BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

Evelyn and John Keller,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	Case No. 12-2177-EL-CSS
Columbus Southern Power Company,	)	
	)	
Respondent.	)	

REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS OF OHIO POWER COMPANY

Complainants, Evelyn and John Keller, filed a complaint against Ohio Power Company f/k/a Columbus Southern Power Company ("AEP Ohio" or "Respondent") on July 27, 2012 consisting of 1½ pages ("Complaint"). The Complaint advances two conclusory and unsubstantiated allegations regarding the Super Derecho storm that passed through central Ohio on June 29, 2012: (1) that AEP Ohio knew or should have known that a tree that fell during the storm and caused an interruption of power service to a few homes needed to be trimmed or removed, and (2) the delay of six days to restore service to the Keller residence was negligent. (Complaint at ¶¶ 5 and 13.) AEP Ohio timely filed an Answer and Motion to Dismiss on August 16, 2012, which denied the key allegations of the Complaint, set forth affirmative defenses as further discussed below and set forth multiple bases for dismissal of the Complaint. Complainants sought to delay their response to the dismissal request for a substantial and inordinate period of time that ended up being nearly more than eight months. Finally, on May 1, 2013, Complainants filed a memorandum opposing dismissal. In their memo contra, Complainants set forth three arguments opposing dismissal and separately advance an extraneous and baseless general criticism of the Commission's complaint process.

The burden of proof in complaint proceedings is on the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189. It is well established that a complainant must state, in order to avoid dismissal of a complaint under R.C. 4905.26, reasonable grounds alleging that any rate charged or demanded is in any respect unjust, unreasonable, or in violation of law, or that any practice affecting or relating to any service furnished is unjust or unreasonable. *Brock v. Ohio Edison Co*., Case No. 11-6085-EL-CSS (March 6, 2013 Opinion and Order at 2). In the case at bar, Complainants fail to state reasonable grounds to avoid dismissal.

This case is very similar to another recent case dismissed by the Commission, *Eugene Holmes v. Cleveland Electric Illuminating Co*., Case No. 12-2980-EL-CSS. In the *Holmes* case, complainant alleged that CEI did not have adequate concern and care for the customers within Superstorm Sandy's path and mismanaged its restoration crews by not restoring the complainant's electric service soon enough. (*See* November 14, 2012 Complaint, Case No. 12-2980-EL-CSS.) Mr. Holmes further complained that CEI exposed its customers to risk of storm damage by sending repair crews out of Ohio to help other utilities manage the aftermath of Superstorm Sandy. (November 30, 2012 Notice of Objection to Dismissal, Case No. 12-2980-EL-CSS.) In dismissing the complaint, the Commission held:

> The complaint, as filed, does not allege a violation by the respondent of any statute, public policy, Commission rule, or precedent. As such, it fails to state reasonable grounds for complaint against CEI or any other public utility.

(*Holmes v. CEI*, Case No. 12-2980-EL-CSS, March 20, 2013 Entry at 4.) Like complainant Holmes, Complainants in this case do not allege violation by AEP Ohio of any statute, public policy, Commission rule, or precedent. For that reason, the Complaint should be dismissed.

Nothing alleged in the Complaint constitutes inadequate service. Instead, the Kellers state their misguided belief that AEP Ohio was "negligent" in three ways: (a) failing to identify

in advance the tree that fell during the storm, (b) failing to conduct vegetation removal and remove the tree before the June 29, 2012 Super Derecho storm occurred, and (c) delaying restoration to the Keller restoration for six days while repairs were made of the storm damage on other circuits. (Keller Memo Contra Dismissal at 5-8.) AEP Ohio disagrees that it was negligent in any respect and, if the case does proceed to hearing, will defend and rebut any evidence offered to the contrary. AEP Ohio understands that it cannot contest factual assertions for purposes of arguing the dismissal request. However, even if the factual claims of Complainants are accepted as true for purposes of ruling on the dismissal request, there are no reasonable grounds for complaint being stated in this case.

A. The Complaint's pre-storm negligence allegation fails to state reasonable grounds and should be dismissed.

Complainants' pre-storm claim is that AEP Ohio was negligent in failing to identify *one tree* in a "stretch of heavily forested" area beside the highway and/or cut this single tree down before the June 29, 2012 Super Derecho. That position is absurd. There are millions of trees in the Company's service territory and limited time and funding available for implementing forestry management programs – even if the Company somehow knew the storm was coming, which it did not.

It would only be appropriate to entertain the Kellers' Complaint if AEP Ohio had a legal duty to remove all trees that could possibly ever cause an outage. Further, such a theory presumes strict liability for any tree causing an outage under any weather conditions. Moreover, such an unreasonable duty would cause the Company's spending to increase exponentially (as well as the associated rate impact). There simply is no legal or regulatory basis to support Kellers' view that AEP Ohio had a strict legal duty to identify and remove this single tree prior to an unknown super storm transpiring.

