

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMPLAINT OF
LYNN E. MATTHEWS,**

COMPLAINANT,

CASE NO. 18-1585-EL-CSS

v.

DUKE ENERGY OHIO, INC.,

RESPONDENT.

ENTRY

Entered in the Journal on December 3, 2018

{¶ 1} On October 19, 2018, Lynn E. Matthews (Complainant) filed a complaint against Duke Energy Ohio, Inc. (Duke). In addition to other allegations, Complainant alleged that Duke is attempting to indiscriminately remove trees on his property without making a determination that the trees actually pose a risk and complete removal is necessary. Complainant further alleged that without such a determination, Duke has no authority to engage in the practice. Lastly, Complainant requested that the Commission order Duke to stay its implementation of its current vegetation management plan, as it relates to the property, during the pendency of this complaint.

{¶ 2} On November 8, 2018, Duke filed an answer to the complaint and generally denied Complainant's allegations. Duke also set forth affirmative defenses, including that Complainant failed to set forth reasonable grounds for complaint. However, Duke did not address whether the Commission should grant Complainant's request to stay all vegetation management activities on Complainant's property, including clear cutting and removal of Complainant's trees, during the pendency of this matter.

{¶ 3} Via Entry dated November 20, 2018, the attorney examiner directed Duke to respond to Complainant's request to stay Duke's implementation of its current vegetation management plan on Complainant's property while this matter is before the Commission.

{¶ 4} On November 27, 2018, Duke filed a response. In its response, Duke indicates that Complainant's request to stay vegetation management on his property should be denied because the Commission does not have the statutory authority to grant this request. Duke further explains that the Commission has no equitable authority to grant this injunctive relief. Moreover, Duke states that even if the Commission had the authority to grant injunctive relief, granting such injunctive relief without due process is unlawful. In support of these contentions, Duke cites to *Penn Cent. Transp. Co. v. Public Utilities Comm.*, 35 Ohio St. 2d 97, 99, 298 N.E.2d 587, 589 (1973).

{¶ 5} Initially, the attorney examiner notes that Duke's reliance on *Penn Central* is misplaced. It is well-settled that the Commission has jurisdiction over issues involving a utility's vegetation management plan. R.C. 4928.11 authorizes the Commission to adopt rules that specify minimum standards for service quality, safety, and reliability for noncompetitive services supplied by an electric utility. Pursuant to this authority, the Commission adopted Ohio Adm.Code 4901:1-10-27, which requires, among other things, that electric utilities establish programs for right-of-way vegetation control. Ohio Adm.Code 4901:1-10-27(E)(1)(f). R.C. 4928.16 states that the Commission also has jurisdiction under R.C. 4905.26 to determine whether an electric utility has violated or failed to comply with any provision of R.C. 4928.01 through 4928.15 or any rule or order adopted or issued under those sections. Here, Duke has filed a vegetation management plan with the Commission as required by Ohio Adm.Code 4901:1-10-27, and, to the extent Complainant has challenged the propriety of this plan, the matter falls squarely within the Commission's exclusive jurisdiction under R.C. 4905.26 and 4928.16.

{¶ 6} Moreover, the facts in this case are dissimilar from those presented in *Penn Central*. In that case, the Commission asserted that it had jurisdiction to inquire into violations of R.C. 4959.01 and 4959.11, which impose statutory obligations on railroads to maintain open drainage outlets and destroy weeds growing within the railroad's right-of-way. As the Supreme Court of Ohio held, R.C. 4959.01 and 4959.11 imposed duties directly upon the railroad and did not grant enforcement rights to the Commission. Consequently,

when the Commission ordered mandatory performance of those duties, it assumed a power of injunctive relief which exceeded its statutory jurisdiction. *Penn Cent.*, 35 Ohio St. 2d at 99-100, 298 N.E.2d at 589-90. In this case, the Complainant has filed a complaint under R.C. 4905.26 alleging that Duke's practices under the vegetation management plan required by Commission rules are unjust and unreasonable. This case involves Commission-promulgated rules for reliability programs rather than statutory duties placed directly on Duke, and the Commission, pursuant to R.C. 4928.16(A)(2), has full enforcement authority over such reliability programs, including vegetation management plans.

