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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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LEO JEFFERS, et al.

Complainants,

v.

THE TOLEDO EDISON COMPANY,

Respondent.

Case No. 10-430-EL-CSS

REPLY BRIEF OF RESPONDENT THE TOLEDO EDISON COMPANY

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	)	
<b>Respondent.</b>	)	
	)	

**REPLY BRIEF OF RESPONDENT THE TOLEDO EDISON COMPANY**

**I. INTRODUCTION**

The record evidence demonstrates that the removal of the trees at issue was within The Toledo Edison Company's ("Toledo Edison") easement rights, called for under Toledo Edison's Transmission Vegetation Management ("TVM") plan and otherwise reasonable. The trees were within or approaching minimum clearances established by the National Electrical Safety Code ("NESC"). The trees, whether of the species claimed by Toledo Edison or by Complainants' witnesses, had the ability to grow taller than the line. The Commission previously determined that removal of trees disposed to grow into a power line was reasonable. *See Wimmer v. Ohio Edison Co.*, Case No. 09-777-EL-CSS, Opinion and Order (Jan. 27, 2011).

Brushing aside any consideration of which party bears the burden of proof, Complainants' post-hearing brief argues, in essence, that the trees should have been trimmed, and not removed.<sup>1</sup> In so arguing, Complainants ignore several key facts:

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<sup>1</sup> Complainants improperly describe the Company's policy as "clear cutting." [Complainants' Brief, p. 3.] This mischaracterizes Toledo Edison's TVM Program. Under the program, only "incompatible vegetation" (or

- The trees at issue were already within or approaching NESC minimum clearances. This condition by itself is indicative of an unsafe condition that threatened the safe and reliable operation of the line.
- Trees, located outside of the easement, that were the same species as the removed trees and that were planted at the same time as the removed trees are now as high as the line. Given that the trees were eight feet away from the line when the removal occurred in February 2010, the remaining trees grew several feet (not a few inches) in the two and one-half years since the removal. The trees at issue thus had the disposition to grow – and would have grown – into the lines.
- A TVM Program that relies on trimming, as opposed to removal, relies on guess work. If Toledo Edison had assumed “average” growth rate for the species cited by Complainants (*i.e.*, a few inches per year), Toledo Edison would have had to return to the area repeatedly, given that the trees would have grown several feet (as demonstrated by the growth of the remaining trees).
- Having customers responsible for trimming their own trees around high voltage lines is simply dangerous, unreliable and unworkable. Indeed, Complainants provide no response to Toledo Edison’s testimony about why allowing customers to trim trees is wrong.

For the reasons that follow, and those set forth in Toledo Edison’s post-hearing brief, the Commission should dismiss Complainants’ complaint.

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(continued...)

vegetation that will grow into the lines) is removed if the Company has a legal right (*e.g.*, an easement) to do so. [TE Ex. 3 (Direct Testimony of Kate Bloss (“Bloss Dir.”) at TE Ex. KB-2 (“Specifications”), p. 25.]

## II. ARGUMENT

### A. **Complainants Have Failed To Carry Their Burden And Demonstrate That Toledo Edison's Actions Were Unreasonable.**

Complainants improperly attempt to shift the burden of proof on to Toledo Edison. [Complainants' Brief, p. 12.] Their brief fails to provide any standard of review, instead making off-hand references to Ohio Revised Code Sections 4905.22 and 4905.26. [*Id.*] In doing so, Complainants imply that the burden is on Toledo Edison to show that its actions were reasonable. Unambiguous Ohio Supreme Court precedent holds otherwise. In complaint cases brought under Ohio Revised Code Section 4905.26, as is the case here, at all times, "the burden of proof rests upon the complainant." *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d 189, 190. *See also, Luntz Corp. v. Pub. Util. Comm.* (1997), 79 Ohio St. 3d 509, 513 (same). Not only do Complainants fail to mention (much less acknowledge) their burden, but Complainants have wholly failed to demonstrate that Toledo Edison acted contrary to the terms of the easement or to its TVM Program, or that the Company's actions otherwise were not reasonable.

Even if the burden were on Toledo Edison to demonstrate that its actions in removing the trees were reasonable, which it is not, as shown below, the Company's actions were proper under the easement and the TVM plan, and were reasonable.

