

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of James L. Griffith,)	
)	
Complainants,)	
)	
v.)	Case No. 13-1956-EL-CSS
)	
Ohio Edison Company,)	
)	
Respondent.)	

OPINION AND ORDER

The Commission, considering the complaint filed by James L. Griffith, and the evidence admitted at the hearing, hereby issues its Opinion and Order.

APPEARANCES:

James L. Griffith, 23541 Route 30, Minerva, Ohio 44657, on his own behalf.

Roetzel & Andress, LPA, by Emily Ciecka Wilcheck, North Point, One SeaGate, Suite 1700, Toledo, Ohio 43604, and Carrie Dunn, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, on behalf of the Ohio Edison Company.

OPINION:

I. BACKGROUND AND HISTORY OF THE PROCEEDING

On September 18, 2013, James L. Griffith (Mr. Griffith or Complainant) filed a complaint against Ohio Edison Company (Ohio Edison), concerning Ohio Edison's cutting of brush and trees on Mr. Griffith's property. According to Mr. Griffith, Ohio Edison's contractor, Asplundh Tree Experts Co. (ATE), in clearing vegetation from the right-of-way for the Company's transmission line, unreasonably left the debris of cleared vegetation on his property, and did not sow the cleared area with grass seed. Mr. Griffith also asserted that the contractor's personnel sprayed herbicide after he asked them not to do so.

On October 8, 2013, Ohio Edison filed its answer, admitting in part and denying in part the allegations contained in the complaint.

A settlement conference was held on February 13, 2014; however, the parties were unable to resolve the matter. A hearing was scheduled on July 29, 2014, but was continued at the request of Ohio Edison for the purpose of taking Mr. Griffith's deposition. Thereafter, an evidentiary hearing was held on October 15, 2014. Ohio Edison filed a post-hearing brief on December 5, 2014. Mr. Griffith chose not to file a post-hearing statement of the case.

II. APPLICABLE LAW

Ohio Edison is a public utility by virtue of R.C. 4905.02 and an electric light company as defined by R.C. 4905.03(A)(3). Ohio Edison is, therefore, subject to the jurisdiction of the Commission pursuant to R.C. 4905.04 and 4905.05.

R.C. 4905.22 requires, in part, that a public utility furnish necessary and adequate service and facilities. R.C. 4905.26 requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any regulation, measurement, or practice affecting or relating to any service furnished is unjust or unreasonable.

In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). Therefore, it is the responsibility of a complainant to present evidence in support of the allegations made in a complaint.

III. SUMMARY OF EVIDENCE

Mr. Griffith's property is located at 23541 Route 30, Minerva, Ohio. The property, in West Township, Columbiana County, was purchased by Mr. Griffith in 2003, and he established his residence on the property in 2007. Mr. Griffith's property that is subject to Ohio Edison's easement consists of a lower portion, which is landscaped with a pond and a grassy area that Mr. Griffith keeps mowed, and an upper portion that was over grown with brush and trees until ATE performed the vegetation clearing that gave rise to this complaint.

Preceding Mr. Griffith's ownership of the property, in July 1958, former owners of the property granted Ohio Edison an easement for its Sammis-Star 345 kilovolt transmission line, which crosses over the property. The easement is numbered 97934. In relevant part, easement 97934 states:

The Grantee will repair or replace all fences gates, lanes, driveways, drains and ditches damaged or destroyed by it on said premises or pay Grantors for all damage to fences, gates,

lanes, driveways, drains, ditches, crops, and stock on said premises caused by the construction or maintenance of said lines.

(Compl. Ex. 2; Respon. Ex. 5 at Att. KB-4)

There is no dispute between the parties over Ohio Edison's ownership of the easement or the Company's right to cut vegetation within the easement in order to keep a clear corridor for its transmission line. As noted previously, Mr. Griffith's complaint concerns the debris that was left on his property after Ohio Edison's contractor cut and mowed the vegetation, the use of herbicide on the area, and the fact that no grass seed was sowed after the area was cleared. The contractor, actually, performed clearing operations in the area within the upper portion of Ohio Edison's easement five times. Initially, in March 2013, the contractor used an aerial saw. In April 2013, the area was mowed and, following notice to Mr. Griffith, herbicide was applied in May 2013 to retard the re-growth of tree stumps. After Mr. Griffith complained about the debris that remained on his property, the contractor windrowed¹ brush and diced debris in the easement below knee height in July 2013. Thereafter, additional mowing was performed in October 2013 in order to satisfy Mr. Griffith's concerns about stubble within the right-of-way. Mr. Griffith, however, would like Ohio Edison to have the area landscaped. This would be done by clearing all of the vegetation out, and then sowing the ground with grass seed. (Tr. at 9-11, 22; Respon. Ex. 6 at 3-6.)

