

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Leo and)	
Cindy Jeffers and Ilene Jeffers,)	
)	
Complainants,)	
)	
v.)	Case No. 10-430-EL-CSS
)	
Toledo Edison Company,)	
)	
Respondent.)	

OPINION AND ORDER

The Commission, considering the complaint filed by Leo and Cindy Jeffers and Ilene Jeffers, and the evidence admitted at the hearing, hereby issues its Opinion and Order.

APPEARANCES:

Kerger and Hartman, LLC, by Kimberly A. Conklin and Steven D. Hartman, 33 South Michigan Avenue, Suite 100, Toledo, Ohio 43604, on behalf of complainant Leo and Cindy Jeffers and Ilene Jeffers.

Jones Day, by David A. Kutik, Jeffrey Saks, and Martin T. Harvey, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114, and Carrie Dunn, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, on behalf of the Toledo Edison Company.

OPINION:

I. BACKGROUND AND HISTORY OF THE PROCEEDING

On April 2, 2010, Leo and Cindy Jeffers and Ilene Jeffers (Jeffers) filed a complaint against Toledo Edison Company (TE), concerning TE's removal of trees on the Jeffers' property. According to the Jeffers, TE unreasonably removed more than 200 trees from their properties. The Jeffers also asserted that TE refused to remove the tree stumps despite offering to do so.

On April 26, 2010, TE filed its answer, admitting in part and denying in part the allegations contained in the complaint.

A settlement conference was held on August 24, 2010; however, the parties were unable to resolve the matter. After numerous continuances requested by the parties, an evidentiary hearing was held on October 1, 2012. Both parties filed post-hearing briefs on November 5, 2012, and reply briefs on November 19, 2012.

II. APPLICABLE LAW

TE is a public utility by virtue of Section 4905.02, Revised Code, and an electric light company as defined by Section 4905.03(A)(3), Revised Code. TE is, therefore, subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code.

Section 4905.22, Revised Code, requires, in part, that a public utility furnish necessary and adequate service and facilities. Section 4905.26, Revised Code, requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any regulation, measurement, or practice affecting or relating to any service furnished is unjust or unreasonable.

In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). Therefore, it is the responsibility of a complainant to present evidence in support of the allegations made in a complaint.

III. SUMMARY OF EVIDENCE

The Jeffers' properties are located at 11295 and 11351 Manore Road, Grand Rapids, Ohio. The property sits on the eastern side of Manore Road, which runs north and south, and was at one point a single property but has since been divided into multiple parcels. On March 23, 1970, Glen and Ilene Jeffers granted TE two easements along the western edge of the single property. The easements are numbered 66252 and 66253. The Midway-Tontogany 69 kilovolt (kV) transmission line sits on the two easements. In relevant part, easement 66253 states:

Together with the rights of ingress and egress to, over and from said property, Grantor(s) and Grantor's(s') heirs (successors) and assigns shall not

build any structure or place any materials on said easement strip, and Grantee shall have the right to trim or remove underbrush and trees and to remove and keep free any obstructions from and along said line or lines that, in the judgment of Grantee, will interfere with the construction or safe operation thereof. At grantee's option the lines herein authorized for the transmission and/or distribution of electricity may be placed overhead, or underground, or one or more overhead and one or more underground, and all of the provisions of this instrument shall be applicable to underground as well as overhead lines.

The easements and the Midway-Tontogany 69 kV transmission line are owned by TE. Between February 22 and February 23, 2010, two rows of evergreen trees directly beneath the Midway-Tontogany 69 kV line were removed by TE from the parcel covered by easement 66253. No trees were removed from the parcel covered by easement 66252. (Tr. at 6-10, Initial Br. at 4, Jeffers Ex. D.)

