

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of	)	
Mary Martha Corrigan and Denis Corrigan,	)	
	)	
Complainants,	)	
	)	
vs.	)	Case No. 09-492-EL-CSS
	)	
The Cleveland Electric Illuminating Co.,	)	
	)	
Respondent.	)	

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**COMPLAINANTS MARY MARTHA CORRIGAN AND  
DENIS CORRIGAN'S POST-HEARING MEMORANDUM**

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## **REVIEW OF THE RELEVANT FACTS**

### **Introduction**

This case calls for the Public Utilities Commission of Ohio (“PUC”) to balance the landowners’ rights in and to their property with a utility’s statutory obligation to provide safe and efficient electrical service. These concerns are not mutually exclusive. As long as Mary Martha and Denis Corrigan (“Corrigans”) have lived on Outlook Drive, their tree and the transmission lines of the Cleveland Electric Illuminating Company and First Energy (collectively “CEI”) have harmoniously co-existed consistent with CEI’s vegetation management policy. With mutual respect and cooperation, the Corrigans’ tree and CEI’s transmission lines will continue to do so.

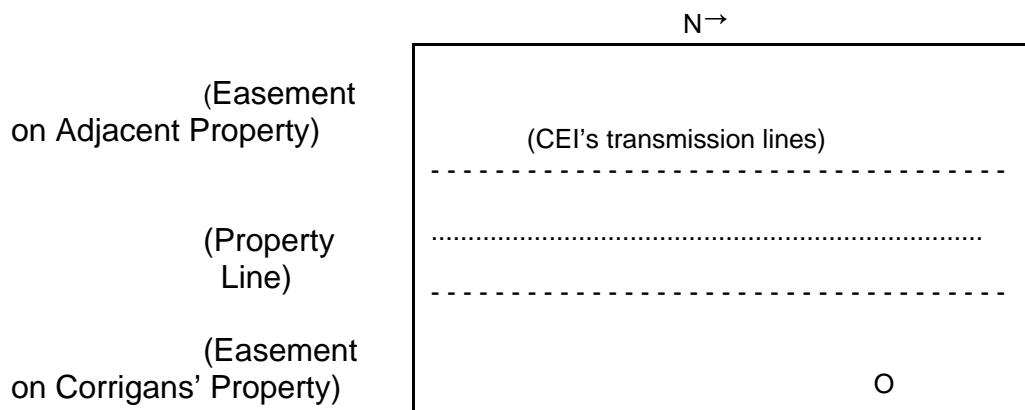
### **The Corrigans purchase a home subject to CEI’s easement within which are a silver maple tree and CEI’s overhead transmission lines**

In 1975, the Corrigans moved to 4520 Outlook Drive, Brooklyn, Ohio and became CEI customers. At the time the Corrigans took title, the property was subject to an easement (“the easement”) in favor of CEI. The relevant provision of the easement at issue herein states that,

Said right and easement shall include the right of [CEI], its successors and assigns at all times to enter upon the right-of-way occupied by said transmission lines for the purpose of constructing, inspecting, protecting, repairing or removing said towers, poles, wires, fixtures and appliances, together with full authority to cut and remove any trees, shrubs, or other obstructions upon the above described property which may interfere or threaten to interfere with the construction, operation and maintenance of said transmission lines.

The easement is part of CEI's transmission corridor and traverses, in a north-south direction, the entire rear portion of the Corrigan's' property and begins at the Corrigan's' western property line, going 75 feet eastward, towards their house.

Located within the easement are the Corrigan's' silver maple tree ("the tree") and CEI's 138kV transmission lines which run north-south throughout the easement. The tree is situated near the eastern portion of the easement while the transmission lines run overhead on the western portion of the easement (as well as through the easterly portion of an easement granted on adjacent property immediately to the west of the Corrigan's' boundary line). For illustrative purposes only, set forth below is a not-to-scale depiction of the easement (rectangle), transmission lines (parallel dashed lines), boundary line between the Corrigan's' property and the adjacent property to the west (dotted line), and the tree (circle).



