

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 8, 2018

I. SUMMARY

{¶ 1} The Commission denies the interlocutory appeal filed by Duke Energy Ohio, Inc., and affirms the decision of the attorney examiner issued on November 16, 2017. The Commission also grants the motions to dismiss filed by Duke Energy Ohio, Inc. with regard to the individuals identified in in those motions due to their lack of standing, pursuant to R.C. 4905.26. Furthermore, the Commission dismisses certain claims raised by Complainants as they fall outside of the Commission's jurisdiction.

II. DISCUSSION

A. *Procedural History*

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is a public utility, pursuant to R.C. 4905.02, and is, therefore, subject to the jurisdiction of this Commission.

{¶ 3} On November 14, 2017, Citizens Against Clear Cutting (Complainants) filed a complaint against 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 respective 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.

{¶ 4} Along with their complaint, Complainants requested that the Commission issue a stay of the implementation of Duke's vegetation management plan, approved in Case No. 16-915-EL-CSS, 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. The attorney examiner granted Complainants' motion to stay on November 16, 2017.

{¶ 5} On November 21, 2017, Duke filed an application for review and interlocutory appeal of the attorney examiner's Entry granting Complainants' motion to stay, pursuant to Ohio Adm.Code 4901-1-15.

{¶ 6} 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).

{¶ 7} On March 7, 2018, the attorney examiner certified Duke's interlocutory appeal to the Commission.

{¶ 8} On December 4, 2017, Duke filed a motion to dismiss certain Complainants' claims pursuant to R.C. 4905.26, Ohio Adm.Code 4901-1-12 and 4901-9-01(C). On December 19, 2017, Complainants filed a memorandum contra to Duke's motion to dismiss.

{¶ 9} On December 28, 2017, Duke filed a motion for leave to file a reply and a reply memorandum in support of its motion to dismiss. On January 4, 2018, Complainants filed a memorandum contra to Duke's motion for leave to file a reply in support of its motion to dismiss.

{¶ 10} On January 25, 2018, the attorney examiner granted Complainants' January 5, 2018 motion to amend its November 22, 2017 amended complaint, thereby permitting

additional complainants with similar claims to join this proceeding. The attorney examiner also held a prehearing conference in this matter on February 5, 2018.

{¶ 11} On January 25, 2018, Duke filed an answer to Complainants' second amended complaint, which was filed on January 5, 2018. In the answer, Duke reiterates that it has valid easements and right-of-ways within which it is conducting vegetation management activities approved by the Commission. It also contends that certain Complainants do not own property under the transmission circuits where Duke is currently conducting vegetation management practices and argues that their claims should be dismissed, accordingly.

{¶ 12} On February 2, 2018, Duke filed a motion to dismiss with regard to Complainants' second amended complaint. On February 20, 2018, Complainants filed a memorandum contra to the motion to dismiss. Lastly, on February 20, 2018, Duke filed a renewed motion to dismiss.

{¶ 13} For ease of discussion, the Commission considers Duke's November 21, 2017 interlocutory appeal first and then addresses Duke's motions to dismiss.

B. Duke's Interlocutory Appeal

{¶ 14} Pursuant to Ohio Adm.Code 4901-1-15(E), upon consideration of an interlocutory appeal, the Commission may exercise discretion and either: (1) affirm, reverse, or modify the ruling; or (2) dismiss the appeal, if the Commission is of the opinion that the issues presented are moot, the party taking the appeal lacks the requisite standing to raise the issues presented or has failed to show prejudice as a result of the ruling in question, or the issues presented should be deferred and raised at some later point in the proceeding.

{¶ 15} Additionally, in considering motions to stay, the Commission favors the four-factor test outlined in *MCI Telecommunications v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 606, 510 N.E.2d 806 (1987). The four factors are:

- (a) Whether there is a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Whether the stay would cause substantial harm to other parties; and
- (d) Where the public interest lies.

{¶ 16} Duke, in its November 21, 2017 application for review and interlocutory appeal of the attorney examiner's Entry granting Complainants' motion to stay, claims that the attorney examiner exceeded the Commission's statutory authority and acted unlawfully by granting Complainants' motion to stay clear cutting and the removal of trees. Citing to Supreme Court of Ohio precedent in support of its proposition, Duke states that only Ohio courts have the ability to grant injunctive relief and the Commission has no such power. *Penn Cent. Transp. Co. v. Pub. Util. Comm.*, 35 Ohio St. 2d 97, 99, 298 N.E.2d 587, 589 (1973). Duke further complains that the attorney examiner granted the stay without providing it notice or opportunity to be heard.

