

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Citizens)	
Against Clear Cutting, <i>et al.</i> ,)	
)	
Complainants,)	
v.)	Case No. 17-2344-EL-CSS
)	
Duke Energy Ohio, Inc.,)	
)	
Respondent.)	

APPLICATION FOR REHEARING

In this proceeding, the Public Utilities Commission of Ohio (Commission) has, without evidentiary support and without legal authority, granted injunctive relief to Complainants while at the same time putting public safety and the reliability of electric service at risk for all the other customers of Duke Energy Ohio, Inc. (Duke Energy Ohio). Pursuant to Revised Code (R.C.) 4903.10 and Ohio Administrative Code (O.A.C.) Rule 4901:1-35, Duke Energy Ohio hereby files this application for rehearing of the Commission's Entry dated March 8, 2018.

As explained in more detail in the attached Memorandum in Support, the Commission's Entry in this case is unreasonable and unlawful on the following grounds:

1. The Commission's Entry is unreasonable and unlawful because the Commission lacks authority to issue an injunction or injunctive relief to stay Duke Energy Ohio's transmission vegetation management program.
2. The Commission's Entry is unreasonable and unlawful because the Commission issued its order without engaging in any due process.

Duke Energy Ohio respectfully requests that the Commission modify its Entry as discussed herein.

Respectfully submitted,

/s/ Elizabeth H. Watts

Rocco O. D'Ascenzo (0077651)

Deputy General Counsel

Elizabeth H. Watts (0031092)

Associate General Counsel

DUKE ENERGY OHIO, INC.

139 East Fourth Street

1303-Main

P.O. Box 960

Cincinnati, Ohio 45202

Telephone: (513) 287-4320

Rocco.D'Ascenzo@duke-energy.com

Elizabeth.Watts@duke-energy.com

Robert A. McMahon (0064319)

Eberly McMahon Copetas LLC

2321 Kemper Lane, Suite 100

Cincinnati, Ohio 45206

(513) 533-3441 (telephone)

(513) 533-3554 (fax)

bcmahon@emclawyers.com

Attorneys for Duke Energy Ohio, Inc.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Citizens)	
Against Clear Cutting, <i>et al.</i> ,)	
)	
Complainants,)	
v.)	Case No. 17-2344-EL-CSS
)	
Duke Energy Ohio, Inc.,)	
)	
Respondent.)	

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

I. INTRODUCTION

Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) submits the following memorandum to the Public Utilities Commission of Ohio (Commission) in support of its Application for Rehearing of the Commission's Entry (Entry) denying Duke Energy Ohio's interlocutory appeal. The Company alleges two errors for the Commission's consideration and urges the Commission to reverse the conclusions referenced herein in its Entry on Rehearing.

II. BACKGROUND

Duke Energy Ohio, as a public utility in Ohio, is required pursuant to Ohio and Federal law to inspect, maintain, repair, and replace transmission and distribution system facilities to provide safe and reliable service to its customers at all times. Pursuant to O.A.C. Rule 4901:1-10-27(E)(1), the Company must establish and comply with written programs, policies, and procedures that describe its programs for compliance, including maintenance of right-of-way

vegetation control. Duke Energy Ohio's particular program was filed on April 28, 2016, and approved by the Commission as of 46 days thereafter.¹ Such approved programs are vital to the Company's ability to manage the safety and security of its system and to provide service to all customers within its service territory.

Duke Energy Ohio maintains 1607 miles of circuits, 734 miles of which are 138kV lines. The Complainants in this proceeding reside along one of five transmission rights-of-way, all of which provide clearances for 138kV conductors that comprise a loop network system surrounding the Ohio/Kentucky service territory and serving as the main conduit from the Company's 345 kV system to the 69kV system.

The easements relevant to this case were obtained in the 1950s and the line was built in 1952. The neighborhoods in which the Complainants live were developed after the construction of the line. Thus, all of the Complainants acquired property along the Company's right of way with full knowledge of the existence of the easement and the lines themselves.

In maintaining the overall 138kV system and these circuits in particular, the Company had completed 21.44 of the 27.35 miles of these combined circuits prior to encountering problems with respect to the properties owned by the Complainants. In the midst of this important work, the Commission directed the Company to stop its vegetation management program for the pendency of this case. Due to the Company's inability to work on the approximately sixty-eight properties concerned, vegetation management has come to a standstill along these five circuits.