**CEI's vegetation management policy between 1975 and 2000 provided hands-on care and maintenance of the tree which assured that the tree did not interfere or threaten to interfere with the transmission lines**

At all times relevant, CEI promulgated and abided by its vegetation management policy to care for and maintain vegetation within the rights of way granted CEI.

Between 1975 and 2000, and in accordance with its vegetation management policy, CEI exclusively provided regular, routine, and competent “hands-on” care and maintenance of the tree (as well as for the other trees in the neighborhood located within CEI’s easements on other properties). CEI’s hands-on care and maintenance of the tree during this time was undertaken without request by or additional cost to the Corriganes.

Proper care and maintenance of the vegetation, consistent with CEI’s vegetation management policy, PUC regulation, and proper arboreal standards assured that the tree neither interfered nor threatened to interfere with CEI’s transmission lines or the ability of CEI to provide safe and efficient electrical service to its customers. During this time period (1975-2000) and with proper hands-on care and maintenance, there were no reported service outages or disruptions caused by the tree.

During this period (1975-2000), CEI contracted with the Davey Expert Tree Company (“Davey Tree”) to provide the hands-on care and maintenance to the tree. The Corriganes did not call, select, or compensate Davey Tree to provide this hands-on care and maintenance to the tree.

Davey Tree employees attending to the tree were obliged to report any perceived or actual hazards to CEI’s transmission lines which may be caused by vegetation in general or by the tree in particular. At no time between 1975 and 2000 had Davey Tree notified CEI nor had CEI notified the Corriganes that the tree interfered or threatened to interfere with CEI’s transmission lines or the safe and efficient provision of electrical service. Likewise, at no time during this period between 1975 and 2000 had CEI received any citation for any violation involving the tree asserting that the tree

constituted a hazard to CEI's transmission lines or violated any vegetation management statute, rule, regulation, or policy.

Between 1975 and 2000, the tree, properly cared-for and maintained consistent with CEI's vegetation management policy, and CEI's transmission lines co-existed harmoniously without incident and without any reasonable concern about their future together.

**In 2000, CEI changed its vegetation management policy, but still provided hands-on care and maintenance to the tree to continue assuring that the tree did not interfere or threaten to interfere with the transmission lines**

In 2000 CEI modified its vegetation management policy described as becoming more aggressive in removing certain vegetation. Regardless, CEI continued to provide hands-on care and maintenance to the tree. Similar to the period between 1975 and 2000, at no time between 2000 and 2003 had CEI been notified nor had CEI notified the Corrigan's that the tree interfered or threatened to interfere with CEI's transmission lines or the safe and efficient provision of electrical service. Likewise, at no time during this period between 2000 and 2003 had CEI received any citation for any violation involving the tree asserting that the tree constituted a hazard to CEI's transmission lines or violated any vegetation management statute, rule, regulation, or policy.

**For all intents and purposes, between 1975 and 2003 and per CEI's vegetation management policy, the tree had been "compatible" vegetation and when properly cared for and maintained, the tree neither interfered nor threatened to interfere with CEI's transmission lines or CEI's ability to provide safe and efficient electrical service to its customers.**

**In 2003 and without any change to its vegetation management policy, CEI ceased its hands-on care and maintenance to the tree and declared the “compatible” tree as “incompatible” vegetation subject to immediate removal**

In 2003, CEI ceased its regular and routine hands-on care and maintenance of the tree.

In the summer of 2004, and with no change to the tree or CEI’s vegetation management policy, CEI notified the Corriganes (1) that CEI declared the tree to be “incompatible” vegetation, (2) as “incompatible” vegetation the tree interfered or threatened to interfere with CEI’s transmission lines, and, (3) the easement authorized the removal of vegetation that interfered or threatened to interfere with CEI’s transmission lines. CEI planned for the tree’s immediate destruction.

**The Corriganes objected to CEI’s designation of the tree as “incompatible” vegetation and of its removal**

The Corriganes objected to CEI’s designation of the tree as “incompatible” vegetation and of its intended destruction of their tree. The Corriganes contested CEI’s claim that the Corriganes had no right to care for and maintain their tree at their (Corriganes’) expense. CEI rejected the Corriganes’ offer to pay for tree care and maintenance by competent tree professionals and refused to delay the date for the tree’s destruction.

