

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Individual	)	Case Nos. 17-2170-EL-CSS
Complaints of Fu Wong and Peony	)	17-2172-EL-CSS
Lo, Bob Schmeling, Melissa and Peter	)	17-2173-EL-CSS
Broome, Melisa Kuhne, Jim and Laura	)	17-2176-EL-CSS
Haid, Shana Berge, Jason	)	17-2181-EL-CSS
Dimaculangan, John Gump, Chris	)	17-2183-EL-CSS
Hendriksen, Melissa and Brian Weiss,	)	17-2191-EL-CSS
Evelyn and Tim King, Anne Wymore,	)	17-2192-EL-CSS
Anita Deye, Clifford W. Fauber,	)	17-2195-EL-CSS
Timothy Wilson, Sandra Nunn,	)	17-2196-EL-CSS
Melanie Maughlin, Amber and Chris	)	17-2201-EL-CSS
Francosky, Sanford and Barbara	)	17-2203-EL-CSS
Casper, Patricia McGill, Carlyle Reid	)	17-2213-EL-CSS
	)	17-2214-EL-CSS
	)	17-2223-EL-CSS
	)	17-2224-EL-CSS
	)	17-2225-EL-CSS
	)	17-2262-EL-CSS
	)	17-2268-EL-CSS
	)	17-2314-EL-CSS
	)	17-2212-EL-CSS
)	

**APPLICATION FOR REVIEW
AND
INTERLOCUTORY APPEAL**

Pursuant to Ohio Administrative Code (O.A.C.) 4901-1-15, Duke Energy Ohio, Inc., (Duke Energy Ohio) hereby files an Application for Review and Interlocutory Appeal of the November 17, 2017, attorney examiner’s ruling that Duke Energy Ohio, Inc. shall not “clear cut any trees within the 100 feet utility easement on [Complainant’s] property until further notice.” That ruling exceeds the Commission’s authority and represents a departure from past precedent by granting injunctive relief against Duke Energy Ohio, and also violates the Company’s rights under its easement on Complainant’s property and its Programs for Inspection, Maintenance,

Repair and Replacement of Distribution and Transmission Lines, Section (f), as approved on June 13, 2016. Accordingly, the Commission's immediate determination is needed to prevent the likelihood of undue prejudice to Duke Energy Ohio.

For the reasons explained in the memorandum in support attached hereto, Duke Energy Ohio respectfully requests that the Commission act on this Application for Review and Interlocutory Appeal and, in so doing, reverse the attorney examiners' ruling to be consistent with Ohio law.

Respectfully submitted,

/s/ Elizabeth H. Watts

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MEMORANDUM IN SUPPORT

Introduction and Procedural Background

In the above-captioned complaints filed with the Public Utilities Commission of Ohio (Commission), twenty-one Complainants allege that Duke Energy Ohio is violating its easement “by clear cutting and obliterating (vs. trimming) all trees located” within the 100 foot right-of-way and that the Company is “surpassing the requirements by PUCO as described in: Programs for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines 4901:1-10-27(E)(1).” Complainants thereafter request an “emergency stop cut order”, for which there is no legal precedent. Those requests were filed with the Commission, but not served on Duke Energy Ohio, as required by O.A.C. 4901-1-05(A). By Entry dated November 17, 2017, the Commission granted Complainants’ motions and effectively entered a preliminary injunction against Duke Energy Ohio without notice or opportunity to be heard.

Duke Energy Ohio timely filed its Answers to the above-referenced Complaints in these proceedings. In its Answers, the Company explains how it is exercising its lawful right, pursuant to grants of easement, to engage in vegetation management activities that include, but are not limited to, removing vegetation within its easement and right-of-way. Duke Energy Ohio further explains in its Answers how such services are necessary to enable the continued safe and reliable operation of high-voltage power lines used in the provision of service to the Company’s customers, including Complainants. Finally, Duke Energy Ohio’s Answers note that its actions are also consistent with its Programs for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines, Section (f), as approved on June 13, 2016.

Legal Requirements for the Filing of an Interlocutory Appeal

O.A.C. 4901-1-15 addresses the right of parties to Commission proceedings to appeal rulings issued in writing or orally by attorney examiners. Specifically, the rule provides that any party who is adversely affected by such a ruling may take an immediate interlocutory appeal to the Commission if the ruling falls within certain designated categories. Rule 4901-1-15(A)(1), O.A.C. If, as in these cases, one of those categories is absent, a party may take an interlocutory appeal if the appeal is certified because the appeal “presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.” Rule 4901-1-15(B), O.A.C.

The governing rule goes on to require that interlocutory appeals must begin with an application for review that is filed with the Commission within five days after the ruling is issued. The application must set forth the basis of the appeal and citations of authorities relied upon. A copy of the ruling or the portion of the record that contains the ruling must be attached to the application. Rule 4901-1-15(C), O.A.C.

Upon consideration of an interlocutory appeal, the governing rule authorizes the Commission to affirm, reverse or modify the ruling. Rule 4901-1-15(E), O.A.C. Here, reversal is both necessary and appropriate.

