

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Daniel R. Birrell,

Complainant,

v.

Ohio Power Company,

Respondent.

Case No. 16-2281-EL-CSS

POST-HEARING BRIEF OF RESPONDENT OHIO POWER COMPANY

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I. INTRODUCTION

On September 16, 2017, a healthy tree located more than 26 feet outside of Ohio Power Company’s (“AEP Ohio” or the “Company”) right-of-way easement fell on transmission and distribution lines, allegedly causing an overvoltage event. At all times relevant, AEP Ohio provided adequate service to its customer, Complainant Daniel R. Birrell, according to all applicable provisions of Ohio law, Public Utilities Commission of Ohio (“Commission”) regulations, and the Company’s tariff. Complainant has not proven otherwise. As set forth below, the Complaint should be denied.

II. STATEMENT OF FACTS

A. The Newcomerstown – East Coshocton 34.5 kV Transmission Circuit and West Lafayette School Distribution Circuit

Complainant resides at 22000 Emerson Street, West Lafayette, OH 43845. AEP Ohio Ex. 1 at 4. His house is included on the Newcomerstown – East Coshocton 34.5 kV transmission circuit. *Id.* at 4-5. This transmission circuit has a 12 kV distribution under-build on the poles as well, identified as the West Lafayette School distribution circuit. *Id.* at 5 and Ex. WAS-1. In

order to provide safe and reliable service, AEP Ohio employs vegetation management practices such as trimming trees inside the right-of-way corridor of the lines. *Id.* at 2.

Easements are fundamental to the Company's vegetation management practices. The applicable easement gives AEP Ohio the right to construct and operate transmission and distribution facilities. *Id.* at 5 and Ex. WAS-3. The easement is a blanket easement that grants AEP Ohio the right to remove any tree that may interfere with the safety of or endanger the operation or maintenance of the transmission or distribution facilities. *Id.* Because the easement is a blanket easement with no prescribed boundaries, AEP Ohio maintains the right-of-way to the initial width of the right-of-way at the time the line was constructed or to an acceptable width to ensure a safe and reliable service. *Id.* In this case, the right-of-way's historical width was determined to be 20 feet from the centerline, which Walter A. Sherry, Distribution Engineering Services Manager and former Forestry Operations Manager for the Company, testified is considered a safe and reliable width for the voltage levels in use. *Id.*

The Company employs similar but distinct vegetation management practices for transmission and distribution lines. Distribution circuits, including the distribution 12 kV underbuilt circuit at issue in this case, are maintained under the Company's distribution vegetation management rider, which allows for each distribution circuit to be cleared end-to-end every four years. *Id.* at 6. The Company's records indicate that the West Lafayette School distribution circuit was cleared completely in May 2014 and is scheduled to be addressed again in 2018 and 2022. *Id.* at 6 and Ex. WAS-5. In the period from January 2014 to June 2017, 1848 trees on the West Lafayette School distribution circuit were trimmed, at a total cost of \$310,620.59. AEP Ohio Ex. 3.

Transmission lines are maintained based on performance. AEP Ohio Ex. 1 at 6. The Company cleared the Newcomerstown – East Coshocton transmission circuit end-to-end in 2005. *Id.* at 6 and Ex. WAS-4. Prior to the September 17, 2016 outage, the transmission circuit at issue had no recorded vegetation management outages since 2005. *Id.* at 6. The transmission circuit is patrolled annually. *Id.* During the patrol, any issue that may need maintenance in the following 12 months is evaluated. *Id.* Since 2005, the Company has spent over \$32,000 conducting vegetation management maintenance on this transmission circuit. *Id.* at Ex. WAS-4.

B. September 17, 2016 Outage

At approximately 5:43 AM on September 17, 2016, a healthy maple tree from outside of the Company’s right-of way fell, damaging the transmission and distribution circuits. *Id.* at 4; Hearing Transcript (“Tr.”) at 11. The maple tree was approximately 46 feet from the circuit centerline, or 26 feet outside of the right-of-way corridor. *Id.* The response crew reported that the maple tree fell from outside the right-of-way, initially came to rest on the transmission line, then broke through all three phases of the 34.5 kV transmission circuit, the 12 kV distribution under-built circuit, and brought down the neutral. *Id.* Complainant alleges that the maple tree’s interference with the lines caused an overvoltage event, which damaged electronic equipment in his house. Tr. At 11-13. By approximately noon that day, crews had restored functionality to the lines and service to affected customers. AEP Ohio Ex. 1 at Ex. WAS-1.