**The common pleas court enjoined CEI from destroying the tree declaring that the tree neither interfered nor threatened to interfere with CEI’s transmission lines**

The Corriganes’ efforts to discuss with CEI saving the tree were without response by CEI. As CEI’s designated destruction date for the tree drew near and absent any communication with CEI to save the tree from or delay its destruction, the Corriganes



initiated an action in the Cuyahoga County Common Pleas Court, to wit, *Mary Martha Corrigan v. The Illuminating Co.*, Cuyahoga CP Case No. CV-535563, wherein the trial court issued a temporary restraining order prohibiting CEI from cutting down the tree.

The trial court held further hearings with testimony from witnesses produced by the Corrigans and CEI. The trial court concluded that as cared-for and maintained, the tree did not interfere or threaten to interfere with CEI's transmission lines, thus the easement did not give CEI any right to remove the tree from the Corrigans' property. The trial court granted a preliminary injunction and ultimately a permanent injunction preserving the tree.

The injunction issued by the trial court did not preclude or restrict CEI from performing hands-on care and maintenance of the tree or otherwise affect any of CEI's other rights under the easement. Further, were circumstances to change, e.g., the Corrigans failed to care for and maintain the tree, CEI was not precluded from seeking relief from the trial court's injunction.

### **The court of appeals affirmed the trial court's injunction**

CEI unsuccessfully appealed the trial court's injunction as the court of appeals affirmed the trial court's order. *Corrigan v. Illum. Co.*, 175 Ohio App.3d 360, 2008-Ohio-684 (8th Dist. Cuyahoga).

In affirming the trial court, the appellate court found, that (1) CEI had not received a single citation or experienced any problems with any administrative or regulatory agency as a result of the tree, (2) the Corrigans, at their expense, provided hands-on care and maintenance for the tree, and (3) the community had not experienced any service interruptions due to the tree. *Id.* at ¶¶24-32. The appellate court also concluded

that the tree did not pose a possible threat to CEI's transmission lines as the Corriganes have worked with and independently of CEI to ensure the health of their tree and the safety of the transmission lines. *Id.* at ¶31, 33.

**The Ohio Supreme Court determined that this issue is one of vegetation management within the exclusive jurisdiction of the PUC and vacated the prior court decisions on jurisdictional grounds and not on the merits**

The Supreme Court of Ohio accepted CEI's appeal from the court of appeals. The Supreme Court determined that the issue of vegetation management was a service-related matter, thus within the exclusive province of the PUC. *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, ¶21. The Supreme Court did not rule upon the merits of the issues considered by the trial court, and in vacating the lower courts' proceedings, the Supreme Court held, *inter alia*, that where a vegetation management issue is called to the PUC's attention, the PUC is required to decide whether vegetation removal is reasonable. *Id.*

**The Corriganes' complaint filed with the PUC**

On June 10, 2009, immediately following the Supreme Court's decision, the Corriganes filed their complaint with the PUC requesting, *inter alia*, that the PUC determine that the tree did not interfere or threaten to interfere with CEI's transmission lines, thus CEI's intended removal of the tree is neither reasonable nor warranted per PUC regulation or CEI's vegetation management policy.

On July 29, 2009, following CEI's filing of its answer to the Corriganes' complaint, the PUC, through attorney examiner Rebecca Hussey, issued an order that "CEI abstain from any action to remove or otherwise adversely affect the tree on [the

Corrigans'] property at issue in this case.” Neither the July 29, 2009 Order nor any subsequent order of the PUC prevented, obstructed, or interfered with any effort or opportunity by CEI to perform hands-on care and maintenance to or monitoring of the tree.

At no time following the July 29, 2009 Order had CEI sought or attempted to perform any hands-on care and maintenance to the tree. Subsequent to the July 29, 2009 Order, CEI was aware that were the tree to present a clear and present danger to CEI's transmission lines or such other hazard warranting immediate attention, it could have sought relief from the PUC. At no time subsequent to the July 29, 2009 Order had CEI sought relief from the PUC alleging that the tree presented a clear and present danger to CEI's transmission lines or such other hazard warranting immediate attention.