Griffith Testimony

Mr. Griffith testified that Ohio Edison's contractor, ATE, cleared brush from the right-of-way on his property, but just left the brush lay and sprayed a herbicide that killed everything. Mr. Griffith noted that he does not want herbicide used on his property. He stated that, considering the language in the easement document, it is reasonable to assume that ATE will clean up cut brush when work is done on the property. Mr. Griffith stated that, according to the language of the document, if the contractor is going to fix everything else that might be damaged during the course of any work that is performed, then the reasonable assumption is that the brush will be cleaned up as well. (Tr. at 5-6, 10-11.)

On cross examination, Mr. Griffith testified that, in July 2013, Ohio Edison's contractor cut woody brush that was about 10 feet high in the easement and stacked it in windrows at the sides of his property near the tree lines. Mr. Griffith stated that the contractor returned in October 2013 and performed additional mowing, cutting the windrows into smaller piles, but one can still not go into the woods through the

¹ A windrow is composed of herbaceous material, such as woody brush, that has been cut and stacked together in piles to form a row. On Mr. Griffith's property, the brush debris was stacked parallel to the tree line and diced down so that the debris lay at knee-height or lower. (Tr. at 13; Respon. Ex. 6 at 5.)

windrows. Mr. Griffith testified that, prior to the Company coming in and having mowing work done in the spring of 2013, he was not mowing or otherwise using the upper portion of his property in Ohio Edison's easement. He noted that the reason he could not mow that area is because the last time the easement was cleared, debris was left, including logs, that almost upset his tractor. Mr. Griffith stated that the area is his property, that he pays taxes on it, and that it should be cleaned up the way he wants it cleaned up. Mr. Griffith stated that Ohio Edison has owned the right-of-way for years, and has never taken care of the property. (Tr. at 12-18.)

Mr. Griffith testified that he told Ohio Edison's representative, Alan Glover, that he did not want herbicide applied to his property. He indicated that, even though the herbicide is approved for use by the Environmental Protection Agency, it all runs downhill into his pond and that the pond, and the fish in it, are worth quite a bit of money. He explained that, initially, he did not want grass seed sowed; however, after the area was sprayed, the herbicide killed everything, and he then wanted it sowed. Mr. Griffith testified that it is Ohio Edison's responsibility to clean up the mess and plant grass, instead of just letting weeds grow in the area. Mr. Griffith noted that, as he explained to Mr. Glover, if the contractor had cleaned up the brush and sowed grass seed, he would have kept the area mowed and the contractor would not have to come back to clear the area again. (Tr. at 17-19, 20, 22, 23-24.)

Bloss Testimony

Katherine Bloss, supervisor of transmission vegetation management (TVM) for First Energy Service Company, testified in support of Ohio Edison. Ms. Bloss testified that First Energy's TVM program consists of the requirements under Ohio Adm.Code 4901:1-10-27(E) (the Plan) and the First Energy Management Contractor Specifications (the Specifications). She noted that the Specifications incorporate and elaborate on the Plan and contain instructions to contractors regarding, among other things, the safe and effective implementation of the Plan's requirements. Ms. Bloss testified that the right-of-way on Complainant's property includes both a maintained lawn area and non-maintained area where the cutting and mowing work was performed by Ohio Edison's contractor. Further, she stated that the Specifications specifically address the disposal of debris from cut vegetation and the use of herbicide within Ohio Edison's right-of-way.

Concerning debris disposal within the right-of-way, Ms. Bloss testified that the Specifications provide for the following:

Accepted FirstEnergy methods of disposal include windrowing, chipping, lopping, and stacking. Lopping must be below knee height. Logs may be left at full length. In areas accessible by mechanical equipment brush and logs must not

be left in any waterway or more than 10 feet from the edge of a transmission corridor. In areas not accessible by mechanical equipment, debris may be diced and left in place. In maintained lawn areas where there is ground to sky pruning, the contractor will chip wood and leave the wood that is too large to be chipped in handling lengths for the property owner to cut into final firewood lengths. There is no requirement to chip wood or leave wood in handling lengths for non-maintained lawn areas. (Respon. Ex. 5, Att. KB-2 at 41.)

