

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., to Amend its) Case No. 20-944-EL-ESS
Transmission and Distribution Inspection,)
Maintenance, Repair and Replacement)
Programs Pursuant to Section 4901:1-10-27)
Ohio Administrative Code, Regarding)
Electric Companies.)

REPLY COMMENTS OF DUKE ENERGY OHIO, INC.

On May 15, 2020, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) submitted an application (Application) to amend the vegetation management portion of its Transmission and Distribution Inspection, Maintenance, Repair, and Replacement Programs (Programs), pursuant to Section 4901:1-10-27(F)(1) of the Ohio Administrative Code (O.A.C.). With the Application, the Company attached a clean version of its proposed vegetation management program incorporating all changes (Amended VM Program) and a copy of the existing vegetation management program currently approved (Previous VM Program).

On June 24, 2020, the Attorney Examiner issued an entry suspending automatic approval of the Application, and permitting the filing of comments.¹ The Attorney Examiner instructed that initial comments be filed by July 8, 2020, and reply comments filed by July 15, 2020.² The Staff of the Public Utilities Commission of Ohio (Staff) filed its comments on July 7, 2020 (Staff Comments).³ The Office of Ohio Consumers' Counsel (OCC) and Citizens Against Clear

¹ Entry (June 24, 2020), p. 3.

² *Id.*

³ Staff Comments (July 7, 2020).

Cutting (CACC) (collectively Intervenors) intervened and filed joint comments on July 8 (Joint Comments).⁴ The Company submits the following comments in reply.

I. STAFF CORRECTLY OBSERVES THAT THE COMPANY’S PROPOSED AMENDED VM PROGRAM BRINGS THE COMPANY INTO COMPLIANCE WITH PAST COMMISSION ORDERS.

After reviewing the Company’s Amended VM Program, Staff concludes that “the modified vegetation management portion of Duke’s Program brings Duke into compliance with previous Commission orders.”⁵ Among other things, Staff noted that the revision to the Company’s distribution trim cycle from four to five years “is in compliance with the Commission’s order in Case No. 17-0032-EL-AIR,” and that the revision to the Company’s transmission trim cycle to move from a six-year cycle to a threat and condition-based trimming approach “is in compliance with the Commission’s order” in Case No. 17-2344-EL-CSS (the Tree Trimming Case).⁶ The Company agrees with these assessments.

II. MINOR CLARIFICATIONS IN THE TRANSMISSION PORTION OF THE PROGRAM WILL MAKE ITS COMPLIANCE WITH THE TREE TRIMMING STIPULATION MORE APPARENT AND EXPLICIT.

In response to the transmission-related portion of the Joint Comments, the Company proposes certain edits. Although the Company believes that its Amended VM Program complied with the stipulation in the Tree Trimming Case (Tree Trimming Stipulation)⁷ as filed, admittedly, the formatting differences between the Tree Trimming Stipulation and the as-filed Amended VM Program document resulted in some ambiguities that warrant clarification. The Company believes that such compliance will be more apparent and explicit with the following clarifications and revisions.

⁴ Joint Comments (July 8, 2020).

⁵ Staff Comments, p. 3.

⁶ Staff Comments, p. 2.

⁷ *In the Matter of the Complaint of Citizens Against Clear Cutting, et al.*, Case No. 17-2344-EL-CSS, Stipulation and Recommendation (December 17, 2019).

1. Clarifications regarding the definition of “Compatible Vegetation.”

Intervenors perceive that the Company’s definition of “Compatible Vegetation” in the Amended VM Program is “narrower” than in the Tree Trimming Stipulation and, in some instances, uses different terminology.⁸ While the Company believes that the definitions in the Amended VM Program are consistent with what was agreed upon in the Tree Trimming Stipulation when the documents are read in their entirety, nonetheless, in response to the concerns expressed by Intervenors on this point, the Company agrees to make the following revisions to the Transmission portion of the Amended VM Program:

