

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Citizens Against Clear Cutting, et al.)	
)	
Complainants,)	
)	
v.)	Case No. 17-2344-EL-CSS
)	
Duke Energy Ohio, Inc.,)	
)	
Respondent)	

**CITIZENS AGAINST CLEAR CUTTING'S
POST-HEARING BRIEF**

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I. INTRODUCTION

This case is about indiscriminate clear cutting that is unjust, unreasonable, unlawful, and, most importantly, simply unnecessary. Not only is it not necessary to remove every tree within the 100 foot easement or every tree within the “wire zone” to ensure safe and reliable electric service, it is simply not permitted by Duke Energy Ohio, Inc.’s (Duke) vegetation management plan approved by the Public Utilities Commission of Ohio (Commission) or the Commission’s rules. To be clear, no party to this case seeks to prevent Duke from conducting vegetation management that is necessary to ensuring safe and reliable electric service. In fact, Complainants in this case have a vested interest in Duke providing safe and reliable electric service. Like Duke and the Commission, Complainants want Duke to provide electric service to customers consistent with the requirements of Ohio law and the Commission’s rules.

Complainants, however, also want Duke to comply with provisions of Ohio law that require Duke to act justly and reasonably in all respects as it furnishes electric service to customers.¹ Namely, Complainants ask that the Commission prohibit Duke from engaging in vegetation management practices that are unjust, unreasonable, unnecessarily destructive, do not provide any meaningful improvement to the safety and reliability of Duke’s electric service, and are inconsistent with Duke’s vegetation management plan.

Complainants brought this matter before the Commission when they learned that Duke was abandoning its prior vegetation management practices and was planning to clear cut the equivalent of an eight-lane highway along its transmission lines through Complainants’ properties without any regard for whether the trees and other vegetation it planned to remove actually impacted the safety or reliability of Duke’s electric service.

¹ R.C. 4905.22.

Throughout this proceeding, Duke has attempted to justify its vegetation management practices and stated intent to clear cut the equivalent of an eight-lane highway through Complainants' properties in a number of different, inconsistent ways. Duke has pointed to regulations that do not apply to the transmission lines at issue in this case. Duke has pointed to its vegetation management plan that does not once mention clear cutting or removing all trees within Duke's easement or removing all trees within the "wire zone." Duke has pointed to purported industry standards that have not been fully adopted by other Ohio utilities. Without the proper nexus, Duke has pointed to past vegetation management incidents relating to other utilities that did not occur in Duke's territory and that would not occur if Duke simply adhered to its prior practices of trimming and pruning trees rather than clear cutting them. Customers who tried to resolve this matter with Duke without resorting to litigation were given inconsistent, often conflicting, explanations for Duke's significant change in vegetation management practices by Duke representatives. Duke's finger pointing and inconsistent explanations are red herrings—merely an attempt to distract the Commission's attention from the central issue in this case: if Duke follows its filed vegetation management plan, which authorizes Duke to remove dangerous trees that cannot be maintained to avoid contact with the transmission wires and that threaten the safety and reliability of the electric system, and trim trees to maintain them a safe distance from the transmission wires (as it has always done) (a 15- foot clearance), Duke will maintain safe and reliable service as it relates to these transmission lines as is required by the Commission's rules and as Duke has successfully completed in the past.

II. PROCEDURAL HISTORY

After unsuccessfully attempting to resolve this matter with Duke for months during the summer and fall of 2017, a coalition of concerned Duke customers (Complainants, Citizens

Against Clear Cutting, or CACC) filed the first Complaint in this case on November 14, 2017.² In the Complaint, Complainants raised several issues concerning the reasonableness and lawfulness of Duke's vegetation management policies, practices, and plan, and the implementation of Duke's vegetation management policies, practices, and plan. Specifically, Complainants alleged issues related to: the adequacy and lawfulness of Duke's vegetation management plan; the unjust and unreasonable vegetation management practices and policies of Duke; the unjust, unreasonable, and unlawful implementation of Duke's vegetation management practices, policies, and plan, which includes the clear cutting of trees and vegetation on Customers' properties and the use of dangerous herbicides to remove or destroy trees and vegetation; and defects in how Duke's vegetation management plan was modified, including deceptive and misleading statements and filings by Duke.

On November 16, 2017, the Attorney Examiner granted CACC's request to stay Duke's implementation of its vegetation management plan and to stay clear cutting and removal of Complainants' trees and other vegetation on their properties during the pendency of the Complaint.³ On November 22, 2017, CACC moved to amend the Complaint to include additional Duke customers who had similar concerns with Duke's vegetation management plan, policies, or practices and asked the Commission to extend the stay to all Complainants added to the Amended Complaint.⁴ That motion was granted and the Amended Complaint was accepted on November 28, 2017.⁵

² See Complaint (November 14, 2017).

³ See Entry at 2 (November 16, 2017).

⁴ See Motion to Amend Complaint and Expedited Request to Extend Stay (November 22, 2017).

⁵ See Entry (November 28, 2017).

On January 5, 2018, Complainants filed a Motion to Amend the Amended Complaint to embrace even more Duke customers who had become startled by the Company's proposed vegetation management activities and to clarify claims contained within the Amended Complaint.⁶ In that Motion, Complainants also requested that the stay in this case be extended to include the Complainants being added to the case. On January 25, 2018, the Commission granted Complainants' Motion to Amend and Extend the Stay.⁷ On February 5, 2018, the Office of the Ohio Consumers' Counsel (OCC) intervened in this matter.⁸

In the Second Amended Complaint, Complainants raise several issues concerning the just and reasonableness and lawfulness of Duke's vegetation management policies, practices, and plan, and the implementation of Duke's vegetation management policies, practices, and plan. Specifically, Complainants allege issues related to: the adequacy and lawfulness of Duke's vegetation management plan; the unjust and unreasonable vegetation management practices and policies of Duke; the unjust, unreasonable, and unlawful implementation of Duke's vegetation management practices, policies, and plan, which includes the clear cutting of trees and vegetation on Customers' properties and the use of dangerous herbicides to remove or destroy trees and vegetation; and defects in how Duke's vegetation management plan was modified, including deceptive and misleading statements and filings by Duke.

On March 8, 2018, the Commission addressed a number of outstanding issues in this case. The Commission denied Duke's interlocutory appeal of the stay of its vegetation management activities granted on November 16, 2017 and as extended on November 28, 2017 and January 25, 2018, thus protecting Complainants from having their trees removed during the pendency of this

⁶ See Motion to Amend Amended Complaint and Expedited Request to Extend Stay (January 5, 2018).

⁷ Entry (January 25, 2018).

⁸ Motion to Intervene (February 5, 2018).

case.⁹ The Commission also denied a motion to dismiss all Complainants filed by Duke.¹⁰ The Commission, however, dismissed those Complainants that did not own property in the 100-foot right-of-way under three transmission lines upon which Duke intends to conduct vegetation management activities.¹¹ Finally, the Commission narrowed the scope of this case to include only those issues raised by Complainants that fall within the Commission's administrative expertise.¹² Complainants, along with OCC, filed a Joint Application for Rehearing and Motion for Clarification regarding the Commission's March 8, 2018 decision on April 9, 2018.¹³ Duke also filed its own Application for Rehearing on that same date.¹⁴ On May 9, 2018, the Commission granted the Joint Application for Rehearing filed by Complainants and OCC and the Application for Rehearing filed by Duke for further consideration of the matters specified therein.¹⁵ The Commission has not taken any further action with regard to these applications, which remain pending.

Complainants maintain that the Commission should grant its Joint Application for Rehearing for the reasons stated therein. Specifically, the Commission further erred in limiting the scope of this case such that Complainants were precluded from presenting evidence regarding Duke's unreasonable use of herbicides. The justness and reasonableness of Duke's chosen methods of vegetation management is an issue that the Commission has authority to consider. Just as the Commission has authority to consider whether or not tree removal is just, reasonable, and

⁹ See Entry at ¶ 5 (March 8, 2018).

¹⁰ Id. at ¶ 42.

¹¹ Id. at ¶ 57.

¹² Id. at ¶ 44-48 (citing *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio. St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824 ¶ 12-13).

¹³ Joint Application for Rehearing and Motion for Clarification (April 9, 2018).

¹⁴ Application for Rehearing (April 9, 2018).

¹⁵ Entry on Rehearing (May 9, 2018).

necessary to ensure the safety and reliability of Duke's electric service, it has authority to do the same for the use of herbicides as part of Duke's vegetation management program. Additionally, the use of herbicides is a form of clear cutting and the Commission has authority to determine whether Duke's proposal to clear cut is unjust and unreasonable in the provision of electric service under R.C. 4905.22.

Similarly, the Commission should grant rehearing on its decision to exclude evidence regarding soil erosion from this case. Soil erosion could affect not only Complainants' properties, but also Duke's transmission infrastructure located on Complainants' properties. In judging whether Duke's vegetation management practices are just, reasonable, and necessary under R.C. 4905.22 and 4905.26, the Commission should consider the risks associated with Duke's clear cutting, complete removal, or destruction of trees or other vegetation. The Commission has authority over vegetation management plans and activities that utilities engage in to ensure that the safety and reliability of electric service to customers is not interrupted. If the soil upon which Duke's electric transmission or distribution infrastructure becomes eroded as a result of Duke's vegetation management activities, those activities could ultimately have the opposite effect, compromising the safety and reliability of the system. Duke's choice to engage in practices in the name of safety and reliability that actually have a negative effect on Duke's ability to attain those goals would certainly be an unreasonable practice by Duke that the Commission has jurisdiction to review.

As the Commission is tasked with determining whether Duke's vegetation management practices are just and reasonable, it should grant the Joint Application for Rehearing filed by Complainants and OCC and expand the scope of this case to consider whether Duke's actions are

justified given that they are not necessary to ensure safety or reliability and may even have effects that actually hinder the Company's ability to provide safe and reliable electric service.