**Since 2004, CEI has monitored, on the ground and from the air, the care and maintenance of the tree provided by the Corrigans and during this time there have been no reports of the tree constituting a hazard to the transmission lines or causing disruption to CEI's ability to provide safe and efficient electrical service**

From 2004 through the present, the Corrigans have retained the services of the Forest City Tree Protection Co. to provide hands-on care and maintenance to the tree which services have included pruning, application of growth retardants, and a tree-stabilizing system.

During this period (2004 to present), on a regular and routine basis, CEI has (1) dispatched its employees/agents to the Corrigans' property to personally observe and monitor the tree and (2) conducted, 2-3 times per year, helicopter flights over the Corrigans' property to observe and monitor the tree and its position *vis-a-vis* the

transmission lines.<sup>1</sup> Both the on-ground and helicopter observations over the Corrigan's property were conducted by professional and competent CEI employees/agents familiar with CEI's vegetation management policy, utility regulations, and utility industry protocol involving tree location and utility transmission lines. At no time had any ground or air observation resulted in a report to CEI that the tree represented a clear and present danger to CEI's transmission lines. At no time had CEI sought from the PUC a modification of the July 29, 2009 Order.

**Consistent with PUC regulation, the tree is not situated beneath any CEI transmission line, is well beyond mandated horizontal and vertical clearance areas, and is not subject to any danger of arcing**

There are industry protocols establishing safe distances between utility transmission lines and objects to prevent contact with the lines or otherwise present a hazard to them.

The National Electrical Safety Code, 2007 edition ("NESC"), prescribes the clearances to be achieved from various types of electric lines. The [PUC] has adopted the NESC as the requirements for clearances in Ohio. See Rule 4901:1-10-06, Ohio Administrative Code. In 2012, a new version of the NESC was published. There are no relevant material differences between the 2007 and 2012 editions of the NESC regarding the operative tree-transmission line clearances.

Direct Testimony of David Kozy, P.E, CEI Exhibit 5, at 6.

Mr. Kozy further stated that,

The NESC establishes required minimum clearances between 138 kV lines and various types of objects, such as vegetation. Under the NESC, trees are considered "objects that are not buildings and non-pedestrian-accessible." For those objects, the NESC requires a minimum horizontal

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<sup>1</sup> These fly-overs are not limited solely to the transmission lines traversing the Corrigan's property, as CEI conducts fly-overs over all of its transmission lines within its transmission corridors on a twice-yearly basis.

clearance of 9.6 feet and a minimum vertical clearance of 10.1 feet. Attachment DK-3 contains the relevant portion of the 2012 edition of the NESC pertaining to clearances for a 138 kV transmission line.

*Id.* at 6-7.

In addition to horizontal and vertical clearances, Mr. Kozy referred to arcing, a phenomenon “in which electricity can literally ‘jump’ from the transmission line to a nearby object, such as vegetation, without that object actually touching the line.” *Id.* at 5. Arcing may occur with objects approximately four feet away, but Mr. Kozy confirmed that no part of the tree was within four feet of the transmission lines. Tr. at 98.

Thomas Neff, the surveyor retained by CEI to take measurements within the easement, was never asked by CEI and did not perform any measurements to determine the horizontal distance of the transmission line closest to the Corrigan's tree. Tr. at 80-81. Neff roughly estimated a clearance of 23 feet between transmission line and the Corrigan's tree, Direct Testimony of Thomas Neff, P.E, CEI Exhibit 4, at 8, well beyond the 9.6 feet industry standard.

Summarizing: the tree, as currently cared-for and maintained by the Corrigan's (1) is not underneath CEI's transmission lines, (2) is outside of the horizontal clearance area of 9.6 feet, and, (3) is beyond the four-foot arcing zone. At no time, before or after 2003, has CEI (1) been cited by any agency for the tree's location or (2) sustained any power outage or other adverse incident affecting its transmission lines where the tree was the primary cause or even a contributing factor.

**CEI's designation of the tree as “incompatible vegetation” is a company term, not one defined by the PUC nor contained in the language of the easement**

Rebecca Spach, CEI's manager of transmission vegetation management, confirmed that the designation of vegetation as "incompatible" is a company and industry term, not one of the PUC, Tr. at 176, nor is "incompatible vegetation" mentioned, described, or defined in the easement. *Id.* at 174, 176.