{¶ 7} Next, in considering motions to stay, the Commission favors the four factor test outlined in *MCI Telecommunications v. Pub. Util Comm.*, 31 Ohio St.3d 604, 606, 510 N.E.2d 806 (1987). The four factors are:

- (a) Whether there is a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Whether the stay would cause substantial harm to other parties; and
- (d) Where the public interest lies.

{¶ 8} With regard to the first factor, the attorney examiner finds that at this juncture, neither Complainant nor Duke has demonstrated that they are likely to prevail on the merits of this matter. Complainant has only summarily concluded that clear cutting will cause irreparable injury to him without considering whether clear cutting may address potential reliability and safety concerns with regard to the provision of electric service. On the other hand, Duke mentions that it has an established and ascertainable right to clear cut trees under its vegetation management plan filed with the Commission and through two grants of easement it holds on Complainant's property. Although Duke has an approved vegetation management plan, it does not preclude Complainant from challenging Duke's

practices under it pursuant to R.C. 4905.26. Duke also does not explain why its current need to clear cut vegetation is necessary, despite only trimming vegetation in the past.

{¶ 9} Furthermore, the Commission has granted a stay, modified subsequently at the request of the parties, in a case involving similar claims against Duke by property owners in the same geographic area as in this case. *Citizens Against Clear Cutting*, Case No. 17-2344-EL-CSS (CACC Case), Entry (March 8, 2018). Finally, it is established Commission practice for an attorney examiner to grant stays in complaint cases regarding electric utilities' vegetation management plans. *In re the Complaint of Mary-Martha and Dennis Corrigan v. The Cleveland Elec. Illum. Co.*, Case No. 09-492-EL-CSS, Entry (July 29, 2009) at 4, Entry (Mar. 2, 2010) at 2; *In re the Complaint of Kurt Wimmer/Wimmer Family Trust v. Ohio Edison Co.*, Case No. 09-777-EL-CSS, Entry (Nov. 17, 2009) at 3, Entry (Dec. 17, 2009) at 2, Entry (Feb. 3, 2010) at 2; *In re the Complaint of Karl Friederich Jentgen, et al. v. Ohio Edison Co. and American Transmission Systems, Inc.*, Case No. 15-0245-EL-CSS, Entry (Feb. 11, 2015) at 2, Entry (Mar. 13, 2015) at 3, Entry (Dec. 14, 2015).

{¶ 10} Second, based on the facts presented, Complainant would suffer irreparable harm absent the stay. Pursuant to the Commission's authority under R.C. 4905.26 and 4928.16, it is necessary to take action to preserve the trees and vegetation that are the subject of this litigation in order to ensure that the Complainant's claims are preserved.

{¶ 11} Third, the attorney examiner finds that Duke would not suffer substantial harm if a stay is in place during the pendency of this litigation. Duke has failed to articulate any specific reliability issues that have now prompted it to clear cut trees on Complainant's property as opposed to its prior practice of trimming service. Likewise, Duke has not demonstrated why it cannot continue with its vegetation management plan in other parts of its service territory and return to the Complainant's area when this proceeding has been completed. Further, Duke has not demonstrated that it will be subject to undue expense as a result of the stay. Consequently, a stay for a limited time during these proceedings is unlikely to cause Duke substantial harm.

{¶ 12} Fourth, with respect to the public interest, as noted above, at this point in the proceedings, Duke has failed to articulate any specific reliability issues that have now prompted it to clear cut trees on Complainant's property as opposed to its prior practice of trimming trees. Moreover, Duke has not demonstrated that reliability of service is at risk due to the stay. Furthermore, the attorney examiner notes that the Commission has already stated that it intends to expeditiously resolve this matter in order to mitigate any risk to the public interest in reliable electric service. *CACC Case*, Entry (March 8, 2018).