Also pending before the Commission is Complainants' Motion to Compel Discovery, Motion to Enforce PUCO Orders, Motion for Forfeitures and Sanctions and Request for Expedited Treatment (Motion for Sanctions),¹⁶ filed on August 10, 2018. The Commission should grant Complainants' Motion for Sanctions and assess sanctions and/or forfeitures against Duke for its obstructive and outrageous conduct throughout the discovery process in this case.¹⁷ During a prehearing conference on September 10, 2018, Complainants' Motion for Sanctions was acknowledged and it was determined that the Commission would rule on the motion at a later date.¹⁸ This case has now reached a point where it is appropriate for the Commission to take up the Motion for Sanctions and provide the requested relief to Complainants.

As recounted in the Motion for Sanctions, Duke repeatedly flouted Commission orders when it did not want to produce discovery that it was ordered to produce.¹⁹ Duke's actions resulted in several continuances of the hearing on this matter, ultimately delaying the hearing on this case for roughly six months and increasing Complainants' legal costs. Duke was ordered to produce a number of discovery responses including internal emails and documents on May 1, 2018.²⁰ Duke failed to produce responsive emails by the date ordered.²¹ Duke was again ordered to produce

¹⁶ Complainants recognize that aside from the motion for sanctions and forfeitures, the Commission has properly disposed of this pleading by requiring Duke to produce additional documents. Thus, Complainants refer to this pending motion as the "Motion for Sanctions," as that is the only matter from this motion now before the Commission.

¹⁷ See Motion to Compel Discovery, Motion to Enforce PUCO Orders and Motion for Forfeitures and Sanctions and Request for Protective Order (August 10, 2018) (Motion for Sanctions and Forfeitures).

¹⁸ See Tr. of Hearing Held on September 10, 2018 at 13, lines 15-18 (September 24, 2018).

¹⁹ Motion for Sanctions and Forfeitures at 4-6.

²⁰ See *id.* at 4-5 (internal citations omitted).

²¹ See *id.* at 5 (internal citations omitted).

responsive documents with a privilege log detailing claims of privilege on May 8, 2018.²² Duke finally produced the documents, but neglected to include a privilege log.²³ Then, when Duke finally produced a privilege log, it was defective in its explanations of the asserted privileges.²⁴ Ultimately, the case was delayed yet again as Duke was ordered to produce a number of documents for which it had improperly claimed to be privileged.²⁵ Throughout the process, Duke's only defense of its behavior was repeated regurgitations of already-rejected arguments that producing the ordered discovery was burdensome.²⁶ Duke's actions in this case are made even more egregious when one considers that hardly more than a year ago, the Commission rebuked Duke for stymying discovery in a different complaint case brought against Duke.²⁷ It is time for the Commission to put an emphatic end to Duke's apparent misperception that it is above the discovery rules that bind all parties in proceedings before the Commission or its brazen disregard for the Commission and its orders.

As a result of Duke's relentlessly obstructive tactics, Complainants were forced to expend extensive resources to draft motions and attend hearings all for the purpose of obtaining discovery that Complainants should have been able to receive from Duke without resorting to involving the Commission at all under the well-established discovery practice before the Commission and the Commission's rules governing discovery.

²² See *id.* at 5 (internal citations omitted).

²³ See *id.* at 6 (internal citations omitted).

²⁴ See *id.* at 6.

²⁵ See Entry (September 17, 2018).

²⁶ See Motion for Sanctions and Forfeitures at 21-24.

²⁷ See *In the Matter of the Complaint of the Office of the Ohio Consumers' Counsel and Communities United for Action v. Duke Energy Ohio, Inc.*, Case No. 15-1588-GE-CSS, Entry at ¶ 13, n.2 (October 11, 2017).

As explained more fully in the Motion for Sanctions, the Commission has authority under R.C. 4905.54 to assess sanctions against utilities for failure to comply with Commission orders, including orders to provide discovery that are issued under Ohio Adm. Code 4901-1-23.²⁸ Specifically, the Commission has authority under R.C. 4905.54 to assess up to \$10,000 per day in forfeitures for Duke's failure to comply with Commission directives and, under Ohio Adm. Code 4901:1-10-30, to make restitution or damages to its customers for such failure.

Furthermore, the Commission has authority under Ohio law and its own rules to use the imposition of sanctions to make Complainants' whole for the damages they have suffered as a result of Duke's flagrant behavior. The Commission relies on the Ohio Rules of Civil Procedure to provide guidelines in the conduct of discovery before the Commission,²⁹ and those rules provide that a party that fails to produce discovery can be ordered to pay the expenses that an adverse party incurred in seeking to enforce the deficient party's obligation to provide discovery. As noted in the Motion for Sanctions, the Commission has previously directed sanctions imposed against a utility towards measures designed to make aggrieved customers whole.³⁰ For these reasons, as more fully explained in Complainants' August 10, 2018 Motion for Sanctions, the Commission should grant Complainants' pending Motion for Sanctions.

²⁸ Id. at 22.

²⁹ See, e.g., *In the Matter of the Complaint of The Limited Stores, Inc. v. Columbus & Southern Elec. Co., Relative to an Alleged Failure to Furnish Necessary and Adequate Service*, Case No. 80-354-EL-CSS, Entry at ¶ 5 (July 25, 1980).

³⁰ See *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, Entry on Rehearing at ¶ 52 (June 20, 2002).

The hearing on this matter was initially set to begin on February 26, 2018.³¹ The hearing, at the joint request of the parties,³² was continued until April 17, 2018.³³ The hearing was further continued until May 14, 2018 as the parties pursued mediation.³⁴ But the hearing did not go forward on May 14, 2018. Rather, it was continued four separate times as a result of Duke failing to produce discovery, even after Duke was ordered to do so. After a brief continuation of a week when Complainants' initial motion to compel was granted,³⁵ additional continuances were necessitated when Duke failed to produce all documents that it was required to produce,³⁶ then failed to produce a privilege log as it had been ordered to do,³⁷ and then failed to produce an adequate privilege log,³⁸ and then was ordered to produce documents unlawfully withheld.³⁹ After Duke was continually ordered to produce the documents and Complainants finally received the documents, the hearing commenced on November 6, 2018, and concluded on November 8, 2018.⁴⁰ At hearing, Complainants entered as evidence the uncontroverted testimony of 17 Duke customers who are Complainants in this case and one arborist, Tim Back, who individually assessed many of the trees at issue in this case to determine whether the trees could be trimmed and maintained in a manner that would not threaten the safety and reliability of the electric system.⁴¹ Mr. Back was

³¹ Entry at ¶ 12 (January 25, 2018).

³² See Joint Motion for Continuance (February 7, 2018).

³³ Entry at ¶ 10 (February 8, 2018).

³⁴ Entry at ¶ 14 (April 5, 2018).

³⁵ See Transcript of May 1, 2018 Hearing at 97, lines 14-17 (filed May 18, 2018).

³⁶ Entry at ¶ 6-7 (May 14, 2018).

³⁷ Entry at ¶ 17 (June 11, 2018).

³⁸ Entry at ¶ 18 (August 24, 2018). See also Transcript of September 10, 2018 Hearing (filed on September 24, 2018).

³⁹ Entry at 11-12 (September 17, 2018).

⁴⁰ See Tr. Vol. I-III.

⁴¹ See Complainants' Ex. 2, Testimony of Kim Carrier (Carrier Testimony); Complainants' Ex. 3, Testimony of Karen Dabdoub (Dabdoub Testimony); Complainants' Ex. 4, Testimony of Dr. Randall Fick (Fick Testimony);

the only witness who actually reviewed and assessed the trees at issue in this case.⁴² Complainants further jointly sponsored the testimony of an additional witness, James D. Williams, with OCC.⁴³ Duke offered the Testimony of four witnesses.⁴⁴

After the hearing concluded, the Attorney Examiners established a December 17, 2018 deadline for the filing of initial post-hearing briefs and January 4, 2019 for reply briefs.⁴⁵ Complainants now submit this brief pursuant to the Attorney Examiners' November 16, 2018 Entry.

III. APPLICABLE LAW

The Commission has jurisdiction over this dispute. R.C. 4905.06 provides that the Commission has general supervision over all public utilities within its jurisdiction. Duke is a public utility, as defined in R.C. 4905.02. R.C. 4905.26 allows customers of public utilities to file complaints in writing before the Commission when the services offered by a public utility are "in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of

Complainants Ex. 5, Testimony of Joseph Grossi (Grossi Testimony); Complainants' Ex. 6, Testimony of John Gump (Gump Testimony); Complainants' Ex. 7, Testimony of Jim Haid (Haid Testimony); Complainants' Ex. 8, Testimony of Nicole Hiciu (Hiciu Testimony); Complainants' Ex. 9, Testimony of Jonathan Mackey (Mackey Testimony); Complainants' Ex. 10, Testimony of Nicole Menkhaus (Menkhaus Testimony); Complainants' Ex. 11, Testimony of Mike Preissler (Preissler Testimony); Complainants' Ex. 12, Testimony of Steve Schmidt (Schmidt Testimony); Complainants' Ex. 13, Testimony of Olga Staios (Staios Testimony); Complainants' Ex. 14, Testimony of Kim Wiethorn (Wiethorn Testimony); Complainants' Ex. 15, Testimony of Kenneth Bryant (Bryant Testimony); Complainants' Ex. 16, Testimony of Fred Vonderhaar (Vonderhaar Testimony); Complainants' Ex. 17, Testimony of Dennis Mitman (Mitman Testimony); Complainants' Ex. 18, Testimony of Melisa Kuhne (Kuhne Testimony); Complainants' Ex. 35, Testimony of Tim Back (Back Testimony).

⁴² Tr. Vol. I at 116, line 25-117, line 2 (Duke witness Fletcher testifying that he never visited the area involved in this case); Tr. Vol. II at 306 (Duke witness Adams testifying that he had provided a discovery response that stated that Duke engineers had not assessed every tree at issue in this case); Tr. Vol. III at 586, lines 4-15 (Duke Witness McLoughlin stating that he did not walk the entirety of the transmission lines at issue); Tr. Vol. III at 678, lines 8-12 (Duke witness Goodfellow stating that he did not actually enter onto Complainants' properties to view their trees);

⁴³ See Complainants-OCC Jt. Ex. 1.