The Company has inspected the right of way along these five circuits and estimates that there are approximately 81 trees that pose an imminent hazard to safety. The hazards have been

¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of Revised Paragraph (f) of its Programs for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines*, Case No.16-915-EL-ESS.

classified according to severity and the most severe have been or will be addressed.² However, there are many more trees of concern that continue to grow, especially with the onset of the spring growing season, and which continue to pose a reliability hazard to all of Duke Energy Ohio's customers. The Commission's overbroad and unlawful order staying the Company's vegetation management on all of Complainants' properties presents an existing and growing risk to the safety and reliability of Duke Energy Ohio's transmission lines.

1. The Commission's Entry is unreasonable and unlawful because the Commission lacks authority to issue injunctive relief to stay Duke Energy Ohio's transmission vegetation management program.

It is well settled in Ohio that the Commission is a creature of the General Assembly and may exercise no jurisdiction or powers except as expressly conferred by statute.³ As the Ohio Supreme Court held in *Penn Central*, "The General Assembly has granted the power of injunctive relief solely to the courts in Ohio. It has conferred no such right upon the Public Utilities Commission, and the commission, in exercising such power, has exceeded its statutory jurisdiction."⁴

The Commission stated, in its Entry affirming the Attorney Examiner's ruling, that it "favors" a four-factor test for the issuance of a stay. The four-factor test originates from a dissenting opinion in *MCI Telecommunications v. Pub. Util. Comm.*, that is not helpful in this context because that case involved a question as to whether a stay of a Commission order was

² See Joint Motion to Revise Stay, (April 3, 2018).

³ See, *Penn Cent. Transp. Co. v. Public Utilities Com.*, 35 Ohio St. 2d 97, 99, 298 N.E.2d 587, 589 (1973), paragraph 1 of the syllabus, citing *Toledo v. Pub. Util. Comm.* (1939), 135 Ohio St. 57; *Akron & Barberton Belt Rd. Co. v. Pub. Util. Comm.* (1956), 165 Ohio St. 316; *Baltimore & Ohio Rd. Co. v. Pub. Util. Comm.* (1968), 16 Ohio St. 2d 60; *Ohio Bus Line v. Pub. Util. Comm.* (1972), 29 Ohio St. 2d 222; see also, *Ohio Mfrs' Asso. v. Public Utilities Com.*, 46 Ohio St. 2d 214, 217 (1976) ("the commission possesses no power or authority except that conferred and vested in it by statute"); *In the Matter of the Complaint of Harry G. Dworkin Complainant, v. East Ohio Gas Co.*, Case No. 88-1716-GA-CSS, 1989 Ohio PUC LEXIS 230, *2 ("The Commission lacks jurisdiction to grant injunctive relief"); *In the Matter of the Complaint of Richard Powell, d.b.a. Scioto Lumber Company, Complainant, v. The Cincinnati Gas & Electric Co.*, Case No. 88-916-GE-CSS, 1988 Ohio PUC LEXIS 674, *4 ("As also correctly pointed out by CG&E, the Commission is without jurisdiction to award the type or relief [injunctive] sought by Complainant").

⁴ *Id.* at 101

appropriate in that case, not a stay imposed by the Commission of lawful utility conduct.⁵ Even if the four-factor test that the Commission says it favors were applicable, the Attorney Examiner failed to address that test in the stay order. Further, in its Entry denying the Company's interlocutory appeal, the Commission merely mentioned the alleged test but entirely failed to explain its view of the how the four factors applied in this situation.

Here, the Attorney Examiner clearly disregarded the binding precedent in *Penn Central* and exceeded the Commission's statutory authority by granting the Complainants' motions and ordering Duke Energy Ohio to "stay its vegetation management plan and stay the clear cutting and removal of Complainants' trees and vegetation on their properties during the pendency of this complaint," as set forth in the November 16, 2017, Entry. On its face that order is an unlawful injunction.