p. 16	<p>COMPATIBLE VEGETATION – Vegetation within the Transmission Right of Way that: (1) does not present a threat; (2) with a typical maximum mature height less than 15 feet and is typically no closer, <u>horizontally on the ground</u>, than 25 feet from any Duke Energy facilities <u>ground mounted structures</u> (towers, poles, guy wires, guy anchors, etc.); and (3) and does not interfere with safe and reliable operation, or emergency restoration. <u>Generally, vegetation with a typical maximum mature height of 15 feet or less shall be considered compatible vegetation, as long as it does not present a grow-in or fall-in threat. Additionally, ornamental and landscaped vegetation that matures taller than 15 feet may be considered compatible vegetation if it does not present a grow-in threat or a fall-in threat.</u></p>
pp.21-22	<p>THREAT/CONDITION-BASED ACTION</p> <p>During the work planning and marking process, many factors and criteria must be considered when developing the mitigation strategy <u>for incompatible vegetation</u>. A trained utility vegetation management professional will evaluate the vegetation based on arboricultural, regulatory/safety standards, legal ROW rights and criteria such as size, age, location, growth rate, maintained/landscaped vs. non-maintained/non-landscaped, etc. <u>For maintained/landscaped areas, vegetation that typically matures to a maximum height of 15 feet or less, will generally be considered compatible vegetation, as long as it does not present a grow-in or fall-in threat. Additionally, ornamental and landscaped vegetation with a typical mature maximum height exceeding 15 feet will be considered compatible if it does not present a grow-in or fall-in threat.</u> Property owner</p>

2. Clarifications regarding the definition of “Incompatible Vegetation” and related allegedly imprecise verbiage.

⁸ See Joint Comments, pp. 8-10.

Intervenors express a number of concerns regarding the definition of Incompatible Vegetation in the Amended VM Program.⁹ The Company agrees to make revisions to address these concerns, but also believes it must correct an important point of the Tree Trimming Stipulation that Intervenors appear to misunderstand.

Intervenors write that the Tree Trimming Stipulation “allows vegetation that has been deemed Incompatible Vegetation to become Compatible Vegetation through pruning.”¹⁰ This is simply incorrect. The Tree Trimming Stipulation permits incompatible vegetation *to remain* if it “can be safely managed through . . . pruning less than 33% of the vegetation canopy to obtain necessary clearance....”¹¹ But this allowance does *not* transform the incompatible vegetation into compatible vegetation. It merely means that the incompatible vegetation in question will be permitted to remain—despite its status as incompatible vegetation—until re-evaluation on the next cycle.¹² Intervenors are incorrect in equating permission to remain with a fundamental change in the vegetation’s status. This is because such vegetation will continue to grow and may not be able to remain into perpetuity if, at some point, it cannot be pruned as described in the Amended VM Plan and/or becomes a grow-in/fall-in/blow-in threat to the system or prevents necessary access.

The placement of the provision regarding pruning in the Tree Trimming Settlement (in the section on Incompatible Vegetation), as well as the wording, clearly demonstrate that pruning does not change the category of the vegetation in question (red markings added):

⁹ See Joint Comments, pp. 11-12.

¹⁰ Joint Comments, p. 11.

¹¹ Tree Trimming Stipulation, p. 6.

¹² *Id.*

<i>Compatible Vegetation</i>	<p>Compatible vegetation within the Transmission Right of Way shall include:</p> <ul style="list-style-type: none"> • Ornamental and landscaped vegetation that matures taller than 15 feet and does not present a grow-in or fall-in threat. • Generally, vegetation with a maximum mature height of 15 feet. • From an access perspective, vegetation no closer horizontally on the ground than 25 feet from any Duke Energy Ohio ground mounted structures (towers, poles, guy wires, guy anchors, etc.).
<i>Incompatible Vegetation</i>	<p>Incompatible vegetation within or outside the Transmission Right of Way that will mature to a height or size that will pose a grow-in, fall-in, or blowing-together threat within 6 years to the transmission conductor, or that will limit or block access, or the safe and reliable operation, emergency restoration, or maintenance activity, which is typically within 25 feet from any Duke Energy Ohio ground-mounted structures (towers, poles, guy wires, guy anchors, etc.).</p> <ul style="list-style-type: none"> • Using a threat and condition-based approach, <u>all incompatible vegetation per Duke Energy Ohio trained personnel's assessment that does not limit/block access and can be safely managed through the proper arboricultural pruning guideline of pruning less than 33% of the vegetation canopy to obtain necessary clearance over a 6-year cycle will be pruned accordingly and allowed to remain until re-evaluation on the next cycle.</u> • Using a threat and condition-based approach, all incompatible vegetation per Duke Energy Ohio trained personnel's assessment that limits/blocks access or cannot be safely managed through the proper arboricultural pruning guideline because of greater than 33% of the vegetation canopy would be pruned to obtain necessary clearance over a 6-year cycle will be targeted for removal based on a priority removal protocol and subject to the easement rights granted to Duke Energy Ohio.

