950s or early 1960s, Glen Jeffers and his father planted a long row of evergreen trees to function as a wind break along the western edge of the property. The trees were planted in a double row from the northern limit of the property to the southern boundary of Illene's house. From that point to the southern most point of Leo's property the trees were planted in a single row. (Tr. 13) That area, known as the Black Swamp, consists of very sandy soil and windbreaks are commonly planted to prevent the sand from eroding the ground soil. (Tr. 8.) Leo Jeffers built his house in its current location to take advantage of this windbreak. (Tr. 14.)

On March 23, 1970, Glen and Ilene Jeffers granted Toledo Edison two easements to "construct, relocate, operate, repair, replace, remove and maintain" "a line or lines for the transmission and/or distribution of electric energy." (Tr. 20, Complainants' Ex. D & E.) The easements were granted as to a 20 foot strip of land on either side of a center line located approximately 31 feet west of the center of Manore

Road. Practically speaking, the easement gave Edison access to property 50 feet west of the center of Manore Road.

The two easements covered different parcels owned by Ilene and Glen Jeffers. Easement 66252, marked as Exhibit E during the hearing, concerns a parcel of land the two obtained after they were married and no trees were removed from this parcel. (Tr. 22.) Easement 66253, marked at Exhibit D, pertains to the parcel on which both Jeffers' homes are situated and on which the trees in question were planted. (Id.)

Each deed contains type-written language describing the boundaries of the easement. The last type-written paragraph of Easement 66252 gives Edison the right to "trim, cut or remove such trees on the above described premises outside of the boundaries of the easement as in the judgment of the [Edison] will interfere with or endanger [Edison's] line or lines or the operation thereof." The final typed paragraph of Easement 66253 is nearly identical, except that it only grants Edison the right to "trim such trees".

Both deeds also contain preprinted language, in very fine print, at the bottom of the documents which give Edison the right to "trim and remove underbrush and trees".... "that in the judgment of [Edison] will interfere with the construction or safe operation" of the power lines.

### **B. Notice and Removal of the Trees**

Leo Jeffers first learned that Edison intended to remove his trees while working on farm equipment at his parents' home. According to

Leo, Chris Hahn from Toledo Edison came to the property and showed him a work order for the tree removal. (Tr. 16, 18; Hahn Direct, Ex. 4 & 5.) At first Jeffers believed Hahn was merely referring to a few trees that the State of Ohio had purchased and intended to remove in order to complete construction of a new highway. When he realized Hahn was referring to the long row of evergreen trees, Jeffers was surprised and became indignant. (Tr. 17.) Jeffers refused to sign the work order.

Leo testified that the next time Hahn returned to the property, he brought the easements with him, though he refused to provide the Jeffers a copy. (Tr. 19.) When Leo Jeffers asked Hahn why the trees had to be removed, the response was nothing more than a vague reference to the black out. Jeffers testified that the trees had never been trimmed by Edison and Edison had no records or knowledge of prior trimmings. (Tr. 15, 159-160.)

From the point they were notified of Edison's plans, the Jeffers made it known that that objected to the removal of the trees and actively sought out ways to have their objections heard and/or to prevent the removal of the trees. Hahn first told Jeffers that a complaint would get filed and Edison would be back in touch. (Tr. 19, 21.) Hahn later told Jeffers that the refusal process required them to get an attorney. (Tr. 139, 140.) The Jeffers did as directed, hired an attorney and through this attorney obtained copies of the easements. (Tr. 19.) The Jeffers believed

that they would have notice before Edison showed up to remove the trees. (Tr. 20.)

On October 30, 2009, Edison sent the Jeffers a formal notice that it intended to remove the trees by November 9, 2009 in order to ensure the safe and reliable operation of its lines. (Complainant's Ex. C.) Upon receiving this letter, Leo Jeffers called Hahn continued to object to the removal of the trees. On November 5, 2009, the Jeffers' attorney called Hahn, and at that point he sent the matter to legal. (Tr. 140, Complainants Ex. Q.) The November deadline came and went and the trees were not removed.

At some point during this process, Leo Jeffers asked Hahn why a neighbor's trees had been trimmed and not removed. Hahn indicated that these property owners were Edison customers and therefore they had distribution lines under the transmission line. (Tr. 25, 27.) Apparently, the existence of distribution lines *under* the transmission lines saved his neighbors trees because distribution lines keep trees from encroaching into transmission lines. (Tr. 142.) According to Hahn, if the Jeffers had distribution lines, their trees would probably not have to be removed. (Tr. 143.) However, the relevant NESC clearance standards to not change for transmission lines because there is distribution line underneath that transmission line. (Tr. 164.)

