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November 29, 2017

Public Utilities Commission of Ohio
Docketing Division, 11th Floor
180 East Broad Street
Columbus, Ohio 43215

RE: Notice of Correction to Complainants' Reply Memorandum to Duke Energy Ohio, Inc.'s Memorandum Contra the Motion to Consolidate, Request for Stay and Request for Expedited Ruling of Stay, in Case Nos. 17-2344-EL-CSS, et al.

Dear Sir/Madam:

Complainants submit this notice of correction to the case caption provided in their Reply Memorandum to Duke Energy Ohio, Inc.'s Memorandum Contra the Motion to Consolidate, Request for Stay and Request for Expedited Ruling of Stay, filed in the above-referenced docket on November 28, 2017.

Some case numbers listed in the case caption were incorrect, but have been corrected. There have been no changes to the rest of the filing. Attached hereto is the corrected version.

Should you have any questions or need additional information, please feel free to contact me.

Sincerely,

Kimberly W. Bojko

Kimberly W. Bojko
Counsel for Complainants

708676

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Individual Complaints of Joseph Grossi, Fu Wong and Peony Lo, Bob Schmeling, Melissa and Peter Broome, Melisa Kuhne, Robert Schmeling, Jim and Laura Haid, Olga Staios, Shana Berge, Gregory Hoeting, Richard and Carol Tenenholtz, Tammy and Karl Ross, R. Allen Pancoast, Paul E. Smith, Jason Dimaculangan, John Gump, Chris Hendriksen, Melissa and Brian Weiss, Steve Kahn, Evelyn and Tim King, Anne Wymore, John and Sally Riester, Phillip Griggs, David E. Shewmon, David and Beverly Fenton, Brett Leonard, Timothy H. Jones, Sharon M. Felman, Anita Deye, Clifford W. Fauber, Nicole Menkhaus, Eric Oswald, Jeremy and Carina Henry, James Wulker, Timothy Wilson, Sandra Nunn, Melanie Maughlin, Amber and Chris Francosky, Sean and Emily Hunt, Nicholas Calo, Sanford and Barbara Casper, Mark and Calissa Thompson, Mary and Michael Meno, Michael Preissler, Patricia McGill, Dana and Joy Steller, Mark Wahlquist, Gary Pauly, Emmanuel Black, Elizabeth Vorholt, David and Patricia McLean, Jack C. Daugherty, Steve and Nanci Scmidt, Kathleen Danner, Mr. and Mrs. Jeffrey R. Sims, Julia M. Guy and David A. Guy	)	Case Nos. 17-2126-EL-CSS 17-2170-EL-CSS 17-2172-EL-CSS 17-2173-EL-CSS 17-2176-EL-CSS 17-2180-EL-CSS 17-2181-EL-CSS 17-2182-EL-CSS 17-2183-EL-CSS 17-2184-EL-CSS 17-2185-EL-CSS 17-2186-EL-CSS 17-2187-EL-CSS 17-2188-EL-CSS 17-2191-EL-CSS 17-2192-EL-CSS 17-2195-EL-CSS 17-2196-EL-CSS 17-2197-EL-CSS 17-2201-EL-CSS 17-2203-EL-CSS 17-2205-EL-CSS 17-2206-EL-CSS 17-2207-EL-CSS 17-2208-EL-CSS 17-2209-EL-CSS 17-2210-EL-CSS 17-2211-EL-CSS 17-2213-EL-CSS 17-2214-EL-CSS 17-2219-EL-CSS 17-2220-EL-CSS 17-2221-EL-CSS 17-2222-EL-CSS 17-2223-EL-CSS 17-2224-EL-CSS 17-2225-EL-CSS 17-2262-EL-CSS 17-2263-EL-CSS 17-2267-EL-CSS 17-2268-EL-CSS 17-2269-EL-CSS 17-2270-EL-CSS 17-2302-EL-CSS

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	)	17-2343-EL-CSS
	)	17-2369-EL-CSS
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	)	
	) Case No.	17-2344-EL-CSS
In the Matter of the Complaint of Kim Wiethorn, Karen Dabdoub, Jeff and Linda Sims, Fred Vonderhaar, Donald and Nancy Jacob, James Johnson, Majid Qureshi, Keith Donovan, Julie Reynolds, John Lu, Robert Schneider, Amanda Sachs, John Hasselbeck, Lawrence Hug, Dennis Mitman, Nicole Hiciu, Jason Mayhall, James and Shelley Hoyer, Theresa Reis, Gary Balser, David Siff, and the Symmes Township Trustees	)	