⁴⁴ See Duke Ex. 1-3, 5.

⁴⁵ Entry at ¶ 8 (November 16, 2018).

law.” Under R.C. 4905.26, the Commission further has jurisdiction over an electric utility’s compliance with R.C. 4928.01-4928.15 and any rules adopted by the Commission under those chapters of the Ohio Revised Code.⁴⁶ This case concerns Duke’s vegetation management plan, which was filed under Ohio Adm. Code 4901:1-10-27, which was promulgated by the Commission under R.C. 4928.11. Moreover, under Ohio law, the Commission has exclusive jurisdiction over matters where its administrative expertise is required to resolve the issue in dispute and where the act complained of constitutes a practice normally undertaken by the utility. The Commission’s jurisdiction over this matter, and all matters related to vegetation management plans of electric utilities, has been further confirmed both by the Commission and by the Supreme Court of Ohio.⁴⁷

R.C. 4905.22 states that “[e]very public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable.” Under R.C. 4905.26, Complainants needed to demonstrate that this aspect of Duke’s service—its vegetation management plan, practices, and policies and Duke’s implementation of its vegetation management plan, practices, and policies—“is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law.” Both Duke’s vegetation management plan on file with the Commission and its practices and policies under that plan, as well as Duke’s implementation of its vegetation management plan, practices, and policies, are at issue in this case. In fact, the Commission has already held that Complainants may challenge Duke’s practices under its filed vegetation management plan pursuant to R.C. 4905.26.⁴⁸ The

⁴⁶ See R.C. 4928.16.

⁴⁷ See Entry at ¶ 19 (March 8, 2018); *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009 at ¶ 21 (questions relating to utility vegetation management are “manifestly service-related”).

⁴⁸ Entry at ¶ 21 (March 8, 2018).

Commission further noted that Duke had not, at the time of the Commission's Entry, explained "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 safe and reliable service to its customers."⁴⁹

As demonstrated below, Complainants have met their burden of showing that Duke's proposed vegetation management plan, practices, and policies and its implementation of its vegetation management plan, practices, and policies, are unjust, unreasonable, and unlawful as Duke's proposed vegetation management plan, practices, and policies are unnecessary for the safe and reliable provision of electric service.

IV. STATEMENT OF FACTS

Complainants' concerns with Duke's proposed vegetation management program, practices, and policies and Duke's stated plans to implement its vegetation management plan in a manner inconsistent with that plan and inconsistent with previous vegetation management practices and policies have persisted for the better part of two years. During the early summer and fall of 2017, Complainants—many of whom had lived at their current properties for decades—were approached by Duke and informed of Duke's plans for vegetation management on Complainants' properties along Duke's transmission circuits.⁵⁰ Although Duke had previously trimmed trees and other vegetation on Complainants' properties as needed and/or pursuant to Duke's regular tree trimming cycle, Duke had not previously engaged in mass tree removal on Complainants' properties.⁵¹ Duke informed Complainants of its plans for vegetation management through in-person meetings, door hangers describing the proposed work, brochures and other documents detailing Duke's proposed

⁴⁹ Id.

⁵⁰ See, e.g., Vonderhaar Testimony at 5, lines 20-25.

⁵¹ See, e.g., id. at 2, lines 12-21.

vegetation management practices (i.e., vegetation management materials).⁵² Some Complainants who resisted Duke's attempts were threatened with legal action.⁵³

As Complainants learned more about Duke's intent regarding vegetation management, the reasons behind Duke's decision to change its practices became less and less clear, as did the nature of those practices themselves. Duke representatives visited Complainants and offered various explanations for the stated change in vegetation management policies. The policies themselves were further made unclear when different Complainants were given different explanations of the work that Duke intended to perform.⁵⁴ Some were given door hangers that said all trees 50 feet on either side of the center of Duke's transmission lines would be removed completely,⁵⁵ while others saw some willingness to compromise from Duke about which trees and other vegetation would be removed.⁵⁶

After multiple Complainants were told that Duke would be "clear cutting" trees and vegetation along the 138 kV transmission circuits at issue, Complainants came to the understanding that Duke's proposed practices could best be described as the complete removal of all trees and vegetation within a specified area.⁵⁷ This understanding was confirmed by the results of Duke's practices and the implementation of Duke's proposed vegetation management program that Complainants personally observed in their communities.⁵⁸ Throughout this proceeding and at hearing, however, Duke has muddled this understanding slightly. At various times, Duke has

⁵² See, e.g., *id.* at 5, lines 5-19.

⁵³ *Id.*, Attachment J.

⁵⁴ See *infra* at D.i.

⁵⁵ See, e.g., Wiethorn Testimony, Attachment B.

⁵⁶ See, e.g., Hiciu Testimony at 4, lines 3-8.

⁵⁷ Grossi Testimony at 8, lines 15-20.

⁵⁸ See Bryant Testimony, Attachments A-B.

referred to its own practices as clear cutting, as its representatives described the policies to Complainants.⁵⁹ At other points, Duke has described a wire zone-border zone concept that is described in vegetation management materials that were provided to Complainants in this case.⁶⁰ Duke has offered testimony that this wire zone-border zone concept is part of an approach Duke describes as “integrated vegetation management” or “IVM.”⁶¹ Notably, the wire zone-border zone concept, IVM, and the principle of clear cutting are all absent from Duke’s vegetation management plan on file with the Commission pursuant to Ohio Adm. Code 4901:1-10-27.

Duke’s lack of a consistent description of its own program for vegetation management in pleadings in this case, to its customers, and in its vegetation management plan on file with the Commission has clouded the issues at stake in this case. The best Complainants can surmise is that Duke proposes to perform integrated vegetation management (which includes the wire zone-border zone concepts described in Duke’s vegetation management materials and includes complete tree removal in the wire zone), however, first Duke must “reclaim” its easement, which will include clear cutting.⁶²

After unsuccessful attempts to reach compromise solutions with Duke, Complainants initiated this case to ask the Commission to require Duke to implement its vegetation management plan on file at the Commission in a just and reasonable manner that is consistent with Ohio Adm. Code 4901:1-10-27 and R.C. 4905.22, undertaking just and reasonable vegetation management practices and policies rather than the unnecessary mass destruction of trees and other vegetation that Duke seeks to inflict on Complainants’ properties. Complainants also seek an order from the

⁵⁹ See, e.g., Preissler Testimony at 9, lines 1-2.

⁶⁰ See, e.g., Grossi Testimony, Attachment E.

⁶¹ Adams Testimony at 14, line 7.

⁶² McLoughlin Testimony at 14, lines 4-23.

Commission directing Duke to not clear cut, destroy, or otherwise engage in mass tree and vegetation removal (e.g., by the use of herbicides) unless that removal is actually necessary for the maintenance and operation of a safe and reliable electric system and Duke has provided such justification.

V. ARGUMENT⁶³

A. Duke's Proposed Removal of Trees and Other Vegetation Is Unnecessary and Does Not Improve the Safety or Reliability of Duke's Electric Service in Violation of R.C. 4928.11 and Ohio Adm. Code 4901:1-10-27 and Is, Therefore, Unjust, Unreasonable, and Unlawful.

From the outset, this case has turned on the necessity of Duke's unjust and unreasonable actions and policies. Duke attempts to couch the case as one of safety and reliability of the electric system. But the Commission requires electric utilities to file vegetation management plans in order to ensure safe and reliability service. See Ohio Adm. Code 4901:1-10-27(E)(1) ("Each electric utility and transmission owner shall establish, maintain, and comply with written programs, policies, procedures, and schedules for the inspection, maintenance, repair, and replacement of its transmission and distribution circuits and equipment. These programs shall establish preventative requirements for the electric utility to maintain safe and reliable service. Programs shall include, but are not limited to, the following facilities: (a) Poles and towers; (b) Circuit and line inspections; (c) Primary enclosures (e.g., pad-mounted transformers and pad-mounted switch gear) and

⁶³ As is noted throughout this brief, Duke has not provided a precise description of the vegetation management that it proposes to conduct on Complainants' properties. Duke offered testimony both that clear cutting is necessary and that it was performing "integrated vegetation management" (IVM). Complainants understand IVM to be represented in the documents attached to several Complainants' testimonies (see, e.g., Wiethorn Testimony, Attachment C), which were provided by Duke. These documents are described throughout as "Duke's vegetation management materials." Complainants object to the policies described in Duke's vegetation management materials and, to the extent that Duke proposes to clear cut areas along its transmission line rather than follow the policies outlined in its own vegetation materials, as Witness McLoughlin suggests (see McLoughlin Testimony at 14, lines 4-23), Complainants object to those practices as well.

secondary enclosures (e.g., pedestals and handholes); (d) Line reclosers; (e) Line capacitors; (f) Right-of-way vegetation control; (g) Substations.”).

As required, Duke filed a plan for that purported purpose. However, Duke is ignoring that plan and attempting to go beyond that plan by implementing vegetation management policies and practices that are unjust and unreasonable, claiming, without justification, that the more extreme measures are necessary in the name of safety and reliability.⁶⁴ Duke is implicitly telling this Commission that its vegetation management plan on file is inadequate in violation of Ohio Adm. Code 4901:1-10-27 and R.C. 4928.11 and 4905.22. Duke’s customers, including Complainants expect reliable service and the Commission has stated that it wants to hear from Duke about why the change to its proposed current practice (of clear cutting vegetation) that Duke plans to implement on Complainants’ properties from its past practice (selective trimming of vegetation) is necessary to ensure reliable service to customers.⁶⁵ Thus, the question becomes whether or not Duke’s proposed vegetation management practices and policies are necessary to ensure safety and reliability. Throughout the hearing on this case, it became clear that they are not.

i. The Record Indicates that Simple Standards Can Be Used to Assess Whether a Tree Poses a Threat to Safety or Reliability.