Based on this, Leo Jeffers made efforts to obtain Edison power. He also offered to have his trees professionally trimmed and obtained estimates for doing so. (Tr. 25, 31.) Nevertheless, the next time Leo

Jeffers heard from Edison was at 7am on February 22, 2010 when his son called him at work to report that Edison was there to remove the trees. (Tr. 28, Complainant's Ex. Q.) Edison knew as early as February 2, 2012 that it would be at the Jeffers' property on February 22, 2012 but did not notify the Jeffers because it is not their process. (Tr. 157.) There was no emergency or imminent need to remove the trees. (Tr. 141.)

It took Edison two days to remove the trees and when it was over Edison refused to remove the stumps because they do not offer stump removal when a customer objects to the removal of the trees. (Tr. 142.) Leo Jeffers testified that Edison removed 316 Trees. (Tr. 9.)

### **C. Characteristics of the Trees**

It is undisputed that the Jeffers' trees were not actually touching the Edison Transmission line. (Tr. 141.) According to Hahn's visual inspection of the trees, "some" were within eight feet of the lowest transmission wire. (Hahn Direct, p. 5.) The lower conductors of the transmission poles on the Jeffers' property were 35.5 feet to 41 feet in height. (Id.) Using Hahn's lowest conductor measurement, at the time of removal "some" of the Jeffers trees were higher than 27 feet.

Phil Parsons, who was the General Manager of Tri-County Rural Electric Cooperative, Inc. in Malinta, Ohio for 25 years and in this capacity oversaw vegetation management with respect to the protection of power lines, estimated the trees to be about 15-18 feet. Upon being notified that Edison intended to remove the trees, Parsons conducted a visual inspection and determined that trees



did not pose any threat to the 69kv transmission line, at that time or in the future. According to Parsons, all of the trees were well below the lowest 69 kv line on the poles and not close enough to the line to where line sag was a concern. (Parsons Direct, p. 5.)

David Kozy, First Energy's General Manager for Transmission Engineering, testified that the National Electrical Safety Code (NESC) establishes minimum horizontal clearance of 8.2 feet and a minimum vertical clearance of 8.7 feet between 69 kV lines and vegetation. (Kozy Direct, p. 7.) Thus, "some" of the Jeffers' trees were within this NESC clearance zone. Kozy did not see the trees before they were removed and relies on Hahn for information regarding the growth rate and size of the trees. (Tr. 119-120.) Moreover, Kozy acknowledged that the NESC does not mandate that all trees *below* the clearance zone be removed if it is possible that they will someday grow into the zone. (Tr. 121.)

Hahn testified that he identified the Jeffers' trees as "Green Giant Arborvitae" - trees that can grow up to 60 feet high. (Hahn Direct, p. 4.) Despite his testimony, Hahn never identified the Jeffers' trees as Green Giants on his forestry work refusal record (Complainants Ex. Q) or in any other document he generated prior to the Jeffers filing this Complaint. (Tr. 136.) No one from Edison provided any testimony or opinion as to the growth rate of the Jeffers trees.

According to the Jeffers' experts, Phil Parsons and Jay Brewster, the Jeffers' trees were actually American Arborvitae- a native species of the evergreen whereas the Green Giant was a hybrid species not available when Glen Jeffers planted the trees. (Direct Parsons, p. 3-4; Direct Brewster, p. 3-4.) Brewster's

opinion of the Jeffers' trees was that they were fully mature and would therefore, like all evergreens, experience a slower annual growth rate. This growth rate would be 1 to 2 inches per year, but due the sight conditions on the Jeffers property, Brewster expected less than this. (Brewster Direct, p. 4.)

#### **D. Edison's Vegetation Management Plan**

Edison's official "Transmission Vegetation Management Plan" appears in the record as Exhibit 1 to the Direct Testimony of Kate Bloss, Chris Hahn's direct supervisor. The "Vegetation Management Specifications" appear at Exhibit 2 to the Direct Testimony of Kate Bloss.

According to these documents, transmission lines operating at 23kV - 69kV shall be ***cleared*** no less than 15 feet from the conductor. (KB-1, p.1) Moreover, the document indicates that the "frequency of vegetation control activities depends on several factors, such as growth conditions, control methods previously used, results of aerial or ground inspections, line parameter and line performance history. (KB-1, p.2.)

The Vegetation Management Specifications provide similar standards as well as the following guidelines:

- Distribution lines shall have a 15" clearance zone as well, (KB-2, p. 11.)
- All pruning, both initial and re-pruning shall be done in accordance with modern arboriculture standards using the current ANSI 300 Standards and Amendments. Directional pruning is the preferred method of line clearance pruning. Whenever possible, the Contractor shall obtain clearance in this manner. (KB-2, p. 16.)

- Trees that should be removed are those that are dead or defective which constitute a hazard to the conductor, trees that have fast growth rates or trees that cannot be pruned for effective conductor clearance, immature trees, generally classified as brush, Trees that are overhanging the primary conductors and are unhealthy or structurally weak, all priority trees located adjacent to the sub-transmission and transmission clearing zone corridor that are leaning towards the conductors, are diseased or are significantly encroaching the clearing zone corridor, all incompatible trees that are located within the clearing zone corridor. (KB-2, p. 17.)