### B. **Because The Easement Grants Toledo Edison The Right To Remove Any Vegetation That In Toledo Edison's Judgment Threatens The Safe And Reliable Operation Of Its Transmission Lines, And Because The Trees At Issue Did Pose Such A Threat, The Company Properly Removed The Trees.**

While Complainants try to distinguish between "type-written language" and "fine print" [Complaints' Brief, p. 5], the plain language of the easement unambiguously grants Toledo Edison an unqualified right to remove offending vegetation:

Grantee [Toledo Edison] shall have the right to trim or remove underbrush and trees....from and along said line or lines that, in the judgment of the Grantee, will interfere with the construction or safe operation thereof.

[TE Ex. 2 (Direct Testimony of Christopher Hahn ("Hahn Dir.") at TE Ex. CH-2.] Moreover, at hearing, Complainants' witnesses had no trouble understanding the easement and agreed that the easement provided Toledo Edison with the right to remove incompatible trees:

Q. [T]he easements give the company the right to remove trees if in the company's judgment the company believes that the trees will interfere with the lines, correct?

A. Yes.

[Hearing Transcript ("Tr.")<sup>2</sup>, 49:23-50:3 (Jeffers Cross).]

Q: Now, as part of your investigation for this case, you looked at the easement, correct?

A: Correct.

Q: And there is no question in your view, is there, that the company has the right to remove trees if in the company's judgment it believes that the trees will interfere with the lines, correct?

A: That's correct. That's in the easement.

[Tr., 98:13-98:20 (Parsons Cross).]

Complainants' citation to language in the easement that grants Toledo Edison "the right to 'trim such trees'" [Complainants' Brief, p. 5] is irrelevant. As the easement makes clear, that language applies *exclusively* to trees "outside of the boundaries of the easement." [TE Ex. CH-2.] Because all of the trees that were removed were within the boundaries of the easement (save for a few sick and dying trees removed at the request of Mr. Jeffers [TE Ex. 2 (Hahn Dir.), p. 8]) the trim-only language cited by Complainants' brief is irrelevant.

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<sup>2</sup> References to the hearing transcript here will show the page and line reference as follows: page:line(s).

Moreover, Complainants ignore that the easement vests Toledo Edison with sole discretion to exercise its judgment in removing vegetation. [TE Ex. CH-2.]. As such, Toledo Edison should be the sole party to decide whether vegetation poses a threat to the safe and reliable operation of its line, and if so, whether to remove that vegetation. Because the trees had the genetic disposition to grow into the lines and were already within or approaching the NESC minimum clearance zones, Toledo Edison deemed the trees a threat to the safe and reliable operation of its 69 kV transmission line. Toledo Edison thus acted within its rights under the easement in removing the trees.

As Complainants acknowledge, the language in the easement is almost identical to the easement language favorably noted by the Ohio Supreme Court in *Wimmer v. Pub. Util Comm.* (2012), 131 Ohio St. 3d 283. [Complainants' Brief, p. 14.] Recognizing this, Complainants vainly try to distinguish this case from *Wimmer*. They argue that there is a "significant factual difference" between the easement in *Wimmer* and the easement here, because the easement in *Wimmer* contained the term "may interfere" while the present easement uses "will interfere." [Id.]

This argument falls flat because the claimed distinction between "may" and "will" is devoid of any significance. As noted, the remaining trees on Complainants' property, which are the same species as the removed trees, are presently at least as tall as Toledo Edison's transmission line. [Tr, 57:2-10 (Jeffers Cross); 80:8-12 (Brewster Cross); 149:10-21 (Hahn Redirect).] Toledo Edison thus rightfully concluded that the trees "will interfere" with the transmission lines. Because the trees were within or approaching NESC minimum clearances, the trees posed a threat to the safe and reliable operation of the line by: (a) creating an unsafe condition [Tr., 120:4-10; 121:7-10 (Kozy Cross)]; and (b) being in sufficient proximity to the

line where arcing (and consequent faults in the line) could occur. [Tr., 116:10-21 (Kozy Cross).]