{¶ 17} In their memorandum contra filed on November 27, 2017, Complainants argue that Duke's reliance on *Penn Central* is misplaced because that case did not involve an electric utility or its vegetation management plan. Instead, Complainants believe that *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009 (*Corrigan I*) is applicable. Complainants note that *Corrigan I* upheld the Commission's exclusive jurisdiction over vegetation management plans. Here, Complainants argue that they have specifically challenged the propriety of Duke's vegetation management 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.

Complainants also argue that Duke has not demonstrated that an immediate determination by the Commission is necessary because its inability to remove trees during the pendency of the matter will somehow endanger the reliability and safety of its service. Overall, Complainants state 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.

{¶ 18} The Commission finds that the attorney examiner's ruling granting the stay against clear cutting in the November 16, 2017 Entry should be affirmed in all respects. We note that R.C. 4901.18 specifically authorizes the Commission to appoint attorney examiners, and we have set forth the authority and duties of the attorney examiners in Ohio Adm.Code 4901-1-27. Under this rule, the Commission has authorized the attorney examiners to take such actions as are necessary to assure that the hearing proceeds in an orderly and expeditious manner. Ohio Adm.Code 4901-1-27(B)(7)(d).

{¶ 19} With respect to Duke's reliance on *Penn Central*, it is also well-settled that the Commission has jurisdiction over issues involving a utility's vegetation management plan. R.C. 4928.11 authorizes the Commission to adopt rules that specify minimum standards for service quality, safety and reliability for noncompetitive services supplied by an electric utility. Pursuant to this authority, the Commission adopted Ohio Adm.Code 4901:1-10-27, which requires, among other things, that electric utilities establish programs for right-of-way vegetation control. Ohio Adm.Code 4901:1-10-27(E)(1)(f). R.C. 4928.16 states that the Commission also has jurisdiction under R.C. 4905.26 to determine whether an electric utility has violated or failed to comply with any provision of R.C. 4928.01 through 4928.15 or any rule or order adopted or issued under those sections. Here, Duke has filed a vegetation management plan with the Commission as required by Ohio Adm.Code 4901:1-10-27, and, to the extent Complainants have challenged the propriety of this plan, the matter falls squarely within the Commission's exclusive jurisdiction under R.C. 4905.26 and 4928.16.

{¶ 20} Thus, the Commission agrees with Complainants that Duke's reliance on *Penn Central* is misplaced. Neither the Commission nor the attorney examiner has granted injunctive relief. See *Corrigan II* at ¶ 5 (Where the Supreme Court of Ohio acknowledged that the Commission had issued a stay of the utility's vegetation management program, first, while the matter was pending at the Commission, and, second, after we issued our final order denying the complaint, and while the complainants sought a stay on appeal from the Court). Instead we are acting pursuant to our authority under R.C. 4905.26 and 4928.16. Additionally, the Commission notes that the facts in this case are dissimilar from those presented in *Penn Central*. In that case, the Commission asserted that it had jurisdiction to inquire into violations of R.C. 4959.01 and 4959.11, which impose statutory obligations on railroads to maintain open drainage outlets and destroy weeds growing within the railroad's right-of-way. As the Supreme Court of Ohio held, R.C. 4959.01 and 4959.11 imposed duties directly upon the railroad and did not grant enforcement rights to the Commission. Consequently, when the Commission ordered mandatory performance of those duties, it assumed a power of injunctive relief which exceeded its statutory jurisdiction. *Penn Cent.*, 35 Ohio St. 2d at 99-100, 298 N.E.2d at 589-90. In this case, the Complainants have filed a complaint under R.C. 4905.26 alleging that Duke's practices under the vegetation management plan required by Commission rules are unjust and unreasonable. This case involves Commission-promulgated rules for reliability programs rather than statutory duties placed directly on Duke, and the Commission, pursuant to R.C. 4928.16(A)(2), has full enforcement authority over such reliability programs, including vegetation management plans.

{¶ 21} Moreover, in affirming the attorney examiner's stay, the Commission has considered the four-factor test outlined in *MCI Telecommunications*. First, the Commission finds that, at this juncture, neither the Complainants nor Duke has demonstrated that they are likely to prevail on the merits of this matter. Complainants, who will bear the burden of proof in this proceeding, have only alleged that Duke is unjustly and unreasonably implementing its vegetation management plan, without considering whether the clear

cutting practice may address potential reliability and safety concerns associated with Duke's past practice of trimming vegetation or how the clear cutting practice is unreasonable pursuant to the Company's approved vegetation management plan. For its part, Duke summarily mentions that it has an established and ascertainable right to clear cut trees under its vegetation management plan and through the easements and right-of-ways it holds on Complainants' properties. However, Duke does not explain its current need to clear cut vegetation versus its past practice of trimming vegetation and why the change in practice is now important for assuring reliable service to its customers. In addition, although Duke has an approved vegetation management plan, Commission approval of the plan does not preclude Complainants from challenging, pursuant to R.C. 4905.26, Duke's practices under the vegetation management plan.