All parties agree that there are two ways that trees or other vegetation can impact the safety and reliability of electric service along the transmission lines at issue in this case: trees or other vegetation can directly contact the transmission lines or the trees and other vegetation can grow sufficiently close to the transmission lines and allow for the possibility of “flashover,” “arcing”

⁶⁴ Adams Testimony at 6, lines 3-5.

⁶⁵ Entry at ¶ 21 (March 8, 2018).

or the transfer of electricity through the air to the nearby vegetation.⁶⁶ Thus, in establishing a vegetation management plan, a utility should assess when and how these issues can arise and calibrate vegetation management practices to prevent the occurrence of direct contact between trees and transmission lines and the incidence of a flashover or arcing event.

Direct contact can occur in two different ways. First, a tree could grow to such a height that given the tree's proximity to the transmission line it (or one of its limbs) could contact the transmission line. Second, as the result of a storm or other event, a tree could fall towards the transmission wires and contact a transmission wire on its way down. It would then follow that for either of these possibilities, the utility should look at three factors in determining how to address a particular tree: the height of the tree, the location of the tree relative to the transmission wires, and the height of the transmission wire.

Arcing, flashover, or flash-across events are slightly different. Those events occur only when a tree or other vegetation is sufficiently close to a transmission line for the electricity to jump from the transmission line to the nearby tree or other vegetation.⁶⁷ As such, the height of the tree, location of the tree relative to the transmission wires, and the height of the transmission wires would also be relevant in assessing whether these events could occur. But for flashover/flash-across/arcing events, we must also consider the proximity that must exist between vegetation (or any physical object) and the transmission wires for the electricity to actually jump from the transmission lines to the vegetation. The American National Standards Institute (ANSI) has done

⁶⁶ See McLoughlin Testimony at 15, lines 4-16; Goodfellow Testimony at 3, lines 6-11 ("There are two modes of failure on the transmission system attributed to trees. The mechanical mode of failure describes damage to utility infrastructure due to tree and branch strikes. The electrical mode of failure describes circumstances where the tree provides a short circuit fault pathway. This can occur either by direct contact between a tree and an energized conductor or by an air gap flash-across. The contact can be created by either movement of the tree or movement of the conductor." See also Preissler Testimony at 1, line 15-2, line 13.

⁶⁷ Preissler Testimony at 1, line 19-2, line 13.

extensive research on this topic and developed minimum vegetation clearance distances that are based on the voltage of the transmission line and the elevation above sea level of the area where the transmission line is located.⁶⁸ Duke witness McLoughlin actually relied on these ANSI Standards and admitted on cross-examination that the minimum vegetation clearance distance (MVCD) to avoid arcing or flashover on the lines at issue is only 2.3 feet, according to those standards.⁶⁹

Duke conducts its vegetation management along its transmission lines on a six-year cycle, meaning that Duke will return every six years to conduct vegetation management.⁷⁰ Thus, with the following basic principles in mind, Duke can and should conduct its analysis of which vegetation is compatible with the transmission wires and which vegetation is incompatible and is required to be removed:

1. Is the vegetation currently able to contact the transmission wires, either by growing into the transmission lines or by falling into the transmission lines?
2. Within the current trimming cycle, will the vegetation grow to a point where it will either contact the transmission wires or fall into the transmission wires?
3. Is the vegetation currently within the MVCD to prevent arcing or flashover?
4. Within the current trimming cycle, will the vegetation grow to a point where it encroaches on the MVCD to prevent arcing or flashover?
5. If the answer to any of these questions is yes, can the vegetation be trimmed or otherwise maintained such that it will not pose a threat?

⁶⁸ See Complainants' Ex. 24 at 16.

⁶⁹ See *id.* at 1 (noting that the standard was produced in response to an interrogatory requesting all documents relied upon by Duke witnesses and stating that witness McLoughlin relied upon this document); Tr. Vol. III at 530, line 22-531, line, 4.

⁷⁰ See Wiethorn Testimony, Attachment G at 6 ("Duke shall clear vegetation away from its transmission lines (69 KV and above) at least once every six years).

It appears that Duke did do such analysis and created a vegetation management plan that took these basic principles in mind and established minimum line clearances. Duke filed that plan with the Commission in Case No. 16-915-EL-ESS,⁷¹ creating a transmission clearing cycle that established minimum transmission line clearances of 15 feet when the clearing is completed (“vegetation shall be no closer than fifteen feet to an energized conductor when the clearing is completed”).⁷² Duke also stated in its plan that vegetation management may include cutting down and removing vegetation from a Duke corridor when Duke has the legal right to do so.⁷³ Nowhere in its plan did Duke state that it needed the right to clear cut or remove all trees and/or vegetation in its entire easement or establish wire and border zones with the right to cut down all trees in the wire zone.

Just as Duke has done in the past, every six years, Duke could and should review the trees and other vegetation along its transmission lines with the above questions in mind and take appropriate corrective action based on the answers to those questions. If it did this, Duke could ensure that trees and other vegetation along the transmission lines never impact the safety or reliability of Duke’s electric service. Duke’s efforts in the past have been successful in this regard.⁷⁴ And Duke has not complained about this process or argued that it would be an overly burdensome process. Had Duke believed so, it would and could have revised its vegetation management plan accordingly, but it did not. Duke chose to establish a 15-foot minimum

⁷¹ Wiethorn Testimony, Attachment G.

⁷² Id. at 7.

⁷³ Id. at 6.

⁷⁴ Williams Testimony at JDW-10.

clearance as a “preventative requirement[] for [Duke] to maintain safe and reliable service.” Ohio Adm. Code 4901:1-10-27(E)(1). Duke should adhere to its filed plan.

ii. Duke Seeks to Remove Trees from Complainants’ Properties that Do Not Jeopardize the Safety or Reliability of Duke’s Electric Service.

So now, we turn to the trees at issue on Complainants’ properties. As an initial matter, Duke proposes to remove a number of trees that do not come close to violating any of the principles discussed above. Testimony filed by Complainants’ is replete with examples of trees that Duke has stated an intent to remove that do not now—and, in some cases, may not ever—come close to contacting the transmission wires, present a possibility of falling into the transmission wires, or coming close enough to the transmission wires that arcing or flashover may occur. Notably, Complainant Witness Tim Back measured the transmission wires to be around 40 feet above the ground at their lowest point in his assessment of nine Complainants’ properties.⁷⁵

Complainant Kim Wiethorn provided photographs taken from the ground and with a drone that demonstrated the trees on her property do not come close to the transmission wires.⁷⁶ These photographs show trees that Duke intends to remove under its proposed vegetation management plan and makes apparent that these trees, which include ornamental trees, do not pose a threat to the transmission wires or to the safety and reliability of the electric system. In fact, Steve Holton, who represented Duke in a meeting with Ms. Wiethorn admitted as much when he told Ms. Wiethorn that “it was a shame that Duke was being required to cut all these trees down” and that “if an arborist looked at [Ms. Wiethorn’s pine trees], the arborist would determine that the pine trees will not ever grow tall enough to come close to the transmission wires.”⁷⁷

⁷⁵ See Back Testimony, Attachments A-I, Appendix A to each attachment.

⁷⁶ Wiethorn Testimony at 4, line 21-5, line 3 and Attachments E and F.

⁷⁷ Id. at 7, lines 1-8.

Complainants Mike Preissler and John Gump each provided photographs (including drone photographs) of their property as well.⁷⁸ As is seen in those photographs, both Mr. Gump and Mr. Preissler demonstrated that with a proper perspective, many of the trees at issue in this case are significant distances from the transmission wires. Attachment C to Mr. Gump's testimony and Attachment G to Mr. Preissler's testimony were clearly not taken from the ground level, and they show substantial distances between the trees and transmission wires. The drone photographs contained in Attachment D to Mr. Gump's testimony and Attachment I to Mr. Preissler's testimony confirm the reality that the trees will not contact the transmission wires and do not threaten the safety and reliability of the electric system. The examples of unjust, unreasonable, and simply unnecessary tree removal continue throughout the testimony. From the small trees contained on the property of Complainant Dr. Randall Fick—some of which are no more than a few feet high⁷⁹—to the 16-foot mulberry located ten feet outside the transmission wires on the property of Complainant Joseph Grossi,⁸⁰ to multiple trees that are less than 20 feet tall on the property of Complainant Jim Haid,⁸¹ Duke is proposing to unnecessarily destroy trees that are unable to contact the transmission lines at issue in this case and that do not threaten the safety and reliability of the electric system.

Moreover, Duke does not only seek to remove trees that Complainants or common sense would say do not pose a threat to the safety and reliability of the transmission wires, but also trees that Duke itself has previously deemed to be acceptable. After seeing Duke perform vegetation management on trees that actually posed a legitimate threat to the transmission wires in the past,

⁷⁸ See Preissler Testimony, Attachments G and I; Gump Testimony, Attachments C and D.

⁷⁹ See Fick Testimony at 6, lines 16-22 and Attachment C

⁸⁰ See Grossi Testimony at 8 line 21-9, line 3 and Attachment F.

⁸¹ Haid Testimony at 4, lines 1-14.

Complainant Olga Staios had Duke remove the offending trees and explicitly asked Duke which trees she could plant in their place so as to not pose an issue for the transmission lines.⁸² Notably, Duke told Ms. Staios that if she followed these recommendations, she would not even have to worry about Duke trimming her trees, let alone removing them.⁸³ Taking Duke's recommendations, she planted trees, dwarf trees, and bushes in place of the larger trees she had Duke remove.⁸⁴ Despite working with Duke and following its instructions, however, Duke now seeks to remove the vegetation that Ms. Staios planted at Duke's direction.⁸⁵ When Ms. Staios raised the concern that Duke was trying to remove trees and other vegetation that she had invested her own money in planting only after seeking approval from Duke, Duke's representative, Steve Holton, ignored her.⁸⁶

In addition to failing to consider the location and size of individual trees, Duke's policies also fail to account for unique characteristics of individual properties. Complainant Dennis Mitman described how the majority of the trees on his property are not located at street level, but rather at the bottom of a slope that ends roughly 35 feet below street level where the transmission tower is located.⁸⁷ As a result of this topographical feature of Mr. Mitman's property, even the tallest, full mature trees are 30-40 feet below the nearest transmission wire.⁸⁸ Even Duke Witness McLoughlin admitted that depending on the locations of conductors, the fact that a tree is located at the bottom of a slope should impact the determination of whether or not that tree is deemed to

⁸² Staios Testimony at 2, line 14-17.

