

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMPLAINT OF
CITIZENS AGAINST CLEAR CUTTING, ET
AL.,**

COMPLAINANTS,

v.

CASE NO. 17-2344-EL-CSS

DUKE ENERGY OHIO, INC.,

RESPONDENT.

ENTRY

Entered in the Journal on March 7, 2018

{¶ 1} On November 14, 2017, Citizens Against Clear Cutting (Complainants) filed a complaint against Duke Energy Ohio, Inc. (Duke). Complainants are located in Hamilton County, Symmes Township, Deerfield Township, and the City of Montgomery, Ohio. Complainants allege that Duke is attempting to remove trees on their properties without making a determination that the trees actually pose a risk to the safe and reliable provision of electric service and complete removal is necessary. They further allege that without such a determination, Duke has no authority to engage in the practice.

{¶ 2} Along with their complaint, Complainants requested that the Commission issue a stay of the implementation of Duke's vegetation management plan as it relates to the Complainants' properties, as well as a stay of the clear cutting and removal of trees and vegetation on the Complainants' properties during the pendency of the complaint. Complainants indicated that the stay is necessary because Duke could commence clear cutting trees immediately.

{¶ 3} The attorney examiner granted Complainants' motion to stay on November 16, 2017.

{¶ 4} On November 21, 2017, Duke filed an application for review and interlocutory appeal of the presiding examiner's entry granting Complainants' motion to stay, pursuant

to Ohio Adm.Code 4901-1-15. In the appeal, Duke notes that the presiding examiner exceeded the Commission's statutory authority and acted unlawfully by granting Complainants' motion to stay clear cutting and the removal of trees.

{¶ 5} On November 27, 2017, Complainants filed a memorandum contra to Duke's application for review and interlocutory appeal, pursuant to Ohio Adm.Code 4901-1-15(D). Complainants argue that Duke's appeal fails to meet the certification requirement as a request for stay during the pendency of a complaint is not a new or novel question and the Commission has previously granted such stays in the past. Moreover, Complainants note the Commission has jurisdiction over vegetation management plans and that they specifically challenged the propriety of Duke's plan, which was previously approved by the Commission. Complainants argue that the Commission's exclusive jurisdiction over complaints related to the removal of trees would be meaningless if it could not actually prevent Duke from cutting down the trees at issue in this case. Lastly, Complainants argue that Duke has not demonstrated that an immediate determination by the Commission is necessary because it fails to show how its inability to remove trees during the pendency of the matter will somehow endanger the reliability and safety of its service.

{¶ 6} Ohio Adm.Code 4901-1-15 sets forth the substantive standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission pursuant to paragraph (B) of the rule. As Duke notes in its appeal, the presiding examiner's ruling that is the subject of Duke's interlocutory appeal is not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, Duke's interlocutory appeal may only be certified to the Commission if it meets the requirements of paragraph (B) of Ohio Adm.Code 4901-1-15.

{¶ 7} Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that 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 that 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. In order to certify an interlocutory appeal to the Commission, both requirements must be met.

{¶ 8} Duke contends that the interlocutory appeal should be certified to the Commission under Ohio Adm.Code 4901-1-15(B) because the Entry granting the motion to stay exceeds the Commission's statutory authority. Specifically, Duke notes that the Commission can only exercise jurisdiction as expressly conferred by statute. Moreover, Duke states that only courts can grant injunctive relief and the presiding examiner acted unlawfully in granting Complainants' motion to stay. According to Duke, the presiding examiner's order also deprived Duke of its due process rights as it granted Complainants' request shortly after their complaints were filed. Lastly, Duke states that the presiding 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' rights.

{¶ 9} Although the attorney examiner agrees that requests for stays regarding the removal of a single tree or trees on a single parcel of property have been issued in prior cases, the attorney examiner finds that under the unique facts presented in this proceeding, including the sheer magnitude of this stay, the presiding examiner's decision to grant the motion to stay presents a new or novel question of interpretation, law, or policy. Further, the attorney examiner finds that an immediate determination by the Commission is necessary to prevent the likelihood of undue prejudice to Duke due to the potential delay in implementation of its approved programs for inspection, maintenance, repair and replacement of distribution and transmission lines. Therefore, the attorney examiner finds that Duke's interlocutory appeal should be certified to the Commission, pursuant to Ohio Adm.Code 4901-1-15(B).

{¶ 10} It is, therefore,

{¶ 11} ORDERED, That Duke's request for certification to the Commission of its interlocutory appeal be granted. It is, further,

{¶ 12} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Gregory Price

By: Gregory Price
Attorney Examiner

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Summary: Attorney Examiner Entry granting Duke's request for certification to the Commission of its interlocutory appeal; electronically filed by Vesta R Miller on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio