

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF THE COMPLAINT
OF MARY-MARTHA
AND DENIS CORRIGAN

Appellants,

v.

THE PUBLIC UTILITIES COMMISSION
OF OHIO

CASE NO.

14-0799

Appeal from the Public Utilities
Commission of Ohio
Case No. 09-492-EL-CSS

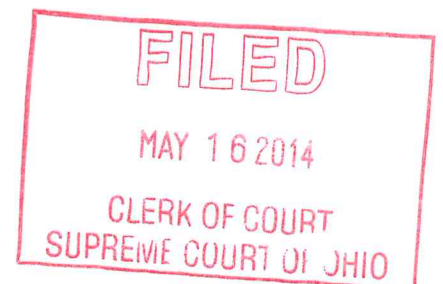
NOTICE OF APPEAL OF
MARY-MARTHA AND DENIS CORRIGAN

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**NOTICE OF APPEAL OF
MARY-MARTHA AND DENIS CORRIGAN**

Appellants Mary-Martha and Denis Corrigan hereby give their Notice of Appeal, pursuant to R.C. 4903.11, R.C. 4903.13, and Sup.Ct.R. 10.02, from the Public Utilities Commission's, March 26, 2014, Opinion and Order, (Attachment A) and its May 14, 2014, Entry of Rehearing (Attachment B), in PUCO Case No. 09-492-EL-CSS.

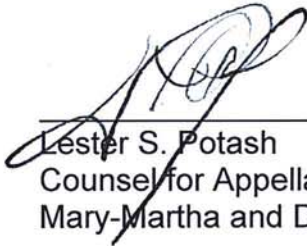
Appellants were and are parties of record in PUCO Case No. 09-492-EL-CSS and timely filed their Application for Rehearing of Appellee's Opinion and Order in accordance with R.C. 4903.10. Appellants' Application for Rehearing was denied with respect to the issues on appeal herein by the Appellee's Entry on Rehearing dated May 14, 2014.

The Appellee's Opinion and Order and its Entry on Rehearing denying Appellants' Complaint against The Cleveland Electric Illuminating Company ("CEI") are unlawful and unreasonable in the following respects:

1. The Opinion and Order is unreasonable or unlawful as the reliable and probative evidence does not support the finding that trimming and pruning of the Corrigan's tree is not a viable option.
2. The Opinion and Order is unreasonable or unlawful in that removal of the Corrigan's tree contravenes Commission policy to preserve vegetation with removal only when trimming and pruning are not viable options.
3. The Opinion and Order is unreasonable or unlawful as the reliable and probative evidence does not support the conclusion that the Corrigan's tree interferes or may interfere with CEI's transmission lines.

WHEREFORE, Appellants respectfully submit that Appellee's March 26, 2014 Opinion and Order and its May 14, 2014 Entry on Rehearing are unlawful and unreasonable and should be reversed with this matter remanded to Appellee with instructions to grant Appellants' Complaint and for the relief sought therein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'L. Potash', is written over a horizontal line.

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


CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was served electronically this 16th day of May, 2014, as follows:

Chairman of the Public Utilities Commission of Ohio, c/o Docketing Division, via its Docketing Information System;

The Public Utilities Commission of Ohio c/o William L. Wright, Section Chief, Public Utilities Section, Ohio Attorney General's Office, at william.wright@puc.state.oh.us; and,

The Cleveland Electric Illuminating Company c/o Carrie M. Dunn, Esq., counsel of record, at cdunn@firstenergycorp.com and Lydia Floyd, Esq. at lfloyd@jonesday.com.



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

CERTIFICATE OF FILING

I hereby certify that the Notice of Appeal of Appellants Mary-Martha and Denis Corrigan has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with Sup.Ct.R. 3.11(A)(2), R.C. 4903.13, and Ohio Adm. Code 4901-1-36, on the 16th, day of May, 2014.



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

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Mary-Martha and Dennis Corrigan,)	
)	
Complainant,)	
)	
v.)	Case No. 09-492-EL-CSS
)	
Cleveland Electric Illuminating Company,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The Commission, considering the complaint filed by Mary-Martha and Dennis Corrigan and the evidence admitted at the hearing, hereby issues its Opinion and Order.

APPEARANCES:

Lester S. Potash, 25700 Science Park Drive, Suite 270, Beachwood, Ohio 44122, on behalf of complainants Mary-Martha and Dennis Corrigan.

Jones Day, by Lydia M. Floyd, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114, and Carrie M. Dunn, 76 South Main Street, Akron, Ohio 44308, on behalf of the Cleveland Electric Illuminating Company.

OPINION:

I. HISTORY OF THE PROCEEDINGS

On June 10, 2009, Mary Martha and Dennis Corrigan (Corrigans or Complainants) filed a complaint against the Cleveland Electric Illuminating Company (CEI or Company), concerning CEI's planned removal of a silver maple tree (the Tree) on the Corrigans' property that falls within CEI's easement. Complainants allege that CEI's decision to remove the Tree, and CEI's implementation of its vegetation management policy, as well as the policy itself, violate Ohio Adm.Code 4901:1-10-27 and that the Corrigans' maintenance of the Tree comports with the Commission's right-of way vegetation control. CEI filed an answer on July 1, 2009, denying, among other things, the material allegations of the complaint.