**The "Great Blackout of 2003" is the great non-sequitur**

Ms. Spach acknowledged that CEI's latest iteration of its vegetation management policy, the 2010 version, does not vary materially with the vegetation management plan filed in 2000 with the PUC. *Id.* at 192, 195. Thus, the current version of CEI's vegetation management plan, virtually identical to the 2000 vegetation management plan, existed a full 3 years prior to "the Great Blackout of 2003."<sup>2</sup> Of greater significance, of all the modifications and improvements adopted by CEI after this event, CEI did not modify its 2000 vegetation management policy. *Id.* at 196.

Finally, Ms. Spach confirmed that the tree, whether cared-for and maintained by CEI or by the Corriganes, neither caused nor contributed to any blackout or service interruption to date. *Id.* at 201.

**Neither snow nor rain nor heat nor gloom of night nor any other environmental condition has caused or currently causes the tree to interfere or threaten to interfere with CEI's transmission lines**

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<sup>2</sup> Much has been made by CEI and its witnesses of this event; however, (1) as CEI's vegetation management plan currently in force is the same as existed in 2000, three years before this blackout, (2) at no time had the tree caused or contributed to any service interruption, and (3) as the tree falls outside of established clearance areas, any reference to the "Great Blackout" in the same sentence with the tree as constituting a threat to the transmission lines is a "boogeyman" for scare purposes and has no basis in any evidence produced at the hearing.

Prior to 2003 (when CEI performed hands-on care and maintenance to the tree) and after 2003 (when CEI ceased caring for and maintaining the tree), the greater Cleveland area has undergone numerous severe and adverse weather events. At no time has it been reported that any severe and adverse weather event resulted in the tree, or parts thereof, interfering with CEI's transmission lines or the safe delivery of electrical service. No evidence has been produced to substantiate any claim that the tree is not securely rooted. The crown of the tree, in its present condition, is lop-sided such that were the tree to fall naturally, it would fall away from CEI's transmission wires and onto the Corrigans' house.

Absent the deliberate cutting of the tree in the direction of CEI's transmission lines or hurricane-force winds that would uproot comparably situated trees and structures, the tree would not naturally come into contact with any CEI transmission line.

**No evidence has been produced to demonstrate that at any time, especially since 2003, the tree interfered or threatened to interfere with CEI's transmission lines; the evidence established that with regular and proper care the tree and the transmission lines can and will harmoniously co-exist**

Since 2004 through the present, consistent with CEI's past and present vegetation management policy and PUC regulation, the tree did not and does not interfere nor threaten to interfere with CEI's transmission lines. With continued care and maintenance the tree and the CEI's transmission lines can co-exist in harmony.

## **DISCUSSION OF THE ISSUES**

**Issue No. 1: The PUC Is Charged With Determining Whether CEI's Planned Removal Of The Corrigans' Tree Is Reasonable.**

**CEI's Vegetation Management Policy**

Ohio Admin. Code 4901:1-10-27(E)(1) directs CEI to,

establish, maintain, and comply with written programs, policies, procedures, and schedules for the inspection, maintenance, repair, and replacement of its transmission and distribution circuits and equipment. These programs shall establish preventative requirements for the electric utility to maintain safe and reliable service. Programs shall include, but are not limited to, the following facilities: \* \* \* (f) Right-of-way vegetation control.

Ohio Admin. Code 4901:1-10-06 requires each electric utility and transmission owner to comply with the 2007 edition of the American National Standard Institute's NESC. As relevant herein, there are vertical and horizontal clearance areas established by the NESC which must be observed.

Of import is that (1) the PUC has not set forth any specifics as to the manner or means for controlling right-of-way vegetation, (2) there are minimum clearance standards which are to be observed, and (3) property owners retain rights to their property within the right-of-way not inconsistent with the authority granted to the utility.

These considerations were of concern to the Supreme Court in *Corrigan* when the court required the PUC to decide whether vegetation removal is reasonable. The PUC is further guided by *In re Complaint of Cameron Creek Apts. v. Columbia Gas of Ohio, Inc.*, Slip Opinion No. 2013-Ohio-3705, decided August 29, 2013.

