

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Citizens Against Clear Cutting, et al.,)	
)	
Complainants,)	
)	
v.)	Case No. 17-2344-EL-CSS
)	
Duke Energy Ohio, Inc.,)	
)	
Respondent)	

**INITIAL BRIEF IN SUPPORT OF CONSUMERS
BY
INTERVENOR, THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

Utilities' vegetation management programs should balance the needs of the utility to provide reliable service with the interest of property owners. In this case, the Complainants¹ allege that the vegetation management plan of Duke Energy Ohio, Inc. ("Duke"), and the plan's implementation, involve the destruction of customers' trees and other vegetation in a 100-foot right-of-way under five transmission lines across several communities. They contend that Duke's vegetation management plan and practices are unjust, unreasonable, and in violation of Ohio law.

The Complainants seek to prevent the continuation of Duke's unlawful vegetation management policies and practices on Complainants' properties. The Office of the Ohio

¹ Complainants are defined as the 65 property owners that are located on the 100-foot right-of-way below five transmission circuits identified by Duke and who wish to pursue the Complaint. *See* Third Amended Complaint filed simultaneously herewith.

Consumers' Counsel ("OCC") intervened in this case on behalf of all Duke customers who may be affected by Duke's vegetation management plan.²

Complainants and OCC have shown that Duke's amended vegetation management plan, filed in April 2016, is a marked departure from its previous plan for transmission rights-of-way, despite Duke's characterization of the changes as not substantive.³ The previous plan emphasized working with and communicating with property owners regarding the removal of trees from transmission rights-of-way. The amended vegetation plan, however, emphasizes Duke's "right to cut down and remove vegetation" from the rights-of-way.⁴ This does more than "clarify and make terms more coherent," as Duke claimed in its application to change the vegetation management policy.⁵

As discussed in the hearing, Duke changed its vegetation management philosophy from "maintenance" to what is called "Integrated Vegetation Management." "Maintenance" allowed some trees in the wire zone and trimmed them periodically so they would not pose a risk to the transmission lines. But Integrated Vegetation Management is more aggressive. It is the complete removal of all trees and some other vegetation within the wire zone ostensibly to allow shorter vegetation to grow there.⁶ In some instances it begins with complete clearing of the land. This concept is not discussed in the vegetation management plan Duke submitted to the PUCO in 2016.

² OCC filed a motion to intervene in this case on February 5, 2018.

³ See Complainants-OCC Joint Exhibit 1A (Williams Supplemented Testimony), Attachment JDW-3 at 1.

⁴ See *id.* at 5.

⁵ *Id.* at 1.

⁶ See Duke Ex. 2 (Adams testimony) at 6.

The PUCO should grant Complainants the relief they seek. The PUCO should find that Duke's practice of clear-cutting vegetation is unlawful. Duke should be required to revert to the vegetation management program that was in effect immediately prior to April 2016 and be barred from implementing an Integrated Vegetation Management program that involves clear-cutting vegetation in rights-of-way without the property owner's permission. This should apply to all Duke customers, including the Complainants.

II. RECOMMENDATIONS

- A. The PUCO should find that Duke mischaracterized the changes to its vegetation management programs in April 2016 as not substantive, which misled the PUCO and the public regarding the nature of Duke's vegetation management program for transmission lines.⁷**

The PUCO's rules require electric companies to "establish, maintain, and comply with written programs, policies, procedures, and schedules for the inspection, maintenance, repair, and replacement of its transmission and distribution circuits and equipment."⁸ The written program must address vegetation control in rights-of-way.⁹ The plan, along with supporting justification and rationale based upon generally accepted industry practices and procedures, must be filed with the PUCO.¹⁰ Likewise, all revisions or amendments (including modification to a current program, addition of a new program,

⁷ This argument relates to Count III of the Second Amended Complaint.

⁸ Ohio Adm. Code 4901:1-10-27(E)(1).

⁹ Ohio Adm. Code 4901:1-10-27(E)(1)(f).