A settlement conference was held on August 13, 2009, and subsequent negotiations between the parties occurred; however, the parties were unable to resolve the matter. By entry issued November 5, 2010, the attorney examiner granted the parties' joint motion for an indefinite continuance until the Commission issued its decision in *In the Complaint of Kurt Wimmer/Wimmer Family Trust v. Ohio Edison Company*, Case No. 09-777-EL-CSS (*Wimmer*). A final appealable order was issued in *Wimmer* on March 16, 2011, and on February 29, 2012, the Ohio Supreme Court rendered a decision in that matter in *Wimmer v. Pub. Util. Comm.*, 131 Ohio St.3d 283, 2012-Ohio-757, 964 N.E.2d 411. By entry issued November 1, 2012, a procedural schedule was established in this case, and, after several continuances at the request of the parties, the case was set for hearing on July 25, 2013.

An evidentiary hearing was held as scheduled on July 25, 2013. The Corrigan's filed a post-hearing brief on September 13, 2013, while CEI filed its post-hearing brief on September 16, 2013. Both parties filed post-hearing reply briefs on September 30, 2013.

II. APPLICABLE LAW

CEI is a public utility by virtue of R.C. 4905.02 and an electric light company as defined by R.C. 4905.03(A)(3). CEI is, therefore, subject to the jurisdiction of the Commission pursuant to R.C. 4905.04 and R.C. 4905.05.

R.C. 4905.22 requires, in part, that a public utility furnish necessary and adequate service and facilities. R.C. 4905.26 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. BACKGROUND

The sole issue in dispute is whether CEI's planned removal the Tree, which is located within CEI's easement on the Corrigan's property, is reasonable. CEI argues that the Tree is decayed and has the potential to interfere with its transmission lines that run across the Corrigan's backyard. The Corrigan's, who own the Tree, maintain that they have the right to prune and care for the Tree and that the Tree, if properly cared for, will not threaten CEI's transmission lines in any way.

In July 2004, CEI gave notice to the Corriganes that the Tree would be cut down in order to protect the Company's transmission lines. The Corriganes obtained an injunction against removal of the Tree in Common Pleas Court. The injunction, after being upheld in the Court of Appeals, was appealed to the Ohio Supreme Court. In *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 17-19, the Court held that CEI's easement is valid, that the Tree is within the easement, and that CEI's easement permits removal of any tree that threatens its transmission lines. The Court, however, ruled that the Commission has exclusive jurisdiction in the matter. The case then was remanded for the Commission's determination of the reasonableness of CEI's planned removal of the Tree.

IV. SUMMARY OF THE TESTIMONY

Testimony of Mary-Martha Corrigan

Mrs. Corrigan testified that the Tree was present when the Corriganes moved into their residence in 1975, and was maintained by CEI up until 2003. She stated that CEI would provide routine maintenance and pruning of the Tree every four to five years, as well as other trees located in the Corriganes' neighborhood. Mrs. Corrigan indicated that CEI's periodic maintenance of the Tree was in accordance with an easement that CEI holds through part of the Corriganes' property. She acknowledged that the tree in her backyard falls within CEI's easement, but points out that the Tree is on the edge of CEI's easement that is closest to the Corriganes' residence. Further, Mrs. Corrigan testified that, between 1975 and 2003, she and her husband received no notices from CEI that the Tree interfered with the Company's transmission lines (Tr. at 9-14.)

Mrs. Corrigan testified that a letter was sent to Mr. Corrigan on July 1, 2004, indicating that the tree located within CEI's easement represented an incompatible tree species. The letter stated that CEI was granted the right to remove trees in the right-of-way in 1926, and that an inspection of the Tree, which is in the right-of-way, revealed that the Tree could cause reliability and safety hazards unless it is removed. Subsequently, the Corriganes, disputing that the Tree poses a threat to CEI's transmission lines, obtained an injunction prohibiting CEI from removing the Tree from the right-of-way. (Corrigan Ex. 1; Tr. at 14-17.)

Mrs. Corrigan testified that, after obtaining the injunction, CEI stopped providing maintenance for the Tree, and the Corriganes have been providing that maintenance since 2004 through the Forest City Tree Protection Company. Mrs. Corrigan testified that, between 2004 and the present, she and her husband received no notices from CEI that the Tree interfered with the Company's transmission lines.

She stated that the Tree continues to be healthy and strong as a result of the Corrigan's maintenance and that she has received no indication from CEI that the Tree remains a threat to the transmission lines. (Corrigan Ex. 2; Tr. at 17-20.)

Mrs. Corrigan testified that the Common Pleas Court issued an injunction preventing the Tree from being cut, and the Court of Appeals ruled in the Corrigan's favor. She stated that the Ohio Supreme Court then ruled that the Common Pleas Court and Court of Appeals did not have jurisdiction, only the Commission, but they did not rule on the merits of the case. Mrs. Corrigan noted that she is fighting for the Tree because it is a part of the Corrigan's property and a value to their home. She stated that the Tree is healthy and to cut it down would be unnecessary. (Tr. at 27-28, 30.)

Mrs. Corrigan testified that she is not an arborist and has no education in forestry or arboriculture, nor does she have any education, training, or experience in pruning the Tree or determining the health of the Tree. Further, according to her testimony, Mrs. Corrigan does not know the height of the Tree, has no knowledge regarding electric transmission lines, and cannot speak with any authority as to what the industry standard is for maintaining trees around electric lines. She testified that her opinion as to the health of the Tree is based her conclusion that because the Tree is growing foliage, it must be healthy, and because other people have told her they thought the Tree is healthy. Further, Mrs. Corrigan testified that 2012, 2011, and 2009 invoices from the Forest City Tree Protection Company listed maintenance work on the Tree, including removal of decayed and dead wood, removal of new growth on the side of the Tree facing the transmission lines, and reduction in the height of the Tree. (Tr. at 30, 32-33, 36-39.)