REPLY MEMORANDUM TO DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA THE MOTION TO CONSOLIDATE, REQUEST FOR STAY AND REQUEST FOR EXPEDITED RULING OF STAY (CORRECTED)

I. INTRODUCTION

Complainants Kim Wiethorn, Karen Dabdoub, Jeff and Linda Sims, Fred Vonderhaar, Donald and Nancy Jacob, James Johnson, Majid Qureshi, Keith Donovan, Julie Reynolds, John Lu, Robert Schneider, Amanda Sachs, John Hasselbeck, Lawrence Hug, Dennis Mitman, Nicole Hiciu, Jason Mayhall, James and Shelley Hoyer, Theresa Reis, Gary Balser, David Siff, and the Symmes Township Trustees (collectively, Complainants) hereby submit this reply

memorandum[1] in response to Duke Energy Ohio, Inc.'s (Duke) Memorandum Contra Complainants' Motion to Consolidate, Request for Stay and Request for Expedited Ruling of Stay, pursuant to Ohio Adm. Code 4901-1-12(B)(2).

Throughout its Memorandum Contra, Duke takes the position that litigating essentially the same issues across numerous cases is more efficient than resolving those same issues in a single docket.[2] Although logic may dictate otherwise, Duke reaches the conclusion that in order to achieve the goal of efficiency, the Commission should resolve the one issue that is central to every case that Complainants seek to consolidate—whether Duke has a right to indiscriminately remove its customers' trees and other vegetation and spray the property of those customers with toxic herbicides—repeatedly, across several dockets rather than a single time, in one docket.

For the reasons outlined below, and those stated in Complainants' Motion to Consolidate,[3] the Commission should reject Duke's opposition to consolidating these cases and grant Complainants' Motion to Consolidate.

II. DISCUSSION

The Commission should reject Duke's Memorandum Contra and consolidate these cases in order to efficiently address the common allegations made across various complaints regarding Duke's vegetation management policies and practices and the implementation of its vegetation management plan.

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1 In the Motion to Consolidate, Complainants asked the Commission to consolidate their cases with other individual cases that had been filed with the Commission. Complainants also requested an expedited ruling on its request for stay of Duke's implementation of its vegetation management plan and a stay of the clear cutting and removal of trees and vegetation on the properties of the individual complainants they sought to consolidate. Pursuant to Ohio Adm. Code 4901-1-12(B), a party that requests expedited treatment of a motion is not entitled to a reply. As such, Complainants do not address the requested stay in this Reply, only the Motion to Consolidate, for which they did not request expedited treatment.

2 See Memorandum Contra at 3-4 (November 21, 2017).

3 See Motion to Consolidate, Request for Stay and Request for Expedited Ruling of Stay (November 21, 2017).

A. Complainants Have Satisfied the Requirements for Consolidation Under the Commission's Rules and the Ohio Rules of Civil Procedure.

Duke seeks to have it both ways. On one hand, Duke has requested, in a single pleading filed in each docket that Complainants seek to consolidate, expedited prehearing conferences.[4] On the other hand, Duke avers in its Memorandum Contra Complainants' Motion for Consolidation—filed the very same day as its Motion for Expedited Prehearing Conferences—that these cases do not present "common issues of law," as required by the Ohio Rules of Civil Procedure.[5] In sum, Duke attempts to simultaneously gain the benefits of putting all the complaints under the same legal umbrella when doing so, in its estimation, advances its own position and is convenient and more efficient. But Duke desires to treat the cases separately, when doing so also advantages the Company and is more burdensome for the Complainants. As described below, Complainants meet the requirements for full, and not just selective, consolidation.

Ohio courts and the Commission have traditionally looked to four factors to determine whether consolidation is appropriate:

i. Whether there is substantial commonality of question of law and fact among all of the involved cases.

ii. Whether the parties are substantially the same in all of the involved cases.

iii. Whether consolidation is an efficient use of resources.

iv. Whether consolidation would unduly delay or otherwise prejudice the issues raised in the separate cases.[6]

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4 See Motion for Expedited Prehearing Conferences at 4 (November 21, 2017).

5 See Memorandum Contra Motion to Consolidate, Request for Stay, and Request for Expedited Ruling of Stay (Memo Contra) (November 21, 2017).