A. The Jeffers

The Jeffers make two arguments as to why they believe TE should not have removed the trees on their property. First, the Jeffers contend that the easement grants TE the right to trim the trees and not to remove the trees. The Jeffers then argue that the trees removed by TE were not interfering with the operation of the Midway-Tontogany 69 kV transmission line, did not have the capacity to grow to interfere with the line, could have been trimmed to prevent interference with the line, and that TE acted in a way to purposefully deprive the Jeffers the opportunity to save the trees. (Jeffers Br. at 13-17.)

Leo Jeffers testified that he is the owner of a portion of the property in question and that his mother, Ilene Jeffers, is the owner of the other portion of the property. Mr. Jeffers further explained that he has lived at the property his entire life and that 316 trees were removed from the property because they were on an easement granted to TE by Leo's father, Glen. The trees in question were two rows of evergreen trees that were located on the west side of the property. Mr. Jeffers explained that he believed the trees in question were planted in approximately 1959, or 1960, as a wind-break. (Tr. at 7-11.)

With respect to the timeline of the removal, Mr. Jeffers stated that one afternoon he was on his mother's portion of the property when TE representative Chris Hahn approached him, showed him a work order, and told him TE was going to remove the row of trees beneath the transmission line. Mr. Jeffers testified that TE representative Hahn returned to the property a second time with copies of the easements granting TE the rights to remove the trees. Subsequent to TE representative Hahn's second visit to the property, the Jeffers received a letter from TE detailing the rights of TE and providing notice of the work to be conducted. Mr. Jeffers testified that he offered to have the trees professionally trimmed and received estimates for the cost to trim the trees but that he was told that he was not allowed to do anything beneath the lines. Mr. Jeffers states that on or around February 22, 2010, TE removed the trees from his property. On cross examination, Mr. Jeffers noted that he was not contesting the validity of the easement or that all of the trees were within the boundaries of the easement. Furthermore, Mr. Jeffers admitted on cross-examination that both easements give TE the right to remove trees if in TE's judgment the trees will interfere with the line. (Tr. at 16-18, 28, 45, 49, 50; Jeffers Exs. C, D, E.)

Jay Brewster, a Registered Landscape Architect, testified that he visited the property on May 14, 2012, which was over two years after the trees were removed by TE. Mr. Brewster explained he observed the area where the trees were removed, as well as the remaining trees next to the easement. Mr. Brewster testified that he identified the remaining trees as *Thuja occidentalis*, or American Arborvitae, and estimated them to be over thirty years old. He further testified that by his estimate, the trees growing on the Jeffers' property would grow less than one to two inches per year. (Tr. at 74, 78-79.)

Phillip Parsons, an employee and customer of Tricounty Rural Electric, testified that in his opinion the trees would not have interfered with the Midway-Tontogany 69 kV transmission line and did not need to be cut down. Mr. Parsons visited the property and took photos of the trees in 2009 before they were removed. Based upon his observations, he concluded that because the trees were located several feet to the east of the line and were not directly under the line, there was no reason for concern regarding the trees potential effect on the Midway-Tontogany line. (Jeffers Ex. P at 4-5.)

B. TE

TE contends that the trees it removed from the Jeffers' property were within the boundaries of the easement directly beneath the Midway-Tontogany 69 kV transmission line, that the trees had the capacity to grow to interfere with the line, that

the trees were within clearance limits established by the National Electric Safety Code, and that the trees were within the clearance limits of TE's Transmission Vegetation Management (TVM) program. (TE Ex. 2 at 9-10.)