¹⁰ Ohio Adm. Code 4901:1-10-27(E)(2).

or elimination of an existing program) must be filed with the PUCO as outlined in Ohio Adm. Code 4901:1-10-27(E)(2).¹¹

The Complainants in this case allege that Duke mischaracterized the changes to its vegetation management program in Case No. 16-915-EL-ESS. As a result, according to the Complainants, Duke's filing in that case lacked the supporting justification and rationale required by the PUCO's rules. Thus, the Complainants contend, Duke's current vegetation management program is unjust and unreasonable and in violation of R.C. 4905.22. OCC agrees.

Duke filed its last revised inspection, maintenance, repair, and replacement program on April 28, 2016 in Case No. 16-915-EL-ESS.¹² In its application in that case, Duke asserted that there were no substantive changes to the plan.¹³ Duke represented that the changes "simplify and make the terms more coherent."¹⁴ In reality, the changes were substantive and altered the relationship between Duke and its customers so that the needs and desires of customers regarding the maintenance of transmission rights-of-way were no longer considered.

In Case No. 16-915-EL-ESS, Duke amended section (f) of its vegetation management program pertaining to vegetation management of its electric lines. This section allowed a minimum clearance between vegetation and the transmission lines of fifteen feet.¹⁵ But the program also provided that for routine clearance of "circuit" lines,

¹¹ Ohio Adm. Code 4901:1-10-27(E)(2).

¹² OCC-Complainants Joint Ex. 1A (Williams Supplemented Testimony), Attachment JDW-3.

¹³ *Id.* at 1.

¹⁴ *Id.*

¹⁵ *Id.* at 7.

the removal of trees whose trunks were more than ten feet from the conductor should be approved by the Duke Forester before work was to begin.¹⁶

The program went on to state: “In the absence of a legal right to remove, *and* excluding an emergency situation, a signed permission notice must be obtained from the property owner or their agent prior to removing such brush or trees.”¹⁷ In other words, the previous program required Duke to obtain a signed permission notice from the property owner or agent to remove brush or trees unless Duke had a legal right to do so *and* there was an emergency situation. The language did not specify the type(s) of circuit lines it was referencing.

Duke’s previous vegetation management program required coordination with customers before removing trees.¹⁸ Duke acknowledged that its previous vegetation management program was intended to avoid contention with property owners.¹⁹ That is not the case now. Contrary to Duke’s claim in its application in Case No. 16-915-EL-ESS, the new program is substantively different from the previous program.

Gone are all references to getting property owners’ permission to remove brush or trees from the right-of-way. Instead, the new section (f) places no limitation on “Duke Energy Ohio’s right to cut down and remove vegetation from a Duke Energy Ohio corridor when Duke Energy Ohio had a legal right to do so, e.g., statute, recorded easement grant, easement by prescription, license, condemnation order, etc.”²⁰ But

¹⁶ *Id.* at 9.

¹⁷ *Id.* (emphasis added).

¹⁸ *See id.*, pages 8-9 (Duke must contact and receive approval from the property owner or agent “absent a legal right to remove and excluding an emergency situation”). *See also* Tr. Vol. II at 252-253.

¹⁹ *Id.*, Attachment JDW-8 (Duke’s response to CACC INT-05-045).

²⁰ *See id.*, Attachment JDW-3 at 5.

except in rare circumstances, such as a condemnation order, nothing in the new vegetation plan explains how it would be determined that Duke has the right to cut down and remove vegetation – or who would make that determination. Duke would unilaterally determine the limitations of its rights to cut down and remove vegetation in its easements to consumers' property. This is a marked change from the previous vegetation management program.

At first, Duke held fast to its claim that the change in the vegetation management program only clarified section (f). But now Duke has acknowledged that the application involved a substantive change in the vegetation management program. Witness James D. Williams, on behalf of both OCC and Complainants, testified that Duke now admits that it changed its line clearing policy from a “policy of maintenance” to an integrated vegetation management (“IVM”) program.²¹ As Duke witness Adams stated in his written testimony, Duke has changed its philosophy toward vegetation management.²²

At hearing, Duke witness Adams testified as follows: “There’s a big difference in what we’ve done historically as maintenance versus management and that’s the whole philosophy of IVM. IVM is – from a utility vegetation-management perspective, IVM is a much broader preventative approach than just managing clearances.”²³

Mr. Adams described integrated vegetation management as a “reclamation” project.²⁴ In essence, the vegetation currently in the right-of-way is removed so that new,

²¹ *Id.* at 9.