6 See Civ. R. 42(A); *Waterman v. Kitrick*, 60 Ohio App.3d 7, 13-14, 572 N.E.2d 250 (10th Dist. 1990) (citing *Dir. of Highways v. Kleines*, 38 Ohio St.2d 317, 319, 313 N.E.2d 370 (1974)); see also *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is*

As an initial matter, Duke does not contend that the parties are not substantially the same in all of the involved cases. Instead, it argues that the cases do not share common questions of law and that consolidation is not efficient because it would delay the conclusion that Duke sees as inevitable: that it will be able to arbitrarily lay waste to its customers' trees and vegetation. This conclusion, however, is neither inevitable nor a relevant consideration in determining how best to manage the litigation of the issues presented in this case.

In opposing the consolidation, Duke argues that the cases do not include common issues of law or fact.[7] First, as stated previously, Duke implied that these cases could be treated as one when it filed a single Motion for Expedited Prehearing Conferences. Second, the cases do in fact present common questions of law or fact. At their core, each case concerns the vegetation management practices and policies of Duke and the implementation of its recently modified vegetation management plan. Each case also involves Duke's plan to clear cut along and around the same transmission line within a particular area of its service territory. Moreover, many of the complainants have the same or similar easement that is also germane to the complaints. Duke has also sent the same or similar notices and threats of legal actions to complainants across these cases. Finally, Duke has served numerous discovery requests on the individual complainants (even the individual complainants of the joint complaint) that are substantially similar.

Duke strangely asserts that not all of the complaints involved in this motion dispute "the Company's right to act in accordance with its approved Program for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines," citing only the complaint filed

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Approved, as a Merged Company (collectively AEP Ohio) for an Increase in Electric Distribution Rates, at al., Case Nos. 11-351-EL-AIR, et al., Entry at 5-6 (November 1, 2011) (adopting these four factors in considering a motion to consolidate cases before the Commission).

[7] Id.

by Bob Schmeling in Case No. 17-2172-EL-CSS.[8] It would, of course, be bizarre if any complainant filed a complaint against Duke regarding its plan to clear cut customers' trees and said complainant did not actually contest Duke's right to do so. Indeed, Mr. Schmeling's complaint says, "I have no objection to trimming of trees, as previously practiced by Duke Energy, however *I object to the total destruction of all trees located within the easement.*"[9] The remaining individual complainants share similar concerns, questioning whether Duke has the authority to clear cut their trees and vegetation pursuant to their respective easements and/or the Commission's rules.

Duke next contends that consolidation would not be efficient due to the fact that it has already filed dispositive motions regarding the standing of some of the involved complainants and may file—but has not as of yet—additional dispositive motions relating to the Commission's jurisdiction over certain claims made against Duke.[10] The standing issues Duke has raised and the jurisdictional issues it suggests, like the rest of the issues in these complaints, are the same across all cases. For example, should the Commission adopt Duke's position, which Complainants dispute below, that customers not directly situated in the path of Duke's easement do not have standing to bring these claims, that determination would be the same for every customer who has complained and does not own property on the easement. If the Commission so chose, which Complainants believe it should not, it could just as easily dismiss those complainants from a consolidated case as dismiss them in individual cases.

If it is true that not all complaints currently before the Commission have merit, consolidation poses no barrier to the Commission's ability to terminate those specific

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8 Id. at 3.

9 *In the Matter of the Complaint of Bob Schmeling v. Duke Energy*, Case No. 17-2172-EL-CSS, Complaint at 1 (October 23, 2017) (emphasis added).

10 See Memo Contra at 3-4.

complaints. Ultimately, the general legal issues will be the same across all Complainants: whether Duke may engage in indiscriminate clear cutting of customers' trees and vegetation and the unmitigated use of toxic herbicides that will affect the land and a water resource for many communities, whether a customer must own property subject to Duke's easement in order to have standing, and over which sorts of claims the Commission has jurisdiction.

Finally, Duke advances that litigating dispositive motions in a consolidated action—as opposed to in more than fifty individual claims—"will prolong the disposition of matters and delay the Company's ability to engage in those activities . . ."[11] Duke does not offer evidence to support the claim that litigating repetitive issues in dozens of cases will be less time consuming than litigating each of those issues only once. With this contention, Duke also proceeds as if its "ability to engage in those activities" is a foregone conclusion and the only matter to be decided in these cases is the timetable for doing so. In reality, its rights to clear cut trees and vegetation and spread herbicides and/or the manner in which it is completed are very much at issue here, and given that those issues have not been resolved in Duke's favor, the Commission should not prioritize the acceleration of Duke's possible return to those practices over proper consideration and litigation of the cases.