Notwithstanding Intervenor's misunderstanding of the definition of Incompatible Vegetation in the Tree Trimming Settlement, the Company believes that Intervenor's central concern is to ensure that the Amended VM Program states explicitly that all incompatible vegetation meeting the pruning criteria in the Tree Trimming Stipulation will be allowed to remain until re-evaluation on the next cycle. To clarify this point, and to address other concerns expressed by Intervenor, the Company agrees to make the following revisions to the Transmission portion of the Amended VM Program:

p. 16	<p>INCOMPATIBLE VEGETATION – Vegetation within or outside the Transmission Right of Way that will mature to a height or size that will pose a grow-in, fall-in, or blowing-together threat to the transmission conductor, or that will limit or block access, or the safe and reliable operation, emergency restoration, or maintenance activity, which is typically <u>horizontally on the ground</u> within 25 feet of any Duke Energy <u>ground mounted structures</u> facilities (towers, poles, guy wires, guy anchors, etc.).</p>
p.22	<p>MITIGATION FOR INCOMPATIBLE VEGETATION THREATS</p> <p>.....</p> <p>Non-NERC Circuits</p> <ol style="list-style-type: none"> 1. Maintained/Landscaped Areas: Incompatible vegetation within these areas will be evaluated to determine if the threat can be managed <u>mitigated</u> through proper arboricultural pruning

	<p>guidelines of less than 33% of the vegetation canopy to obtain necessary clearance. <u>If the threat can be mitigated and necessary clearance obtained through pruning less than 33% of the vegetation canopy, such incompatible vegetation will be pruned accordingly and allowed to remain until reevaluation on the next cycle. If management is not viable the threat cannot be safely mitigated by pruning less than 33% of the vegetation canopy, removal of the incompatible vegetation is required. will be taken down.</u></p> <p>a.</p> <p>2. ...</p>
p. 23	<p>Non-NERC Reclamation Program: Over a 12-year period from 2020 to 2032, Duke Energy Ohio will perform planned work within and along these corridors. Initial phase of the program will be focused on removing non-manageable incompatible <u>incompatible vegetation that (1) poses a grow-in and or blowing together threats and (2) which cannot be safely mitigated by pruning less than 33% of the vegetation canopy</u> within and along the corridor for landscaped/maintained areas. Second phase will be focused on removing healthy <u>incompatible vegetation that poses a fall-in threats within and along the corridor for landscaped and maintained areas, and cannot be safely mitigated by pruning less than 33% of the vegetation canopy.</u></p>
p. 25	<p>INCOMPATIBLE VEGETATION MITIGATION (i.e. trees)- Trees which are in close proximity to electrical facilities can require extensive pruning (greater than 33% of the canopy) to prevent them from causing reliability or safety risk. <u>Incompatible vegetation will be evaluated to determine if the threat can be mitigated through proper arboricultural pruning guideline of less than 33% of the vegetation canopy to obtain necessary clearance. If the threat can be mitigated and necessary clearance obtained through pruning less than 33 % of the vegetation canopy, such incompatible vegetation will be pruned accordingly and allowed to remain until re-evaluation. If the threat cannot be safely mitigated by pruning less than 33% of the vegetation canopy, the incompatible vegetation</u> These trees within the right of way will be targeted to be taken down and Duke Energy Ohio will attempt to notify the affected property owner.</p>

The Company believes the above edits also address the concerns about imprecision in the use of certain terms expressed on pages 12-14 of the Joint Comments.

