

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF  
PHILLIP HAMMER,

COMPLAINANT,

CASE NO. 19-1586-EL-CSS

v.

DUKE ENERGY OHIO, INC.,

RESPONDENT.

## ENTRY

Entered in the Journal on September 27, 2019

{¶ 1} On August 15, 2019, Phillip Hammer (Complainant) filed a complaint against Duke Energy Ohio, Inc. (Duke). In addition to other allegations, Complainant alleged that Duke is attempting to remove 30 or more trees on his property located in Batavia Township in Clermont County, Ohio, without determining that the trees actually pose a risk and complete removal is necessary. Complainant further alleged Duke's legal department has advised him that only Duke contractors can trim trees on his property, and he is not allowed to retain his own arborist to do the same. Lastly, Complainant requested that the Commission order Duke to stay its implementation of its current vegetation management plan, as it relates to his property, during the pendency of this complaint.

{¶ 2} On August 26, 2019, Duke filed an answer to the complaint and generally denied all of Complainant's allegations. Duke also set forth affirmative defenses, including that Complainant failed to set forth reasonable grounds for complaint. With regard to the Complainant's request to stay all vegetation management activities on Complainant's property during the pendency of this matter, Duke stated that the Commission is without jurisdiction to resolve issues of equity. Further, Duke stated that any vegetation management activities in which it may engage are permissible under express grants of easement and consistent with its Programs for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines, Section(f), as approved on June 13, 2016.

{¶ 3} Upon review, the attorney examiner notes that 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, which was approved on June 13, 2016. 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.

{¶ 4} 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.

{¶ 5} 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 the trees in question never

posed an issue previously, without considering whether removal of trees may address potential reliability and safety concerns with regard to the provision of electric service currently. On the other hand, Duke mentions that it has an established and ascertainable right to conduct vegetation management activities through a grant of easement it holds on Complainant's property and under its vegetation management plan filed with the Commission. 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 remove the trees in question is necessary.

{¶ 6} 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 a neighboring geographic area as in this case. *Citizens Against Clear Cutting*, Case No. 17-2344-EL-CSS (CACC Case), Entry (Mar. 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. 15-245-EL-CSS, Entry (Feb. 11, 2015) at 2, Entry (Mar. 13, 2015) at 3, Entry (Dec. 14, 2015).

{¶ 7} 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.

{¶ 8} 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 remove trees on Complainant's

property as opposed to its prior practice of trimming these particular trees. 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 this proceeding is unlikely to cause Duke substantial harm.

{¶ 9} Fourth, with respect to the public interest, as noted above, at this point in the proceeding, Duke has failed to articulate any specific reliability issues that have now prompted it to remove 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 (Mar. 8, 2018).

{¶ 10} To ensure that Duke continues to provide 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. 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 Duke's service 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.

{¶ 11} Finally, to allow parties to continue exploring a resolution of the complaint, the attorney examiner schedules a settlement conference for October 29, 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 settlement conference.

{¶ 12} 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.

{¶ 13} 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.

{¶ 14} 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).

{¶ 15} It is, therefore,

{¶ 16} ORDERED, That Duke abstain from removing 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,

{¶ 17} ORDERED, That Duke be authorized to create a 15-foot clearance distance between trees and vegetation and the nearest transmission or distribution line, as further described in Paragraph 10, by utilizing trimming and pruning techniques. It is, further,

{¶ 18} ORDERED, That Duke provide notice to Complainant in the manner described in Paragraph 10 prior to performing any vegetation management work. It is, further,

{¶ 19} ORDERED, That a settlement conference be scheduled in accordance with Paragraph 11. It is, further,

{¶ 20} 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

SJP/mef

**This foregoing document was electronically filed with the Public Utilities**

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**Case No(s). 19-1586-EL-CSS**

Summary: Attorney Examiner Entry Ordering a stay of vegetation management in accordance with this Entry; Setting a settlement conference for 10/29/19 at 11:00 am at the Commission offices. electronically filed by Ms. Mary E Fischer on behalf of Anna Sanyal, Attorney Examiner, Public Utilities Commission