C. The Complaint

On November 29, 2016, Mr. Birrell filed a Complaint requesting that the Company “pay for damage to [his] home occurring on 9-17-2016 due to trees contacting power lines * * *.” Compl. at 1. Mr. Birrell alleges that his property would not have been damaged “[h]ad AEP [Ohio] trimmed trees in 2014 * * *.” *Id.* Mr. Birrell does not contend that AEP Ohio acted

unreasonably in responding to the September 17, 2016 outage and restoring service to his property. *Id.*

III. STANDARD OF REVIEW

As the Commission has long recognized, “a utility cannot insure that a customer will never be without service” and “is not expected to be an insurer of service.” *In the Matter of the Complaint of Robert Sturwold v. The Ohio Bell Tel. Co.*, Case No. 86-577-TP-CSS, Opinion and Order, 1987 Ohio PUC LEXIS 604, *11-12 (June 2, 1987). Rather, Ohio law requires “[e]very public utility [to] furnish necessary and adequate service * * *.” R.C. 4905.22.

In deciding whether a public utility provided adequate service, the Commission considers whether: 1) the cause of an outage or power surge was in the company’s control; 2) the company failed to comply with any statutory or regulatory requirements regarding the operation of its system that could have caused the outage or surge; 3) the company’s actions or inactions constituted unreasonable service; and 4) the company acted responsibly in correcting the problem. *In the Matter of Edward J. Santos v. Dayton Power & Light Co.*, Case No. 03-1965-EL-CSS, Opinion and Order at 9 (Mar. 2, 2005) (“*Santos*”), citing *In the Matter of Miami Wabash Paper, LLC v. The Cincinnati Gas & Elec. Co.*, Case Nos. 02-2162-EL-CSS, *et al.*, Opinion and Order at 7 (Sept. 23, 2003) (“*Miami Wabash Paper*”); *see also In the Matter of David T. Davis v. Toledo Edison Co.*, Case No. 08-864-EL-CSS, Opinion and Order at 7 (Sept. 2, 2009).

AEP Ohio’s Terms and Conditions of Service (“Tariff”) in effect on September 17, 2016 (the date of the incident at issue), which the Commission has reviewed and approved, also bear on whether the Company provided adequate service in this case. *See Miami Wabash Paper* at 4. Pursuant to the Tariff, the Company must “use reasonable diligence in furnishing a regular and

uninterrupted supply of energy but does not guarantee uninterrupted service.” Ohio Power Company Tariff, P.U.C.O. No. 20, Terms and Conditions of Service, Section 19, 1st Rev. Sheet No. 103-16 (eff. June 1, 2015). Although the Company may be liable for damage “directly resulting from interruptions, irregularities, delays, or failures of electric service * * * caused by the negligence of the Company or its employees or agents,” the Tariff is clear that AEP Ohio “shall not be liable for damages in case such supply [of energy] should be interrupted or fail by reason of an act of God” or “breakdowns or injury to machinery, transmission lines, distribution lines[,] or other facilities of the Company.” *Id.*

The burden of proof in complaint proceedings is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1966). If the complainant fails to prove that the utility failed to comply with statutory or regulatory requirements or acted unreasonably in some other manner, then the utility is not responsible for damage to the complainant’s property. *Santos* at 9-10.

IV. ARGUMENT

Complainant has presented no evidence that the Company failed to comply with any statutory or regulatory requirements pertaining to anything that could have caused the September 17, 2016 outage. There is also no evidence demonstrating that the Company violated its Tariff, acted unreasonably, or otherwise provided inadequate service to Mr. Birrell. Rather, the record demonstrates that the tree that fell on the Company’s electric lines, causing the overvoltage event that allegedly damaged Complainant’s property, was a healthy tree outside of AEP Ohio’s right-of-way easement and thus not within AEP Ohio’s control. Moreover, the evidence shows that AEP Ohio adhered to all vegetation management requirements within its right-of-way thus

provided adequate service with respect to the circuit at issue. Accordingly, because AEP Ohio provided adequate service, the Complaint should be denied.

A. The cause of the September 17, 2016 was out of AEP Ohio's control.

Although the PUCO regulates right-of-way vegetation maintenance, *see* O.A.C. 4901:1-10-27, it does not regulate vegetation maintenance outside of the utility right-of-way. It is a basic principle of property law that public utilities are not authorized, and have no duty, to conduct maintenance outside of their easement. *Cottrell v. Am. Elec. Power*, 190 Ohio App.3d 518, 2010-Ohio-4673, 942 N.E.2d 1143, ¶ 18 (holding that a public utility is liable in tort if it exceeds the scope of its easement); *Walker v. Dotson*, 12th Dist. No. CA95-10-071, 1996 Ohio App. LEXIS 1816, *3-4 (May 6, 1996) (holding that an electric utility did not have a duty to maintain a tree outside of its easement), citing *Estate of Durham v. Amherst*, 51 Ohio App.3d 106, 107-108, 554 N.E.2d 945 (9th Dist. 1988).