Testimony of Thomas Neff

Thomas J. Neff, Jr., a surveyor with the engineering and surveying firm of Neff & Associates, testified in support of CEI. Mr. Neff testified that he performed a site survey of the Corrigan's property on March 19, 2013. Mr. Neff stated that he used his surveying equipment to plot the location of the tree, tree branches, and electric lines and then uploaded the coordinates into a data collection system software, which was used to generate the survey (Co. Ex. 4, Att. TN-1). He noted that CEI provided him with a copy of the easement from the Cuyahoga County Recorder's Office and that the "212°F" listed on the survey depicts the sag in the line at that temperature. Mr. Neff also stated that the cross-section portion of the survey, which reflects curved dashed lines from the top of the tree to the ground, reflects the path of the tree were it to fall towards the electric line, assuming the pivot point of the fall is at ground level. Further, this line was generated by determining the radius of the Tree's canopy, based on its height. (Co. Ex. 4 at 5-8.)

On further examination, Mr. Neff testified that the horizontal distance from the Tree to the transmission lines was measured when he conducted his survey, but is not depicted in the survey report (Co. Ex. 4, Att. TN-1). Mr. Neff stated that he would have to refer to his field notes for the exact answer, but that the distance is approximately 23 feet. (Tr. at 83.)

Testimony of David Kozy

David Kozy, CEI's general manager, Transmission Engineering, testified in support of the Company's position in the case. Mr. Kozy first noted the serious consequences of vegetation coming into contact with electric lines and the line conditions known as "arcing" and "sagging". Mr. Kozy then testified that electricity can arc or jump from the 138kV transmission line as much as four feet and that wind may blow a transmission line as much as 7.3 feet to the right or left. Mr. Kozy stated that, based on computer simulations, and depending on such factors as temperature, wind, and line load, the sag or the dip further toward the ground of 138kV transmission line can vary as much as nine feet in a single day, 12 feet from season to season, and 27 feet at the line's maximum operating temperature. Further, the hotter an electric line, the lower it tends to sag. (Co. Ex. 5 at 5-7.)

Mr. Kozy testified that, with regard to trees and 138 kV transmission lines, the National Electrical Safety Code requires a minimum horizontal clearance of 9.6 feet and a minimum vertical clearance of 10.1 feet. Mr. Kozy testified that, based on his review of the testimony filed by CEI witnesses Spach and Laverne, his personal observations, and his review of Neff & Associates' survey, he believes that the Tree may interfere, or threaten to interfere with CEI's transmission line, through direct contact, arcing or both. Mr. Kozy stated that, given that the Tree is 25.6 feet high, higher than the lower conductor of the line, if the Tree were to fall in the direction of the line, it would certainly contact the conductor and cause a fault in the line. (Co. Ex. 5 at 7-8.)

Mr. Kozy confirmed that, between his first and last visits to the Corrigans' property, which covered a five or six year span of time, the locations of the Tree and the transmission lines remained the same. Further, the crown of the Tree on the side facing the transmission lines has been cut. Mr. Kozy noted that no part of the Tree is within four feet of the lines. However, while the Tree is not directly underneath the lines, the Tree's position is such that if it falls toward the lines, due to the conductor location and its sag, it will contact the line creating an outage. Mr. Kozy also confirmed that, according to the National Electric Safety Code, the minimal horizontal clearance between a tree and the transmission lines is 9.6 feet. He stated that, at no time, did he observe the Tree encroaching within 9.6 feet of the lines. (Tr. at 91-108.)

Testimony of Rebecca Spach

Rebecca Spach, manager of transmission vegetation management and a certified arborist for FirstEnergy Service Company (FirstEnergy), which provides services to CEL, including transmission vegetation management, testified in support of the company. She testified that FirstEnergy's management of vegetation in the corridor - the areas beneath and around the lines - is carried out according to the company's current vegetation management plan (Plan) and its contractor specifications (Specifications). Ms. Spach testified that the Plan and Specifications generally prescribe a five-year maintenance cycle, during which FirstEnergy inspects and controls all incompatible vegetation (vegetation that will grow tall enough to interfere with the lines) within its transmission corridor. She stated that the width of the transmission corridor varies according to size of the easement obtained by the utility and the voltage of the transmission lines. Ms. Spach testified that the Plan provides for the following: "The clearing of vegetation located in a specified corridor is performed in accordance with pre-established schedules, or as required to ensure line reliability, maintain access, make repairs, or restore service." However, vegetation does not have to be directly underneath a transmission line to be designated for removal. Ms. Spach stated that any vegetation that is located on a transmission corridor and has the potential to interfere with the safe and efficient operation of the transmission system should be removed. As a result, any tree species that can grow tall enough to interfere with a transmission line by either growing into the line or by falling into the line is removed. Ms. Spach stated that, in addition, any tree that is dead or defective that poses a threat to the line must be removed. She noted that pruning may occur in certain limited situations, primarily when the utility does not have an easement granting removal rights. In such cases, vegetation is pruned 25 feet or greater from the conductor of a 138 KV transmission line. (Co. Ex. 6 at 4-8.)

