

**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.)	

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

Lester S. Potash (#0011009)
25700 Science Park Drive, Suite 270
Beachwood, OH 44122
Tel.: (216) 771-8400
Fax: (216) 771-8404
E-mail: lsp@potash-law.com

Counsel for Complainants
Mary Martha Corrigan and
Denis Corrigan

Complainants' Post-Hearing Reply Memorandum

Distilled to its essence, CEI relies on fear and presents suppositions of future calamities involving the tree and transmission lines. The Corrigan's present historical and current evidence of proper care and maintenance, *i.e.*, trimming and pruning, of their tree wherein both the tree and transmission lines neither interfered nor threatened to interfere with the other, and, in conjunction with the utility's ongoing oversight, nature need not be disturbed. The PUC's obligation is to determine what is reasonable, *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, ¶21, consistent with PUC policy recognizing that,

removal of trees is sometimes necessary in accordance with a utility's vegetation management plan, [but] **removal must be done only when trimming and pruning are not a viable option.** (Boldface added.)

In the Matter of the Complaint of Leo and Cindy Jeffers and Ilene Jeffers v. Toledo Edison Company, PUC No. 10-430-EL-CSS, Opinion and Order at 10 (Jan. 23, 2013).

For more than 50 years, proper vegetation maintenance of trimming and pruning the Corrigan's tree assured that the tree neither interfered nor threatened to interfere with CEI's transmission lines. Only when CEI decided, in 2000, to radically alter its policy from vegetation maintenance (trimming and pruning) to vegetation removal did it then decree that trimming and pruning of the Corrigan's tree were not viable options. Nothing else changed – *e.g.*, the science and technology of tree care and maintenance remained the same, the transmission lines were not repositioned, the tree was not left unattended, the Great Blackout of August 2003 was three years in future, etc. – nothing except that vegetation previously maintained by CEI and deemed “compatible” as of December 31, 1999, transformed, as of January 1, 2000, into “incompatible” vegetation subject to immediate destruction. Not one of CEI's witnesses explained this magical

transformation other than to conclude “because we say so.” This is because there are no facts to support CEI’s conclusion, only its repetition of “because we say so.”

No matter how many times one hears about the dangers of sagging, arcing, or rapid growth, the factual evidence, both historical and current as testified to by CEI’s witnesses, upon which a reasonable decision must be based applying PUC policy, totally supports the retention of the Corrigans’ tree. The factual evidence, not “because we say so,” without question showed (1) that sagging was not a reasonable concern (the tree is not underneath any transmission line), (2) that arcing was not a reasonable concern (the tree is well outside the 4-foot clearance zone), (3) that rapid growth was not a reasonable concern (the tree is smaller today than in 2009, Tr. at 222), and (4) the tree is outside NESC’s 9-foot clearance area. Nothing presented by CEI in its Post-Hearing Brief counters the factual testimony of its witnesses.

Certain claims contained in CEI’s Post-Hearing Brief, were they relevant or material, could warrant further discussion, but needless to say,

- ▶ The Corrigans **never** agreed to the removal of their tree,
 - ▶ CEI initiated its vegetation removal policy at issue herein **three years prior** to the Great Blackout of August 2003, thus the blackout had nothing to do with CEI’s current vegetation removal policy implemented in 2000,
 - ▶ CEI **was never** prevented from providing care or maintenance to the tree.
- In its Post-Hearing Brief at 10, CEI states that it “has been prevented from taking any adverse action with respect to the Tree, including removing the Tree.” What other adverse action could CEI have taken? and,

- ▶ “Pruning, moreover leaves uncertainty,” CEI’s Post-Hearing Brief at 18, is a head-scratcher as more than 50 years of CEI’s pruning provides a pretty good indication of the certainty of the effectiveness of tree pruning to assure that the tree neither interferes nor threatens to interfere with CEI’s transmission lines.

This case is dissimilar to *Wimmer v. PUC*, 131 Ohio St.3d 283; 2012-Ohio-757 and *Jeffers*. In both of those cases the trees grew into the transmission lines (*Wimmer* sought to prevent the removal of the trees, in *Jeffers* the trees had already been removed). Here the Corrigan’s solitary tree is distant, *i.e.*, well outside the mandated clearance area, from the transmission lines.