⁸³ Id.

⁸⁴ Id. at 3, line 1-9.

⁸⁵ Id. at 6, lines 6-10.

⁸⁶ Id.

⁸⁷ Mitman Testimony at 2, lines 1-4 and Attachment B.

⁸⁸ Id. at 2, lines 11-15.

be compatible with the transmission wires.⁸⁹ Yet Duke seeks to remove all of the trees at the bottom of the slope on Mr. Mitman's property, despite their massive clearance from the transmission wires.⁹⁰

Perhaps the most remarkable element of Duke's arbitrary policy of removing all trees and other vegetation in a specified area is that the policy, as documented in Duke's own vegetation management materials and as employed in practice by Duke, results in threatening or dangerous vegetation being left unaddressed. In his testimony, Dr. Fick notes that even though Duke has already cleared portions of his property and marked additional trees for removal, Duke has not approached him or done anything to address massive trees that are more than 50 feet from the center of the transmission lines that could actually fall into the transmission wires.⁹¹ Similarly, Mr. Grossi describes the approach Duke suggests for a shagbark hickory tree on his property that is tall enough to fall into the transmission wires.⁹² Mr. Grossi explains how Duke intends to take a healthy tree, shear off one side of it (because the entire tree is not in Duke's easement), thus making it less healthy while no less able to fall into the transmission wires, which could threaten the safety and reliability of the electric system.⁹³ If anything, taking actions like this along the edges of Duke's easement makes its transmission system less, not more, safe and reliable.

iii. Even Trees or Other Vegetation that Could Eventually Threaten Transmission Wires Can Be Safely Maintained.

One key lynchpin of Duke's defense of its practices is its assertion that vegetation which may not threaten the safety and reliability of the transmission lines now or in the near future could

⁸⁹ Tr. Vol. III at 611, lines 2-16.

⁹⁰ Mitman Testimony at 2, lines 16-20.

⁹¹ Fick Testimony at 8, lines 15-26.

⁹² Grossi Testimony at 13, lines 3-18.

⁹³ Id.

someday grow to a point where it could do so and, thus, removal is necessary and reasonable. But the evidence does not support this claim. Complainants submitted the testimony of Tim Back in order to demonstrate that properly trained arborists can maintain trees at specified heights, as needed by an electric utility's specific situation.

Mr. Back has been in the tree care industry for more than 30 years, has won awards for his work, and is certified as an arborist by the International Society of Arboriculture.⁹⁴ He discussed a number of measures that Duke, or any utility, could use to maintain and control the growth of trees or other vegetation, in addition to regular trimming and pruning. Specifically, Mr. Back described how proper pruning techniques can be used to maintain trees at specified heights while also maintaining the health of the trees.⁹⁵ Mr. Back further described growth regulators, which are chemicals that can be used to dramatically slow the growth of a tree without impacting the overall health of that tree.⁹⁶ Mr. Back agreed in his testimony that some trees may indeed need to be removed,⁹⁷ but notes that most trees can be trimmed to specified clearances to simultaneously ensure the health of the trees and the safety and reliability of Duke's transmission of electric power.⁹⁸

Duke counters claims that pruning can be a reasonable solution by arguing that trees, when pruned will regrow quicker than expected, thus posing a threat to the transmission lines.⁹⁹ Notably, Duke's assertion that pruning causes exaggerated regrowth is advanced by Witnesses McLaughlin

⁹⁴ Back Testimony at 2, line 6-4, line 6.

⁹⁵ Id. at 13, lines 1-18.

⁹⁶ Id. at 14, lines 5-20.

⁹⁷ Id. at 15, lines 8-10.

⁹⁸ Id. at 15, lines 1-19.

⁹⁹ See McLaughlin Testimony at 13, lines 17-19; Goodfellow Testimony at 11, line 14.

and Goodfellow, neither of whom are arborists.¹⁰⁰ Meanwhile, Mr. Back, the only certified arborist to testify in this matter, confirmed that Duke's assertions can be quelled simply by ensuring that pruning of trees is done properly and in accordance with industry standards. Specifically, Mr. Back testified that "proper cutting techniques will mitigate against the possibility of unanticipated growth."¹⁰¹

Duke then attempted to establish its concerns about regrowth of trees and other vegetation after pruning through the use of a growth study that Duke purportedly conducted.¹⁰² Complainants would note that the growth study entered into the record as Duke Exhibit 4 was only discussed with Mr. McLoughlin on redirect, who was not involved in the preparation of the study and prior to discussing it at hearing had only been "provided it by Duke" and "perused it," but had not "evaluated everything in the document."¹⁰³ Moreover, Mr. McLaughlin did not discuss the study at any length in his filed direct testimony.¹⁰⁴ Therefore, Complainants did not have an opportunity to cross-examine any individuals who were in charge of actually preparing Duke Exhibit 4.

In any event, Duke Exhibit 4 does not rebut Mr. Back's testimony about the use of proper pruning techniques to prevent exaggerated regrowth rates for pruned trees. On re-cross examination, Mr. McLoughlin admitted that pruning methods that were different than the topping methods used to gather the data contained in Exhibit 4 could reduce regrowth rates.¹⁰⁵ Mr. McLoughlin further admitted that the use of growth inhibitors, as Mr. Back suggested could further

¹⁰⁰ See Tr. Vol. III at 525, lines 16-17; 689, lines 18-21.

¹⁰¹ Back Testimony at 15, lines 14-16.

¹⁰² See Duke Ex. 4.

¹⁰³ Tr. Vol. III at 635, line 13-637, line 7.

¹⁰⁴ See McLoughlin Testimony.

¹⁰⁵ Tr. Vol. III at 661, lines 9-14.

reduce regrowth rates.¹⁰⁶ Notably, Duke Exhibit 4 is based, in part, on simulations of how trees might possibly grow, as opposed to concrete, observed data for all trees.¹⁰⁷ Also of note is the fact that Duke Exhibit 4 only explores regrowth rates when trees are pruned to a clearance of up to 15 feet.¹⁰⁸ Duke does not consider the possibility that its concerns with regrowth could be completely remediated simply by pruning to a greater initial clearance, even though Mr. McLoughlin admitted that doing so certainly “would buy some more time.”¹⁰⁹ Finally, the data that Duke pointed to in Duke Exhibit 4 to support its assertion that pruning creates unmanageable regrowth falls victim to the same generalization that plagues Duke’s entire defense of its policies: it generalizes one conclusion for all trees, regardless of differences in species and maturities. Mr. McLoughlin testified that even though individual species’ regrowth rates were collected as part of the study described in Duke Exhibit 4, the tables containing the data Duke asked Mr. McLoughlin about were only averages of all species.¹¹⁰ Duke could have requested that the parties who prepared its regrowth study provide species-specific data that would have allowed Duke to develop effective pruning techniques for each tree that it encountered, but Duke instead morphed all the data together in an attempt to create the appearance of unmanageable regrowth data.

iv. Duke’s Past Practices Demonstrate that Trimming and Pruning with Minimum Line Clearances Are Safe and Effective Practices.

The Commission need not take the testimony of Mr. Back (or any other witness to this proceeding) on faith and assume that trimming and pruning can successfully prevent vegetation-related safety and reliability disruptions. Instead, the Commission can look to decades of past

¹⁰⁶ Id. at 661, line 23-662, line 1.

¹⁰⁷ Id. at 656, lines 4-16.

¹⁰⁸ Id. at 660, lines 11-16.

¹⁰⁹ Id. at 660, lines 11-25.

¹¹⁰ Id. at 662, lines 18-22.

practices by Duke and its predecessors that empirically show that reasonable trimming, performed while working in conjunction with customers, can adequately prevent safety or reliability issues along the transmission lines. Seventeen Complainants filed unopposed testimony in this case, and all 17 described how the past practice of trimming and pruning vegetation had not resulted in any safety or reliability issues of which Complainants were aware.¹¹¹

Of course, Complainants do not have access to outage data and cannot, as customers, unequivocally speak for the safety or reliability of Duke's entire transmission system. But Duke can. And in response to Complainants' discovery, Duke could identify only a single instance in the past ten years where there was an outage along any of the transmission lines at issue in this case that it could attribute to vegetation.¹¹² When Complainants asked for further information about that outage, Duke responded that it is impossible to say how an outage is initiated¹¹³ and that "[t]he outage was listed as being caused by vegetation. No further details are available."¹¹⁴

Additionally, when Complainants, in discovery, asked Duke whether these past practices had negatively affected safety and reliability, Duke responded that Duke never put the safety and reliability of its transmission system at risk.¹¹⁵ Instead, Duke claimed that the prior practices had resulted in "excessive off-cycle work" to protect the safety of the transmission system.¹¹⁶ Of course, in reviewing the descriptions by Complainants of past work by Duke on Complainants' properties, it does not appear that a great deal of off-cycle work was being performed.¹¹⁷ In fact,

¹¹¹ See Complainants' Ex. 2-18.

¹¹² See Preissler Testimony, Attachment F.

¹¹³ See Complainants' Ex. 26.

¹¹⁴ See Complainants' Ex. 27.

¹¹⁵ Complainants' Ex. 29.