The Commission likely recognized this infirmity in its ruling, as it claimed, in its Entry, that "[n]either the Commission nor the attorney examiner has granted injunctive relief."⁶ The Commission's Entry then incorrectly cited a case to support this assertion. The cite provided, *Corrigan II*,⁷ was offered to demonstrate that the Supreme Court of Ohio has acknowledged that the Commission had issued a stay of a utility's vegetation management program. However, *Corrigan II* involved a question of jurisdiction with respect to utility vegetation management programs generally and the question of a stay was never raised or addressed in any respect. In *Corrigan II*, the Supreme Court affirmed that the utility vegetation management program and practices were within the Commission's jurisdiction as opposed to a trial court. Indeed, the *Corrigan II* case was on appeal from the Eighth District Court of Appeals (Ohio). Thus, citation to *Corrigan II* in this case was of no assistance.

⁵ *MCI Telecommunications v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 606, 510 N.E.2d 806(1987).

⁶ Entry at ¶20 (March 8, 2018)

⁷ [Corrigan v. Illuminating Co., 151 Ohio St. 3d 85, 2017-Ohio-7555, 86 N.E.3d 287, 2017 Ohio LEXIS 1687](#)

Also of no assistance or relevance is the Commission's reliance upon other cases that admittedly are distinguishable from the facts and issues here.⁸ In one sentence the Commission notes "that attorney examiners have previously granted stays in complaint cases regarding electric utilities' vegetation management plans, **albeit under more limited circumstances.**" (emphasis added) Then, after citing the inapposite decisions, the Commission claimed that the stay in this case is somehow "consistent with the Commission's established practice in similar cases." None of the cited cases is at all similar to this case. Here, 68 Complainants, who live in multiple neighborhoods along different transmission lines, joined together in filing a Second Amended Complaint. Without considering any evidence to support the Complainants' request for a stay, the Commission granted a blanket stay of Duke Energy Ohio's vegetation management at all 68 Complainants' properties, thereby essentially shutting down the Company's vegetation management along five transmission lines. The breadth of the Commission's unlawful stay in this case differs completely from stays previously granted by attorney examiners.

Nor is the Commission's claimed distinction between this case and *Penn Central* of any assistance. While the facts of *Penn Central* may differ, the Ohio Supreme Court's statement that the Public Utilities Commission of Ohio has no injunctive authority was quite clear. Thus, for that purpose, *Penn Central* is controlling here.⁹

The Commission's response to this argument was that it has authority pursuant to R.C.4928.11, which authorizes the Commission to adopt rules for service quality, safety, and reliability. Likewise, the Commission stated that it has authority under R.C.4905.26 to determine whether an electric utility has violated or failed to comply with any provision of

⁸ Entry at ¶22

⁹ *Penn Cent. Transp. Co. v. Public Utilities Com.*, 35 Ohio St. 2d 97, 99, 298 N.E.2d 587, 589 (1973)

R.C.4928.01 through R.C.4928.15, or any rule or order adopted under those sections. The Commission correctly states that these statutes give the Commission authority for the purposes stated. There is no dispute that the Commission has such authority under these statutes. However, none of them gives the Commission authority to issue injunctive relief of the kind granted in this case

2. The Commission's Entry is unreasonable and unlawful because the Commission issued its order without engaging in any due process.

Despite the significance of these transmission lines, and the fact that there is no issue in this case as to whether or not the Company maintains a lawful easement along this right-of-way, the Commission has, without any record support, directed the Company to cease work on Complainants' properties during the pendency of this case. This creates a dangerous precedent that invites future complainants to interrupt the work of any Ohio utility with potentially frivolous complaints at the risk of service and safety to all other customers. For these reasons, the Commission's actions here are unreasonable and unlawful.

The Attorney Examiner's Entry granting a stay of the Company's vegetation management simply referenced the Complainant's request and then granted it. There had been no reply to Complainant's assertions as the Company had not yet filed an answer to the complaints. The Company was not given any opportunity to reply even on an expedited basis. There was no record upon which to grant or deny any motion. Moreover, although the Commission denies having granted injunctive relief, it now seeks to justify the Attorney Examiner's ruling with reference to a four-factor test first referenced in a dissenting opinion in *MCI Telecommunications v. Pub. Util. Comm.*¹⁰ The test was discussed in a dissenting opinion

¹⁰ *MCI Telecommunications v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 606, 510 N.E.2d 806(1987).

with regard to the granting of a stay, which as a legal matter constitutes injunctive relief. Thus the Commission belies its own argument.