Finally, CEI claims that the Corrigan’s tree is the only tree within the transmission corridor, CEI Post-Hearing Brief at 11, thus it cannot be made to provide care for this tree. CEI cites comments in *Jeffers*, Opinion and Order at 10, concerning the prospect of a property owner’s care and maintenance of their vegetation. First, the situation herein is dissimilar as there is no forest growing underneath nor within any clearance area of a CEI transmission line.

Second, in *Jeffers* the PUC discussed the theoretical as the homeowner had not provided tree care and maintenance whereas since 2004, for almost 10 years, the Corrigan’s have established a track record of the pruning and trimming of their tree without incident and within established standards to assure that the tree does not interfere or threaten to interfere with the transmission lines.

Third, unlike *Wimmer*, where the trial and appellate court found that their trees did interfere or threaten to interfere with the utility's transmission lines, herein, the trial and appellate courts held the opposite.

We find that in reviewing the entire record, weighing the evidence, and in reviewing the credibility of the witnesses, the trial court's judgment in the instant case is supported by competent credible evidence. **The Corrigans' tree does not pose a possible threat to the transmission lines at issue.** (Boldface added.)

Corrigan v. Illum. Co., 175 Ohio App.3d 360, 2008-Ohio-684, ¶31 (8th Dist. Cuyahoga).

And, fourth, each year, for the near decade that the Corrigans have provided care and maintenance to their tree, CEI has undertaken regular and routine ground and visual observations of the tree, consistent with its overall policy of observation of all vegetation within all of its transmission corridors, not just the Corrigans. Not once following a ground or aerial observation has CEI called to a court's or to the PUC's attention any issue relating to the Corrigans' care and maintenance of their tree *vis-a-vis* the transmission lines or that the tree represented an immediate danger to the transmission line. The reasonable conclusion as to why CEI has not done so is that the Corrigans have provided proper pruning and trimming to their tree to assure that the tree does not interfere or threaten to interfere with CEI's transmission lines.

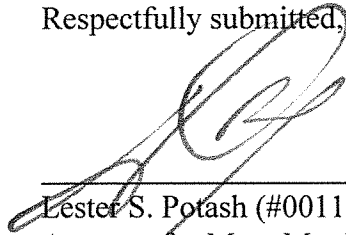
Vegetation maintenance is not synonymous with vegetation removal. Herein, proper vegetation maintenance has worked, whether by means of pruning, trimming, growth retardants, and/or supplemental support system. "Because we say so" combined with fear and supposition, regardless of the number of times repeated, do not overcome the established facts supporting the retention of the Corrigans' silver maple tree.

Conclusion

The Corrigan's have proven that historically and currently, their tree does not interfere nor threaten to interfere with CEI's transmission lines. Trimming and pruning, among other arboreal methods have been and remain viable options. CEI has presented no rational or logical reason to destroy the Corrigan's tree and it is not reasonable to allow CEI to do so.

WHEREFORE, Mary Martha and Denis Corrigan respectfully pray that the Public Utilities Commission sustain their complaint, prohibit CEI from removing the silver maple tree on their property, and grant such other relief as is just and reasonable in the premises.

Respectfully submitted,



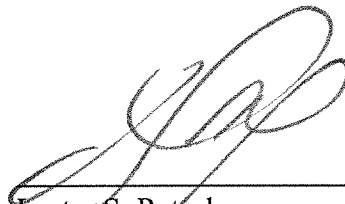
Lester S. Potash (#0011009)
Attorney for Mary Martha
and Denis Corrigan
25700 Science Park Drive, Suite 270
Beachwood, OH 44122
Tel.: (216) 771-8400
Fax: (216) 771-8404
E-mail: lsp@potash-law.com

CERTIFICATE OF SERVICE

A true copy of the foregoing Post-Hearing Reply Memorandum has been deposited this
30th day of September, 2013, in the United States Mail, postage prepaid for service upon
counsel for Respondent as follows:

Lydia Floyd, Esq.
Jones Day
901 Lakeside Avenue
Cleveland OH 44114-1190

Carrie M. Dunn, Esq.
First Energy
75 South Main Street
Akron, OH 44308



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

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/30/2013 7:52:21 AM

in

Case No(s). 09-0492-EL-CSS

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