²² Duke Ex. 2 (Adams testimony) at 8.

²³ Tr. Vol. II at 249.

²⁴ Duke Ex. 2 (Adams testimony) at 8.

much lower vegetation can replace it.²⁵ All trees within the wire zone must go, even if they do not pose an actual threat to the transmission lines.²⁶ This new plan, along with Duke's assertion that it has an absolute right to remove any and all trees within the rights-of-way on customers' property, is at the heart of this case.

Duke claims that the policy of maintenance was unsustainable.²⁷ But this assertion was not included in Duke's application to amend its vegetation management program. This, even though Duke initiated its integrated vegetation program in Ohio in late 2015,²⁸ months before Duke filed its application. The term "integrated vegetation management" is not even mentioned in Duke's application in Case No. 16-915-EL-ESS.²⁹

Duke's application in Case No. 16-915-EL-ESS was misleading regarding the nature of the changes to Duke's vegetation management program. The application thus did not have the supporting justification or rationale required by the PUCO's rules. Duke's vegetation management program is unjust and unreasonable, and violates R.C. 4905.22. The PUCO should find for the Complainants on this issue.

²⁵ See Tr. Vol. III (McLoughlin) at 599.

²⁶ See Tr. Vol. II (Adams) at 267.

²⁷ OCC-Complainants Joint Ex. 1A (Williams Supplemented Testimony), Attachment JDW-06.

²⁸ See Tr. Vol. I at 250.

²⁹ See *id.* at 340.

B. Duke's clear-cutting of trees around transmission lines is unjust and unreasonable, does not consider the needs of the consumers who own the property on which Duke has been granted an easement, and should be prohibited.³⁰

Duke has begun implementing its vegetation management program described in Case No. 16-915-EL-ESS. But Duke is not conducting vegetation management in the rights-of-way on the Complainants' properties consistent with the program.

As Complainants' witness Tim Back observed, Duke treats vegetation differently depending on whether the vegetation is in the "wire zone," the "border zone," or the "peripheral zone."³¹ For the 69 KV transmission lines at issue in this case, the wire zone extends 15 feet past the outermost conductor on both sides of the tower.³² For the 138 KV transmission lines at issue in this case, the wire zone extends 20 feet past the outermost conductor on both sides of the tower.³³ No trees of any kind are permitted in the wire zone; only low-growing shrubs and grasses.³⁴ The border zone extends from the edge of the wire zone to the edge of the right-of-way.³⁵ Only trees that do not exceed a height of 15 feet are allowed in the border zone.³⁶ The peripheral zone is outside the right-of-way and adjacent to the border zone.³⁷ Trees are allowed in the peripheral zone,

³⁰ This argument relates to Counts II and IV of the Second Amended Complaint.

³¹ Complainants Ex. 35 (Back testimony), Attachment J at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.* See also Complainants Ex. 14 (Wiethorn testimony) at 6, 9.

³⁵ Complainants Ex. 35 (Back testimony), Attachment J at 2.

³⁶ *Id.*

³⁷ *Id.*

but Duke states that trees with canopies may be subject to pruning or removal³⁸ – even though they are outside the easement granted to Duke.

None of these concepts are discussed in Duke’s vegetation management program filed at the PUCO. And in banning all trees from the wire zone, Duke does not take into consideration whether the tree’s height at maturity would cause any threat to the transmission lines. *Every* tree in the wire zone must be removed. No exceptions.

Mr. Back discussed the unreasonableness of Duke’s vegetation management practice. He noted that Duke bases its determination on whether a tree is in the wire zone or the border zone strictly on the location of the tree’s base.³⁹ He stated that the danger a tree or other vegetation may pose regarding contact with transmission lines is often unrelated to its ground position.⁴⁰ Nevertheless, Duke uses the location of the tree’s base as the single criterion for determining whether to remove a tree in the right-of-way.