{¶ 22} The Commission also notes that attorney examiners have previously granted stays in complaint cases regarding electric utilities' vegetation management plans, albeit under more limited circumstances. For example, in *Corrigan*, the attorney examiner granted a stay prior to conducting a procedural hearing so that The Cleveland Electric Illuminating Company (CEI) could not remove the subject of the litigation, a silver maple located on the complainants' property within the easement granted to the company. *In re the Complaint of Mary-Martha and Dennis Corrigan v. The Cleveland Elec. Illum. Co.*, Case No. 09-492-EL-CSS, Entry (July 29, 2009) at 4, Entry (Mar. 2, 2010) at 2; *see also In re the Complaint of Kurt Wimmer/Wimmer Family Trust v. Ohio Edison Co.*, Case No. 09-777-EL-CSS, Entry (Nov. 17, 2009) at 3, Entry (Dec. 17, 2009) at 2, Entry (Feb. 3, 2010) at 2; *In re the Complaint of Karl Friederich Jentgen, et al. v. Ohio Edison Co. and American Transmission Systems, Inc.*, Case No. 15-0245-EL-CSS (*Jentgen*), Entry (Feb. 11, 2015) at 2, Entry (Mar. 13, 2015) at 3, Entry (Dec. 14, 2015). As such, the attorney examiner's granting of a stay to prevent any clear cutting of the trees at issue during the pendency of this matter was consistent with the Commission's established practice in similar cases.

{¶ 23} Second, based on the facts presented, Complainants would suffer irreparable harm absent the stay. We find that, pursuant to our authority under R.C. 4905.26 and 4928.16, it was and is necessary to take action to preserve the trees that are the subject of this litigation in order to ensure that the Complainants' claims are preserved. We note that, in the *Corrigan* case cited above, following the Supreme Court of Ohio's decision, the Corriganes filed a complaint with the Commission to prevent CEI from removing the maple tree. After a hearing, the Commission ruled that removal of the tree was reasonable because it was extensively decayed. While the Commission initially granted a stay preventing CEI from removing the tree pending the issuance of the final order, that stay had expired by June 27, 2014. On that day, without a stay in place from either the Commission or any other court, CEI removed the tree. *Corrigan v. Illum. Co.*, 151 Ohio St.3d 85, 2017-Ohio-7555, 86 N.E.3d 287 (*Corrigan II*), ¶¶ 2-5. After the tree was removed, the Corriganes appealed the Commission's decision finding CEI's plan to remove the tree as reasonable. *Corrigan II* at ¶ 1. Although the Supreme Court affirmed the Commission's decision, Justice DeWine, in his dissent, noted that he would have dismissed the Corriganes' appeal as moot because, once the maple at issue was cut down, the Court could no longer provide any actual relief. Justice DeWine stated:

To be sure, the Corriganes had standing when they filed the complaint. They presented an actual controversy about the fate of their tree. But *the chainsaw that brought down the silver maple took the Corriganes' standing with it*. The relief they sought—to keep their tree—was no longer available. Even if the Corriganes' legal arguments were to carry the day, we cannot bring back the tree. The appeal should be dismissed as moot.

Corrigan II at ¶ 25 (emphasis added).

{¶ 24} Based on the same reasoning, the Commission finds that staying the clear cutting of trees at issue in Hamilton County, Symmes Township, Deerfield Township, and the City of Montgomery, Ohio is necessary to preserve Complainants' claims and to prevent

irreparable harm because, absent the stay, the trees subject to this litigation may no longer exist.

{¶ 25} Third, the Commission finds that Duke would not suffer substantial harm if a stay is in place during the pendency of this litigation. Duke claims that clear cutting is necessary to enable the continued safe and reliable operation of high voltage power lines it uses to provide service to its customers. However, as noted above, Duke has not identified any specific reliability issues which require clear cutting as opposed to its prior practice of trimming trees. Likewise, Duke has not demonstrated why it cannot continue with its vegetation management plan in other parts of its service territory and return to the Complainant's area when this proceeding has been completed. Further, Duke has not demonstrated that it will be subject to undue expense as a result of the stay. Consequently, a stay for a limited time during these proceedings is unlikely to cause Duke substantial harm.

{¶ 26} Fourth, with respect to the public interest, the Commission finds that the reliability of electric service to the public is of paramount importance. Here, however, at this point in the proceedings, Duke has failed to articulate any specific reliability issues that have now prompted it to clear cut trees on Complainants' property as opposed to its prior practice of trimming trees. Further, Duke has not demonstrated that reliability of service is at risk due to the stay. Moreover, the Commission intends to expeditiously resolve this matter in order to mitigate any risk to the public interest in reliable electric service.