The Ruling

Duke Energy Ohio is requesting a review of the attorney examiner’s Entry dated November 17, 2017, a copy of which is attached hereto, with regard to the following issues:

1. In finding (3), the attorney examiner found: Complainants’ “motions are reasonable and should be granted. Accordingly, until further notice, Duke should not clear cut any trees within the 100-foot utility easement on [Complainants’] property.”
2. In finding (5), the Entry states that Complainants’ “motions to stay are granted.”
3. Also in finding (6) of the Entry, the attorney examiner orders Duke Energy Ohio not to “clear cut any trees within the 100 feet utility easement on [Complainants’] property until further notice.”

Discussion

It is well settled in Ohio that the Commission is a creature of the General Assembly and may exercise no jurisdiction or powers except as expressly conferred by statute.¹ As the Ohio Supreme Court held in *Penn Central*, “The General Assembly has granted the power of injunctive relief solely to the courts in Ohio. It has conferred no such right upon the Public Utilities Commission, and the commission, in exercising such power, has exceeded its statutory jurisdiction.”²

Here, the attorney examiner clearly disregarded the binding precedent in *Penn Central* and exceeded the Commission’s statutory authority by choosing to treat Complainants’ initial Complaints as also motions and then granting Complainants’ motions and ordering Duke Energy Ohio not to “clear cut any trees within the 100 feet utility easement on [Complainants’] property

¹ See, *Penn Cent. Transp. Co. v. Public Utilities Com.*, 35 Ohio St. 2d 97, 99, 298 N.E.2d 587, 589 (1973), paragraph 1 of the syllabus, citing *Toledo v. Pub. Util. Comm.* (1939), 135 Ohio St. 57; *Akron & Barberton Belt Rd. Co. v. Pub. Util. Comm.* (1956), 165 Ohio St. 316; *Baltimore & Ohio Rd. Co. v. Pub. Util. Comm.* (1968), 16 Ohio St. 2d 60; *Ohio Bus Line v. Pub. Util. Comm.* (1972), 29 Ohio St. 2d 222; see also, *Ohio Mfrs’ Asso. v. Public Utilities Com.*, 46 Ohio St. 2d 214, 217 (1976) (“the commission possesses no power or authority except that conferred and vested in it by statute”); *In the Matter of the Complaint of Harry G. Dworkin Complainant, v. East Ohio Gas Co.*, Case No. 88-1716-GA-CSS, 1989 Ohio PUC LEXIS 230, *2 (“The Commission lacks jurisdiction to grant injunctive relief”); *In the Matter of the Complaint of Richard Powell, d.b.a. Scioto Lumber Company, Complainant, v. The Cincinnati Gas & Electric Co.*, Case No. 88-916-GE-CSS, 1988 Ohio PUC LEXIS 674, *4 (“As also correctly pointed out by CG&E, the Commission is without jurisdiction to award the type or relief [injunctive] sought by Complainant”).

² *Id.* at 101

until further notice,” as set forth in the November 17, 2017, Entry. On its face that order is an unlawful injunction.

As more fully reflected in the docket for these proceedings, that unlawful order is even more egregious given the fact that it was entered *ex parte*, without notice or opportunity to be heard by Duke Energy Ohio. Complainants do not seek an expedited ruling, nor did the attorney examiner direct that the Complaints be treated as motions and direct the Company to respond. Had that transpired, Duke Energy Ohio would have responded in a timely manner and fully apprised the attorney examiner of the factual and legal reasons that Complainants’ motions must be denied. However, by granting Complainants’ motions absent any response by the Company, the attorney examiner effectively deprived Duke Energy Ohio of its due process rights.

Moreover, even if the Commission had the power to grant injunctive relief, which *Penn Central* clearly rejects, the attorney examiner granted injunctive relief without performing the requisite analysis or making any findings to support a conclusion that injunctive relief was necessary or appropriate to preserve the status quo and protect Complainants’ clear rights. After all, Complainants readily admit in their Complaints that Duke Energy Ohio has an easement and right-of-way on their properties. Complainants also acknowledge the Company’s rights under its Programs for Inspection, Maintenance, Repair and Replacement of Distribution and Transmission Lines, Section (f), as approved on June 13, 2016. Complainants’ motions are silent as to how Duke Energy Ohio supposedly is violating a clearly established and ascertainable right that would remotely justify the extraordinary and unlawful imposition of injunctive relief by the Commission.

Nothing in the record demonstrates that Complainants’ requests for injunctive relief were justified by fact or law. On the contrary, the record firmly establishes that the attorney examiner

exceeded the Commission's authority by granting injunctive relief and ordering Duke Energy Ohio not to perform necessary vegetation management services within its acknowledged easement and right-of-way on Complainants' properties. As mandated by the Ohio Supreme Court in *Penn Central*, the unlawful injunction set forth in the November 17, 2017, Entry must be reversed.

Conclusion

Duke Energy Ohio requests that, upon review, the Commission should reverse the Entry dated November 17, 2017, and deny Complainants' request for an "emergency stop cut order" to stop the Company's lawful vegetation management policies and procedures within its acknowledged easement and right-of-way on Complainant's property.

Respectfully submitted,

/s/ Elizabeth H. Watts

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by regular U.S. Mail or via electronic mail on this 21st day of November, 2017:

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Summary: Memorandum Application for Review and Interlocutory Appeal electronically filed by Ms. Emily Olive on behalf of Duke Energy Ohio and Spiller, Amy B. Ms. and Watts, Elizabeth H. Ms. and McMahon, Robert A. Mr.