¹¹⁶ *Id.*

¹¹⁷ See Complainants' Ex. 2-18.

many Complainants noted that Duke had performed trimming on their properties only sparingly, as trimming had not been necessary every six years. For instance, Mr. Mitman testified that he was only aware of Duke performing vegetation management one time in the thirty years he and his wife had owned their home.¹¹⁸ Complainant Steve Schmidt testified that since he had purchased his home in 1996, he believed that Duke had only come to trim trees on his property one time.¹¹⁹ Complainant Melisa Kuhne testified that she was aware that Duke had trimmed trees on her property only once in the 11 years she had lived there.¹²⁰ The record reflects that even a six-year clearing cycle was more than enough for Duke to perform work necessary to ensure safety and reliability without removing trees or other vegetation unnecessarily.

OCC and Complainant Witness James Williams demonstrated that Duke's past practices have been effective. Upon a review of reports filed by Duke regarding its vegetation management, Mr. Williams concluded that Duke has been able to consistently complete its vegetation management goals under its prior plan, and has done so in an efficient and cost-effective manner.¹²¹ For example, Mr. Williams attached Duke's latest annual report filed with the Commission to his testimony.¹²² That report states that the condition of Duke's transmission system "meets or exceeds" industry standards and customer expectations for the delivery of safe and reliable electric service.¹²³ Mr. Williams notes that despite Duke's supposed need to adjust its vegetation

¹¹⁸ Mitman Testimony at 1, lines 17-23.

¹¹⁹ Schmidt Testimony at 1-2.

¹²⁰ Kuhne Testimony at 1, lines 18-23.

¹²¹ Williams Testimony at 10, lines 14-20.

¹²² See *id.* at JDW-10.

¹²³ *Id.* at JDW-10 at 12.

management plan, it has not actually performed any studies, analyses, reviews, or other assessments to determine whether its new plan will result in any improvements to reliability.¹²⁴

Perhaps in an attempt to avoid the fact that Duke did not have documented safety or reliability disruptions to support its claims of the alleged danger posed by the trees and vegetation on Complainants' properties, Duke Witness Adams included charts in his testimony comparing reliability in different states where Duke's parent company operated electric transmission systems.¹²⁵ Despite efforts to manipulate the data into supporting Duke's claims, however, the data demonstrates that past practices did result in a reliable transmission system for Duke. Mr. Adams' first chart compares the amount of outages per hundred miles per year (OHMY) for Duke Energy Ohio and Kentucky, Duke Energy Midwest (which includes Ohio, Kentucky, and Indiana¹²⁶), and the rest of Duke Energy's transmission lines, excluding Duke Energy Midwest for 100-199kV lines.¹²⁷ This chart demonstrates that in all but one of the eight years surveyed, Duke Energy Ohio and Kentucky had a lower outage rate than the rest of the Duke Energy systems.¹²⁸ In other words, while Duke was working with Ohio customers on vegetation management and trimming or pruning trees rather than clear cutting and/or removing the vegetation, Duke Energy Ohio was, for the most part, seeing lower outage rates than was experienced on comparable lines across the Duke Energy system. Complainants would also note that the inclusion of the Duke Energy Midwest line only misleads the reader. Mr. Adams testified that Duke Energy Midwest is just the same data as the Ohio and Kentucky data, but with Indiana data added as well.¹²⁹ So,

¹²⁴ Id. at 10, lines 9-12, JDW-09.

¹²⁵ See Adams Testimony at 12-14.

¹²⁶ See Tr. Vol. I at 216, lines 10-12.

¹²⁷ Adams Testimony at 12.

¹²⁸ Id.; Tr. Vol. I at 215, lines 8-15.

¹²⁹ Tr. Vol. I at 216, lines 10-12.

essentially, this line purports to show that Duke Energy Midwest is significantly less reliable than the rest of the system, even though consideration of this data in conjunction with the Duke Energy Ohio and Kentucky data clearly shows that the lack of reliability is being driven by the data from Indiana. Complainants would further note that at no point does Duke present data solely for Ohio, the best they are able to do is offer combined outage data for Ohio and Kentucky.

Next, Mr. Adams offers data comparing Duke Energy Ohio and Kentucky 100-199kV lines to 200-299kV lines across the Duke Energy system.¹³⁰ This is, of course, a mismatched comparison. As demonstrated above, Duke was unable to show that Ohio and Kentucky 100-199kV lines were less reliable under old practices than the rest of the Duke Energy system, so it instead resorted to comparing different types of lines. Considering Mr. Adams's first and second charts together demonstrates the fallacy of this approach. The first chart shows that the system-wide OHMY for 100-199kV lines is between about .25 and .4.¹³¹ The second chart shows that the system-wide OHMY for 200-299kV lines was between 0 and .1.¹³² Thus, it is neither surprising nor remarkable that 100-199kV lines (which perform worse than 200-299kV lines across the whole system) in Kentucky and Ohio performed worse than 200-299kV lines. Mr. Adams's final chart compares the performance of 0-99kV lines.¹³³ This chart is wholly irrelevant, as this case concerns 138kV transmission lines, and this chart would not include any of those lines, and would, in fact, include many lines that are not even transmission lines at all.

This unpersuasive data, combined with Duke's inability to point to specific incidents, Duke's own admissions, and the testimony of Complainants regarding their satisfaction with

¹³⁰ Adams Testimony at 13.

¹³¹ Id. at 12.

¹³² Id. at 13.

¹³³ Id. at 14.

Duke's prior practices all indicate that Duke's trimming and pruning approach to vegetation management did sufficiently ensure safety and reliability along the transmission circuits at issue in this case as required by the Commission's rules.

- v. Duke Is Unreasonably Pursuing Policies that Would Result in the Removal of Harmless Vegetation Despite Knowledge that the Subject Vegetation Poses No Threat and/or Without Performing Any Assessments of the Vegetation It Seeks to Remove.

Duke did not challenge any of the testimony submitted by the Complainants discussed above. In fact, Duke elected not to cross-examine any Complainants regarding their testimony.¹³⁴ Thus, the Complainants testimony stands undisputed. Duke and its witnesses freely admit that the IVM, border zone-wire-zone approach it proposes to use in addressing vegetation management on Complainants' properties will result in trees that may never threaten safety or reliability being removed: In addition to Mr. Holton's admission that Ms. Wiethorn's trees do not pose a threat, Duke Witness Goodfellow freely conceded on cross-examination that the wire zone-border zone concept results in vegetation that has no practical ability to disrupt electric service along the transmission wires being removed.¹³⁵ Presented with hypothetical trees along these transmission wires, Mr. Goodfellow admitted that several trees would be removed, not because they threatened safety or reliability, but because they were located in an arbitrary zone that Duke had established.¹³⁶

If Duke is not aware of the full extent of trees and other vegetation that do not threaten the safety or reliability of the transmission lines but would be removed anyways under Duke's proposed vegetation management approach to Complainants' properties, it is because Duke has

¹³⁴ See Tr. Vol. I.

¹³⁵ See Tr. Vol. III at 713, line 4-717, line 3.

¹³⁶ Id.

not actually assessed whether any of the subject vegetation actually poses a threat to the safety or reliability of the transmission system. Duke admitted as much in response to Complainants' discovery when it stated that it has not had engineers assess the trees that Duke intends to remove in order to determine whether they pose a threat to the safety or reliability of Duke's electric system.¹³⁷ It follows then, that Duke is proposing to undertake vegetation management that includes clear cutting and/or mass removal of trees without ever determining how many of the trees along its transmission lines actually pose a threat (or even could pose a threat) to those lines. Taking on the cost of mass tree removal and destroying vegetation and Complainants' properties without such an assessment is not a just or reasonable approach to vegetation management as required by Ohio law and the Commission's rules. See R.C. 4905.22 and Ohio Adm. Code 4901:1-10-27(E)(2) and (4).

vi. Duke's Own Actions Demonstrate that Allowing Trees to Remain Near or Under the Transmission Wires Does Not Threaten Safety or Reliability.

Even though Duke appears to have chosen to take a hard line with many of its customers, including Complainants in this case, Duke has, in certain instances, demonstrated that it is willing to compromise on the wire zone-border zone principles contained in its purported IVM approach to vegetation management. Given Duke's insistence throughout this proceeding that safety and reliability are of the utmost importance when Duke conducts its vegetation management activities, Complainants presume that Duke would not take any actions with regard to vegetation management that would jeopardize the safety or reliability of its electric transmission lines. Thus, it is strange that Duke claims that an absolute necessity to remove trees on Complainants'

¹³⁷ Preissler Testimony, Attachment E.

properties exists, even though it makes exceptions along these same lines for some, but not all customers.

Duke kept a log throughout this process that was produced to Complainants in response to a discovery request asking for communications between Duke employees or between Duke employees and third parties regarding its decisions to implement or actual implementation of its plan to clear cut trees and other vegetation on or near properties owned by Complainants.¹³⁸ This log appears to contain instructions to Duke personnel and contractors regarding individual properties along the transmission lines.¹³⁹ For each property, the log notes “Special Conditions,” which appear to give additional instruction regarding vegetation on the given property.¹⁴⁰ For many properties, these instructions are as simple as “Clear brush and trees within 50’ of center.”¹⁴¹ Other properties have differing, but ultimately inconsequential instructions such as “do not block driveway.”¹⁴² Other properties noted on the log have instructions that appear to run counter to Duke’s purported “one approach fits all” method of vegetation management. It lets some trees remain, directing contractors that “[a]rbs can stay in back yard near pool,”¹⁴³ to “[a]llow customer to keep Lilac tree out in Border Zone,”¹⁴⁴ or to “[I]eave the Magnolia (near back corner of yard on S side), everything else goes w/in the R/W.”¹⁴⁵ The log also provides that some trees can be trimmed instead of removed, stating for one property that “[t]here is one tree on the north side of

¹³⁸ See Vonderhaar Testimony, Attachment I.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² Id. at line 106.

¹⁴³ Id. at line 268.

¹⁴⁴ Id. at line 274.