Key to this case is the final characteristic listed above: “all incompatible trees that are located within the clearing zone corridor.” Edison views anything that *could* grow into the NESC clearance zone as incompatible vegetation. (Tr. 132) So, if Edison has an easement, and there is a tree within the boundaries of that easement that *could* at any point in the near or distant future, grow into the NESC clearance zone, it is deemed “incompatible vegetation” and will be removed. (Tr. 132, 138, 145, 157.) So, where there is an easement, the current height of the trees, the growth rate of the trees, the history of interference, the age- *none* of that matters if there is an easement and the tree is deemed to be “incompatible”.

So in the Jeffers case, while Chris Hahn’s direct testimony is replete with statements about how he identified the Jeffers trees as being “Green Giant” arborvitae that could grow to reach 60 feet and that he considered the growth rate of the trees, Hahn did not actually consider any of these things. (Tr. 138.) His only concern was that the trees were “incompatible” and that Edison had an easement. (Id.)

According to Edison, it would not be reasonable to allow customers to trim their own trees, to avoid having them removed, because “they don’t know our specs. They don’t know our clearances so therefore, if we have an easement, I need to remove those trees.” (Tr. 145.)

### **III. Argument**

Toledo Edison’s decision to remove, as opposed to trim, nearly 300 trees on the Jeffers’ property was undeniably unreasonable and even more so unnecessary. The decision to do so in such a way as to prevent the Jeffers from having their case heard by the Commission or a court of law *before* the removal was unconscionable. Even assuming that everything Edison says about the NESC and sagging and arching and sway is true, there was no reason the trees could not have been trimmed, at the Jeffers own expense, to avoid removal. These trees were 60 years old, fully mature and their growth rate was such that trimming them would have easily allowed five years clearance.

#### **A. Edison did Not Reasonably Determine That Jeffers Trees “will interfere” with the Midway-Tontogany 69kv Transmission Line.**

Ohio Revised Code §4905.22 requires, in part, that a public utility furnish necessary and adequate service and facilities. Revised Code § 4905.26 in turn provides that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any practice affecting or relating to any service furnished is unjust or unreasonable. In *Corrigan v. Illuminating Company*, 122 Ohio St.3d. 265, 2009-Ohio-2524, ¶21, the Ohio Supreme Court

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 Public Utility Commission's exclusive jurisdiction.

Despite all of its testimony about the species of tree found on the Jeffers' property and the expected growth rate thereof, the reality is that Edison did *not* stop and make any type of calculated determination as to the exact nature of the threat posed by the Jeffers' trees. Chris Hahn said it best: "Green Giant doesn't matter. They were considered incompatible vegetation when they were identified." Indeed, while in his direct Hahn states that he considered the growth rate of the Jeffers trees, he never actually testified as to what that growth rate is. During cross examination, when asked if he considered the age or growth rate of the trees he said, "The determining factor was they were tall enough to impact the line so I did not take that into my account when I looked at the trees and needed them to be removed." So the answer was no, he did not consider the age or growth rate of the trees. So the fact that these were 60 year old trees that Edison had never trimmed before was something he did not consider.

The fact is that Edison did not do anything but determine that trees were within the boundaries of the Easement and that its Vegetation Management Plan allowed for the removal of the trees. Whether it was reasonable or not was never actually considered as shown by Hahn's testimony. This is consistent with Edison's position in *Wimmer v. Ohio Edison Company* 09-777-EL-CSS.

In *Wimmer*, this Commission considered a complaint by property owners who sought to prevent the removal of trees targeted by Ohio Edison, which like Toledo Edison is a subsidiary of First Energy and thus, operates under the same Vegetation Management Plan. The issues presented in that case were substantially similar to those presented here. So much so that this action was stayed for a period of time to allow for a finding in *Wimmer*. Like that case, Ohio Edison had an easement that allowed it to trim cut or remove trees within the boundaries of the easement.

However, there are significant factual differences that exist in this case. In the *Wimmer* case, the easement stated “may interfere” instead of “will interfere” like the easement here. In that case, the Wimmers testified that Edison had been out to trim its trees every five years or so since they granted the easement and that Edison had been out to trim branches just a few weeks prior to the hearing. Here, there is no evidence that Edison had *ever* had to trim the Jeffers trees. Finally, the Wimmers offered no testimony suggesting that their trees did not have the potential to grow into the trees. Here, the Jeffers offer the testimony of Jay Brewster, a landscape architect who indicates that these trees were fully mature evergreens and that at most could be expect to grow one to two inches per year and with existing site conditions, probably less. Edison offers no testimony to the contrary.