Christopher Hahn, a transmission forestry specialist for FirstEnergy Service Company (FirstEnergy), testified on behalf of TE regarding why removal of the trees was both required by the TVM policies and necessary for the continued safety and reliability of the transmission system. Mr. Hahn identified the trees as *Thuja standishii x plicata*, or Green Giant Arborvitae, which had the possibility to grow up to 60 feet but stated that whether the trees were American Arborvitae or Green Giant Arborvitae is a distinction without a difference because both species would be incompatible with TE's TVM program. Both species would be incompatible with TE's TVM program because they both could grow into the clearance zones and interfere with the line, making them incompatible vegetation. Further, Mr. Hahn explained that Green Giant Arborvitae have the potential to reach 60 feet in height, which would be well above the lower conductor of the transmission line. Mr. Hahn testified that approximately 281 stems attached to 227 stumps were removed from the property on February 22 and February 23, 2010. Moreover, Mr. Hahn testified that it would have been unreasonable for TE to trim the vegetation because, given the height of the vegetation, it would have been difficult to estimate how much and how often trimming should be done to ensure sufficient clearance to prevent contact with the line. Mr. Hahn stated that he believes it would also have been unreasonable to allow the Jeffers to trim the vegetation because it is TE's responsibility to ensure that electricity is furnished in a safe and reliable way. (TE Ex. 2 at 2-5, 8, 10-11.)

Katherine Bloss, the Supervisor of Transmission Vegetation Management for FirstEnergy, explained the TVM program and the requirements of the program regarding removal and pruning of vegetation to ensure the continued safety and reliability of the transmission system. According to Ms. Bloss, the TVM plan and specifications prescribe a five-year maintenance cycle, during which TE inspects and maintains all vegetation within the clearing zones, which are the areas beneath and around the transmission line. The TVM program specifically emphasizes removal of vegetation that may interfere with transmission lines in the clearing zone. Specifically, all vegetation that will grow tall enough to interfere with overhead electric facilities is deemed incompatible vegetation and is deemed in need of controlling. Controlling is the removal, either with herbicide or mechanically, of vegetation that has the potential to interfere with the safe and efficient operation of the transmission system. According to Ms. Bloss, the three reasons that removal is emphasized in the TVM program are because removal ensures contact between the vegetation and the line will not occur, the implications of contact between vegetation and a line are severe, and

because various industry groups mandate that certain clearances be maintained. According to Ms. Bloss, the trees posed a threat to the safe and reliable operation of the transmission line and the threat could not have been removed by having the Jeffers or some other party merely trim the tops of the trees every few years. (TE Ex. 3 at 3, 5, 6-8.)

David Kozy, the General Manager of Transmission Engineering at FirstEnergy, testified on behalf of TE regarding the consequences of vegetation contact with a transmission line and the phenomena of sagging and arcing. Mr. Kozy testified that the most direct consequence of vegetation contacting or interfering with the Midway-Tontogany transmission line would be failure of the line, which would have resulted in immediate loss of power to approximately 5,300 customers. Other possible consequences include tree or brush fires and electrocution of individuals standing near the vegetation contacting the line. The detrimental effects of a line contacting vegetation can be caused without actual contact through the phenomena of arcing and sagging. Mr. Kozy testified that by arcing, electricity can jump from a transmission line to a nearby object, such as vegetation, without actually coming into contact with the line. Sagging is where an electricity line sags or droops due to ambient temperature, wind, and the amount of electric load passing through the line. Mr. Kozy testified that in his opinion, to a reasonable degree of engineering certainty, the vegetation would have interfered with the Midway-Tontogany 69 kv line through direct contact, arcing, or sagging, which would have resulted in cascading outages and dangers to life and property. (TE Ex. 1 at 2-6, 8.)

IV. ARGUMENTS OF THE PARTIES

Both parties agree that this case is similar to *Wimmer v. Public Utilities Commission*, 131 Ohio St.3d 283, 2012-Ohio-757, 964 N.E.2d 411. In *Wimmer*, the Wimmers appealed a decision of this Commission finding that Ohio Edison Company should be allowed to remove certain trees from a transmission line easement running under trees on the Wimmers' property. Specifically, in affirming the decision of this Commission, the Supreme Court of Ohio found that the Commission correctly relied on evidence presented to show that the vegetation in question on the Wimmers' property had the genetic disposition to interfere with the transmission lines. *Wimmer* at ¶9, 10, 11. The Jeffers argue that the trees in *Wimmer* had been regularly trimmed to prevent interference with the line, whereas here no evidence was presented that the Jeffers' trees had ever been trimmed to prevent them from interfering with the line. The Jeffers further argue that in *Wimmer* there was no testimony to suggest that the trees might not grow into the line, whereas here testimony was offered by

Jay Brewster that the trees could be expected to grow only one to two inches per year or less. (Jeffers Br. at 14.)