The *MCI Telecommunications* case cited by the Commission involved a question as to whether a stay of a Commission order was appropriate in that case, not a stay imposed by the Commission of lawful utility conduct. In his dissent, Justice Douglas recognized:

Orders of the Public Utilities Commission have effect on everyone in this state – individuals, business and industry. When the commission issues an order, after the thorough review generally given by the commission and its experts, a stay of that order should only be given after substantial thought and consideration – if at all, and then only where certain standards are met. These standards should include consideration of whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; whether or not, if the stay is issued, substantial harm to other parties would result; and above all in these types of cases, where lies the interest of the public.¹¹

While the *MCI Telecommunications* case dealt with a stay of the Commission's Order, as opposed to a stay imposed by the Commission, if the Commission wishes to apply this four-factor test in reliance upon Justice Douglas' recommendation, then it should be willing to adopt the entirety of Justice Douglas' directives. However, the Commission is necessarily applying this test absent any record with which to support its ruling. Even if the four-factor test were appropriate in this case, neither party has been given an opportunity to explain how that test may apply to the facts of this case. The Commission's Entry even states that neither the Complainants nor Duke has demonstrated that they are likely to prevail on the merits.

The Commission goes to great length to discuss the question of whether Duke Energy Ohio would suffer substantial harm if a stay is in place during the pendency of the litigation. The Entry specifically identifies matters not addressed by Duke Energy Ohio. However, the Company was never, at any time, given the opportunity to address these matters because it was

¹¹ *Id.*

not given any notice or opportunity to be heard prior to the imposition of the stay. The Commission also notes that the Company has failed to articulate any specific reliability issues that have now prompted it to “clear cut” trees on Complainants’ property, thereby accepting, without evidence of record, that the Company engages in “clear cutting” in the first place.

The Complainants and the Company should have been given an opportunity to argue the facts in relation to the standards in the four-factor test if that is what the Commission chose to apply. In this case, the four-factor test cannot be applied as there is no record in the case. Indeed, as an example, the Commission’s Order uses a term that has been suggested by Complainants, “clear cutting” without any understanding of its implications or any fact upon which to base its belief that the Company engages in such a practice. The Company has no such practice. But apparently the Commission already believes this to be an underlying fact. It is for these reasons, that the Commission should have invited comments or convened a hearing in order to establish cause for its order. Under such circumstances, imposition of a stay is unreasonable and unlawful. For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission modify its Entry as discussed herein.

Respectfully submitted,

/s/ Elizabeth H. Watts

Rocco O. D'Ascenzo (0077651)

Deputy General Counsel

Elizabeth H. Watts (0031092)

Associate General Counsel

DUKE ENERGY OHIO, INC.

139 East Fourth Street

1303-Main

P.O. Box 960

Cincinnati, Ohio 45202

Telephone: (513) 287-4320

Rocco.D'Ascenzo@duke-energy.com

Elizabeth.Watts@duke-energy.com

Robert A. McMahon (0064319)

Eberly McMahon Copetas LLC

2321 Kemper Lane, Suite 100

Cincinnati, Ohio 45206

(513) 533-3441 (telephone)

(513) 533-3554 (fax)

bcmahon@emclawyers.com

Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 9th day of April, 2018, to the following:

/s/ Elizabeth H. Watts
Elizabeth H. Watts

Kimberly W. Bojko
Stephen E. Dutton
Brian W. Dressel
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
bojko@carpenterlipps.com
Dutton@carpenterlipps.com
dressel@carpenterlipps.com

Counsel for Complainants

Terry L. Etter
Zachary E. Woltz
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4313
terry.etter@occ.ohio.gov
Zachary.woltz@occ.ohio.gov

Counsel for Office of the Ohio Consumers' Counsel

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/9/2018 5:09:54 PM

in

Case No(s). 17-2344-EL-CSS

Summary: Application for Rehearing electronically filed by Carys Cochern on behalf of Watts, Elizabeth H. Ms.