Ms. Spach testified that, if vegetation will grow tall enough to interfere with the lines, then the only certain way to avoid future interference is to remove it. She stated that growth rates of trees are influenced by many variables and that it is difficult to estimate the amount a tree can grow over time. However, FirstEnergy's program does not require the clear cutting of all vegetation inside a transmission corridor. Ms. Spach stated that only vegetation that has the potential to interfere with a transmission line must be removed from transmission corridors. Compatible vegetation, which is vegetation that does not have the potential to grow tall enough to interfere with the lines or with access for making repairs and restoring service, does not need to be removed. (Co. Ex. 6 at 8-9.)

Ms. Spach testified that the species of the Tree is silver maple and that silver maples can grow to a height of 80 feet, with an average growth rate of three to seven feet per year. She noted that the Tree is taller than the middle and lower wires and has grown tall enough to interfere with the transmission lines. In addition, one of the larger branches on the Tree has a large amount of decay at its base and if this branch falls towards the line, it would strike the lower wire. Ms. Spach testified that the Tree has multiple structural defects, and is structurally weak because of decay. She noted that, given the amount of decay and other structural defects, the potential for the Tree to fail is increased. Further, the Tree is thus a defective tree that poses a threat to the transmission lines, and it needs to be removed as soon as possible. (Co. Ex. 6 at 12-13.)

With regard to whether the Tree could be pruned instead of removed, Ms. Spach testified that pruning requires guesswork and that the only certain way to avoid interference with the transmission line is to remove the Tree. She stated that, because of the fast growth rate and potential height of the Tree, it is difficult to estimate how much and how often pruning must be done to ensure that there will be no contact between the Tree and conductors. In addition, given that there are over 6,700 miles of transmission lines to maintain in Ohio (14,000 company-wide), it is unreasonable to require FirstEnergy to prune the Tree, maintain a constant vigil over it, and expect customers to bear the costs. (Co. Ex. 6 at 13-14.)

Ms. Spach testified that it is not reasonable to permit Complainants to assume responsibility for the maintenance of vegetation on their property. She stated that CEI and FirstEnergy are responsible for the transmission lines and that, if Complainants were allowed to maintain vegetation, CEI and FirstEnergy would have no control over vegetation management in the transmission corridor, and other customers might want to do the same as the Corriganes. Ms. Spach testified that, given the implications of tree/line contacts and the expertise required to avoid them, this function cannot be delegated to customers. (Co. Ex. 6 at 14.)

Ms. Spach testified that the Tree interferes with the transmission lines because it is a silver maple tree. She explained that the Tree is located on the transmission easement, and it has the propensity to grow into the transmission line. Also, due to the condition of the Tree, the amount of decay that is in it, a branch could break off, or the Tree could fall over. Ms. Spach stated that the Tree, by the definition in FirstEnergy's Plan, interferes with the transmission lines at the present time. With regard to the health of the Tree, Ms. Spach noted that the Tree has a predominant stem which includes bark that's been pruned numerous times, and it has sucker growth, which means that the Tree, as a result of pruning, has grown back rapidly. Further, there is evidence of decay pockets throughout the Tree, which is taller than the transmission line, and branches potentially could break off and strike the line if the Tree were to fall towards the line. Ms. Spach stated that the Tree's condition existed in

2009, and it has continued to decline to today. She stated that although the Tree is not dying, it is slowly declining. However, the Tree was growing in 2009, it has continued to grow, and it continues to sprout and bear leaves. (Tr. at 134, 157, 189.)

Testimony of Robert J. Laverne

Robert J. Laverne, manager of education and training for the Davy Tree Expert Company and a certified arborist, testified in support of CEI. Mr. Laverne testified that, although the Tree is alive, it has multiple structural defects that increase the likelihood of failure of one or more of the branches or one or both of the co-dominant stems. These defects are caused by the Tree's co-dominant stems with included bark (which prevents strong attachment between the two stems), decay throughout the Tree's crown, and weakly attached branches with associated decay. Mr. Laverne noted that there are multiple pockets of decay. He stated that below a cut where a large branch was removed, there is a support device that attaches the two main stems of the Tree and that, although this support device offers a minimal amount of increased strength, any additional strength provided by the support device will go away as the decay from the cut spreads. (Co. Ex. 7 at 4-6.)

Mr. Laverne testified that the Tree, or parts of it, may interfere or threaten to interfere with the transmission lines that are located to the west of the Tree. He noted that the eastward orientation of the unbalanced crown and the north-south orientation of the co-dominant stems reduces the likelihood that, if the Tree fails from the trunk or roots, it will come in contact with the lines. However, this does not completely eliminate the risk that parts of the Tree could come in contact with the lines. Mr. Laverne testified that, given sufficient force from strong winds, the potential exists for the Tree to fail from the trunk or roots and fall toward the lines. Also, when individual branches within the crown of the Tree are considered, there is an increased likelihood of failure toward the utility lines, particularly with respect to those branches with internal decay. (Co. Ex. 7 at 8.)

Mr. Laverne testified that pruning is not a viable option to remove all parts of the Tree that have the potential to interfere with the transmission lines. He stated that in order to eliminate the possibility of interference with the transmission lines, all of the branches that are tall enough to fall into the lines would need to be removed. However, if this is done, the Tree will either respond, as it has in the past, by quickly growing sucker branches that will occupy the same space in a relatively short amount of time, or so much leaf area may be removed that the Tree will be unable to provide itself with sufficient energy with which to continue living. In addition, the current rate at which internal decay is advancing also precludes pruning as a viable option to eliminate the possibility that the Tree may interfere with the transmission lines. Mr. Laverne testified that the rate of decay is likely beginning to outpace the Tree's ability

to compartmentalize the decay; as a result, the likelihood of the Tree's failure is increasing. (Co. Ex. 7 at 8-9.)