¹⁴⁵ Id. at line 492.

his property (east side of the driveway-the middle tree). It is marked with only pink ribbon, to be trimmed, but the other two trees are marked to be removed. He would like to make sure that the middle tree only gets trimmed and not removed.”¹⁴⁶ One owner was given license to trim vegetation on his or her own, a luxury that most Complainants in this case were not afforded, when the contractor was directed, “[d]o not cut the hedge row. Owner will trim down to 7’.”¹⁴⁷ Throughout the log, other concessions are made to property owners in addition to those cited here.

Mr. Preissler also noted a curious case where Duke appeared to make concessions to a different kind of customer. After this case was filed, Mr. Preissler was at the King’s Island amusement park in Mason, Ohio, near Symmes Township.¹⁴⁸ He noticed that Duke’s transmission lines ran over a portion of the park, and that throughout the park there were trees located directly under the transmission lines.¹⁴⁹ Mr. Preissler provided photographic evidence of these trees that would clearly be incompatible according to Duke’s vegetation management materials. Similarly, Symme Township Trustee Ken Bryant also brought the Commission’s attention to an inconsistency in Duke’s approach. Mr. Bryant described how Symmes Township owns property beneath Duke’s transmission wires.¹⁵⁰ Yet, Duke has represented that it does not intend to conduct vegetation management on that property, even though Mr. Bryant’s photographs demonstrate that the property is below the transmission wires and contains trees and other vegetation.¹⁵¹

Finally, Duke has even made minor exceptions for some Complainants. Kim Carrier testified that when she pushed back, Duke allowed her to keep ornamental trees, so long as she

¹⁴⁶ Id. at line 183.

¹⁴⁷ Id. at line 180.

¹⁴⁸ Preissler Testimony at 9, line 18-10, line 9.

¹⁴⁹ See id.

¹⁵⁰ Bryant Testimony at 8, lines 4-9.

¹⁵¹ Id. at 8, lines 10-13, Attachment F.

agreed to have the trees trimmed herself.¹⁵² Nicole Hiciu testified that when a Duke contractor first marked the area within which trees were to be removed, he included a small seven-foot pine tree that was near the edge of Duke's right-of-way.¹⁵³ After some discussion, the contractor agreed to move the flag such that Mrs. Hiciu's small tree would not be included in the area to be clear cut.¹⁵⁴ Mr. Gump testified that Duke representative Steve Holton allowed him to keep a few trees that would have otherwise been removed "as a favor" if he agreed to sign a memorandum of understanding that would let Duke remove the remainder of the trees.¹⁵⁵ These are all concessions that Duke made on individual properties that could have been reasonably been made available to any property owner. But instead of working with all property owners like it did for the few mentioned here, Duke chose to unjustly and unreasonably enforce extreme vegetation management practices without meaningful exceptions for the vast majority of the Complainants in this case and without justification of the need for those extreme vegetation management practices in violation of Ohio law and the Commission's rules. See R.C. 4905.22 and Ohio Adm. Code 4901:1-10-27.

B. Duke's Proposed Removal of Trees and Other Vegetation Is Inconsistent with Duke's Vegetation Management Plan on File with the Commission.

Perhaps seeing that its proposed vegetation management practices and policies is, on its face, unjust and unreasonable, Duke attempts to claim that its proposed practices and policies are consistent with its vegetation management plan it filed in Case No. 16-915-EL-ESS,¹⁵⁶ hoping that the Commission's automatic approval of that plan pursuant to Ohio Adm. Code 4901:1-10-27 will vest Duke's proposed practices and policies with the reasonableness Duke needs for its

¹⁵² Carrier Testimony at 3, lines 10-18.

¹⁵³ Hiciu Testimony at 3, lines 18-21.

¹⁵⁴ Id. at 3, lines 22-24.

¹⁵⁵ Gump Testimony at 9, lines 8-13.

¹⁵⁶ Wiethorn Testimony, Attachment G.

proposed actions to survive Commission scrutiny. There is just one problem with this approach: As explained previously, Duke's plan does not provide for the destructive vegetation management practices that Duke seeks to inflict on Complainants' properties.

When it filed its vegetation management plan, Duke had the opportunity to describe its plan in as much, or as little detail as it wanted. Duke filed the plan that it filed, and the words contained therein (as well as the words not found in the plan) have consequences. Duke has asserted throughout this proceeding that its actions are consistent with industry standards and with its vegetation management plan on file with the Commission. A careful review of that plan does not leave the reader with the impression that Duke, under this plan would pursue clear cutting or would implement a vegetation management plan that relied upon border zones and wire zones, or an IVM approach.

Not once in its filed plan does Duke mention the idea of a "wire zone." Not once does Duke mention the idea of a "border zone." Not once does Duke mention that tree species are not compatible within certain ranges of its transmission wires. Not once does Duke mention the idea of "reclaiming" its right-of-way. Not once does Duke mention an IVM approach. Not once does Duke mention ANSI standards, regulations, or any other authority compelling it to conduct certain vegetation management. In short, Duke's vegetation management plan is almost completely devoid of the concepts that Duke and its witnesses discussed throughout the hearing on this matter.

As interesting as the information missing from the plan may be, the information Duke chose to include in the modification of its vegetation management plan is even more telling. Duke filed testimony stating that pruning, as opposed to removal, creates an "elevated risk to the facilities and to public safety."¹⁵⁷ Yet, in its own vegetation management plan (which contains no

¹⁵⁷ See Goodfellow Testimony at 10, lines 19-21.

blanket prescription for tree removal), Duke describes trimming and pruning standards for its transmission lines. It states that “[f]or any transmission line (69 kV and above), vegetation shall be no closer than fifteen feet to an energized conductor when the clearing is completed.”¹⁵⁸ On one hand Duke is stating that it will not, or cannot, engage in trimming and pruning around its transmission lines, while on the other hand Duke has filed a vegetation management plan that describes standards for engaging in such trimming and pruning in detail. If it is true that Duke’s vegetation management plan supports Duke’s stated practice of clear cutting and removing nearly all trees from its right-of-way, then the inclusion of this language about trimming and pruning standards for trees around the transmission wires and establishing minimum line clearances is unnecessary. It is purely extraneous and a useless inclusion in Duke’s vegetation management plan as, per Duke, it would never actually be invoked.

Duke could have easily filed a plan that clearly laid out its goals and practices and provided detailed information about what Duke actually planned to do with regard to vegetation management around its transmission lines, including the inclusion of the IVM approach, clear cutting, reclamation of the right of way, and the concept of wire and border zones. It could have attached the vegetation management materials it is now relying upon so that its customers and the Commission would have an idea of what the vegetation management Duke was going to perform would look like, but it chose not to do so.

Instead, Duke established minimum transmission line clearances of fifteen feet. Nonetheless, in an effort to tie its new, proposed vegetation management practices and policies to the filed plan, Duke relies on language in its plan that says Duke “shall clear vegetation away from its transmission lines (69kV and above) at least once every six years which may include cutting

¹⁵⁸ Wiethorn Testimony, Attachment G at 7.

down and removing vegetation from a Duke Energy Ohio corridor when Duke Energy Ohio has a legal right to do so.”¹⁵⁹ Duke claims that this language allows Duke to clear cut and/or implement the proposed vegetation management practices and policies on Complainants’ properties. Duke is incorrect as this language does not give Duke blanket authority to perform indiscriminate clear cutting or to remove vegetation without an assessment as to whether the tree removal is necessary to maintain safe and reliable service as required by the Commission’s rules and Ohio law. As explained above, without the proper assessment and justification and without a determination that the tree removal is necessary to maintain safe and reliable service, Duke does not have a legal right to remove the trees per Ohio Adm. Code 4901:1-10-27 or a statutory right per R.C. 4928.11 or 4905.22 as Duke’s actions are unjust and unreasonable.

Additionally, without the above-referenced assessment and determination, Duke does not have a legal right to remove trees and vegetation in its right-of-ways pursuant to the easements Duke holds over a portion of each Complainant’s property.¹⁶⁰ Although the language in every easement is not identical, each easement is for an area 100 feet wide surrounding Duke’s transmission wires and contains language that allows Duke to “cut, trim, or remove any trees, overhanging branches or other obstructions both within and without [the right-of-way] which *in the opinion of the grantee’s engineers may endanger the safety of or interfere with the construction, operation or maintenance of said system . . .*”¹⁶¹ This language is crucial, it establishes that Duke’s easement is not an unrestricted right to remove trees and other vegetation, but rather a limited right to do so, if its engineers determine that the trees being removed could danger or interfere with the electric system.

¹⁵⁹ Id. at 6.

¹⁶⁰ Adams Testimony at 4, lines 19-22.

¹⁶¹ See, e.g., Grossi Testimony, Attachment A (emphasis added).

Complainants, seeking to ascertain the applicability of Duke's easements to the case at hand, asked Duke directly whether its engineers had made the determination necessary for Duke to remove trees under the authority of the easement. Duke stated that its engineers had not.¹⁶² Again, without such an assessment from its engineers, Duke does not have the legal right to remove trees under the easement. And without any of the aforementioned legal rights to remove the vegetation, Duke does not have authority under its vegetation management plan to remove Complainants' trees or other vegetation.

Duke, perhaps recognizing that the necessary requirements for removal under the easement are not met, filed testimony that misstated the requirements of the easement. For instance, Mr. Adams filed testimony that incorrectly stated the requirements of the easement as allowing Duke to remove trees or overhanging branches which "in the opinion of the Company's engineers or other subject matter experts" could jeopardize the system.¹⁶³ Notably, Mr. Adams's testimony purported to quote the language of the easement, except for the addition of the phrase "other subject matter experts." When asked about this modification of the easement language on cross-examination, Mr. Adams admitted that he could not point to any language in a specific easement that mirrored the language in his testimony and tried to justify his modifications as a reflection of changing times where the term engineer has a broader meaning.¹⁶⁴

Mr. Adams's defense of his unilateral modification of the easement language in his testimony does not hold up, given that it was Mr. Adams himself who provided the discovery response stating that Duke's engineers had not assessed the trees at issue in this case.¹⁶⁵ Mr.