Here, it is undisputed that the overvoltage event at issue occurred when maple tree fell on AEP Ohio's transmission and distribution lines. AEP Ohio Ex. 1 at 7; AEP Ohio Ex. 2 at 3; Tr. at 89, 100, 105. The record also irrefutably demonstrates that the tree was located approximately 26 feet outside the Company's right-of-way easement. AEP Ohio Ex. 1 at 4; AEP Ohio Ex. 2 at 4; Tr. at 11. Indeed, as Company witness Sherry testified, had the tree been located within or growing into the Company's right-of-way, AEP Ohio would have noticed it during annual helicopter reviews for danger trees. AEP Ohio Ex. 2 at 4. Because the tree was not within AEP Ohio's easement, AEP Ohio had no right to maintain it. Moreover, based upon his observation of the tree at an August 7, 2017 site inspection, Mr. Sherry testified that the tree was healthy and that "there was no reasonable way to tell that [it] could have fallen." *Id.* Accordingly, the Company had no control over the cause of the September 17, 2016 outage. *See Santos* at 9.

B. AEP Ohio provided adequate service and complied with all applicable statutory and regulatory requirements.

As set forth above, the record unquestionably demonstrates that the tree in question was outside of AEP Ohio's right-of-way corridor. The Company also presented substantial evidence that it complied with its standard vegetation management practices within that right-of-way corridor. Specifically, the Company presented reports that reflect the dollars spent and the number of trees trimmed along the Newcomerstown – East Coshocton and West Lafayette School lines in the period prior to the September 17, 2016 outage. *See* AEP Ohio Ex. 1 at Ex. WAS-4 and WAS-5; AEP Ohio Ex. 3. After the August 7, 2017 site inspection, Mr. Sherry testified that he personally observed no vegetation growth that would be considered a threat to the distribution line for the next 18 months. AEP Ohio Ex. 2 at 3. Mr. Sherry also observed areas where transmission forestry crews had trimmed danger trees. *Id.* Mr. Sherry stated there were no observable danger trees or “grow-ins” where a tree was growing into a conductor in the vicinity. *Id.* This would not be the case if, as Complainant alleges, trimming has not occurred in the area at all.

Mr. Sherry's 30 years of utility experience and 8 years as the former Forestry Operations Manager qualifies him to make these vegetation observations. *See* AEP Ohio Ex. 1 at 2-3. Indeed, Mr. Sherry has substantial experience both in the field and in analyzing the Company's business records summarizing and quantifying the Company's vegetation management activities, like those admitted as AEP Ohio Ex. 1, Exs. WAS-4 and WAS-5, and AEP Ohio Ex. 3. Despite Complainant's characterization, Mr. Sherry is an expert with respect to the Company's forestry and vegetation management practices and was unquestionably qualified to observe and verify that the right-of-way corridor was properly maintained. On the other hand, Complainant has offered no evidence apart from mere speculation to support his conjecture that AEP Ohio failed

to adequately maintain the vegetation within the right-of-way corridor along the Newcomerstown – East Coshocton and West Lafayette School circuits. Complainant’s speculation does not satisfy his burden of proof in this complaint case. *Grossman*, 5 Ohio St.2d at 190. Simply put, Complainant has not demonstrated, and cannot demonstrate – in the face of the Company’s substantial evidence to the contrary – that AEP Ohio failed to provide adequate service or failed to comply with its vegetation management requirements within the right-of-way at issue. The Commission should deny the Complaint for this reason as well.

V. CONCLUSION

There was nothing AEP Ohio could have done to prevent the overvoltage event at issue in this case. The healthy tree that fell on transmission and distribution lines from outside of the Company’s right-of-way was outside of the Company’s control. The Company has complied with all applicable statutes and regulations regarding its vegetation management practices. Complainant has presented nothing more than conjecture and speculation to contradict the Company’s evidence on both of those points. Thus, the overwhelming weight of the record evidence demonstrates that at all times relevant to the Complaint, AEP Ohio provided adequate service to Mr. Birrell pursuant to all applicable statutory and regulatory requirements and acted reasonably and in accordance with its Tariff. Consequently, Complainant has failed to meet his burden of proof, and his Complaint should be denied.

Respectfully submitted,

/s/ Ryan Aguiar

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the individual listed below via U.S. mail, postage prepaid, and e-mail this 6th day of October, 2017.

Daniel R. Birrell
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Complainant

/s/ Christen M. Blend

Christen M. Blend

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Summary: Brief - Post-Hearing Brief of Respondent Ohio Power Company electronically filed by Ms. Christen M. Blend on behalf of Ohio Power Company