Mr. Laverne testified that the Tree is smaller today than it was in 2009. Further, the Tree is in a state of decline because of the amount of foliage that has been removed, which limits the Tree's ability to engage in photosynthesis. He noted that the crown of the Tree is imbalanced, with the portion of the Tree facing the transmission lines being pretty much removed and with the majority of the Tree facing the Corrigan's house. Further, he noted that the Forest City Tree Protection Company was asked to remove a number of the large branches and to reduce the size of the tree crown. Mr. Laverne testified that, when he observed the Tree in May 2013, the majority of the crown that remains did support live foliage, although there were a number dead branches that did not support live foliage. (Tr. at 222-224.)

Mr. Laverne testified that he did not take a core sample of the Tree and examine the growth rings of the trunk. However, from his knowledge of silver maple trees in general and the rate at which they grow, and the size of this Tree, he estimated it to be between 50 and 65 years old. He stated that silver maples can live to be hundreds of years old. However, the Tree repeatedly was subjected to the large scale removal of foliage, and those pruning sites became established with decay. So, the Tree is closer to the end of its life than it would be if it had not been subjected to this amount of pruning. (Tr. at 225-226.)

Mr. Laverne testified that once decay is established in wood, there is no practical way to remove it. So, decay in wood cannot be cured by fertilization, and no maintenance procedure can be used to limit or arrest the spread of decay. Mr. Laverne stated that there are methods that can be employed to assist the Tree in compartmentalizing the decay. However, trees cannot cure or push out decay. Once the wood is decayed, it will always be decayed. He noted that some tree species are able to build chemical and physical walls within the new wood that is produced, which acts as a barrier to the spread of decay and that some species are better than others at doing so. Mr. Laverne stated that silver maples are not particularly good at compartmentalizing the spread of decay. So, what typically happens is that decay spreads most rapidly in the same direction as the tubes that conduct water throughout a tree. Mr. Laverne stated that it is not uncommon to see a tree with an extensive column of decay in the trunk and branches, and still supporting a full crown of green foliage. (Tr. at 227-229.)

Mr. Laverne testified that he used a method called "sounding" to examine the Tree. With this method, an arborist taps on the outside of the wood with a mallet and listens to any change in the pitch of the taps. Basically, if an area is encountered where the pitch of the tap sounds like rapping on a watermelon, then that is an indicator of

internal decay. Mr. Laverne stated that, both from a sound standpoint, sounding the trunk of the Tree, as well as visually observing decay that is present on the base of the older pruning cuts, it appears that the Tree was able to produce reaction wood at a faster rate than it has done with more recent cuts. (Tr. at 230-231.)

With regard to the rate of the advancement of decay in the Tree, Mr. Laverne testified that, as the amount of leaf area in the tree crown was reduced due to previous pruning operations, and because of branches dying and deadwood being removed, the Tree has a reduced capacity to conduct photosynthesis. He stated that the Tree is no longer able to conduct photosynthesis as it used to when it had a full crown and that, when the photosynthesis rate is diminished, the capacity of the Tree to compartmentalize decay is also reduced. Therefore, the Tree has less energy to grow new wood cells in an attempt to reduce the spread of decay. Mr. Laverne testified that he could state with a high degree of certainty that that rate of spread of decay in the Tree is increasing. (Tr. at 232-233.)

Mr. Laverne testified that the Tree continues to grow as decay continues to spread and, at some point, the decay will exceed the strength of the wood, and the branch, trunk, or roots will fail. So, the Tree may be extensively filled with decay and yet still support living foliage. Mr. Laverne testified that it is not uncommon to see trees with extensive decay that fall over, and as they fall over, they have full crowns of green foliage. He stated that he examined the root collar of the Tree, which is the swell at the base of the trunk as the roots meet the trunk, and the roots that extend just beyond the trunk of the tree. He noted that, on the western side of the Tree, there is evidence of some root decay that may have become established because of the lawn being mowed over the top of the roots. Mr. Laverne explained that silver maples typically have a shallow root system, and if the grass is cut in the area, the lawnmower will frequently clip the top of the roots; and when that happens, decay becomes established. (Tr. at 236-237.)

Mr. Laverne testified that, typically, it is not just gravity that causes a tree to fail. He noted that, more often than not, a tree fails when there is a combination of lost strength through advancing decay, and an external force, which is frequently wind. So, as the decay is spreading in the Tree, over time, it will take less and less external force to cause the Tree, or parts of the Tree, to fail. Mr. Laverne noted that one tall branch in particular, on western side of the Tree, is growing straight up, is weakly attached to one of the trunks, and is decayed at its base. He testified that a 20-mile-per-hour wind could cause the branch to fail and, if it does fail, it will reach the wires. Moreover, he testified that the two trunks of the Tree, which have a weak bark attachment between them, might actually separate on a windy day, and the inherent weakness of the bark attachment between the trunks will cause one or both of the trunks to fail. (Tr. at 238-239, 242-244, 247.)

Mr. Laverne testified that he could say, with a relatively high degree of certainty that portions of the Tree will fail within the next ten years and that, within ten years, the supplemental support system will no longer be attached to the Tree in a meaningful way because of decay that is present. Further, he noted that the Tree is shorter than it was in 2009, because of the work done by the Forest City Tree Company to reduce the canopy height. However, the Tree is still taller than the lowest transmission line, and the Tree's height will be back to its 2009 dimensions if water sprouts (branches that grow very fast and produce leaves at a rapid rate) re-grow on the Tree in their former positions. Mr. Laverne testified that, if the Tree is managed in the same way that it has been managed in the past, one of two things will happen. If crown reduction is repeated, especially if the branches lower than the lowest line are removed, there will be very little leaf area left, and the tree will either re-grow water sprouts, and those will grow straight up in an attempt to resume photosynthesis, or the Tree will run out of energy reserves and die. (Tr. at 251, 257-260.)