{¶ 27} Accordingly, upon considering and balancing the four-factor test for a stay outlined in *MCI Telecommunications*, the Commission finds that the attorney examiner's decisions to grant the stay should be affirmed and that Duke's application for interlocutory appeal should be denied.

{¶ 28} Nonetheless, the Commission notes that *Jentgen* involved similar facts to this case in that Ohio Edison Company and American Transmissions Systems, Inc. designated

the removal of a large number of trees and saplings on Complainants' premises pursuant to the companies' approved vegetation management plans. There, while the stay was in place, the parties worked together over a ten-month period and eventually agreed to limit the scope of the stay to eight trees instead of 78. *Jentgen*, Entry (Mar. 13, 2015), Entry (Dec. 14, 2015). Having affirmed the attorney examiner's decision, we direct the attorney examiner to schedule a prehearing conference so the parties can work together with the assistance of a Legal Department mediator to modify the scope of the stay during the pendency of this proceeding and allow Duke to ensure reliable service to its customers without prejudicing the Complainants.

C. *Duke's Motions to Dismiss*

{¶ 29} As an initial matter, the Commission addresses Duke's motion for leave to file its reply memorandum in support of its December 4, 2017 motion to dismiss, which it filed on December 28, 2017, two days after the deadline established by Ohio Adm.Code 4901-1-12. Under Ohio Adm.Code 4901-1-38(B), the Commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in Ohio Adm.Code Chapter 4901-1. In their January 4, 2018 memorandum contra to Duke's December 28, 2018 motion, Complainants state that, according to Ohio Adm.Code 4901-1-12, Duke should have filed its reply within seven days of Complainants' memorandum contra or by December 26, 2017. However, Duke actually filed its reply on December 28, 2017, two days after the deadline. Complainants state that Duke's reason for being late, the holiday season and busy schedules, are not unexpected events and good cause does not exist for the Commission to grant leave. Consequently, Complainants request the Commission to deny Duke's motion for leave and reject the reply memorandum concurrently filed with that motion. Upon review, the Commission finds Duke's December 28, 2017 motion for leave to file its reply memorandum, which was late by only two days, did not unduly prejudice Complainants. Consequently, we find that Duke's motion has set forth good cause, is reasonable, and should be granted.

{¶ 30} Duke, in its December 4, 2017 and February 20, 2018 motions to dismiss, explains that it regularly trims and removes vegetation below and near its transmission and distribution lines as part of the Company's ongoing vegetation management program to ensure the safe and reliable operation of its transmission and distribution grid. To perform those services, Duke has easements and rights-of-way on property owned by third parties. Duke also states that it owns and operates high-voltage transmission lines which run through portions of Symmes Township, Loveland, Ohio and Montgomery, Ohio. Duke identifies the transmission lines in question as transmission circuits 3881, 5483, and 5487. Duke claims it has valid easements and a 100-foot right-of-way below these specific circuits with respect to all property through which these transmission lines run.

{¶ 31} Duke, via affidavit from one of its vegetation management specialists, further explains that transmission circuits 3881, 5483, and 5487 do not run through the properties owned by certain Complainants. These include the following Complainants: Amanda Sachs, David Siff, Carrie and Dan Gause, Susan Falick, Jerry and Lou Ullrich, Darrelle Reese, Julie Carnes, Todd and Michelle Bacon, Patricia Lohse, Rob and Kathleen Olson, John and Barbara Collins, Valerie Van Iden, Joe Zukor, and the Symmes Township Trustees. Additionally, in its answer to Complainants' second amended complaint, Duke also claims that the following Complainants do not own properties under the transmission circuits: Fu Wong and Penny Lo, John and Sally Riester, Sandra L. Nunn, and Mark and Calissa Thompson. Duke contends that these Complainants do not have standing to assert any claims relating to its vegetation management services below transmission circuits 3881, 5483, and 5487 because these circuits do not run through their properties and Duke does not have a right-of-way or easement on these Complainants' properties. Moreover, Duke states that these Complainants are complaining about Duke's service with respect to other property owners' homes on whose properties Duke does have valid rights-of-way or easements. As such, Duke states that these Complainants' claims should be dismissed with prejudice because they fail to set forth reasonable grounds for complaint against Duke

pursuant to R.C. 4905.26 and lack standing to assert claims on behalf of other property owners.

{¶ 32} Complainants, in their memorandum contra dated December 19, 2017, argue that R.C. 4905.26 does not require the activity related to the service to occur on the complainant's property in order for that customer to have standing to bring a complaint before the Commission. Complainants point out that the individuals Duke identifies in its motion to dismiss are all customers of Duke. Because vegetation management is a service Duke provides as a public utility, Complainants contend that these individuals can raise this service-related issue via complaint regardless of the fact that their properties are not directly under transmission circuits 3881, 5483, and 5487.