The Jeffers argue that removal of the trees was unnecessary; therefore the decision to remove them was unreasonable. The Jeffers' argument rests on the premise that TE did not reasonably determine that the tree would have interfered with the line. If TE did not reasonably determine that the trees would have interfered with the lines then it was unnecessary to remove the trees. The Jeffers note that TE did not stop to make any type of calculated determination as to the exact nature of the threat posed by the trees. According to the Jeffers, because TE failed to consider the age or growth rate of the trees, any determination that the trees would interfere with the line without a calculation of the age or growth rate makes the decision to remove the trees unreasonable. (Jeffers Br. at 12, 13.)

The Jeffers also argue that if removal of the trees was necessary, the decision to remove them was unreasonable because the burden of maintaining the trees could have been shifted from TE to the Jeffers. In making this argument, the Jeffers recognize that vegetation management is necessary to maintain safe and reliable electric service. However, the Jeffers assert that TE failed to demonstrate why it is not appropriate for customers to be allowed to trim their trees to a standard set and enforced by TE. (Jeffers Br. at 16.)

The Jeffers' final contentions are that TE could have trimmed the Jeffers' trees instead of removing them and that TE acted in a way to purposefully deprive the Jeffers the opportunity to save the trees. These arguments coincide with the requirement set forth in *Wimmer*, and enforced by the Commission, that the utility attempt to minimize the impact to the property owner, to the extent possible and without sacrificing safety and reliability, when performing vegetation management activities. *Wimmer*, 131 Ohio St. 3d 283, 2012-Ohio-757, 964 N.E.2d 411 at ¶11. The Jeffers assert that by removing the trees instead of trimming the trees, TE acted in a way to purposefully deprive the Jeffers the opportunity to save the trees instead of working to minimize the impact to the Jeffers. (Jeffers Br. at 17.)

In response, TE asserts that the Jeffers bear the burden of proof in this case and argues that the Jeffers failed to meet this burden and attempted to shift the burden to TE. TE argues that removal of the trees was within TE's easement rights. TE supports this argument by first noting that the easement provides that the grantee has the right to trim or remove underbrush and trees if, in the judgment of the grantee, they will interfere with the construction or safe operation of the line. TE states that there is no dispute that all of the trees at issue in this case were within the boundaries of the

easement, as admitted by Mr. Jeffers. TE contends that it exercised its judgment in accordance with its easement rights and removed incompatible trees that were threatening its lines. (TE Br. at 13; Tr. at 45; TE Ex. 2 at 8.)

TE argues that it had to remove the trees pursuant to its TVM Program and the National Electric Safety Code (NESC) standards for safe operation of a transmission line. TE's TVM defines incompatible vegetation as "all vegetation that will grow tall enough to interfere with overhead electric facilities". The NESC standard for vegetation requires a minimum horizontal clearance of 8.2 feet and a minimum vertical clearance of 8.7 feet. TE presented testimony that there were trees within 8 feet of the lowest transmission wire. Furthermore, TE presented testimony that on May 16, 2012, which is over two years after the trees were removed, remaining trees of the same species as the removed trees had grown to a height above that of the lowest conductor line. TE argues that had it not removed the trees on the easement, the trees would have grown as high as the line, much like the trees that were outside the easement. TE argues that because it believed that the trees were interfering with the line and had the genetic disposition to continue to interfere with the line, that its actions to remove the trees were within its rights under the terms of the easement. (TE Br. at 13, 14, 17; TE Ex. 1 at 7; TE Ex. 2 at 5, 6; TE Ex. 3.)