Testimony of Stephen Cieslewicz

Stephen Cieslewicz, a certified utility arborist and president and chief consultant at CN Utility Consulting (CNUC), which provides consulting services to utility companies, regulators, and various service providers in the utility vegetation management (UVM) industry, testified in support of CEI. Mr. Cieslewicz explained that, as a result of his experience in the UVM industry and the studies performed by CNUC, he is considered an expert in the field of UVM. Further, Mr. Cieslewicz noted that, he was one of the two principal UVM investigators of the 2003 Northeast blackout for the Federal Energy Regulatory Commission (FERC) in support of the Joint US/Canada Task Force that was convened to investigate the blackout and make recommendations based on the investigation. (Co. Ex. 8 at 1-4.)

Mr. Cieslewicz testified that, as part of the blackout investigation, he was retained by FERC to investigate FirstEnergy's UVM practices. He testified that FirstEnergy had adequate UVM programs in place that reasonably satisfied the industry and regulatory requirements in place at that time. He stated that FirstEnergy's current UVM program, which is significantly more robust now than it was prior to August 2003, includes full enforcement of easement rights, and aerial and foot patrols of transmission lines. He noted that FirstEnergy's current UVM program contains numerous "best in class," attributes and that their current practices appear to be consistent with what he would expect to see in such a UVM program. (Co. Ex. 8 at 16-20.)

Mr. Cieslewicz testified that the NERC Standard FAC-003 Technical Reference, which is the vegetation management standard that has to be adhered to by utilities

across North America, sets forth categories of the types of outages that can occur because of vegetation interfering with transmission lines. Mr. Cieslewicz explained that, under the FAC-003 standards, if the Tree fell over onto the lines, that would be categorized as a category 2 reporting outage. If the Tree was left unmanaged and grew into the lines, that would be a category 1 outage, and if the Tree was located outside of FirstEnergy's easement and fell into the lines, that would be considered a category 3 outage. Mr. Cieslewicz testified that had the Tree not been routinely pruned back within the required clearances, it could have caused a growth-related outage, which would be a category 1 outage. However, it could also fall into the lines, which would be a category 2 outage. (Tr. at 276, 278, 290.)

With regard to people being electrocuted or seriously injured while climbing trees adjacent to energized lines, Mr. Cieslewicz testified that every case he has been involved with in court, after a fatality, fire, or other significant event, fits the same model as the Tree. Mr. Cieslewicz testified that, while he has no information that there was a fatality related to the Tree, if a serious incident had happened, the Tree would have been removed by now. Further, he stated that it is not a good idea to wait for something to happen. (Tr. at 317-318.)

IV. DISCUSSION

The record in this case reveals that CEI's witnesses presented credible, expert testimony with respect to removal of the Tree. Three of CEI's witnesses are certified arborists. They testified that the Tree is decayed at many points within its structure and that, because of this decay, the Tree, or parts of it, are destined to fail and fall into the transmission lines. More specifically, CEI witness Laverne testified that the Tree, while still supporting living foliage, is extensively filled with decay. Mr. Laverne noted that there is a high degree of certainty that portions of the Tree will fail within the next ten years and fall into the transmission lines. He further noted that the support cable that is attached between the two trunks of the Tree will no longer be effective within ten years. CEI witnesses Kozy, Spach, and Laverne all emphasized that the Tree is decayed and needs to be removed in order to preserve the integrity of the transmission lines from the damaging effects that contact with the Tree might cause (Co. Ex. 5 at 7-8; Co. Ex. 6 at 12-13; Tr. at 134, 157; Co. Ex. 7 at 4-6, 8-9; Tr. at 236-237, 244). CEI witnesses Cieslewicz also stressed the public safety aspects of a tree coming into contact with an electric line, and indicated that it would not be prudent to wait for that to happen (Tr. at 318).

CEI witness Spach further testified that prevailing industry practices specify removal of the Tree because it is considered incompatible vegetation, i.e., it has the potential to grow high enough to interfere with the transmission lines. Ms. Spach testified that the species of the Tree is incompatible vegetation with respect to its

growth in CEI's easement because it has a mature height of 80 feet and a growth rate of three to seven feet per year. She observed the Tree and reported that it is taller than the middle and lower transmission lines and has and has grown tall enough to interfere with those lines. (Co. Ex. 6 at 12-13.)

Mrs. Corrigan appeared as the Corrigan's sole witness at hearing. She testified that the Corrigan's want to preserve the Tree because it is a part of their property and a value to their home (Tr. at 30). Mrs. Corrigan testified that the Tree is healthy because it is growing foliage and because other people have told her that the Tree is healthy (Tr. at 35). With respect to Mrs. Corrigan's testimony, the Commission observes that Mrs. Corrigan is not a certified arborist (Tr. at 30-31) and that her opinions about the Tree seem to be based on her personal beliefs and what other people have told her.