Hence, any putative condition precedent imposed by the “will interfere” language in the easement was easily satisfied. Accordingly, Toledo Edison acted well within its easement rights when it removed the trees.

**C. Because The Trees Indisputably Had The Genetic Disposition To Grow Into The Line, They Were Incompatible Vegetation Pursuant To Toledo Edison’s TVM Program And Were Properly Removed Under That Program.**

The trees removed from Complainants’ property had the genetic disposition to grow into Toledo Edison’s 69 kV transmission line. According to the TVM Program filed with the Commission, these trees were thus incompatible vegetation requiring removal. [Specifications, TE Ex. KB-2, p. 25.]

Toledo Edison demonstrated that the trees had the genetic disposition to grow into the line in three ways. First, given their species, the trees could grow higher than the 35 foot height of the line. Company witness Hahn determined that the species of the trees were Green Giant arborvitae.<sup>3</sup> Green Giant arborvitae grow 40 to 60 feet tall. [*Id.*, p. 4.] Complainants’ witnesses asserted that the trees at issue were American arborvitae. [Tr., 16:1-3 (Jeffers Direct); 79:21-24 (Brewster Cross).] But, as Complainants’ witness Parsons admitted, authoritative sources

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<sup>3</sup> Mr. Hahn based his determination on visual inspection and then cross-referenced his findings with the Arbor Day Foundation website. [TE Ex. 2 (Hahn Dir.), p. 5.] Mr. Hahn has made thousands of such identifications during the course of his 20-year career in utility vegetation management. [*Id.*, pp. 1-2.]

Complainants attempt to argue that Mr. Hahn made a determination that the trees should be removed based solely on the height of the trees. [Complainants’ Brief, pp. 9; 11, 13.] This argument is wrong and irrelevant. As discussed below, the height of the trees – being within NESC minimum clearances – certainly was sufficient to determine that the trees were incompatible, *i.e.*, disposed to interfere with the safe and reliable operation of the line. In addition, Mr. Hahn’s observations and belief about the trees’ disposition to interfere with the line was corroborated by his subsequent identification of the species of the trees at issue. As discussed below, whether the correct species is Green Giant Arborvitae or American Arborvitae, trees of such species could grown 40 feet or more. [TE Exs. 8 and 9; Tr., 76:1-4 (Brewster Cross).]



specify that such trees can also grow to 40 feet tall.<sup>4</sup> [TE Exs. 8 and 9.] Likewise, Complainants' witness Brewster also admitted that American arborvitae can achieve heights of 40 feet. [Tr., 76:1-4 (Brewster Cross).] Both species of arborvitae are therefore incompatible vegetation pursuant to Toledo Edison's TVM Program and warrant removal (wherever removal is legally permissible). Neither could Mr. Brewster nor Mr. Parsons state, with any degree of scientific certainty, that the trees would not grow to at least 40 feet high. [Tr., 109:23-110-7 (Parsons Cross); Tr., 80:13-18 (Brewster Cross).]

Second, the height of the trees was already within NESC minimum clearances. As noted, this created an unsafe condition and, with the potential for arcing, posed a threat to the safe and reliable operation of the line.

Third, the remaining trees -- of the same species and age as the removed trees -- are now at least as tall as the line. [Tr, 57:2-10 (Jeffers Cross); 80:8-12 (Brews Cross); 149:10-21 (Hahn Redirect); TE Ex 6.]. Notably, the facts that the trees were approximately 27 to 30 feet when the Company removed the trees and that the remaining trees -- of the same species as the removed trees -- are now approximately 35 feet belie claims by Mr. Brewster that the trees would only grow 1-2 inches per year [Complainants Brief, p. 10]. Indeed, it appears that the remaining trees have grown (and the removed trees would have grown) approximately 5 to 8 feet in three years.<sup>5</sup> [TE Ex. 6] The variance between Mr. Brewster's "expected" growth rate and the trees' actual growth rate further proves the fact that witnesses from both sides readily agreed to: that annual growth rates for individual trees are, at best, guesses. [Tr. 77:6-9 (Brewster Cross); TE Ex. 2

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<sup>4</sup> As discussed at length in Toledo Edison's post-hearing brief, the extent to which Mr. Parsons can qualify as an expert remains open to serious question. [Toledo Edison's Brief, pp. 20-21.]