In *Cameron Creek*, the Supreme Court recognized a utility's obligation to rely on and enforce the most recent industry standard in assuring the safe and efficient service to customers; where there exists a verifiable safety hazard, the utility has the right, under its tariff and PUC's rules, to address the safety issue. *Id.* at ¶15-16. However, where the customer's premises previously met all code requirements when built and "was still safe because it had not undergone any renovations since the time of



construction and the complex has remained in compliance with all state and local building-code requirements,” the property owner was not required to “retrofit its apartments because there were no imminent safety threats or verifiable safety issues with the gas appliances or venting system at the complex.” *Id.* at 28.

Applying *Corrigan* and *Cameron Creek* to the facts of this case, the consideration is whether, at the stroke of midnight, a compatible tree, always in compliance with PUC (“NESC”) standards and with no history of having interfered or of threatening to interfere with CEI’s transmission lines suddenly, became an incompatible tree, constituting a hazard warranting its removal **solely because CEI changed the label of the tree from “compatible to “incompatible.”**

The uncontested testimony established that the tree stands well beyond the horizontal, vertical and arcing clearance areas set forth by the NESC which the PUC adopted as controlling for enforcement purposes. As in *Cameron Creek*, the tree has remained in compliance with all requirements and does not represent an imminent safety threat or verifiable safety issue with the transmission line, thus there is no justification for the tree’s destruction or of CEI interference with the Corrigan’s right to care for and maintain the tree.

### **An Objective Standard Is Employed To Determine Reasonableness**

Were the PUC to determine that the tree’s position outside the minimum clearance areas is not sufficient for its salvation, the Corrigan’s submit that from an objective review of the totality of the circumstances the tree does not pose a hazard to CEI’s transmission lines or CEI’s ability to provide safe and efficient electrical service to

its customers. The totality of the circumstances may include but is not limited to: considerations involving the utility industry practices, vegetation management practices, effectiveness of past care and maintenance, the realistic potential of the occurrence of possible disaster scenarios in the greater Cleveland, Ohio region.

The PUC, in determining the reasonableness of CEI's planned destruction of the tree, must apply an objective standard as opposed to one premised on subjective speculation. The test of reasonableness does not take place in a vacuum. In the realm of abstract possibilities and speculation anything relating to human affairs is open to some possible or imaginary concern. CEI's presentment of the worst case scenarios failed to provide any relevance to this tree. Rather, it is the contrary that provides the most compelling evidence – since 1975, first CEI then the Corrigans provided regular and proper hands-on care and maintenance to the tree to assure that for the past 38 years the tree would not and did not interfere or threaten to interfere with CEI's transmission lines.

The fear of a category-1 event (tree growth into transmission lines) or a category-3 event (tree-transmission line contact by a tree or parts thereof outside a right-of-way) does not exist in this case, thus CEI's discussion of these fears has no relevance. The fear of a category-2 tree-transmission line fault (tree-transmission line contact by a tree or parts thereof not growing into the transmission lines, but within the right-of-way) although always a possibility in the abstract, is at the extreme end of remoteness in this case given the history of the tree's hands-on care and maintenance and CEI's on-going ground and air monitoring.

A category-2 event involving the Corrigan's tree is not part of any real-time, real-life experience. CEI's claims of "imminent danger," whether asserted in 2004 or today, must be viewed in perspective. Nine-plus years have lapsed since CEI first notified the Corrigan's that the tree constituted an imminent threat to the transmission lines. Whatever could have been "imminent" has long passed its "sell-by" date; and given the hands-on care and maintenance provided, the tree is anything but a danger to CEI's transmission lines.

The testimony confirmed that over the years of litigation in the courts and before the PUC, proper hands-on care and maintenance, whether through CEI or the Corrigan's, has assured, without interruption, the safe and reliable supply of electricity over the very transmission lines that CEI claims the tree endangers. Had CEI the slightest concern over the past nine-plus years that the tree posed an "imminent" risk of harm to its transmission lines, CEI could have petitioned the courts or the PUC to address this concern. No concerns were raised or addressed.