3. *Clarification regarding herbicide use.*

Intervenors express concern that the Amended VM Program “seems to give Duke more discretion” than the Tree Trimming Stipulation in regard to the application of herbicides and does not sufficiently specify that the right to opt out of herbicide also applies to Brush

Management.¹³ Such was not the intent. The Company agrees to make the following revisions for the purpose of improving clarity:

p. 22	<p>MITIGATION FOR INCOMPATIBLE VEGETATION THREATS</p> <p>....</p> <p>Non-NERC Circuits</p> <p>1. Maintained/Landscaped Areas:</p> <p>a. <u>For maintained/landscaped areas, the property owner will be provided a notification of planned herbicide work and may choose to opt out of the herbicide application by contacting Duke Energy Ohio via designated contact set forth in the information provided at the time of notification.</u></p>
p. 25	<p>BRUSH MANAGEMENT - Because of a variety of terrain, differences in soil, land use, and vegetation types, Duke Energy uses IVM practices which include environmentally acceptable herbicides to control brush within the right-of-way. All herbicides used in brush management operations shall be registered with the EPA and the applicable regulating state authority. In situations where brush height is of significant size and therefore not conducive to herbicide applications, the right of way may be mechanically mowed. In landscaped/maintained areas, brush will typically be hand cut and the remaining stumps treated. <u>Also, in non-NERC landscaped/maintained areas, the property owner will be provided a notification of planned herbicide work and may choose to opt out of the herbicide application by contacting Duke Energy Ohio via designated contact set forth in the information provided at the time of notification.</u></p>

III. THE COMMISSION SHOULD REJECT THE REQUESTED CHANGES TO THE DISTRIBUTION PORTION OF THE AMENDED VM PROGRAM.

A. It would be inefficient and counterproductive to require the Company to clear vegetation that can safely remain.

Intervenors object to the statement in the Company’s Application that the Company will “review and clear vegetation as needed from its distribution lines at least once every five years.”¹⁴ The same verbiage appears in the Distribution Portion of the Amended VM Program.¹⁵

¹³ Joint Comments, pp. 14-15.

¹⁴ Application, p. 2.

¹⁵ Amended VM Program, Distribution, p. 11.

This is *not*, as Intervenors represent, an attempt to avoid “perform[ing] vegetation management.”¹⁶

The process of vegetation management involves both review and removal of vegetation, but it does not inherently involve the removal of all vegetation that is reviewed. It is obvious that, by stating that it will “clear vegetation as needed,” the Company means that it will clear only vegetation which it needs to clear, *e.g.*, incompatible vegetation, hazard trees, etc. Given that Intervenors express concern about consumers’ rates, they should not be advocating for the Company to remove vegetation unnecessarily.

B. The Amended VM Program sufficiently defines “Incompatible” and “Compatible” vegetation; further specification would be impractical and would not lead to any cost savings.

Intervenors request that the company be required to “specifically define what it considers to be compatible versus incompatible vegetation,” by identifying “species” for consumers to reference when “making planting decisions.”¹⁷ Producing a list of species would unduly constrain the Company, which needs to remain free to clear vegetation that has the potential to strike electrical lines or distribution equipment or otherwise presents a threat to distribution reliability. The Company’s Previous VM Program (which is currently approved by the Commission) provided no such thing, and Intervenors cite no precedent or authority in support of including this level of detail in a vegetation management plan approved under Rule 27.

Intervenors appear to imply that, in the absence of a list of species, the Company will remove “practically any vegetation” in order to “charge consumers for removal.”¹⁸ Not only is this insinuation contrary to Intervenors’ earlier demand that the Company be ordered to clear *more* vegetation, but it is also easy to refute. The manner in which the Company recovers costs

¹⁶ See Joint Comments, p. 17.

¹⁷ Joint Comments, p. 18.

¹⁸ Joint Comments, p. 18.

for vegetation management already gives the Company incentive to remove no more vegetation than is necessary. The Company's O&M costs for vegetation management on its distribution circuits are recovered annually at a fixed dollar amount of \$10.7 million per year through base rates and then up to an additional \$10 million per year through its Electric Service Reliability Rider. There is no guaranteed recovery for additional incremental vegetation management costs above those currently authorized for recovery absent deferral approval by the Commission. And, any cost recovery for deferral amounts are subject to a prudence review. Capital costs are similarly capped through Rider DCI. Furthermore, all tree trimming and removal activity is audited annually by Staff for prudence and reasonableness. Therefore, it is not possible for the Company to increase the rates collected by excessively removing "practically any vegetation." Accordingly, the Commission should reject Intervenors' request to provide an unnecessary and unduly burdensome level of detail in its vegetation management program regarding what constitutes compatible or incompatible vegetation. The definitions provided on page 6 of the Distribution section of the Amended VM Program are amply sufficient.