{¶ 33} Furthermore, Complainants state that its complaint contains allegations related to Duke's use of toxic herbicides and soil erosion as part of its vegetation management program and allegations concerning the decrease in property value, the decrease in aesthetic value, and the diminution in Complainants' enjoyment of their property. Complainants also note its complaint includes that Duke improperly modified its vegetation management plan, misrepresented the revisions made to the plan in Case No. 16-915-EL-ESS in violation of Commission rules, and is unjustly and unreasonably implementing its vegetation management plan. As such, Complainants argue their claims are much more expansive and affect the service provided to all of Duke's customers in the area, rather than just those who own trees that the Company seeks to cut down.

{¶ 34} Complainants also argue that Duke is mistaken when it represents that Symmes Township does not own property through which a transmission line runs. Complainants state that a transmission line visibly runs through the corner of the Symmes Township property and Duke has conducted vegetation management on a portion of this area. Complainants assert that Duke's vegetation management plan will directly affect the Symmes Township property in the immediate and foreseeable future.

{¶ 35} In its reply dated December 28, 2017, Duke asserts that Complainants' arguments are legally flawed because under Complainants' theory, any customer of a public utility would be entitled to file and go forward on a complaint against a public utility for a service-related issue regardless of whether that customer is affected by the service. Furthermore, Duke notes that Complainants do not dispute that transmission circuits 3881, 5483, and 5487 do not run through the certain Complainants' property. Instead, Complainants state that these individual Complainants' status as customers of Duke trumps all other factors. Duke restates that under R.C. 4905.26, a complainant must state reasonable grounds for a complaint before the case may proceed, and consequently the complainant necessarily must have standing to bring the complaint. As such, in absence of a clear statement of the mandatory reasonable grounds, a complaint must be dismissed.

{¶ 36} With regard to property owned by Symmes Township, Duke states that while Symmes Township Trustees allege that some other transmission circuit owned by Duke traverses a corner of the township's real property, Duke is not currently conducting vegetation management below any other circuits other than transmission circuits 3881, 5483, and 5487. Duke reiterates that Complainants concede that certain homeowners and the Symmes Township lack standing because transmission circuits 3881, 5483, and 5487 do not cross their property and, therefore, Duke is not conducting vegetation management on their property. Consequently, Duke requests the Commission should dismiss the amended complaint with prejudice as to these Complainants because they do not set forth reasonable grounds for their complaint against Duke.

{¶ 37} In its February 2, 2018 motion to dismiss, Duke states that Complainants' second amended complaint fails to state reasonable grounds for complaint against Duke. Duke explains that its vegetation management plan was filed under Ohio Adm.Code 4901:1-10-27(E)(2), publicly docketed in Case No. 16-915-EL-ESS, and was approved by the Commission. Duke avers that because the application was accepted by the Commission,

Complainants may not collaterally attack this plan through the second amended complaint. Instead, Duke argues that Complainants should have sought rehearing in the proceeding.

{¶ 38} In their memorandum contra dated February 20, 2018, Complainants reiterate that they are not mounting a collateral challenge to Duke's vegetation management plan. Complainants argue that they are challenging Duke's policies and practices, and its current implementation of clear cutting trees despite being able to successfully manage vegetation around transmission and distribution lines in the past without tree removal. As such, Complainants urge the Commission to consider each claim they have raised in their second amended complaint.

{¶ 39} Lastly, in its reply memorandum dated February 26, 2018, Duke reiterates previously stated arguments that Complainants fail to state reasonable grounds for complaint against it and consequently, the Commission should dismiss the second amended complaint.

{¶ 40} In response to Duke's arguments regarding the identified Complainants' standing, the Commission again notes that its jurisdiction is statutory. Therefore, the determination of the standing necessary for a potential complainant to file an action before the Commission must be based on a close reading of the applicable statute. With regard to the standing argument, the Commission has previously determined that a complainant has standing to bring an action under R.C. 4905.26 in a situation where that complainant is *directly affected* by the alleged unreasonable activity. *In re the Complaint of Lawrence A. Boros v. The Cleveland Elec. Illum. Co.*, Case No. 05-1281-EL-CSS, Entry (Jan. 11, 2006), citing *In re the Complaint of National Electrical Contractors Association, Ohio Conference, et al. v. Ohio Edison Company, et al.*, Case No. 98-1400-EL-CSS, Entry (Jan. 29, 1999) (emphasis added). Here, the Complainants in question do not dispute that their properties do not fall under transmission circuits 3881, 5483, and 5487, which are the circuits at issue in this case. Additionally, Duke has represented that it is not performing any vegetation management activities on these Complainants' properties; instead, as Duke has stated, and Complainants have

