BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Kim Wiethorn, Karen Dabdoub, Jeff and Linda Sims, Fred Vonderhaar, Donald and Nancy Jacob, James Johnson, Majid Qureshi, Keith Donovan, Julie Reynolds, John Lu, Robert Schneider, Amanda Sachs, John Hasselbeck, Lawrence Hug, Dennis Mitman, Nicole Hiciu, Jason Mayhall, James and Shelley Hoyer, Theresa Reis, Gary Balser, David Siff, and the Symmes Township Trustees	))))))))))))))	17-2344-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 16, 2017, attorney examiner's ruling that Duke Energy Ohio, Inc. shall "stay its vegetation management plan and stay the clear cutting and removal of Complainants' trees and vegetation on their properties during the pendency of this complaint." 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 Complainants' properties 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 examiner's ruling to be consistent with Ohio law.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Introduction and Procedural Background

In the above-captioned complaint filed with the Public Utilities Commission of Ohio (Commission), twenty-five Complainants allege that Duke Energy Ohio is violating its easement by "obliterating all trees and vegetation near its power lines." The Complainants go on to allege that Duke Energy Ohio has not provided justification for its actions.

Complainants requested a stay and expedited ruling in this proceeding. Those requests were filed with the Commission, however, Duke Energy Ohio was not given the opportunity to respond in any way. Pursuant to O.A.C. 4901-1-12(C), the Company should have been permitted to file a memo contra the request for expedited ruling of stay. By Entry dated November 16, 2017, two days after the Complaint was filed, the Commission granted Complainants' request ordering the Company to "stay its vegetation management plan and stay the clear cutting and removal of Complainants' trees and vegetation on their properties during the pendency of this complaint." This Entry effectively entered a preliminary injunction against Duke Energy Ohio without notice or the opportunity to be heard.

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 16, 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 stay its vegetation management plan and stay the clear cutting and removal of Complainants' trees and vegetation on their properties during the pendency of this complaint."
2. In finding (5), the Entry states that Complainants' "request to stay the clear cutting of trees on their properties is granted."
3. Also in finding (6) of the Entry, the attorney examiner orders Duke Energy Ohio to "stay its vegetation management plan and stay the clear cutting and removal of

Complainants' trees and vegetation on their properties during the pendency of this complaint."

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 granting Complainants' motions and ordering Duke Energy Ohio to "stay its vegetation management plan and stay the clear cutting and removal of Complainants' trees and vegetation on their properties during the pendency of this complaint," as set forth in the November 16, 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 to or opportunity to be heard by Duke Energy Ohio. Had the opportunity been lawfully given to Duke Energy Ohio, it

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[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

would have responded in a timely manner and fully apprised the attorney examiner of the factual and legal reasons that Complainants' requests must be denied. However, by granting Complainants' requests two days after the Complaint was filed and before the Company's memorandum contra was due, the attorney examiner effectively deprived Duke Energy Ohio of its due process rights.

Moreover, even if the Commission has 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 Complaint that Duke Energy Ohio has an easement and right-of-way on their properties. Complainant also acknowledges 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' requests 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 16, 2017, Entry must be reversed.

Conclusion

Duke Energy Ohio requests that, upon review, the Commission should reverse the Entry dated November 16, 2017, and deny Complainants' request for a stay of the Company's vegetation management policies and procedures within its acknowledged easement and right-of-way on Complainant's property.

Respectfully submitted,

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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.