{¶ 13} With regard to Duke's contention that the Commission cannot grant a stay without affording Duke due process, the attorney examiner notes that Duke has had two separate opportunities to respond to Complainant's request for a stay. Initially, Duke had the opportunity to respond to Complainant's request in its answer to the complaint, but elected not to do so. The attorney examiner then afforded Duke a second chance to respond to Complainant's request by Entry dated November 20, 2018. Consequently, the attorney examiner finds that Duke has had ample opportunity to address its concerns regarding Complainant's request and, thus, was afforded sufficient due process as to this narrow issue.

{¶ 14} However, in response to Duke's concerns regarding the continued provision of safe and reliable service to its customers, the attorney examiner will authorize Duke to trim and prune trees on Complainant's property that come within 15 feet of a transmission or distribution line at issue during the pendency of this case, but will permit a greater clearing distance for the 345 kilovolt (kV) transmission line if a clearance distance beyond 15 feet is required in order to comply with North American Electric Reliability Corporation (NERC) standards. Apart from the modification to allow a greater clearing distance to comply with applicable NERC standards on the 345 kV transmission line, Duke is directed to adhere to the terms of the modified stay in place in the *CACC Case* and related cases, granted via Entry dated July 11, 2018. The attorney examiner notes that maintaining consistency in the application of all trimming and pruning activities, where practicable, will ensure safe and reliable electric service without prejudicing Complainant and other, similarly situated property owners located in the geographic area. Similar to the notice to

be provided to property owners in the *CACC Case*, the attorney examiner instructs Duke to directly contact and provide 72 hours notice to Complainant. Duke should also instruct its tree trimming personnel and representatives performing vegetation management work to knock on the door or ring the doorbell in an attempt to provide personal notice to Complainant of their intent to perform vegetation management prior to starting that work. Accordingly, upon considering and balancing the four-factor test for a stay outlined in *MCI Telecommunications*, the attorney examiner grants Complainant's request for a stay, subject to the limitations described above.

{¶ 15} Finally, to allow parties to continue exploring a resolution of the complaint, the attorney examiner schedules a prehearing conference on January 16, 2019 at 11:00 a.m. at the offices of the Commission, 180 East Broad Street, Columbus, Ohio 43215. Visitors should register at the lobby desk and then proceed to the 11th floor in order to participate in the hearing.

{¶ 16} If a settlement is not reached at the conference, the attorney examiner may conduct a discussion of procedural issues including discovery deadlines, possible stipulations of fact, and potential hearing dates.

{¶ 17} Pursuant to Ohio Adm.Code 4901-1-26(F), the representatives of the public utility shall investigate the issues raised in the complaint prior to the settlement conference. All parties attending the conference shall be prepared to discuss settlement of the issues raised and shall have the requisite authority to settle those issues. In addition, the parties shall bring with them relevant documents that are necessary to cultivate an understanding of the issues raised in the complaint and to facilitate settlement negotiations.

{¶ 18} As is the case in all Commission complaint proceedings, the complainant has the burden of proving the allegations of the complaint. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That Duke abstain from clear cutting any trees and/or vegetation within the utility easement on Complainant's property during the pendency of this case, except to the extent authorized in this Entry. It is, further,

{¶ 21} ORDERED, That Duke be authorized to create a 15-foot clearance distance between trees and vegetation and the nearest transmission line by utilizing trimming and pruning techniques and be permitted a greater clearing distance if a clearance distance beyond 15 feet is required in order to comply with NERC standards. It is, further,

{¶ 22} ORDERED, That Duke provide notice to Complainant in the manner described in Paragraph 14 prior to performing any vegetation management work. It is, further,

{¶ 23} ORDERED, That a prehearing conference be scheduled in accordance to Paragraph 15. It is, further,

{¶ 24} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Anna Sanyal

By: Anna Sanyal
Attorney Examiner

JRJ/mef

This foregoing document was electronically filed with the Public Utilities

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in

Case No(s). 18-1585-EL-CSS

Summary: Attorney Examiner Entry restricting vegetation management and setting a prehearing conference for 1/16/19 at 11:00am at the Commission offices electronically filed by Ms. Mary E Fischer on behalf of Anna Sanyal, Attorney Examiner, Public Utilities Commission