conceded, the Company is implementing its vegetation management plan only on properties that directly fall under these transmission circuits. Despite the fact that the Complainants in question are customers of Duke, they have failed to identify how they are directly affected by the alleged unreasonable practices of the Company. As such, this subset of the Complainants lack the requisite standing to pursue these claims before us. Additionally, the Commission agrees with Duke in that the Complainants identified by the Company cannot assert service-related complaints on behalf of other homeowners located in Hamilton County, Symmes Township, Deerfield Township, and the City of Montgomery, Ohio that do possess the requisite standing to bring these claims before us. *See In re the Complaint of Eugene Holmes v. The Cleveland Elec. Illum. Co.*, Case No. 12-2980-EL-CSS, Entry (Mar. 20, 2013) at ¶ 8.

{¶ 41} However, the Commission finds that townships and other governmental entities frequently intervene in Commission proceedings on behalf of their citizens. *See, e.g., In re S. Field Energy LLC*, Case No. 15-1716-EL-BGN, Entry (June 6, 2016) at 5 (administrative law judge granted township's motion to intervene because a proposed natural gas electric generation facility was located on approximately 150 acres within its borders and would directly affect the health, safety and welfare of its population); *In re Consumers Ohio Water Co.*, Case No. 95-1076-WW-AIR, Entry (July 26, 1996), at 1 (townships filed motions to intervene because water rate increases would have a real and substantial impact upon the local economy); *In re Dayton Power & Light Co.*, Case No. Case No. 91-414-EL-AIR, Entry (May 7, 1991), at 1 (townships intervened because they and their citizens could be adversely affected by the electric rate increase requested by the utility case). Additionally, under Ohio Adm.Code 4901-1-11, a person may intervene in a proceeding upon a showing of either a statutory right or a real and substantial interest in the proceeding. Here, clear cutting and removal of trees and vegetation will directly affect Symmes Township residents. Consequently, the Commission declines to dismiss the Symmes Township Trustees from the second amended complaint.

{¶ 42} Moreover, the Commission finds that Duke has not demonstrated that all Complainants should be dismissed simply because the Commission has previously approved its vegetation management plan in Case No. 16-915-EL-ESS. Duke cites to *Bd. of Educ. v. Cleveland Elec. Illuminating Co.*, Case No. 91-2308-EL-CSS, Entry (July 2, 1992) in support of the contention that Complainants cannot now collaterally attack the approved plan. In that case, a school board alleged that a public utility overcharged it for service and that the utility did not file tariff rates applicable to a customer class similar to the school board. The Commission held that the complaint was an improper collateral attack on the Commission's order approving the utility's rate design. Importantly, that case did not concern the implementation of a vegetation management plan and is consequently inapplicable here. Additionally, the Supreme Court of Ohio has previously held that R.C. 4905.26 is extremely broad and gives the Commission authority to review matters already considered in a prior proceeding and permits what might be strictly viewed as a collateral attack in many cases. *Western Reserve Transit Authority v. Pub. Util. Comm.*, 39 Ohio St.2d 16, 18, 313 N.E.2d 811 (1974). Moreover, Commission review is appropriate here due to the unique facts presented in this proceeding, including the number of Complainants in this proceeding, the magnitude of the stay in place, and Duke's current practice of clear cutting vegetation in comparison to its past practice of trimming vegetation. Finally, as we noted before, although Duke has an approved vegetation management plan, Commission approval of the plan does not preclude Complainants from challenging, pursuant to R.C. 4905.26, Duke's practices under the vegetation management plan.

{¶ 43} Accordingly, for the reasons stated above, the Commission finds that Duke's December 4, 2017 and February 20, 2018 motions to dismiss in regard to the following Complainants should be granted: Amanda Sachs, David Siff, Carrie and Dan Gause, Susan Falick, Jerry and Lou Ullrich, Darrelle Reese, Julie Carnes, Todd and Michelle Bacon, Patricia Lohse, Rob and Kathleen Olson, John and Barbara Collins, Valerie Van Iden, Joe Zukor, Fu Wong and Penny Lo, John and Sally Riester, Sandra L. Nunn, and Mark and Calissa Thompson. However, Duke's motion to dismiss with regard to the Symmes Township

Trustees should be denied. Finally, we find Duke's February 2, 2018 motion to dismiss should also be denied.

D. Claims outside the Commission's jurisdiction

{¶ 44} Next, the Commission finds, sua sponte, that Complainants have asserted two other claims for which they may have standing but the Commission lacks jurisdiction to consider them. As discussed below, the Commission has broad authority to govern the administration of complaint proceedings pursuant to R.C. 4905.26. Given the number of Complainants and claims in this case, we find that dismissing these non-jurisdictional claims is appropriate to ensure that the hearing in this matter proceeds in an orderly and expeditious manner and is limited to the matters properly before the Commission.