Intervenors also request that the Commission "direct Duke to modify the definitions in its Distribution Amended VM Program to be consistent with the definitions in its Transmission Amended VM Program," believing that this will "prevent confusion."¹⁹ However, distribution reliability and transmission reliability require different approaches to vegetation management. Distribution conductors are typically mounted at a much lower above-ground height compared to transmission conductors. This difference impacts the allowable mature height and clearance from centerline or facilities of compatible vegetation. Thus, Intervenors' request for consistency

¹⁹ Joint Comments, p. 19.

in the definitions of incompatible and/or compatible vegetation between the two sections should be rejected.

C. The Amended VM Program does not give the Company unfettered discretion to unilaterally remove vegetation outside the right of way.

Intervenors object to the definitions of “incompatible vegetation,” “hazard tree” and “danger tree,” as overly broad and permitting the Company to remove vegetation outside the right-of-way. The Intervenors request that the Company should only be able to remove vegetation outside the right-of-way with customer permission or “documentation of an *imminent* threat to the distribution system.”²⁰ These demands are unwarranted, unreasonable, contrary to established precedent, and in many instances would run afoul of established easements negotiated years ago.

First, the Commission has already expressed that the Company is entitled to exercise a certain amount of discretion with regard to vegetation management outside the right-of-way, interpreting language (albeit in an easement) that was very similar to the verbiage in the Amended VM Program. The easement in question authorized the Company to “trim or remove trees outside the easement that may pose a danger to, or interfere with, the utility’s transmission lines,” and a customer argued that the Company “exceeded [this] grant by trimming or removing trees outside the [] easement.”²¹ The Commission, however, held that this was insufficient to demonstrate the Company had “abused its discretion.”

In reaching its conclusion, the Commission explained the scope of the Company’s discretion:

The easement does not require the trees to be encroaching upon or obstructing the actual right of way before they can be removed or

²⁰ Joint Comments, pp. 19-21.

²¹ *In the Matter of the Complaint of Charlene Rundo v. Duke Energy Ohio, Inc.*, Case No. 06-940-GE-CSS, Opinion and Order, p. 7 (March 5, 2008).

trimmed. However, we do not believe that the company has unfettered discretion in cutting down trees outside the right of way. ***The company's actions must be premised on its belief that the trimming or removal of trees, to prevent future outages, is necessary*** because the trees are dead, are unstable, or have some other condition that makes them susceptible to falling down or having branches that could come in contact with the utility's equipment.²²

This language, which Intervenors would surely consider unacceptably vague, is very similar in its level of detail and description of relevant factors to the verbiage in key definitions in the Distribution Portion of the Company's Amended VM Program:

- DANGER TREE – “A tree that if it were to fall or be cut would be tall enough to strike electrical lines and equipment of the distribution system.”²³
- HAZARD TREE – “A tree that is dead, structurally unsound, diseased, shallow-rooted, leaning or otherwise defective that could strike electrical lines or equipment of the distribution system if it falls or is cut.”²⁴
- INCOMPATIBLE VEGETATION – “Vegetation within or outside the distribution right of way that will mature to a height or size that will pose a grow-in, fall-in, or blowing-together threat to the distribution conductor, or that will limit or block access to distribution facilities during routine or emergency maintenance activity.”²⁵

The fact that the Commission has previously described the Company's discretion in similar terms demonstrates that these are sufficiently clear and intelligible standards, which do not provide “unfettered discretion.”

Second, the Company does not rely on its VM Program to authorize what would otherwise be considered encroachment on a customer's property, but on other sources of authority. First and foremost, the Company's retail tariff requires customers to give the Company “all necessary rights of way upon or across property owned or controlled by the customer along dedicated streets and roads. . . or maintenance incidental to the supplying of

²² *Id.*, p. 7 (emphasis added).

