

**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.)	
)	
)	

COMPLAINANTS' REPLY TO RESPONDENT'S POST HEARING BRIEF

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As expected, Edison first defends its removal of the Jeffers' trees by arguing that it had a *right* to remove the trees and that its Vegetation Management Program ("VMP") *required* their removal. The easement and the VMP- these are Edison's weapons. And to its credit, this argument is consistent with the actions taken by Edison leading up to the removal of the trees. When the Jeffers refused to sign the work order, Chris Hahn pulled the easement and had it staked out. (See Compl. Ex. Q.) When that did not satisfy the Jeffers he turned it over to his supervisor and legal.

However, there is no indication anywhere on Hahn's Forestry Work Refusal form that he did *anything* to determine the age or growth rate of these trees. There is no evidence that he ever even researched the "genetic disposition" of the trees *before* the removal of the trees or even *before* the Jeffers filed this action. There is no indication that Hahn, or Edison, put *any* thought at all into whether these particular trees could be managed through pruning. Why not? Because as stated above, the easement and the VMP, that is all Edison believed it needed.

Nothing about the process that took place prior to the removal of the Jeffers' trees suggests Edison attempted at any point to minimize the impact to property owners as this Commission warned in its *Wimmer* decision. And this of course makes sense because when the Jeffers' trees were removed, *Wimmer* had not been decided and Edison was still advocating its position that because this Commission had approved its

VMP, it did not need to establish the reasonableness of its actions taken in accordance with that plan.

To be clear, Edison's "we had an easement and a VMP" argument is immaterial. The easement and the VMP are not enough. Edison must still show that its actions were reasonable under the circumstances.

Which of course is why Edison throws in its final two arguments: that (1) the removal was consistent with "sound vegetation management practices", the NESC standards and the *Wimmer* decision and (2) that it is wrong to argue that the Jeffers could have self-pruned.

In support of its contention that the removal was consistent with sound vegetation management practices, Edison states that the Jeffers' trees had the genetic disposition to grow into the lines. However, Edison never bothers to say ***when if ever*** this genetic disposition would have taken place. These trees were 60 years old. They were growing in sandy soil, exposed to the western winds and not regularly fertilized. According to expert Jay Brewster, the Jeffers' trees 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.) Moreover we know that Edison had *never* had to trim these trees previously.

To close this gap, Edison attempts to put a time frame on the "genetic disposition" by offering testimony that a tree closer to Leo Jeffers' house, off to the side of the power lines, is currently higher than the lowest line.

The point being that if the Jeffers' trees had not been removed, they would have already come into contact with the line. This testimony is incredible since there is no evidence at all as to how high this tree was in 2010. (Hearing Transcript, p. 159.) For all we know it was the same height back then.

Moreover, Chris Hahn testified that "some" of the Jeffers' trees were within 8 feet of the lowest transmission wire. (Hahn Direct, p. 5.) So this would mean that in two years- these trees would have had to grow 7 to 8 feet! Putting aside common sense that with a growth rate like that these 60-year-old trees would be about 100 feet tall, Brewster's uncontroverted expert testimony is that these trees would grow no more than 1 to 2 inches per year and really probably less. Using the 2 inch a year standard, it would take 42 years to grow 7 feet into the power lines! So whether these trees actually had the "genetic disposition" to grow into the power lines is very much in dispute.

Edison further points to removal of the trees being "consistent with the standards established by the NESC regarding minimum clearances for 69 kV transmission lines". But to be clear, the NESC does mandate removal. (Transcript p. 121.) The NESC zones are just that, *clearance* zones. There is no NESC standard that says all trees under transmission lines should be removed. The NESC clearance zones could have been maintained through means other than removal, such as pruning.