{¶ 45} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory. This "jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state * * * is so complete, comprehensive and adequate as to warrant the conclusion that it is exclusive." *Corrigan I* at ¶ 8 (2009), citing *State ex rel. N. Ohio Tel. Co. v. Winter*, 23 Ohio St.2d 6, 9, 260 N.E.2d. 827 (1970), quoting *State ex rel. Ohio Bell Tel. Co. v. Cuyahoga Cty. Court of Common Pleas*, 128 Ohio St. 553, 557, 192 N.E. 787 (1934); see also *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, at 152, 573 N.E.2d 655 (1991). Vegetation management activities within right-of-ways and easements are deemed to be inherently service-related. *Corrigan I* at ¶ 21.

{¶ 46} However, the broad jurisdiction of the Commission over utility service-related matters does not affect "the basic jurisdiction of the court of common pleas in other areas of possible claims against utilities, including pure tort and contract claims." *State ex rel. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 21, quoting *Higgins v. Columbia Gas of Ohio, Inc.*, 136 Ohio App.3d 198, 202, 736 N.E.2d 92

(2000). The Supreme Court of Ohio has adopted a two-part test to determine whether the issues raised in a complaint are within the exclusive jurisdiction of the Commission or whether the issues are pure tort or contract claims better suited for the Ohio courts. The first part of the test asks whether the Commission's administrative expertise is required to resolve the issue in dispute. The second part of the test asks whether the act complained of constitutes a practice normally authorized by the utility. If the answer to either question is in the negative, and the claim is not within the Commission's jurisdiction. *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d. 824, ¶ 12-13.

{¶ 47} The Commission notes that simply because a complainant identifies a cause of action in a particular manner does not necessarily mean that such a claim is or is not within the exclusive jurisdiction of the Commission. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶¶ 18-19 (2004) ¶ 18-19; *State ex rel. the Illuminating Company v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 21 (2002). Rather, the Supreme Court of Ohio has instructed that an analysis of the claims be undertaken to determine whether the substance of the complaint is manifestly service-related. *Henson* at ¶ 20; *Corrigan I* at ¶ 10. The Commission must determine if each of the Complainants' alleged claims is within our exclusive jurisdiction or, instead, are pure tort claims that should be adjudicated in a court of law using the *Allstate* test.

{¶ 48} With regard to Complainants' allegations that they have been injured because of Duke's use of toxic herbicides and soil erosion as part of its vegetation management program, the Commission answers the first question of the *Allstate* test in the negative. Complainants allege, despite owning properties not directly under transmission circuits 3881, 5483, and 5487, that Duke's use of toxic herbicides could injure them through negative impacts to the Polk Run Creek that carries water to the Little Miami River. Similarly, Complainants allege removal of trees and vegetation will contribute to soil erosion, which will endanger portions of property that include hills and uneven terrain by creating the risk

that homes, decks, and other portions of certain Complainants properties will lose their base of support. The Commission's administrative expertise lies, among other things, in evaluating whether rates and tariffs are unjust or unreasonable and in evaluating utility programs to promote reliability. Our administrative expertise is not necessary in evaluating the impact of toxic herbicides in Ohio's waterways or the dangers of soil erosion stemming from tree and vegetation removal. Furthermore, our administrative expertise is not necessary in estimating damages to render Complainants whole. Such an evaluation is not a service-related matter that is within the Commission's exclusive jurisdiction. Instead, this is a tort claim over which the courts of common pleas have jurisdiction. *See, e.g., In re James and Jerry Ross v. American Electric Power Company*, Case No. 14-1935-EL-CSS, Entry (Jan. 21, 2015) at 2 (finding that the Commission has no jurisdiction to award damages for injuries allegedly caused by herbicidal overspray to fish, timber, honey, and the complainants).

{¶ 49} However, the Commission answers the second question presented under *Allstate* in the affirmative. We find that the act complained of constitutes a practice normally authorized by the utility as they are cumulative actions taken by Duke to carry out its vegetation management plan. Nevertheless, in order for the Commission to have jurisdiction, both parts of the *Allstate* test must be affirmatively satisfied, which is not the case here.

{¶ 50} Next, the Commission finds that the first prong of the *Allstate* test is not satisfied with regard to Complainants' allegation that Duke's vegetation management practices will cause diminution in property values, the aesthetic value of the properties in question, and Complainants' enjoyment of their properties. Our administrative expertise lies in determining whether the rates charged by the Company are unjust, unreasonable, or unlawful. Consequently, the Commission's administrative expertise is not necessary to determine if property values will decline or to determine if Duke will interfere with the Complainant's enjoyment of the properties.