²³ Amended VM Program, Distribution, p. 6

²⁴ *Id.*

²⁵ *Id.*

service to customers beyond the customer’s property....”²⁶ Additionally, the Company relies on easements that have been previously negotiated with the customer. And, in the vast majority of cases, the Company is able to obtain the customer’s permission for the specific work outside the right of way that is being contemplated. Thus, there is no danger that approving the Amended VM Program will cause the Company to “interfere[] with customers’ property rights....”²⁷

Third, as explained in the previous section, the Company has no financial incentive to engage in gratuitous vegetation clearing simply to “increase[] the vegetation management costs that can be included in base rates, the tree-trimming rider, and the distribution capital investment rider.”²⁸ Nor does the Company have the time or resources to pad its bills in this manner. The Company faces competing priorities, such that simply completing all the necessary vegetation review and clearing is challenging enough. The Company does not rely on its rates personnel in determining whether to remove a tree; rather, it relies on the expert judgment of qualified arborists and follows acknowledged industry standards, such as ANSI.²⁹

Fourth, waiting until a threat to the distribution equipment is “imminent,” as Intervenors demand, would be inefficient, increase costs, and pose an unacceptable level of risk. Rather than clearing the threat when it is first identified, presumably the Company would have to return repeatedly to monitor the specific threat until it was sufficiently “imminent.” In the meantime, such trees could cause issues with reliability and/or access, potentially even resulting in customer complaints. The Company has highly qualified arborists assessing vegetation; it should be permitted to rely on their expert judgment before a threat is “imminent.”

²⁶ PUCO No. 19, Sheet No. 21.5, p. 4.

²⁷ Joint Comments, p. 19.

²⁸ Joint Comments, p. 19.

²⁹ See Amended VM Program, Distribution, p. 8 (“Contractor shall perform all work in conformance with American National Standards Institute (ANSI) A300 and Z133 . . .”).

For all of the above reasons, the Commission should reject Intervenors' suggestions with respect to restricting the Company's ability to assess and mitigate vegetation threats in the right-of-way.

D. The notification and documentation requirements requested by Intervenors are duplicative and unduly burdensome.

Intervenors request that the Commission order the Company to add a section to its Distribution Amended VM Program to "address[] how customers will be informed..." regarding the Company's vegetation management removal activities "and remedies that are available . . . to dispute Duke's assessment."³⁰ While the Company does, as a general practice, attempt to inform property owners of upcoming vegetation management activities, Rule 27 contains no requirement to do so. Nor is there any requirement to inform customers of potential remedies. Doing so would require giving legal advice, as customers' remedies with regard to property rights (*e.g.* interpretation of easements) lie with the courts and not the Commission. And all Company customers already receive information on how they may contact the Commission and/or file a complaint. Thus, the Commission should reject the Intervenors' requests to add additional notification and remedies provisions to the Amended VM Program.

IV. CONCLUSION

Duke Energy Ohio appreciates the opportunity to provide its reply comments to the Commission and respectfully requests that the Commission approve the Company's Application, with the modifications proposed by the Company herein. Upon such approval, the Company will file an accordingly revised copy of the Amended VM Program.

³⁰ Joint Comments, pp. 21-22.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Larisa M. Vaysman

Rocco O. D'Ascenzo (0077651)

Deputy General Counsel

Jeanne W. Kingery (0012172)

Associate General Counsel

Larisa Vaysman (0090290) (Counsel of Record)

Senior Counsel

Duke Energy Business Services LLC

139 East Fourth Street

Cincinnati, Ohio 45202

(513) 287- 4010

Rocco.DAscenzo@duke-energy.com

Jeanne.Kingery@duke-energy.com

Larisa.Vaysman@duke-energy.com

(Willing to accept service by email.)

Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by first class U.S. Mail or electronic mail, on this 15th day of July 2020, to the following parties.

/s/ Larisa M. Vaysman
Larisa M. Vaysman

Ambrosia.wilson@occ.ohio.gov
Amy.botschner.obrien@occ.ohio.gov
bojko@carpenterlipps.com

Steven.darnell@ohioattorneygeneral.gov
Jodi.bair@ohioattorneygeneral.gov