Concerning herbicide application within the right-of-way, Ms. Bloss testified that, under the Specifications, all incompatible vegetation, i.e., vegetation that will grow tall enough to interfere with overhead electric facilities, must be removed with a herbicide or removed mechanically along with a herbicide application to eliminate the root system. In particular, she noted that all incompatible vegetation less than six inches in diameter within the transmission corridor will be controlled with herbicides. In addition, Ms. Bloss testified that herbicides were applied to incompatible vegetation within the right-of-way in accordance with the Specifications. She noted that this application of herbicide was to control woody stems and root systems and to stop the vegetation from re-growing and re-sprouting. Ms. Bloss stated that the application was necessary because cutting brush increases stem density and allows for rapid re-growth. (Respon. Ex. 5 at 5, 7-8, 10; Att. KB-2 at 37, 117.)

Ms. Bloss testified that the work of Ohio Edison's contractor met the Specifications in all respects. She stated that debris disposal exceeded, to the Complainant's benefit, the debris disposal requirements set forth in the Specifications. Ms. Bloss noted that, prior to the vegetation management work on Complainant's property, the right-of-way included a non-maintained area that was filled with dense, woody brush as high as 16 feet tall. However, brush debris was windrowed and diced below knee height after the vegetation management; then, the contractor returned to the property twice to mow the right-of-way area. (Respon. Ex. 5 at 10-11.)

On cross examination, Ms. Bloss testified that what has grown back in the right-of-way is herbaceous vegetation instead of dense woody stems. She noted that the use of herbicide has allowed for much easier access on the hillside, by walking or with the appropriate equipment, and that the area is much more usable than it was in its prior condition. Ms. Bloss testified that, as the easement does not contain language regarding debris disposal, the Specifications would be used to guide the contractor in how debris is to be left in the area. (Tr. at 27-28.)

Glover Testimony

Alan Glover, a transmission vegetation management specialist employed by ACRT, Inc., which provides vegetation management services to FirstEnergy Service Company, testified in support of Ohio Edison. Mr. Glover noted that he is a certified arborist and that he holds a pesticide applicator license through the state of Ohio. He testified that Ohio Edison's contractor, ATE, began work clearing the easement in March 2013 using an aerial saw and that, after a meeting with Mr. Griffith later that month to discuss the use of herbicide, debris within the right-of-way was mowed in April 2013. Mr. Glover testified that, following written notice to Mr. Griffith in April 2013 concerning the use of herbicide, ATE applied the herbicide to woody vegetation within the right-of-way in May 2013. He noted that there were two meetings with Mr. Griffith to discuss the use of herbicide to control woody vegetation within the right-of-way, in March and July 2013, and that, at the July 2013 meeting, he explained to Mr. Griffith that, pursuant to the Specifications, herbicide had to be applied to control the stumps of the woody vegetation in the area. Mr. Glover testified that he also showed Mr. Griffith specific areas within the right-of-way where grass was re-sprouting, that the herbicide did not cause a complete brown-out, as Mr. Griffith was worried about, and that the herbicide was applied simply to target woody stumps. (Respon. Ex. 6 at 3-4.)

Mr. Glover stated that further meetings were held with Mr. Griffith and, in order to address his concerns about debris and stubble remaining in the right-of-way, ATE returned to the property twice, windrowing brush and dicing debris below knee height in July 2013 and performing more mowing in October 2013. Mr. Glover also noted that this additional work exceeded what the Specifications require for the non-maintained lawn area within the right-of-way on Mr. Griffith's property. (Respon. Ex. 6 at 4-6.)

Mr. Glover testified that debris disposal and the application of herbicide within the transmission corridor on Mr. Griffith's property was appropriate and necessary under the circumstances. He noted that, following vegetation management work in March, April, and May 2013, debris was reasonably maintained in accordance with the Specifications by cutting, mowing, and the application of herbicide. Mr. Glover stated that FirstEnergy, through ATE, complied with the Specifications initially and then returned in order to accommodate the Complainant with respect to debris disposal on his property. (Respon. Ex. 6 at 6-7.)