TE next argues that removal of the trees, and not pruning, is the preferred option when dealing with incompatible vegetation. TE argues that estimations of growth rates are estimations that must be done accurately to prevent interference with the lines. TE argues that pruning is only appropriate where an accurate estimation of the growth rate can be made and where the threat to the line can be sufficiently diminished. When dealing with transmission line reliability, TE argues that estimations have no place because of the severity of the implications of contact with a line; only removal sufficiently diminishes the threat to the line. (TE Br. at 19.)

Finally, TE dismisses the recommendation by the Jeffers that the property owner be permitted to self-prune trees threatening a line. TE argues that it would have no control over how frequently the vegetation is being maintained, what techniques are being used to maintain the line, or whether adequate clearances are being maintained. Furthermore, TE is responsible for ensuring that electricity is furnished in a safe and reliable way and would have no control over providing reliable electric transmission services to any of the customers serviced by that line if customers were providing their own vegetation management. (TE Br. at 21; TE Reply Br. at 13.)

DISCUSSION AND CONCLUSION

The Commission's jurisdiction in this case, the validity of TE's easement, and the location of the trees on the easement are not disputed. Also not disputed in this case is TE's right to remove the trees on the easement, which was admitted by Mr. Jeffers on cross-examination. The only issue remaining for Commission determination is whether the Jeffers met their burden of demonstrating that TE unreasonably determined that the vegetation in question might have interfered or threatened to interfere with the transmission line. Initially, we note that the Jeffers have attempted to shift the burden of proof in this case. The burden of proof in a complaint proceeding before the Commission is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). However, in attempting to meet the burden of proof, the Jeffers argue that TE did not demonstrate that its decision to cut down the trees was reasonable. This argument constitutes an unsuccessful attempt to shift the burden of proof to TE. While TE has a responsibility to act reasonably, the burden remains on the Jeffers to demonstrate that TE failed to act reasonably. (TE Ex. D; Tr. 49, 50.)

This case does not present an issue of first impression before this Commission. In *Wimmer*, the Ohio Supreme Court reviewed whether the Commission erred in finding that removal of trees was reasonable. In *Wimmer*, the Supreme Court found that sufficient evidence was presented to support the Commission's decision and that the utility, Ohio Edison, had reasonably determined that the vegetation may interfere or threaten to interfere with the transmission line and should have been removed. *Wimmer*, 131 Ohio St. 3d 283, 2012-Ohio-757, 964 N.E.2d 411 at ¶11. The Court recognized expert testimony from Ohio Edison that the vegetation in question might have interfered with the line and needed removed. *Wimmer* at ¶9. The Court went on to recognize that even with continuous trimming and pruning, at least one tree had already grown to within four feet of the line at issue, which was sufficient to necessitate removal. *Wimmer* at ¶9. The facts and the holding of the Court in *Wimmer* direct the Commission's decision in the present case.

Here, TE believed by its own judgment as grantee under the easement and under its vegetation management plan that the trees would have interfered with the safe and reliable operation of the Midway-Tontogany line and then removed the trees.

A. Determination of Threat to a Transmission Line

While TE had the responsibility to reasonably determine whether trees would have interfered with the line and needed to be removed, as well as to minimize the

impact to the property owner, the Jeffers carry the burden of proving that TE failed to reasonably determine that there was a threat to the line. This Commission finds that TE reasonably determined that the trees were interfering or would have interfered with the line. This finding is supported by testimony from Christopher Hahn that the trees had the growth potential to interfere with the line, the testimony of Katherine M. Bloss that the trees were within or approaching minimum NESC clearances, and the testimony of David Kozy that the trees would have interfered with the line. (TE Ex. 1 at 8; TE Ex. 2 at 4; TE Ex. 3 at 8.)