<sup>5</sup> In his direct testimony, Mr. Parsons stated that the trees were 15 to 18 feet high prior to removal [Complainants' Ex. P (Parsons Dir.), p. 4.] On cross-examination, he admitted that the trees were seven to twelve feet from the line and, if the line was 35 to 41 feet above ground, the trees would have had to be 23 to 35 feet tall. [Tr., 103:17-23 (Parsons Cross).]

(Hahn Direct), p. 5.] Thus, where trees have the disposition to grow into a line, responsible vegetation management removes such vegetation to assure that no interference will occur.

This is precisely what the Commission previously recognized in *Wimmer v. Ohio Edison Co.*, Case No. 09-777-EL-CSS, Opinion and Order (Jan. 27, 2011). In that case, the Commission stated:

The Commission finds that, based on the undisputed facts in the record, the vegetation in question has the genetic disposition to grow to heights tall enough to potentially interfere with the [transmission] line [at issue], [the electric utility] reasonably determined that this vegetation may interfere or threaten to interfere with the transmission line and should be removed pursuant to [the electric utility's] UVM program.

*Id.*, p. 9. In this case, the undisputed facts show that: (a) the removed trees had the genetic disposition to grown into Toledo Edison's transmission line; (b) the trees were thus incompatible vegetation pursuant to Toledo Edison's TVM Program; (c) Toledo Edison's TVM Program, where possible, mandates the removal of incompatible vegetation; and (d) Toledo Edison's easement permitted removal. Following *Wimmer*, Toledo Edison acted reasonably in removing the trees. Complainants have thus manifestly failed to carry their burden and the Commission should dismiss their case accordingly. There is thus no doubt that Toledo Edison rightly determined that the removed trees were incompatible vegetation.

Pursuant to Toledo Edison's TVM Program filed with the Commission, the preferred method to deal with incompatible vegetation is to "control" – *i.e.*, remove – it whenever Toledo Edison has easement rights that permit it to do so. The Specifications define "incompatible vegetation" to mean "all vegetation that will grow tall enough to interfere with overhead electric facilities." [Specifications, TE Ex. KB-2, p. 25.] "Controlling" means "that *all incompatible vegetation must be removed* with herbicide or be removed mechanically . . .," when such vegetation "has the *potential to interfere* with the safe and efficient operation of the transmission

system.” [*Id.* at 24 (emphasis added); Plan, TE Ex. KB-1, p. 1.] Again, “[v]egetation control is *the removal of vegetation that has the potential to interfere with the safe and efficient operation of the transmission system....*”[e]mphasis is placed on controlling all incompatible vegetation.” [Plan, TE Ex. KB-1, p. 1 (emphasis added).] Because incontrovertible evidence shows that the trees had the genetic disposition to grow into Toledo Edison’s 69 kV transmission line, Toledo Edison acted reasonably in removing them. *See Wimmer v. Ohio Edison Co.*, Case No. 09-777-EL-CSS, Opinion and Order, p. 9 (Jan. 27, 2011).

Complainants incorrectly cite to the sections of the Specifications that deal with trimming. [Complainants’ Brief, pp. 10-11.] But Complainants skip over the Plan and earlier part of the Specifications which emphasize removal instead of mere pruning. Similarly, Complainants’ citation of the Plan’s discussion of vegetation management regarding the Company’s distribution lines is misplaced, given the substantial differences between distribution lines and transmission lines, as discussed further below. Because Toledo Edison had unambiguous easement rights vesting it with authority to remove vegetation that in its sole judgment interferes with the safe and reliable operation of the transmission line, the TVM Plan and Specifications mandate removal—which is what Toledo Edison did.

**D. The Company’s Practices Regarding Distribution Vegetation Management Are Irrelevant.**

Complainants labor under the misconception that the phenomenon of “distribution under-build” somehow aids their cause. It does not. To begin, there was no distribution line underneath the transmission line on Complainants’ property.