B. The Fact that Some Complainants Do Not Own Property that Duke Seeks to Decimate Does Not Bar Those Complainant's Claims.

In its Memorandum Contra, Duke raises the issue that some individual complainants, as well as some of the Complainants who are already parties to this case, do not own land that is covered by Duke's easements and therefore do not have standing to bring these claims against Duke.[12] The Commission should reject Duke's narrow interpretation of whom its vegetation

[11] Id at 4.

[12] See Memo Contra at 2-3.

management practices and policies affect. All complainants, both those joined in the initial Complaint and those whom Complainants now seek to consolidate, are Duke's customers. Duke's decisions regarding the provision of electric distribution service create an impact across its service territory that all customers feel, whether or not their property is directly located on Duke's easements. Furthermore, as argued in the Complaint, some of Duke's vegetation management practices and policies are not confined to the property where the activities occur or where its vegetation management plan is implemented.

Pursuant to R.C. 4905.26, the Commission has jurisdiction over complaints that a public utility is providing service that is unjust or unreasonable. Duke's decision to deploy extreme and unnecessary vegetation management techniques that will impact property values and have other environmental effects is unjust and unreasonable as it relates to customers who do not have trees on their property that are slated to be cut down, just as it is for those customers who will see their own trees leveled. Though customers located on the easements may see *greater* harm, customers outside of those easements are still being served unjustly and unreasonably.

Moreover, the Complaint does not limit its allegations to clear cutting. Complainants also allege that Duke is using toxic herbicides that are polluting nearby Polk Run Creek. Customers do not need to reside on Duke's easements in order for this practice to harm them. In addition to decreasing property values in the community, use of herbicides makes the area less safe for all who live there. Complainants contend that this is another unjust and unreasonable aspect of Duke's service, and, as such, have standing to bring this Complaint. Thus, pending motions to dismiss for lack of standing regarding claims of off-easement complaints do not pose a barrier to the consolidation of these matters.

C. The Commission has Jurisdiction over Every Claim Raised by the Complaints that Complainants Seek to Consolidate.

Duke also contends that the Commission does not have jurisdiction over all allegations brought by the various Complainants at issue in this motion.[13] The Ohio legislature has vested the Commission with jurisdiction over complaints that "any service furnished by [a] public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust . . ."[14] Duke construes this language to only include complaints that question whether services are consistent with Duke's approved programs for the maintenance of its high voltage transmission system.[15] As seen in the language quoted above, however, the statute authorizing complaints as to service does not support such a narrow reading of the Commission's jurisdiction.

Duke asserts in its Memorandum Contra that these possible jurisdictional challenges relate to specific allegations made by "certain Complainants."[16] Duke goes on to argue that the potential for future motions created by the jurisdictional issues it perceives in this case should be a bar to consolidation.[17] Yet, despite having been aware of some of these complaints for over a month, filing numerous answers and serving individual Complainants (even those who are members of the Joint Complaint) with voluminous and burdensome discovery requests within eight days of being served the Complaint, Duke has not yet found time to raise these "potential" jurisdictional challenges other than to use them as a shield against consolidation in its Memorandum Contra. The possibility that Duke may raise a legal argument in the future is insufficient grounds to deny consolidation.

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13 See id. at 3-4.

14 R.C. 4905.26.

15 See Memo Contra at 4.

16 See id.

17 See id.

III. CONCLUSION

The Commission should deny Duke's objections to consolidation and consolidate the cases listed in Complainants' Motion to Consolidate. Doing so will lead to a more fair and efficient resolution of the common dispute at issue in each of these cases.

Respectfully submitted,

/s/ Kimberly W. Bojko
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing reply was filed and served on November 28, 2017, by electronic mail upon all parties of record.

/s/ Kimberly W. Bojko
Kimberly W. Bojko
Counsel for Complainants

This foregoing document was electronically filed with the Public Utilities

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Case No(s). 17-2126-EL-CSS, 17-2170-EL-CSS, 17-2172-EL-CSS, 17-2173-EL-CSS, 17-2176-EL-CSS,

Summary: Reply Memorandum to Duke Energy Ohio, Inc.'s Memorandum Contra The Motion To Consolidate, Request For Stay And Request For Expedited Ruling Of Stay (Corrected) electronically filed by Mrs. Kimberly W. Bojko on behalf of Complainants