BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Evelyn and John Keller,	:	
	:	
Complainants,	:	Case No. 12-2177-EL-CSS
	:	
v.	:	
	:	
Ohio Power Company,	:	
	:	
Respondent.	:	

POST-HEARING REPLY BRIEF OF COMPLAINANTS EVELYN AND JOHN KELLER

INTRODUCTION

As stated in Complainants' initial post-hearing brief, if Complainants lost power because a healthy tree in Complainants' front yard blew over in the storm, there would be no basis for this action. Such was not the case, however. Here, there are unique facts which justify an award to Complainants. Had AEP timely performed its duties, Complainants would not have incurred damages. Clearly, both the duty and opportunity to prevent this outage and the resulting damages lay with AEP.

The essence of AEP's defense is that there was a big storm and it worked hard to restore power. No one is disputing that. However, this argument ignores that the focus of this proceeding is what was done – or not done – with respect to the one dead tree which caused Complainants' damage and closed S.R. 315 for six full days.

ARGUMENT

In reply to AEP's Initial Post-Hearing Brief, Complainants offer the following:

1. AEP argues that the damage results from an Act of God, thereby excusing AEP. Respectfully, the issue is not whether wind blew down the dead tree but rather why that

dead tree was present on June 30. If 50 trees along S.R. 315 between Jewett Road and Powell Road had blown down during the storm, then one could correctly conclude an Act of God had struck. However, it is undisputed that during the storm only this one tree fell along that heavily forested stretch of S.R. 315, and that that tree was dead. If in April or May 2012 AEP's surveyor had identified this one very dead tree as a "danger" or "hazard" tree in need of removal - as was his duty - then that one tree should not have been present when the storm came on June 30.

2. On pages 8 and 9 of its brief, AEP questions whether or not its inspector had identified the dead tree as requiring removal. Respectfully, AEP's witness acknowledged that the contractor did not identify this tree as being dead and needing to be removed. (T.p.58, l. 17). This omission constitutes negligence.

3. The most egregious position taken by AEP in its brief is contained on page14 where AEP righteously argues that it never would have sent its people to do work on S.R. 315 without providing appropriate traffic control. However, it is undisputed that AEP did exactly that when it sent its surveyor to inspect the vegetation along S.R. 315 with no traffic control. AEP, by its own admission, failed to provide its surveyor with the necessary tools and conditions to allow the surveyor to do a proper job. This constitutes negligence by AEP.

4. AEP suggests that Complainants have not proven that AEP would have removed the dead tree before the storm even if AEP's surveyor had timely discovered and identified the dead tree for removal. A consumer asserting negligence should not be held to this degree of proof. AEP's position is essentially that it has seemingly unfettered discretion in what it does and when. No consumer can establish what AEP would have done in any situation. Here, the essential fact is that AEP was prevented from taking any action with respect to this dead tree before the storm because its surveyor negligently did his job – in part because AEP did

not provide him with appropriate traffic control. If the Commission requires a consumer to prove what AEP would have done, that, respectfully, is an unobtainable standard.

5. Beginning on page 13 of its brief, AEP argues that it needed to schedule traffic control with ODOT before doing tree trimming on S.R. 315 and it didn't have an opportunity to do that before the storm. In making this argument, AEP ignores the testimony from its witness Mr. Lajuenesse that his Forestry group had no experience in obtaining ODOT permits. (T.p.81, l.20) The undisputed testimony was that the only effort to obtain an ODOT permit came not from the forestry department responsible for vegetation control, but rather from the engineering department interested in changing the lines in that area from 3 phase to single phase. One is left to ponder how AEP's forestry group conducts its business without any history of obtaining traffic control permits from ODOT. The lack of any knowledge or experience by AEP's vegetation control personnel in the process of obtaining ODOT traffic control permits explains why it didn't begin the permitting process in March or early April 2012, when it knew it would be working along S.R. 315. This lack of knowledge or action with respect to obtaining what AEP claims was a necessary permit, constitutes negligence.

6. AEP argues its restoration efforts just followed its normal list of priorities. However, AEP ignores that one of its admitted priorities is to re-open busy highways which are closed as a result of downed power lines. (T.p.101, l. 23; p. 108, l. 6 and 24; p. 109, l. 5) This was a priority for AEP, it certainly knew or should have known its downed line was preventing the re-opening of S.R. 315 and yet it delayed addressing that repair for six days. This constitutes negligence.

7. Finally, AEP misunderstands the argument about its combining three projects when it finally came out to S.R. 315 on Thursday July 5, 2012. Complainants' argument

is not that a delay occurred because AEP did all three projects at the same time, but rather that planning for and coordinating all three projects necessarily delayed the restoration of power. Each of the three projects required a separate team – one to repair the downed line, another to do the line work to change from 3 phase to single phase, and a third to trim vegetation. During the storm restoration effort which was occurring at that time, it is logical to conclude that it took more time to assemble three different crews, rather than just the one repair crew. AEP admits that a delay occurred. (T.p. 121, l. 22; p.123, l. 9) Again, it is unreasonable to suggest that a consumer such as Complainants must prove exactly the length of this delay; that is a burden no consumer will ever be able to satisfy. But it is undisputable that AEP's unilateral decision to combine these three projects together did cause a delay and, since AEP benefitted financially from combining those three projects, AEP should be responsible for damages resulting therefrom.

CONCLUSION

One undisputed fact is that Complainants did nothing wrong, before, during or after the storm. By contrast, AEP and its contractors made both mistakes and intentional decisions which caused or at least contributed to Complainants' damages. Where, as here, one party had the duty and opportunity to avoid the damages, and failed to do so, it is just and appropriate that the innocent and injured party should not be left with 100% of the resulting damages.

As between AEP and Complainants, the entire burden of the actual damages should not be borne entirely by Complainants. AEP should be directed to reimburse Complainants for the damages they incurred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail and regular U.S. mail on the following persons this 10th day of October, 2013:

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Summary: Brief Post-Hearing Reply Brief of Complainants Evelyn and John Keller electronically filed by Mr. John K. Keller on behalf of Keller, Evelyn and Keller, John