{¶ 51} With regard to the second prong of the *Allstate* test, the Commission finds that the act complained of, tree and vegetation removal pursuant to its vegetation management plan, is a practice normally authorized by Duke to maintain its transmission and distribution grid and ensure safe and reliable service to its customers. However, as noted above, in order for the Commission to have jurisdiction, both parts of the *Allstate* test must be affirmatively satisfied, which it is not the case here. Overall, the Commission finds that Complainants' claims relating to property and aesthetic values and diminution of enjoyment of property are sounding in tort, which fall within the jurisdiction of the courts of common pleas. As noted earlier, the Supreme Court of Ohio has long held that the Commission has no power to judicially ascertain and determine legal rights and liabilities or to adjudicate controversies between parties as to property rights and claims based on tort liability. *New Bremen, et al. vs. Pub. Util. Comm.*, 103 Ohio St. 23, 30-31, 132 N.E. 162, 164 (1921).

{¶ 52} Therefore, we find that the claims pertaining to toxic herbicides, soil erosion, decreases in property value, decreases in aesthetic value, and diminution of enjoyment of property should also be dismissed, as they fall outside the exclusive jurisdiction of this Commission.

{¶ 53} Accordingly, having addressed Duke's motions to dismiss, the Commission finds that the remaining Complainants have stated reasonable grounds for their complaint, pursuant to R.C. 4905.26. The Commission notes that the attorney examiner has set this matter for hearing on April 17, 2018 by Entry issued on February 8, 2018. Furthermore, the stay previously issued in this case shall remain in full force and effect, unless otherwise ordered by the Commission. We also reserve the right to revisit the stay if any imminent reliability risk should arise during the pendency of this matter.

III. ORDER

{¶ 54} It is, therefore,

{¶ 55} ORDERED, That Duke's application for interlocutory appeal be denied. It is, further,

{¶ 56} ORDERED, That Duke abstain from clear cutting any trees within the 100-foot utility easement on Complainants' property until further notice, as previously directed by the attorney examiner. It is, further,

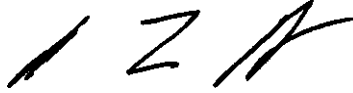
{¶ 57} ORDERED, That, in accordance with the above findings and Paragraph 43, Duke's December 14, 2017 and February 20, 2018 motions to dismiss be granted as the Complainants identified in its motion lack standing to raise the asserted claims. It is, further,

{¶ 58} ORDERED, That Duke's February 20, 2018 motion to dismiss be denied. It is, further,

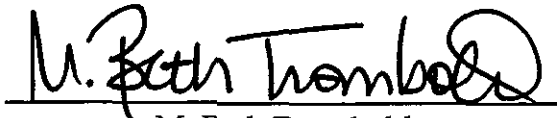
{¶ 59} ORDERED, That Complainants' claims pertaining to toxic herbicides, soil erosion, decreases in property value, decrease in aesthetic value, and diminution of enjoyment of property be dismissed as they fall outside of the Commission's exclusive jurisdiction. It is, further,

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

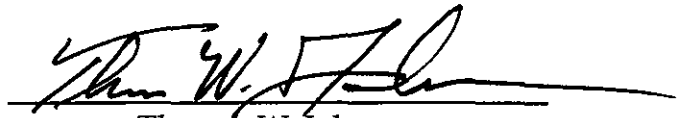
THE PUBLIC UTILITIES COMMISSION OF OHIO



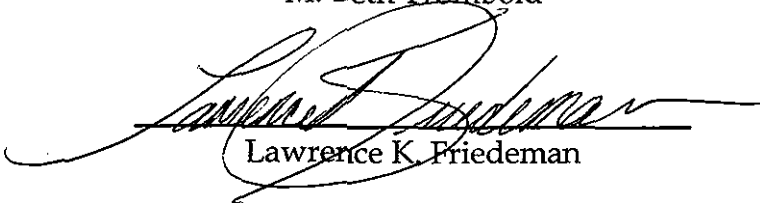
Asim Z. Haque, Chairman



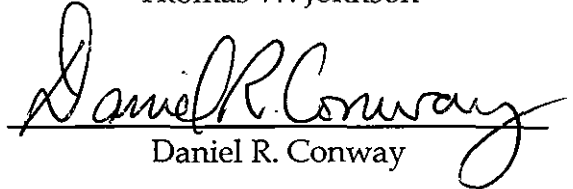
M. Beth Trombold



Thomas W. Johnson



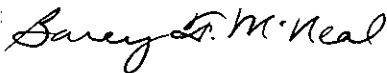
Lawrence K. Friedeman



Daniel R. Conway

AS/vrm

Entered in the Journal
MAR 08 2018



Barcy F. McNeal
Secretary