The issues of whether the Tree is located in CEI's easement, whether CEI has an easement over the Corrigan's property, and whether the company had the right to remove trees in the easement that threaten its transmission lines have already been determined in the affirmative by the Court. *Corrigan* at 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 17-19. Those issues are thus not for our consideration in this proceeding. Our sole charge in this matter is to determine whether CEI's planned removal of the Tree is reasonable. We note that under Ohio Adm.Code 4901:1-10-27, CEI must submit written programs to the Commission for the inspection, maintenance, repair, and replacement of its transmission and distribution circuits and equipment and that such programs include right-of-way vegetation control. Once submitted, if not acted upon by the Commission within a specified time, the filing is deemed approved. Such written programs (the Plan and Specifications previously noted in CEI witness Spach's testimony, Co. Ex. 6 at 4-5, Att. RS-1 and RS-2), originally filed in January 2001, and most recently amended in April 2010, were submitted by CEI for the Commission's review. The Commission did not act upon the information contained in the filings. Therefore, CEI's April 2010 written programs, which include vegetation control measures, were approved in May 2010. We can find nothing about CEI's planned removal of the Tree that conflicts with its right-of-way vegetation control measures on file at the Commission. The evidence of record reveals that the Tree is decayed extensively and that parts of it are almost certain to fail in the not-too-distant future (Tr. at 251). Moreover, continued pruning will cause the Tree to respond by either re-growing branches at a rapid rate back into the areas that have been pruned, or if pruning is done enough times, the Tree will run out of energy reserves and die (Co. Ex. 7 at 8-9; Tr. at 259-260). Therefore, due to the condition of the Tree, the Commission finds that pruning is not practicable. Further, CEI witnesses Kozy and Cieslewicz presented testimony as to the public safety hazards - including power outages, possible fatalities, and fire - associated with the Tree's continued existence near CEI's transmission lines (Co. Ex. 5 at 5, 8; Tr. at 100, 317-318). Complainants did not rebut the evidence of either the decayed condition of the Tree or

the safety hazards that the Tree, if left standing, might cause. Accordingly, consistent with the facts presented on this record, we find that CEI reasonably determined that the Tree could potentially interfere with its transmission lines.

In addition, as we stated in *In the Complaint of Leo and Cindy Jeffers and Ilene Jeffers v. Toledo Edison Company*, Case No. 10-430-EL-CSS, Opinion and Order (Jan. 23, 2013) at 10-11, because of the danger to customers and because of the unduly burdensome situation that might develop for a utility in trying to enforce its vegetation management policies, the Commission believes that it would be inappropriate for any utility to allow customers to manage vegetation located near power lines in a utility's easement.

The Commission is also mindful that, in the past, we have stated that tree removal should be done only when pruning is not a viable option. *See, Jeffers* at 10. In this case, having found that pruning is not practicable, and considering the decayed state of the Tree and the obvious potential hazards to public safety, we believe that CEI is justified in its planned removal of the Tree. Finally, as we did with the public utility involved in *Wimmer*, Opinion and Order (Jan. 27, 2011) at 10, the Commission would caution CEI that, while the Company should hold safety and reliability paramount when performing vegetation control near its transmission lines, it should try as well to lessen the effect of those control measures on property owners.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) The Corrigans filed a complaint against CEI, on June 10, 2009, contesting CEI's planned removal of a tree located on the Corrigans' property.
- (2) CEI is a public utility as defined by R.C. 4905.02 and an electric light company, as defined in R.C. 4905.03(A)(3).
- (3) On July 1, 2009, CEI filed its answer, admitting in part and denying in part the allegations contained in the complaint.
- (4) A settlement conference was held on August 13, 2009, however, the parties failed to resolve this matter.
- (5) After numerous continuances, a hearing was held on July 25, 2013.
- (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) Due to its condition, pruning the Tree is not practicable.
- (8) CEI's planned removal of the Tree is reasonable under the circumstances presented in this case.

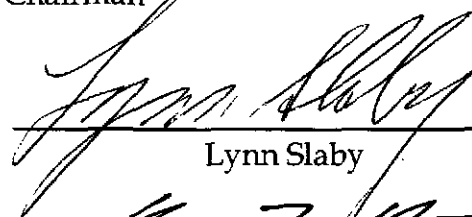

ORDER:

It is, therefore,

ORDERED, That the complaint be denied. It is, further,

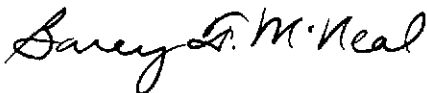
ORDERED, That copies of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman
Steven D. Lesser
M. Beth Trombold
Lynn Slaby

Asim Z. Haque

KKS/vrm

Entered in the Journal
MAR 26 2014



Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

- (1) On June 10, 2009, Mary Martha and Dennis Corrigan (Complainants) filed a complaint against the Cleveland Electric Illuminating Company (CEI), concerning CEI's planned removal of a silver maple tree (the Tree) on the Complainants' property that falls within CEI's easement.
- (2) CEI filed an answer on July 1, 2009, denying, among other things, the material allegations of the complaint.
- (3) By entry issued November 5, 2010, the attorney examiner granted the parties' joint motion for an indefinite continuance until the Commission issued its decision in *In the Complaint of Kurt Wimmer/Wimmer Family Trust v. Ohio Edison Company*, Case No. 09-777-EL-CSS (*Wimmer*). A final appealable order was issued in *Wimmer* on March 16, 2011, and on February 29, 2012, the Ohio Supreme Court rendered a decision in that matter in *Wimmer v. Pub. Util. Comm.*, 131 Ohio St.3d 283, 2012-Ohio-757, 964 N.E.2d 411.
- (4) An evidentiary hearing was held in this case on July 25, 2013.
- (5) On March 26, 2014, the Commission issued its Opinion and Order in this matter. In the Opinion and Order, the Commission found that the planned removal of the Tree on the

Complainants' property by CEI is reasonable under the circumstances presented in this case.