TE reasonably determined that the trees would interfere with the line and was therefore within its rights, under the easement, to remove the trees. The impact to the property owner in this case is commensurate with the threat to the safe and reliable operation of the line. This finding does not diminish TE's responsibility to minimize the impact of vegetation removal on property owners, to the extent possible and without sacrificing safety and reliability, when performing vegetation management activities.

B. Determination to Remove Instead of Prune

The Commission finds that in this instance, TE reasonably determined that the trees needed to be removed. In *Wimmer*, the Court recognized that continuous pruning and trimming was not a viable option. *Wimmer*, 131 Ohio St. 3d 283, 2012-Ohio-757, 964 N.E.2d 411. The Commission finds in this case that trimming was also not a viable option because there were trees approaching or within NESC minimum clearances. Trimming and pruning would have presented a serious threat to the safe and reliable operation of the line. The effects of vegetation contacting a transmission line can pose significant risk to the reliability of the grid and to the safety of customers. In this case, the trees were growing directly beneath the transmission line and had grown to a height that threatened to interfere with the safe and reliable operation of the line. Furthermore, removal of trees is sometimes necessary in accordance with a utility's vegetation management plan, though removal must be done only when trimming and pruning are not a viable option. (TE Ex. 1 at 3-5; Tr. 119, 120.)

Furthermore, the Commission believes it would be inappropriate for any utility to allow a property owner to retain responsibility for pruning trees approaching a line. The requirement for TE to provide safe and reliable electricity means that TE must discourage and seek to prevent customers from approaching or contacting a line. Allowing a customer to maintain vegetation near a transmission line would be inherently dangerous to the customer. Moreover, if all customers were responsible for their own vegetation management, TE would be in the position of trying to enforce its

policies on its customers to assure reliability for all customers, an unduly burdensome situation. In this instance, TE was within its rights to remove the trees and TE acted reasonably in doing so.

C. Conclusion

The Commission finds that the Jeffers have failed to prove that TE acted unreasonably in removing the vegetation at issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

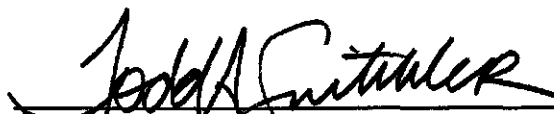
- (1) Leo and Cindy Jeffers and Ilene Jeffers filed a complaint against the Toledo Edison Company (TE), on April 2, 2010, contesting TE's removal of trees on the Jeffers' property.
- (2) TE is a public utility as defined by Section 4905.02, Revised Code, and an electric light company, as defined in Section 4905.03(A)(3), Revised Code.
- (3) On April 26, 2010, TE filed its answer, admitting in part and denying in part the allegations contained in the complaint.
- (4) A settlement conference was held on August 24, 2012, however, the parties failed to resolve this matter.
- (5) After numerous continuances, a hearing was held on October 1, 2012.
- (6) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Pub. Util. Comm*, 5 Ohio St.2d 189, 214 N.E. 2d 666 (1966).
- (7) The Jeffers have not met their burden of proof that TE acted unreasonably in removing the vegetation from their property.

ORDER:

It is, therefore,

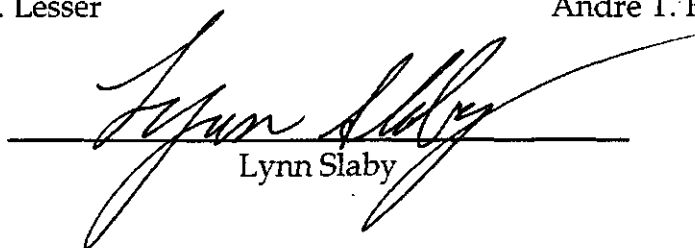
ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Steven D. Lesser

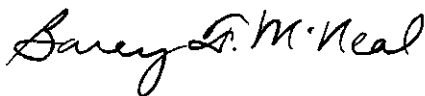

Andre T. Porter


Lynn Slaby

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JAN 23 2013



Barcy F. McNeal
Secretary