Moreover, when a distribution line runs directly below a transmission line, Toledo Edison’s distribution vegetation management program generally prevents the growth of trees into the higher transmission line. [TE Ex. 3 (Bloss Dir), p. 9.] More specifically, there are separate

departments for distribution line vegetation management and for transmission line vegetation management. [*Id.*] The distribution department trims on a four-year maintenance cycle, while the transmission department trims on a five-year cycle. [*Id.*] The distribution department thus manages the vegetation more often and thereby can ensure that the proper clearances are achieved. Because the trees would be trimmed several feet below the distribution line, which is in turn below the transmission line, the distribution department generally ensures that the safe and reliable operation of the transmission line is achieved, consequently preventing NESC violations. [*Id.* pp. 9-10.]

Complainants' claim that "the relevant NESC clearance standards to [*sic*, do] not change for transmission lines because there is distribution line underneath that transmission line" [Complainants' Brief, p. 7] misses the point. Given the configuration of distribution lines and transmission lines, where distribution lines (like trees) must be beyond a minimum clearance under the NESC [Tr., 166:12-23 (Bloss Redirect)], if a tree is below a distribution line, it will necessarily be beyond the minimum NESC clearance for an overhead transmission line. Ms. Bloss drove this last point home in her testimony at hearing:

Q. Well, it is your understanding if a tree is below a distribution line and the transmission line is above the distribution line, more often than not or perhaps almost all the time that that will assure that the NESC clearances as applicable to the transmission line will be met?

A. Right.

[Tr., 166:12-18 (Bloss Redirect).]

**E. Complainants Had More Than Adequate Notice That The Incompatible Trees Were Subject To Removal And Were Represented By Counsel During The Pre-Removal Time Period.**

In an attempt to raise every possible argument, no matter how remote, Complainants claim that Toledo Edison did not provide them with proper notice prior to removing their trees.

[Complainants' Brief, pp. 6-7; 8.] These arguments are simply false and beside the point.<sup>6</sup> Mr. Jeffers was provided with ample notice on multiple occasions that the offending trees were subject to removal. This notice was provided in person, via telephone, and via letter, to wit:

- July 2009: During the initial PennLine contractor visit, a work form indicating the planned removal of all trees in the easement corridor was presented to Mr. Jeffers, which he refused to sign. [TE Ex. 2 (Hahn Dir.), p. 6; TE Ex. 2 at Ex. CH-4 (work form).]<sup>7</sup>
- September 2009: Mr. Hahn and a PennLine supervisor visited Complainants' property and told Mr. Jeffers in person that the trees had to be removed to secure the safe and reliable operation of the Midway-Tontogany 69 kV transmission line. Mr. Jeffers responded that he would 'shoot the first [expletive] that fired up a chainsaw'. [TE Ex. 2 (Hahn Dir.), pp. 6-7; Tr., 52:23-53:41 (Jeffers Cross).]
- October 28, 2009: Mr. Hahn telephoned Mr. Jeffers and told him that the trees would be removed. [TE Ex. 2 (Hahn Dir.), p. 7.]
- October 30, 2009: Mr. Hahn sent a letter to Mr. Jeffers explaining the need for removal and Toledo Edison's removal rights under the easement, and advising that the trees would be removed on or after November 9, 2009. [*Id.*, p. 7; TE Ex CH-5.]
- December 9, 2009: Mr. Hahn telephoned Mr. Jeffers and informed Mr. Jeffers that Toledo Edison would be proceeding with the removal. [*Id.*, p. 7.]

Since at least October, 2009, Mr. Jeffers had retained an attorney. [Tr., 27:18-28:13 (Jeffers Direct); 53:23-54:6 (Jeffers Cross).] Thus, he was represented by counsel prior to the removal of the trees. [Complainants' Brief, p. 6.]

Given the above, any argument claiming lack of adequate notice is baseless. The time period from October 30, 2009 (setting November 9, 2009 as the date after which removal would

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<sup>6</sup> Complainants make a similarly false claim with regards to the alleged failure of Toledo Edison to remove stumps from Complainants' property. [Complainants' Brief, p. 8.] Contrary to Complainants' claim, Toledo Edison *provided stump grinding services at no cost to Complainants and hired a contractor to perform this work.* [See TE Ex. 2 (Hahn Dir.), p. 8; TE Ex CH-7 (showing receipt for removal of 227 stumps from Complainants' property).]