- (6) R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.
- (7) On April 21, 2014, Complainants filed an application for rehearing of the Commission's March 26, 2014 Opinion and Order. In the memorandum in support of the application for rehearing, Complainants assert the following assignments of error:
 - (a) The Order is unreasonable or unlawful as the reliable and probative evidence does not support the finding that trimming and pruning of the Corrigan's Tree is not a viable option.
 - (b) The Order is unreasonable or unlawful in that removal of the Corrigan's Tree contravenes Commission policy to preserve vegetation with removal only when trimming and pruning are not viable options.
 - (c) The Order is unreasonable or unlawful as the reliable and probative evidence does not support the conclusion that the Corrigan's Tree interferes or may interfere with CEI's transmission lines.
- (8) On May 1, 2014, CEI filed a memorandum contra to the Complainants' application for rehearing.
- (9) Complainants argue that the Commission's Opinion and Order is unreasonable and contrary to law because the evidence presented at hearing does not support a finding that pruning is not a viable option or that the Tree has the potential to interfere with CEI's transmission lines. Further, Complainants argue that removal of the Tree contravenes Commission policy of removing vegetation only when pruning is not a viable option. Specifically, the Complainants assert that the evidence presented at hearing confirmed that the dangers of sagging, arcing, or rapid growth were not the driving forces in 2000

when CEI replaced its policy of vegetation management with one of vegetation removal. Complainants argue that, having received proper maintenance and care, the Tree's decades-long history of non-interference with CEI's transmission lines cannot be superseded by CEI's declaration that the Tree suddenly has become incompatible with the transmission lines. Moreover, Complainants note that the Tree stands outside any recognized zone of danger from sagging, arcing, or rapid growth. Thus, CEI's declaration that the Tree is incompatible with its transmission lines is not a reasonable basis to cause severe and adverse consequences to Complainants and their property by removing the Tree. Complainants argue that, in light of the care the Tree has received from Complainants' arborist over the last ten years, it is not reasonable to conclude from the totality of the evidence that the Tree will be ignored and will not receive proper care in the future. Complainants further argue that the prevention of generic public safety hazards with regard to the transmission lines, which have the remotest possibility of being caused by Complainants' Tree, does not constitute probative evidence for the removal of the Tree.

- (10) In addition, Complainants assert that the Commission's policy of approving the removal of property owners' vegetation only when pruning is not a viable option is violated by CEI's program of virtually removing all vegetation. Complainants argue that, to overcome the Commission's policy of vegetation preservation requires CEI to present probative evidence that Complainants cannot properly attend to their Tree. Complainants argue that, as CEI has presented no such probative evidence, the Commission's policy directs that the Tree remain standing. Further, because the Order omitted any discussion or analysis of the Commission's policy of vegetation retention and of vegetation removal only where pruning is impracticable, and because the Order failed to analyze the past ten years of the Complainants' maintenance of their Tree in relation to the Commission's policy of vegetation retention, the Order is unreasonable and unlawful.
- (11) CEI argues that the Commission's March 26, 2014 Opinion and Order correctly found that CEI's planned removal of the Tree is reasonable. CEI points out that the Commission found that CEI's plan to remove the Tree is consistent with its vegetation management plan, which requires removal of vegetation that

has the potential to interfere with a transmission line. CEI further points out that, as established by the evidence, the Tree could potentially interfere with the transmission line by falling or growing into the line and that, given the safety hazards the Tree could cause if left standing, and the extensive decay in the Tree, the Commission determined that pruning the Tree is not a viable option. Furthermore, the Commission found that it would be inappropriate for a utility to allow customers to manage vegetation located near power lines.

- (12) CEI states that Complainants repeat the same arguments that the Commission has already fully considered and rejected. With regard to this contention, CEI notes Complainants' continuing argument that the history of the Tree's co-existence with the transmission line shows that the Tree should not be removed. However, the Commission's Order correctly recognizes that the Tree has matured to where it now is extensively decayed, so that the Tree or parts of the Tree will likely fall in the near future. CEI states that Complainants also continue to make allegations that either ignore or mischaracterize evidence demonstrating that the Tree poses a hazard both to CEI's transmission lines and to public safety, that pruning will not remove these hazards, and that the only way to prevent the Tree from interfering with the line is to remove the Tree. CEI states that the Commission should reject all of Complainants' assignments of error, deny the application for rehearing, and allow CEI to move forward with the removal of the Tree.
- (13) In considering the Complainants' arguments, the Commission finds that it considered all of the evidence presented in this case in its initial Opinion and Order. Moreover, Complainants fail to raise any new arguments for the Commission's consideration in their application for rehearing. In reexamining the evidence presented, the Commission affirms its prior conclusion that the planned removal of the Tree on the Complainants' property by CEI is reasonable under the circumstances presented in this case. Accordingly, the Commission finds that Complainants' application for rehearing should be denied.

It is, therefore,

ORDERED, That Complainants' application for rehearing be denied. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

M. Beth Trombold
M. Beth Trombold

Lynn Slaby

Asim Z. Haque

KKS/vrm

Entered in the Journal

MAY 14 2014

Barcy F. McNeal

Barcy F. McNeal
Secretary

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in

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

Summary: Supreme Court Appeal Notice of Appeal to Ohio Supreme Court electronically filed by Mr. Lester S. Potash on behalf of Corrigan, Mary Martha