Additionally, there is an important and dispositive lack of causation addressed in the Kellers' Complaint allegations. Indeed, even Complainants seem to understand that any damage being claimed must be "as a result of" Respondent's negligence. (Keller Memo Contra at 3.) Thus, even if there were a valid negligence claim (which there is not), Complainants would have to establish causation linking the Company's actions to their damages. If the tree had fallen on its own and the Company was proven to have violated its duty of care and caused the outage, then there might have been a connection to damages associated with the outage. Of course, it was the 85 mile per hour wind gusts associated with the Super Derecho that caused the tree to fall – not actions or inactions of the Company. Complainants acknowledge that the storm caused the tree to fall. (Complaint at ¶10.) Because the storm caused the tree to fall and create a power outage affecting the Keller residence, the Complaint against AEP Ohio should be dismissed.

The Company does not have strict liability under its tariffs for outages or for damage caused by storm-downed trees or other such weather events. On the contrary, there is a specific exception for Acts of God in the Commission-approved tariff. AEP Ohio's Commission-approved tariff states that it will use "reasonable diligence in furnishing a regular and uninterrupted supply of energy but does not guarantee uninterrupted service." More specifically, the tariff states that "[t]he Company shall not be liable for damages in case such supply should be interrupted or fail by reason of an act of God…." Ohio Power Company Tariff, PUCO No. 20, Terms and Conditions of Service, Paragraph 19, Original Sheet No. 103-16. The storm that occurred on June 29, 2012 was an unprecedented event, with winds reaching up to 85 miles per hour, damaging everything in its path.[1] In fact, the effects of the storm were so massive that it caused the Governor of Ohio to declare a state of emergency[2] and the President of the United States to declare Ohio a federal disaster area.[3] Nothing about this storm was foreseeable and these kinds of storms cannot be categorized in any way other

than as an "act of God."

The Kellers' position ignores the obvious and undisputable fact that the June 29, 2012 Super Derecho was an extraordinary and unexpected weather event – not a known deadline for making sure all of the danger trees in central Ohio were cut down. Complainants' premise is that June 29th was marked on AEP Ohio's calendar of events and that the Company should have had all of its work done on Circuit 3101 by that date. Kellers' claim that the Company negligently failed to remove the tree prior to the storm is a fallacious claim that wrongly assumes foreknowledge of the extraordinary storm event of June 29, 2012.

In sum, there is no law or rule which states that the marking of a tree as part of the normal tree trimming process requires immediate removal of the tree or that not immediately removing the tree implies negligence on the part of the utility. This standard, asserted by Complainants, is not based in law or rule and should be dismissed. Therefore, because AEP Ohio is not liable for damages caused by this act of God and has not violated its tariff or any Commission rule, it has not provided inadequate service with respect to the service related issues caused by the storm.

B. The Complaint's post-storm negligence allegation also fails to state reasonable grounds and should be dismissed.

It is unfortunate that power could not be restored to all customers immediately, but this does not imply inadequate service on the part of AEP Ohio. Without any basis whatsoever, the Complaint states (at ¶ 13) that the delay in restoring Complainants' service was negligent. There is simply no basis or information the Kellers had at the time of filing the Complaint that could possibly substantiate that claim. And nothing in discovery has confirmed it either. In their memo contra, Kellers briefly (at 6-7) state their belief that vegetation control near their residence was "not performed before the June storm" because the Company wanted to

coordinate that work with other needed work along this section of road – given that a voluntary road closure of a busy highway is needed in order to do all of the work. Kellers merely offer speculation that AEP Ohio was trying to save money and conclude that it was negligent in doing so. Again, their position falsely presupposes that the June storm was a looming deadline that was known and should be worked around.

Kellers' egocentric perspective also tends to suggest that AEP Ohio's storm response managers asked themselves the question each day "Should we turn the power back on to the Keller residence or continue working on other circuits first?" The reality is that only a small handful of customers were out of power based on the downed tree and there were a lot of other outage priorities that were being addressed – as part of an overall emergency outage response of unprecedented scale. AEP Ohio did its best to respond to the massive amount of storm damage and the Kellers' arbitrary dissatisfaction with their outage time period does not constitute negligence and does not warrant a hearing before this Commission.

This storm was unprecedented and caused outages to more than one million customers in the entire AEP system and approximately 660,000 customers within AEP Ohio's service territory. Moreover, the process of restoration after a storm outage is prioritized first by need of critical services. The line serving the area on SR 315 between Jewett Road and Powell Road is a tap off of the main line and serves less than a dozen customers, a small amount compared to other lines serving thousands of customers. Furthermore, AEP Ohio's line crews, along with crews recruited from other states to assist with restoration, were working as diligently and safely as they could in their efforts to restore power to customers.