In the *Wimmer* case, Edison argued that its approved Vegetation Management Plan and the easement were the only justification it needed to remove the trees. It was Edison’s contention that permitting individual review of

its enforcement of the plan would undermine its UVM practice because work would stop while it litigated cases. See *In the Matter of the Complaint of Kurt Wimmer/Wimmer Family Trust*, 09-777-EL-CSS, Opinion and Order, p. 8. In other words, Edison wanted the Commission to rule that as long as the plan allowed for the removal, citizens could not raise objections as to their individual situation. In response to that argument, the Commission held as follows:

“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.

Thus, the Commission rejected Edison’s contention that applying a reasonableness standard to each case was overly burdensome.

The evidence here is that only “some” of the trees were within the NESC clearance zone and that these 60 year old evergreens would not grow in such a way as to pose any threat to the lines. Consider Hahn’s testimony that if the Jeffers had a distribution line under their transmission line, like their neighbors, their trees would probably not have been removed. If Edison’s true motivation was NESC clearances- the existence of a distribution line would be irrelevant. The NESC clearance standards do not change with the presence of a distribution line. The *only* thing that changes is Edison’s practice- which in that case is to just trim the trees because the Distribution department will be out sometime in the next five years. This amounts to incontrovertible evidence that the trees could have been

trimmed, that they did not pose a threat and that Edison's actions were unjustified and unreasonable.

### **B. Tree Removal is Not Synonymous with Vegetation Management**

Even assuming that because "some of the trees" were already in the NESC clearance zone, it would be reasonable to determine that the trees posed a danger to the lines, removal was not the only option.

There is no question that vegetation management is necessary to maintain safe and reliable electrical service. Ohio Adm. Code 4901:1-10-27(E)(2). The Jeffers do not refute this. But Edison has come forward with no reason as to why, in a defined set of circumstances, customers could not be allowed to trim their trees to a standard set and enforced by Edison. While Edison's witnesses testified repeatedly that it would be unreasonable and unmanageable, no one provided any good reason why.

As it stands now, Edison sends crews or personnel, like Hahn, to inspect trees in the "clearance corridor". If Edison finds the trees to be "incompatible" and they have an easement, they ask no more questions and simply cut the trees down. But why not issue a letter- like the October 30, 2009 letter that Edison sent to the Jeffers? This letter, rather than saying "we will remove", could say "if you do not take action to put your tree into compliance by this date, we will remove the tree." Edison could even mandate the use of certain contractors. The Jeffers would have gladly paid Penn Line to trim their trees so that they could keep them. In this case, the property owner would have a choice, either follow



instructions or lose the trees. And in this case, Edison is still enforcing its Vegetation Management Plan.

Perhaps the better question is why not just trim? As already pointed out, Edison trims when there is a distribution line underneath. Why not trim in situations where the trees are fully mature, old and have a slow growth rate?

### **C. Edison Acted In A Way To Purposefully Deprive The Jeffers The Opportunity To Save Their Trees**

Edison's refusal process has been defined as a "letter" sent to the client, telling the client to get a lawyer and then handing it over to legal. Here the evidence is that the Jeffers received Edison's October 2009 letter, retained an attorney and sought to prevent the removal of their trees. What went on during that process is not on the record. What is known is that Edison did not notify the Jeffers of the exact day they intended to remove the trees and it's clear that they did so to prevent them from taking action to stop the process. This is in and of itself unreasonable conduct. There was no emergency or imminent need to remove the trees.

## **IV. Conclusion**

Despite 60 years of existence without any prior instances of interference with the power lines, the Jeffers' fully mature trees were deemed to be "incompatible" and removed in such a way as to purposely deprive the Jeffers' of the right to be heard or to petition the courts and or this Commission for relief. There was no real inquiry into whether the trees posed a threat to the lines and no real inquiry was made into whether

trimming the trees would have minimized the impact to the Jeffers. The Jeffers therefore request that this Commission make a finding that the removal of their trees was an unreasonable exercise of power by Toledo Edison.

Respectfully submitted,

Kimberly A. Conklin (0074726)  
Steven D. Hartman (0074794)

By /s Kimberly A. Conklin  
*Counsel for the Complainants*

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the above was delivered to the following counsel for Respondent Toledo Edison by regular mail this 5<sup>th</sup> day of November 2012:

David A. Kutik, Esq.  
Jeffrey Saks, Esq.  
Martin T. Harvey, Esq.  
JONES DAY  
North Point, 901 Lakeside Avenue  
Cleveland, Ohio 44114-1190

/s Kimberly A. Conklin  
*Counsel for the Complainants*

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Summary: Brief Post Hearing Brief of Complainants electronically filed by Ms. Kimberly A. Conklin on behalf of Mr. Leo Jeffers and Mrs. Cindy Jeffers and Mrs. Illene Jeffers