<sup>7</sup> Complainants erroneously state that Mr. Jeffers' first notice of Toledo Edison's intent to remove the trees was when Mr. Hahn visited Complainants' property. [Complainants' Brief, pp. 5-6.] Mr. Jeffers and Mr. Hahn testified otherwise. [Tr., 16:20-24 (Jeffers Cross); TE Ex. 2 (Hahn Dir.), p. 6.]

occur) through February 22, 2010 (the date of removal) is more than 100 days. Thus, Complainants' and their counsel had more than enough time to do whatever they thought that they needed to in order take action and try to stop the then-pending tree removal. For this reason, Complainants' argument that Toledo Edison somehow "purposefully deprived" Complainants of an opportunity to "save their trees" is spurious. [Complainants' Brief, p. 17.] Indeed, Complainants nowhere explain what notice the Company should have given or what Complainants would have done differently if they had been given such notice.

**F. Because Self-Pruning By Property Owners Is A High-Stakes Gamble With The Transmission Reliability And Is Otherwise Unworkable, It Is Not A Reasonable Option.**

Complainants argue that they should have been allowed to self-prune the trees at issue to ensure that the trees did not come into contact with Toledo Edison's transmission line. [See, e.g., Complainants' Brief, pp. 7, 12, 16-17.] Having Complainants trim trees is no better than having the Company trim trees. As noted, removal, not trimming, is the only way to eliminate guesswork about adequate clearances and grow rates; removal assures safe and reliable service.

What's more, Complainants fail to consider the severe consequences of tree-transmission line contacts, as testified to at length by Mr. Kozy. Transmission lines are fundamentally different than distribution lines in that the former are of significantly higher voltage and typically serve several thousand customers. [TE Ex. 1 (Kozy Dir.), pp. 3-5 .] The serious consequences of tree-transmission line contacts include: (a) widespread outages; (b) fires and property damage; (c) electrocution of utility workers and bystanders. [*Id.* pp. 4-5.] These untoward consequences are exacerbated by the phenomena of arcing, sagging and swaying whereby these adverse effects can occur without direct, physical contact between a tree and a transmission line. [*Id.*, pp. 5-6.] Thus, a TVM Program that relies on trimming invites risk of substantial adverse consequences.

Complainants' advocacy of self-help also ignores that Toledo Edison is responsible for ensuring that electricity is furnished in a safe and reliable way – not the Complainants. Further, Toledo Edison is held accountable by the Company's customers and the Commission for providing safe and reliable service. [TE Ex. 2 (Hahn Dir.), p. 11.] Ensuring that transmission lines are free from potential vegetation contacts is a critical part of this duty. Were Complainants permitted to exercise this responsibility, Toledo Edison would have had no effective control over how frequently that vegetation would be maintained, the techniques used to maintain it would be proper, or adequate clearances would be achieved. [*Id.*]

Given the serious implications of tree/transmission line contacts and the expertise required to avoid them, the Company's crucial vegetation management responsibility simply cannot be delegated to customers. [*Id.*] Moreover, such a policy is unworkable. Permitting self-pruning would still require Toledo Edison to police such activities to prevent outages and to ensure the safe and reliable operation of its transmission lines. [TE Ex. 3 (Bloss Dir.), p. 9.] In turn, keeping track of every individual property owner who elects to self-prune would clearly overstretch Toledo Edison's vegetation management resources. [*Id.*] Complainants have provided no evidence that Toledo Edison was required to permit them to self-prune, or that its decision not to do so was unreasonable or contrary to Ohio law or Commission precedent.

Notably, the complainants in *Wimmer* made the same argument that Complainants do here. As in this case, the evidence showed that a strategy that relied on trimming and on property owners to do that work led to potentially unsafe conditions, unreliable service and an unworkable vegetation management program. See *Wimmer v. Ohio Edison Co.*, Case No. 09-777-EL-CSS, Opinion and Order, pp. 8-9 (Jan. 27, 2011). The notion put forward that self-

pruning by customer was a "reasonable" approach did not carry the day in *Wimmer*. It cannot carry the day here.

### III. CONCLUSION

For the foregoing reasons, the Commission should dismiss Complainants' complaint.

DATED: November 19, 2012

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the following persons by  
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