Even under normal weather conditions, an outage does not constitute inadequate service, as the Commission has held on multiple occasions. *E.g., Yerian v. Buckeye Rural Elec. Co-op,* No. 02-2548-EL-CSS (Opinion and Order of Oct. 13, 2003, at 11-12); *Miami Wabash Paper,*

LLC v. Cincinnati Gas & Elec. Co., No. 02-2162-EL-CSS (Opinion and Order of Sept. 23, 2003, at 7), *Verkest v. American Elec. Power*, No. 01-2397-EL-CSS (Opinion and Order of Oct. 31, 2002, at 8); *Cogswell v. Toledo Edison Co.*, No. 91-1421-EL-CSS (Opinion and Order of July 22, 1993, at 4); *Martin v. Dayton Power & Light Co.*, No. 91-618-EL-CSS (Opinion and Order of Sept. 10, 1992, at 7). An electric utility "is not a guarantor of electric service in its service territory" (*id.* at 15) and therefore "cannot guarantee that outages and momentary interruptions will never occur." *Verkest*, at 8; *Cogswell*, at 15.

Moreover, the Commission regulates and oversees AEP Ohio's service quality, forestry program and funding for such activities. Those general regulatory matters are not of concern in this case and are not for an individual customer to raise or address. The Company's overall storm response and process should not be the subject of litigation in this Complaint case involving a single customer outage. In any case, AEP Ohio did not provide inadequate service in its actions following the storm regarding the repair of the power line at issue.

C. Kellers' dissatisfaction with the discovery and complaint process is without merit and is not relevant to considering the dismissal request.

As referenced above, the complainant bears the statutory burden of stating reasonable grounds at the outset of filing a claim. There is no pre-filing discovery right under R.C. 4905.26 or the Commission's rules. And complainants are not supposed to file a complaint then engage in a fishing expedition in discovery to try and substantiate the claims already filed. If anything, the Kellers have had an extraordinary (if not record-breaking) amount of time to respond to the Company's motion to dismiss – nearly more than 8 months to respond when the normal deadline is 15 days! During this entire time, the Kellers have conducted discovery in order to backfill their claims and come up with something through discovery to support their negligence theories. Yet, they still have not come up with anything to substantiate their flawed claims. While they

may be frustrated that not all of their overbroad questions and concerns are answered, complainants are not entitled to complete the discovery process before defending a motion to dismiss for failure to state a claim.

AEP Ohio is also frustrated that it has engaged in extensive discovery in good faith to try and resolve a $1,500 case. To date, Complainants have served and AEP Ohio has responded to four sets of written discovery, consisting of over 100 interrogatories (with subparts) and resulting in nearly 400 documents being produced. In addition, Complainants have deposed two AEP Ohio individuals over two business days. Contrary to Complainants' assertions discovery in this case has been more than ample – especially considering it was all conducted prior to the threshold ruling on the Company's motion to dismiss. Ultimately, discovery issues are beyond the scope of the dismissal request decision and they will be resolved through a separate process – to the extent the dismissal decision does not moot those disputes.

In this regard, Kellers also complain about their litigation costs in prosecuting the Complaint even though they "have the distinct – and very unusual – benefit of having in the family an experienced lawyer with the ability and willingness to take the time to pursue this complaint action." (Keller Memo Contra at 8.) This is a bizarre and self-serving statement for Mr. Keller to say he is a talented attorney that cares enough to take the time to work on his own case! In any event, under the American system of justice, a plaintiff bears their own legal expenses absent a specific statutory of legal rule for reimbursement of litigation costs. None exists for a complaint case under R.C. 4905.26. AEP Ohio likewise routinely incurs incremental costs in defending meritless complaints and that is also part of the system. Of course, if the Commission dismisses the case or the complainants' voluntarily drop the claim, there will be no additional litigation costs.

Finally, Kellers attack the Commission's process for complaint cases and complain that no resolution of the case has occurred some ten months after it was initiated. Ironically, of course, Complainants' own 8-month delay in responding to the dismissal request has eaten up the vast majority of that time period. As part of this grumbling, Kellers also question (at 9) "the attitude of Respondent in and toward consumer complaints." This oblique but misguided statement has no basis in this case and is completely uninformed as to other complaint cases. AEP Ohio will stand on its extensive record of consistently resolving customer complaints, of which the Commission is well aware.

While AEP Ohio wanted to briefly respond to the Kellers' extraneous points about the discovery and complaint process for the record, there is no need for the Commission to address these matters in deciding the motion to dismiss. For as discussed above, the Complaint fails to state reasonable grounds for complaint and should be summarily dismissed.

CONCLUSION

For the foregoing reasons, the Commission should dismiss the complaint in this case with prejudice.

Respectfully submitted,

/s// Steven T. Nourse
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Memorandum was served by electronic mail, upon Complainants Evelyn and John Keller at the address listed below on this 10th day of May 2013.

/s// Steven T. Nourse
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Summary: Reply Memorandum electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company