Duke should, but does not, consider the tree’s growth characteristics. Mr. Back pointed out that a tree whose base is only 19 feet away horizontally from the outermost conductor of a 138 KV line would be in the wire zone.⁴¹ Thus, the tree would be removed entirely, regardless of the tree’s height or potential risk to the transmission lines. But if the tree’s base is 21 feet from the outermost conductor of the 138 KV line, it would be in the border zone.⁴² Thus, the tree could be pruned instead of removed. The difference of two feet from the outside conductor could mean the difference between

³⁸ *Id.*

³⁹ Complainants Ex. 35 (Back testimony) at 8-9.

⁴⁰ *Id.* at 9.

⁴¹ *Id.* at 8-9.

⁴² *Id.* at 9.

removing a tree and pruning it, even though it may pose the same risk to the transmission lines.

Further, Mr. Back noted that Duke could use alternatives to the complete removal of trees within the right-of-way. He suggested using various pruning techniques or growth regulators on trees as ways to allow them to stay in the right-of-way without posing a risk to transmission lines.⁴³ Duke apparently will not even consider such methods for retarding the growth of trees. This is unreasonable.

It is also unreasonable that Duke no longer considers the rights of property owners when removing trees from the wire zone area. As Duke witness Adams noted, Duke through the years accommodated property owners' desires regarding the presence of trees in wire zones.⁴⁴ This accommodation was consistent with Duke's prior vegetation management program.⁴⁵ As a result of Duke's prior policy, some Complainants planted trees and shrubs in the right-of-way based on Duke's prior recommendations regarding acceptable vegetation.⁴⁶ In addition, some Complainants came to expect that Duke would continue to work with them regarding vegetation in the transmission rights-of-way.⁴⁷

That is not the case anymore. As part of its reclamation project, Duke is unilaterally removing all trees and brush from the right-of-way without the property

⁴³ *Id.* at 13-14.

⁴⁴ Duke Ex. 2 (Adams testimony) at 8-9.

⁴⁵ *See* Tr. Vol. II at 319-320.

⁴⁶ *See* Complainants Ex. 13 (Staios testimony) at 3-4.

⁴⁷ *See id.* at 2-3.

owner's consent.⁴⁸ Several Complainants testified that Duke personnel made it clear that all trees and brush in the right-of-way would be removed, regardless of the property owner's wishes.⁴⁹ Duke's plans included the use of herbicides, even if the customer objected.⁵⁰

Duke's reclamation efforts have resulted in problems on many consumers' properties.⁵¹ And this is not a short-term situation. Mr. Adams stated that it "will take several years for the reclamation strategy to be fully implemented and yield results."⁵² In the meantime, consumers' rights would suffer. Complainant Mackey testified that he was told his property would have the appearance of "craters on the surface of the moon."⁵³ He also testified that the Duke representative said it would take a year before there would be even minimal growth of grass where the trees had been removed.⁵⁴ This is not balancing Duke's need to maintain the right-of-way with the interest of the property owners.

Duke's practice of clear cutting is also inconsistent with information on Duke's website concerning vegetation management. Duke's website contains an informational

⁴⁸ See Complainants Ex. 5 (Grossi testimony) at 5; Complainants Ex. 17 (Kuhne testimony) at 8; Complainants Ex. 16 (Vonderhaar testimony) at 6-9; Complainants Ex. 11 (Preissler testimony) at 9 (quoting Duke representative Holton as saying Duke is "clear cutting everything"); Complainants Ex. 6 (Gump testimony) at 8; Complainants Ex. 18 (Mitman testimony) at 3; Complainants Ex. 3 (Dabdoub testimony) at 4-5; Complainants Ex. 7 (Haid testimony) at 3; Complainants Ex. 12 (Schmidt testimony) at 5; Complainants Ex. 4 (Fick testimony) at 3-4.