IV. Discussion

Inasmuch as Ohio Edison's ownership of the easement through Mr. Griffith's property and the Company's right to perform vegetation management within the easement are not at issue in this case, the only issue for our determination is whether Mr. Griffith has met his burden of proof in demonstrating that the Company's contractor, ATE,

acted unreasonably with regard to debris disposal and the application of herbicide within the right-of-way on his property. The record reveals that Ohio Edison's witnesses presented credible evidence concerning debris disposal and herbicide use. Ohio Edison witness Glover testified that, after the initial round of aerial sawing, mowing, and herbicide application in March, April, and May 2013, ATE returned twice in order to satisfy Mr. Griffith's concerns. In July 2013, ATE reduced the remaining debris further and stacked it in windrows along the edge of the trees that border the property, and in October 2013, ATE performed additional mowing to reduce the size of the residual stubble from the cut vegetation in the area. Mr. Glover testified that a herbicide application, which is called for under the Ohio Edison's contractor Specifications, was necessary to counteract the fast re-growth of woody stems after cutting. He noted that the herbicide was applied only to the stumps of woody vegetation. Further, Mr. Glover stated that grass had already begun to sprout in the area in July 2013 and the herbicide did not cause a brown-out following the mowing and herbicide application in April and May 2013, respectively. (Respon. Ex. 6 at 3-7; Respon. Exs. 1-4 - photographs of Griffith property.)

Mr. Griffith presented his own case at hearing. He testified that, by the language of the easement, Ohio Edison has a duty to see that any damage done to his property in vegetation clearing operations is repaired; therefore, it is reasonable to assume that the Company should be required to dispose of the debris from the vegetation clearing and clear the property according to the way he wants it done. According to Mr. Griffith, the way he wants it done is for ATE to landscape the upper portion of the right-of-way by removing all of the debris and sowing grass seed. Mr. Griffith further testified that Ohio Edison has not taken care of the right-of-way for years and that the Company is responsible for cleaning up the area and sowing grass seed because it owns the easement. (Tr. at 18-19, 23-24.)

Mr. Griffith's complaint is based on two contentions: (1) his interpretation of the easement document, 97934, which he reads as requiring the Company to landscape and reseed his property, as well as to repair or replace damaged property features in the right-of-way caused by the construction or maintenance of its transmission line (Tr. at 10; Compl. Ex. 2), and (2) the fact that ATE applied herbicide in the cut and mowed area in the right-of-way when he had argued against its use (Tr. at 6, 17, 23).

With respect to Mr. Griffith's first contention, the Commission observes that Ohio Edison's contractor Specifications (Respon. Ex. 5, Att. KB-2 at 41) allow for debris disposal by leaving logs at full length and the piling of other vegetation debris in windrows and leaving it in place. Unlike Mr. Griffith, the Commission does not read the Specifications as requiring an additional assumption that the area cleared of vegetation will be landscaped and sown with grass seed. This assumption, that landscaping is required as part and parcel of debris disposal in the right-of-way, was stated by Mr. Griffith at hearing (Tr. at 10-11), and is not set forth in the terms of the easement document (Compl. Ex. 2; Respon.

Ex. 5 at Att. KB-4). Our reading of that document, together with the Specifications, is that, basically, debris in the non-maintained area of Mr. Griffith's property in the right-of-way may be piled in windrows and left in place for further disposal by the property owner. There is no evidence of record that landscaping by further clearing the area of debris and seeding it with grass seed is required. Lacking such evidence, the Commission observes that the only indication in this record as to the extent of debris disposal in the right-of-way is the testimony and exhibits of Ohio Edison's witnesses. Both Ohio Edison witnesses testified that ATE complied with the Specifications at the outset, and then returned twice in order to accommodate the Complainant with respect to debris disposal on his property. (Respon. Exs. 5 and 6 at 10-11 and 7, respectively).