The PUC must apply the test of objective reasonableness which considers all relevant evidence to arrive at its conclusion whether it is (objectively) reasonable that the tree "may" interfere or threaten to interfere with the operation and maintenance of the CEI's transmission lines. Nine years ago, upon similar evidence under similar conditions, two courts determined that properly maintained, the tree caused no harm nor did it threaten harm to CEI's transmission lines. Other than the passage of time, nothing has changed. A subjective supposition premised in that anything is possible, means, in essence, "because we say so." Such is not based on reason nor is it reasonable.

**Issue No. 2: CEI Failed To Meet Its Burden Of Proof That The Tree Interferes Or Threatens To Interfere With Its Transmission Lines.**

The easement authorizes vegetation removal where such interferes or threatens to interfere with CEI's transmission lines. The Corrigan's retain residual rights to provide care for and maintain the vegetation on their property. The burden falls upon CEI to justify any intended removal of any of the Corrigan's' vegetation within the easement.

CEI's burden, as with most other civil matters, is to demonstrate by a preponderance of the evidence, to a reasonable probability, not a mere possibility, that the Corrigan's' tree interferes or threatens to interfere with CEI's transmission lines. The Corrigan's do not have to prove the negative, *i.e.*, that their tree does not interfere or threaten to interfere with CEI's transmission lines.

The evidence from 2004 to the present overwhelmingly reflects that having received proper care and maintenance consistent with all regulatory standards and consistent with CEI's vegetation management policy, the Corrigan's' silver maple tree coexisted with, in that it neither interfered nor threatened to interfere with CEI's transmission lines. CEI has produced no evidence to the contrary and has failed to meet its burden of proof.

**Issue No. 3 The Tree Does Not Violate Any Regulatory Mandated Clearance Areas.**

As there are no statutory guidelines or directives specifying utility vegetation management, such has been left to the PUC. There are two regulations providing for utility vegetation management, to wit: Ohio Admin. Code 4901:1-10-27(E)(1)(f), which requires CEI to have a right-of-way vegetation management plan, and Ohio Admin.

Code 4901:1-10-06, directing each electric utility and transmission owner to comply with the 2007 edition of the American National Standard Institute's NESC.

The NESC mandates a vertical clearance of 10.6 feet (which is not an issue as the tree is not underneath any of CEI's transmission wires) and a horizontal clearance of 9.6 feet. Both Mr. Kozy and Mr. Neff verified that the tree stands well outside the mandated NESC horizontal clearance as well as the four-foot arcing area.

Although CEI's vegetation management plan may desire a greater vertical and/or horizontal clearance, the question before the PUC is not whether CEI's self-imposed restrictions<sup>3</sup> renders the tree subject to removal, but whether the tree is situated within an area that PUC regulations prohibit, *i.e.*, vertical clearance of 10.6 feet and a horizontal clearance of 9.6 feet. All evidence produced places the tree well beyond the designated clearance areas. As the tree is outside of an area which may interfere or threaten to interfere with CEI's transmission lines or CEI's ability to provide safe and efficient electrical service to its customers, the only reasonable conclusion to be drawn is that neither PUC regulation nor the easement authorize CEI's destruction of the tree, and it would be unreasonable to permit its destruction.

**Issue No. 4: *Arguendo*, Were The PUC To Consider CEI's Policy Of Horizontal Clearance Area Of 25 Feet, Such Requirement Is Unjust Or Unreasonable Permitting Modification Under The Circumstances Of This Case**

CEI referenced its vegetation management plan, submitted to the PUC, which sets a horizontal clearance area of 25 feet. Despite such submission and approval, R.

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<sup>3</sup> There was no reliable evidence that the tree stood within CEI's wider clearance area given that the surveyor was not asked to and did not measure horizontal clearance.

C. 4905.37 permits the PUC to determine whether such regulations, practices, and services are unjust or unreasonable and to modify them accordingly.

Industry standards mandate a horizontal clearance of 9.6 feet. Notwithstanding the absence of any objection or comment when CEI submitted its vegetation management plan, the evidence, industry standards, and common sense, along with the facts of this case, warrant the PUC to find that the 25 feet clearance (of which there is no evidence that the tree is within this self-imposed 25-foot clearance area) is unjust and unreasonable, thus unenforceable as it relates to the tree.