As for being consistent with the *Wimmer* decision, the Jeffers vehemently disagree with this statement. The facts in *Wimmer* were different in that their trees had routinely come into contact with the lines and had required frequent pruning. This Commission focused on that fact in its determination that removal was reasonable. The *Wimmer* decision does not stand for the proposition that Edison can remove any tree it wants so long as its self-invented definition of “incompatible” is met. This Commission ended the *Wimmer* decision by warning utilities to “minimize the impact to property owners, to the extent possible and without sacrificing safety and reliability, when performing UVM activities.” Edison failed to do that here.

Finally, even assuming that the Jeffers’ trees would have, in time (a very long time) grown tall enough to touch the lines, there is simply no real reason that these trees could not have been managed by pruning. With a growth rate of 1 to 2 inches per year the trees could have easily been pruned to remain well below the NESC clearance zone. Edison claims this argument is wrong, because (again) their VMP establishes removal, not pruning, as the preferred method because removal is the “only way for Toledo Edison to be certain that there is no future interference within the transmission lines is to remove vegetation that will grow close enough to touch or otherwise interfere with them.”

This is nothing more than a self-serving and conclusory declaration- and it is simply false. There *are* other ways. Pruning is another way. Edison just does not want to do it because it is easier to cut them down and never come back. But this is

not “minimally invasive” and it is not proportionately balanced to serve both the property owners rights and the needs to maintain safe lines.

Edison says pruning is unworkable because growth rates can never be adequately predicted. Edison relies on Chris Hahn and Kate Bloss for this statement- both of whom never attempted to determine a growth rate for the trees. Jay Brewster *did* believe that growth rates could be determined and in fact determined a growth rate for the Jeffers’ trees. And while Brewster agreed that growth rates vary based on conditions, there was enough information for him to make an educated assessment. Edison’s “unpredictable” argument might be more compelling if Edison had ever actually had to prune the Jeffers’ trees. But these trees had existed ***for 60 years***, untouched by Edison, without harming Edison’s lines.

Edison’s argument is further belied by the fact that when there is a distribution line under the transmission line, the standard is to prune the trees to a five year clearance and let the Distribution Department handle it from there. This practice means that Edison personnel are perfectly capable of making a decision to prune to allow for a certain amount of growth in five years and do so on a routine basis. Chris Hahn admitted that if the Jeffers would have had a distribution line under their transmission line (like their neighbors), their trees probably would not have had to be removed (like their neighbors). This is significant! Hahn was the one that called for the removal of the Jeffers’ trees. And yet he testified that his decision would have been different if there was another electric line underneath that line. This proves beyond a doubt that pruning was a viable option.

Edison similarly scoffs at the notion that they could allow property owners the option to self-prune in order to prevent removal. Edison reasons that in this scenario they would have no control over how frequently that vegetation would have been maintained, the techniques used to maintain it, assurance of adequate clearances and that keeping track of every individual homeowner who elects to self-prune would clearly overstretch its resources. But these are all red herrings. Why in the world would Edison need to control or keep track of anything any differently than they do now? As it stands now they establish a clearance corridor, inspect it and target “incompatible vegetation”. Under the Jeffers suggestion they could do the *exact same* thing with one exception, give the property owner a date by which they must use an approved contractor to prune the trees to an acceptable height or face removal as per the terms of the easement.

Without question, Edison did not undertake to minimize its impact on the Jeffers. It had an easement and declared the Jeffers trees to be incompatible based on a definition they created. And because they had this easement and this VMP to hide behind, Edison made *no effort* to determine whether or not their power lines could be protected in any way other than removal. They took route easiest for them- and the most detrimental to the Jeffers. Edison complains that the trees could not be pruned because it is dangerous and because the growth rate is unpredictable – but these reasons are weak and inaccurate.

Edison wants this Commission to let it remove trees whenever it has an easement. But having the *right* to take an action does not always mean there is a *good reason* to take action. The *Wimmer* decision suggested that regardless of

the right, the reason must be sound. Illene, Leo and Cindy Jeffers therefore urge this Commission to hold up that decision and issue a finding that Toledo Edison failed to act reasonably and wrongfully removed their trees.

Respectfully submitted,

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By /s Kimberly A. Conklin
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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 19th day of November 2012:

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