⁴⁹ See Complainants Ex. 9 (Mackey testimony) at 7; Complainants Ex. 15 (Bryant testimony) at 2.

⁵⁰ See Complainants Ex. 9 (Mackey testimony) at 4.

⁵¹ See Complainants Ex. 16 (Vonderhaar testimony) at 4; Complainants Ex. 8 (Hiciu testimony) at 2. Erosion is also an issue for some property owners. See Complainants Ex. 16 (Vonderhaar testimony) at 4; Complainants Ex. 18 (Mitman testimony) at 5.

⁵² Duke Ex. 2 (Adams testimony) at 9.

⁵³ See Complainants Ex. 9 (Mackey testimony) at 4.

⁵⁴ *Id.*

section called “Vegetation Management: Keeping the Lights On.”⁵⁵ Under the “Pruning vs. cutting down” portion of the website, Duke states: “Each tree must be considered individually.”⁵⁶ But Duke is not assessing each tree to determine the “health and proximity to the lines of each tree”⁵⁷ in determining whether to prune a tree or remove it. Several complainants testified that, to their knowledge, Duke has not performed an assessment of the trees in the right-of-way on their properties.⁵⁸

In addition, Duke has not studied the situation along the transmission lines in question to determine whether the “reclamation strategy” will improve reliability for consumers. Duke claimed that the new vegetation management program would protect and maintain the safety and reliability of the transmission system.⁵⁹ However, Duke has performed no studies, analysis, reviews, or any other similar actions to determine the impact of the vegetation management program on the number of outages on the transmission lines at issue in this case.⁶⁰

The Complainants have shown that Duke’s implementation of its revised vegetation management program is unjust and unreasonable, in violation of R.C. 4905.22. The PUCO should find for the Complainants and order Duke to revert to its prior vegetation management program.

⁵⁵ *See id.* at 8.

⁵⁶ *Id.* at 8 and Attachment I at 3.

⁵⁷ *Id.*

⁵⁸ *See id.* at 7-8; Complainants Ex. 5 (Grossi testimony) at 3; Complainants Ex. 14 (Wiethorn testimony) at 12; Complainants Ex. 11 (Preissler testimony) at 10; Complainants Ex. 6 (Gump testimony) at 10; Complainants Ex. 18 (Mitman testimony) at 4; Complainants Ex. 3 (Dabdoub testimony) at 5-6; Complainants Ex. 7 (Haid testimony) at 4; Complainants Ex. 10 (Menkhaus testimony) at 5; Complainants Ex. 4 (Fick testimony) at 5.

⁵⁹ OCC-Complainants Joint Ex. 1A (Williams Supplemented Testimony), Attachment JDW-7 (Duke’s response to CACC INT-01-007).

⁶⁰ *Id.*, Attachment JDW-9 (Duke’s response to CACC INT-05-023).

III. CONCLUSION

For many years consumers in Duke's service territory were able to work with Duke regarding the management of vegetation in rights-of-way containing transmission lines. As a result of recommendations by Duke, many of the Complainants in this case purchased and planted trees and shrubs in the right-of-way on their property. Now, Duke has changed its policy and has unilaterally determined to cut, mow, and poison the very vegetation Duke recommended that the Complainants plant.

This change in vegetation management policy was unlawful. It was done through a mischaracterization of Duke's new vegetation management program in Case No. 16-915-EL-ESS. And the change is unjust and unreasonable because it treats all trees as if they present the same harm to transmission lines, even though some trees do not grow to a height that places transmission lines at risk.

The Complainants in this case have proven their allegations against Duke. The PUCO should find for the Complainants and provide them the relief they seek: find that Duke acted unlawfully in changing its vegetation management program; find that Duke acted unlawfully in implementing its new vegetation management program; continue the stay of Duke's vegetation program for transmission rights-of-way; and order Duke to revert to its previous vegetation management program for transmission rights-of-way until it is properly changed. The PUCO should make its decision applicable to Duke's entire Ohio service area so that no consumer is harmed by Duke's unlawful actions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief was served upon all parties of record via electronic mail on December 17, 2018.

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