**Issue No. 5: The Corrigans Retain The Right To Maintain Their Tree To Assure That It Neither Interferes Nor Threatens To Interfere With CEI's Transmission Lines.**

For many years, CEI undertook hands-on care and maintenance of the tree. The hands-on care and maintenance assured that the tree would not constitute a hazard to CEI's transmission lines, consistent with CEI's vegetation management policy. And from 1975 through 2003, CEI accepted the duty and responsibility to assure the continued good health and welfare of the Corrigans' silver maple tree assuring that the tree neither interfered nor threatened to interfere with CEI's transmission lines.

For whatever reason, after 2003 CEI decided to no longer provide hands-on care and maintenance to the tree. CEI had every right to discontinue its hands-on care and maintenance of the tree, but that did not prevent the Corrigans from contracting to provide proper care for their tree, and nothing contained within the easement's language prohibited the Corrigans from maintaining their vegetation within the area of the easement. More importantly, CEI's relinquishment of continued hands-on care and

maintenance of the tree did not automatically place this tree on the list of endangered species.

The Corrigan's retained the absolute right to provide care for their tree and, as noted by the Court of Appeals, the Corrigan's provided appropriate care to their tree so that it would not interfere or threaten to interfere with CEI's transmission lines. The evidence presented at hearing confirmed that in the interim there has been no change.

The Corrigan's' ongoing hands-on care and maintenance along with CEI's vigilant ground and air monitoring will assure that the tree will continue to thrive in harmony with CEI's transmission lines.

### **CONCLUSION**

The law respecting the rights of the parties to the easement is not changed or affected by the fact that one of the parties to the easement happens to be a public utility. Where an easement imposes conditions involving a permitted use, such must be viewed employing reasonableness from an objective perspective. CEI bears the burden of proving the existence of the condition that would permit removal of the tree.

Per PUC's regulations, the tree is not within any prohibited clearance area.

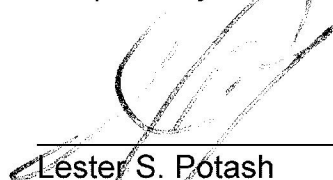
Applying an objective reasonableness standard, with proper hands-on care and ongoing maintenance the tree has been consistent with CEI's vegetation management policy, has not constituted a hazard to CEI, and does not interfere or threaten to interfere with CEI's transmission lines. CEI's decision to discontinue care and maintenance of the tree within the easement prompted the Corrigan's to provide proper hands-on care and maintenance consistent with statutory and regulatory requirements.

maintenance of the tree within the easement prompted the Corrigan's to provide proper hands-on care and maintenance consistent with statutory and regulatory requirements.

Almost four decades of proper tree care and maintenance overcome any recent claim that the tree interferes or threatens to interfere with CEI's transmission lines or its operation. Finally, should the Corrigan's fail to properly care and maintain their tree, CEI may seek appropriate relief from the PUC.

**WHEREFORE**, Mary Martha and Denis Corrigan respectfully pray that the Public Utilities Commission of Ohio grant relief as set forth in their Complaint, including but not limited to an Order prohibiting CEI from removing their tree upon their property, the right of the Corrigan's to care for and maintain their tree consistent with statutory and regulatory standards, and for such other relief as is just and proper.

Respectfully submitted,



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Lester S. Potash  
Counsel for Mary Martha Corrigan and  
Denis Corrigan

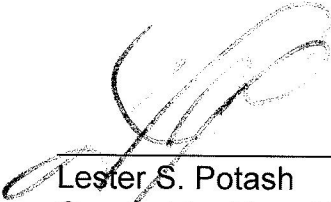


## CERTIFICATE OF SERVICE

A true copy of the foregoing Post-Hearing Memorandum has been deposited this 3<sup>rd</sup> day of September, 2013, in the United States Mail, postage prepaid for service upon counsel for Respondent as follows:

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Denis Corrigan

**This foregoing document was electronically filed with the Public Utilities**

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Summary: Brief Post-Hearing Memorandum electronically filed by Mr. Lester S. Potash on behalf of Mary Martha Corrigan