With respect to Mr. Griffith's second contention, the Commission observes that, while Mr. Griffith stated that he did not want herbicide used on his property and expressed his concern about the herbicide affecting the pond that he had constructed and stocked with fish, there is also no evidence in the record that, other than resulting in the control of woody vegetation in the non-maintained section of the Company's right-of-way, the use of herbicide had an adverse impact on anything within the right-of-way. The Commission believes that Mr. Griffith's testimony, that the application of herbicide by ATE "killed everything" (Tr. at 6, 24), applies only to the elimination of vegetation within that non-maintained area. As noted previously with the issue of debris disposal, the only other evidence available on the record about the use of herbicide within the right-of-way comes from the testimony and exhibits presented by Ohio Edison. This evidence demonstrates that, under the Specifications, an application of herbicide is necessary to retard the rapid re-growth of woody vegetation caused by the clearing of a right-of-way. Moreover, we note that Ohio Edison's witness, Alan Glover, testified that the herbicide was applied only to the stumps of woody vegetation in the non-maintained area, that the herbicide had not caused a brown-out as Mr. Griffith had feared, and that there were areas within the right-of-way in which grass had begun to re-sprout. We also observe that, among the exhibits presented at hearing, there are pictures (Compl. Ex. 1; Respon. Exs. 1, 2, 3, and 4) depicting the right-of-way through Mr. Griffith's property before and after Ohio Edison completed its vegetation management efforts. The "after" pictures show a cleared upper, non-maintained area and a lower maintained area, with grass, trees, and pond seemingly unaffected by the application of herbicide in the non-maintained area.

The Commission would note that under Ohio Adm.Code 4901:1-10-27, Ohio Edison must submit written programs to the Commission for the inspection, maintenance, repair, and replacement of its transmission and distribution circuits and equipment and that such programs include right-of-way, vegetation management. Once submitted, if not acted upon by the Commission within a specified time, the filing of these programs is deemed approved. Such written programs (the Plan and Specifications previously noted in Ohio Edison witnesses' testimony, Respon. Ex. 5 at 5-6; Respon. Ex. 6 at 8-9), originally filed in 2001, and amended in 2010 and 2014, were submitted by Ohio Edison, for the

Commission's review. The Commission did not act upon the information contained in the original or subsequent versions of the filings. Therefore, the written programs, which included the vegetation management measures in the Specifications, were approved. We can find nothing about the debris disposal or herbicide application by Ohio Edison's contractor on Mr. Griffith's property that conflicts with the Specifications on file at the Commission. Consequently, consistent with the facts presented on this record, the Commission believes that Ohio Edison's contractor acted according to the contractor guidelines for debris disposal and herbicide application in the Specifications.

V. Conclusion

The Commission finds that Mr. Griffith has failed to prove that Ohio Edison's contractor, and thus Ohio Edison, acted unreasonably in the disposal of debris or the application of herbicide on his property.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) James L. Griffith filed a complaint against the Ohio Edison Company (Ohio Edison), on September 18, 2013, contesting debris disposal and the application of herbicide by Ohio Edison's contractor in the right-of way that passes through his property.
- (2) Ohio Edison is a public utility as defined by R.C. 4905.02, and an electric light company as defined in R.C. 4905.03(A)(3).
- (3) On October 8, 2013, Ohio Edison filed its answer, admitting in part and denying in part the allegations contained in the complaint.
- (4) A settlement conference was held on February 13, 2014; however, the parties failed to resolve this matter.
- (5) A hearing was initially scheduled on July 29, 2014, but was continued in order to take Mr. Griffith's deposition. Thereafter, the hearing was held on October 15, 2014.
- (6) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E. 2d 666 (1966).
- (7) Mr. Griffith has not met his burden of proof that Ohio Edison's contractor acted unreasonably concerning debris disposal and the application of herbicide on his property.

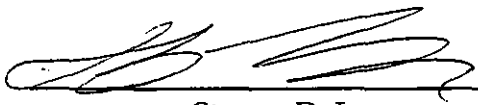
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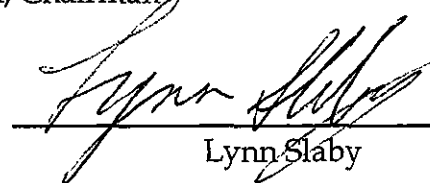
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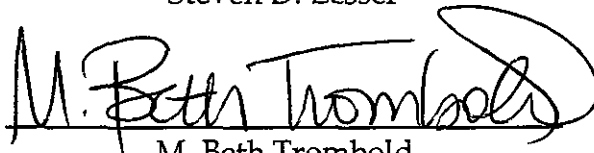
ORDERED, That the complaint be resolved in favor of Ohio Edison and that this case be dismissed. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

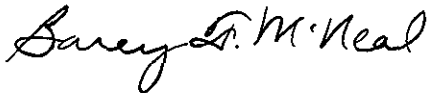
Lynn Slaby

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Entered in the Journal

JAN 21 2015

Barcy F. McNeal
Secretary