¹⁶² See Grossi Testimony, Attachment B.

¹⁶³ Adams Testimony at 5, lines 1-12.

¹⁶⁴ Tr. Vol. II at 294, line 20-305, line 18.

¹⁶⁵ See Grossi Testimony, Attachment B.

Adams could have interpreted the word “engineer” as broadly as he believed was appropriate in answering the discovery request, and he still said that Duke’s engineers had not assessed the trees to be removed.¹⁶⁶

In considering Duke’s decision to present this testimony by Mr. Adams, the Commission must ask why Duke would choose to provide a verbatim restatement of the easement language with only a modification that makes the easement broader than its language provides. The answer is that the language of the easement itself, by Duke’s own admission, does not allow for the removal of trees that Duke now seeks to remove, so Duke needed the Commission to consider different language in order for the Commission to determine that Duke did have a legal right to remove the trees at issue in this case, and was thus justified in doing so under its vegetation management plan. The Commission should reject this attempt by Duke to circumvent the language of its own easements and its own vegetation management plan and hold that Duke’s vegetation management plan does not provide for the indiscriminate removal of the trees at issue in this case. Without an assessment as to whether the tree removal is necessary to maintain safe and reliable service, Duke’s proposed vegetation management practices and policies are inconsistent with its vegetation management plan on file with the Commission, its easements on the Complainants’ properties, and violates the Commission’s rules and Ohio law.

C. Duke Deceptively Modified Its Vegetation Management Plan in Violation of the Commission’s Rules and Ohio Law.

To the extent that the Commission finds that Duke’s vegetation management plan does provide for the type of vegetation management activity proposed in this case (which it does not), the Commission should find that Duke deceptively modified its vegetation management plan,

¹⁶⁶ Id.

which was improper in violation of Ohio Adm. Code 4901:1-10-27(E)(2) and (F)(1), as well as Ohio Adm. Code 4901:1-10-24(D). The deceptive modification is also unjust and unreasonable in violation of R.C. 4905.22.

In filing its vegetation management plan, Duke stated that changes to its plan “were made simply to clarify and make the terms more coherent. There are no substantive changes to the program.”¹⁶⁷ As has been discussed at length, Duke’s prior vegetation management practice differed from what the Company proposes here. Thus, if Duke relies on this modification as a means or justification for changing or implementing new policies and practices, but represented to the Commission that the modification was merely clerical and that Duke made no substantive changes to its plan, Duke’s representations that no changes were made would be deceptive and misleading. Complainants have presented significant evidence demonstrating that this modified vegetation management plan was indeed part of Duke’s overall strategy or justification for changing its vegetation management practices and policies and for implementing clear cutting as opposed to working collaboratively with customers to determine the necessity of tree removal to ensure the safety and reliability of the electric system.

First, the modification to the plan itself removed key language regarding Duke’s intent to work with customers. The application to modify the plan demonstrates that language concerning Duke’s intent to work with customers and allowing some mature trees to remain standing was purposefully removed.¹⁶⁸ Second, the temporal relationship between Duke’s implementation of its new vegetation management approach and this modification to its plan suggests that the modification was related to the new IVM/clear cutting approach. Duke filed this application in

¹⁶⁷ Wiethorn Testimony, Attachment G at 1.

¹⁶⁸ See *id.*, Grossi Testimony at 7, line 8-8, line 4.

2016.¹⁶⁹ That same year is when Duke “initiated focus on its 138 kV system in Ohio.”¹⁷⁰ Then, even though Duke stated that it had not substantively modified its vegetation management plan, its employees were stating in internal emails that Duke was “continu[ing] to make a lot of changes when it comes to Transmission Vegetation Management – especially in Ohio.”¹⁷¹

Moreover, the provisions discussed above concerning the 15-foot clearance surrounding transmission lines mislead customers. These provisions appear to have been included despite Duke having no intention of ever actually trimming trees around the transmission wires. This approach further misleads customers and the Commission by implying that trimming is part of Dukes program when, in fact, it is not. Such misleading language is impermissible under the Commission’s rules and is unjust and unreasonable. See Ohio Adm. Code 4901:1-10-27 and 4901:1-10-24(D) and R.C. 4905.22.

D. Duke’s Additional Justifications for Its Vegetation Management Practices and Policies Are Inconsistent and Are Contradicted by Duke’s Own Actions and by Record Evidence.

Throughout the proceeding, Duke has offered a myriad of explanations for why the trees and other vegetation at issue in this case must be removed. None of these explanations holds up to the scrutiny of logic or the evidence presented in this case. Complainants address a number of these purported explanations below.

i. Customers Who Challenged Duke’s New Vegetation Management Approach Were Provided Inadequate and Inaccurate Justifications by Duke’s Representatives.

When Complainants and other residents of their community first raised issues with Duke regarding its vegetation management practices in 2017, a group of residents sought to meet with

¹⁶⁹ See Wiethorn Testimony, Attachment G.

¹⁷⁰ Adams Testimony at 11, lines 7-8.

¹⁷¹ Kuhne Testimony Attachment I.

Duke to voice their concerns as customers.¹⁷² But Duke refused to meet with its customers to hear concerns in a group setting,¹⁷³ instead preferring to have representatives meet with customers one-on-one. Many Complainants met with Duke representatives in these individual customer meetings, many of which were taken with Duke contractor Steve Holton. During these meetings, Complainants were given a range of differing explanations for Duke's new approach to vegetation management. Many of these explanations were either factually untrue or conflicted with explanations received by other customers.

Many Complainants offered indisputable testimony regarding their meetings with a Duke representative, Steve Holton, regarding Duke's implementation of its vegetation management plan, including Duke's proposed vegetation management practices on their specific properties. Mr. Holton, when confronted with tough questions about why Duke was changing its practices, gave a plethora of explanations. He told Complainant Fred Vonderhaar (and others) that the laws had changes and that the laws now allowed Duke to do whatever it wanted with regard to vegetation management.¹⁷⁴ He further added that Congress had passed a law regarding vegetation management.¹⁷⁵ Mr. Holton told Mr. Preissler that Duke faced fines resulting from new federal regulations if it did not pursue this form of vegetation management.¹⁷⁶ Mr. Holton even failed to point to a regulation that required this activity when pressed to do so by Mr. Staios and Mr. Grossi.¹⁷⁷ He told Complainant Nicole Menkhaus that this was just a new policy without

¹⁷² Bryant Testimony at 1, lines 19-22.

¹⁷³ Id. at 2, lines 1-7.

¹⁷⁴ Vonderhaar Testimony at 6, line 27-7, line 1.

¹⁷⁵ Id. at 7, lines 3-4.

¹⁷⁶ Preissler Testimony at 8, lines 15-19.

¹⁷⁷ Staios Testimony at 6, lines 15-24.

providing any reason at all.¹⁷⁸ He told Mrs. Kuhne that Duke would take down trees and then threatened to fill in part of a lack near her property and that Duke was not making exceptions for any trees.¹⁷⁹ As mentioned above, he told Ms. Wiethorn that it was a shame that Duke was being required to remove some of her trees, because those trees would not impact the transmission wires. He simply told Mr. Haid that he, Steve Holton, was the decision-maker behind these new policies.¹⁸⁰

Of course, none of this was true. At hearing, Duke's witnesses could not point to any federal regulations that required Duke to clear cut or otherwise engage in the destructive policies at issue in this case or be fined for failing to do so. Duke similarly could not point to any new laws that required these policies. Duke witness Adams testified that he is the Duke employee in charge of transmission vegetation management standards employed by Duke,¹⁸¹ and despite Mr. Holton's claim of being a decision-maker, Duke never even called him to testify at hearing. Duke never offered testimony to support Mr. Holton's misrepresentations. Duke did not offer testimony explaining that lakes/ponds would need to be filled in as part of its new vegetation management standards, but did admit in discovery that Duke made exceptions for individual trees in implementing this plan.¹⁸²

In short, nearly every explanation that Mr. Holton provided to Complainants was untrue, which begs the question of why he did not have an accurate explanation to provide. At hearing, Duke offered other justifications for its actions (discussed in greater detail below). If those reasons

¹⁷⁸ Menkhaus Testimony at 5, lines 3-6.

¹⁷⁹ Kuhne Testimony at 3, lines 16-19.

¹⁸⁰ Haid Testimony at 3, lines 19-23.

¹⁸¹ Adams Testimony at 1, line 20-2, line 12.

¹⁸² Kuhne Testimony at Attachments D, E.

were as compelling as Duke now claims in causing this change in policy, it seems that the representative that Duke sent around to address customer concerns regarding that policy would have been equipped with the ability to articulate those explanations to customers, rather than resorting to the fabrications of different justifications entirely. Additionally, if those justifications are true and real, it seems as if Duke could have and should have provided the information to the Commission when filing its modified vegetation management plan. The simplest explanation for Mr. Holton's behavior and purported rationale at hearing must be that the justifications offered did not exist and were not considered as part of the plan to implement Duke's new vegetation management plan, practices, and policies at the time of implementation. Instead, the purported justifications were created after the fact, after the Complaint was filed to defend Duke's behavior.

ii. Duke Refers to Past Events in the Territories of Other Utilities in Order to Create a Sense of Urgency for Its Proposed Vegetation Management Activities on Complainants' Properties that Does Not, In Fact, Exist.

Duke, through testimony, discussed blackouts that occurred in 2003 as a justification for its new policies.¹⁸³ Initially, Complainants note that this blackout occurred 14 years, or more than two transmission vegetation management cycles, before Duke approached Complainants in the summer of 2017. Thus, Duke's reliance on this blackout, and the subsequent reports addressing the causes of such is suspect and should be rejected. Complainants expect that Duke would have taken the risk of a similar event occurring as a result of vegetation in its service territory seriously and would have addressed trees and other vegetation that posed such a threat immediately, rather than waiting 14 years to do so. Moreover, the fact that Duke chose to trim, rather than remove, vegetation on Complainants properties long after the blackout occurred in 2003 reinforces the reality that Duke does not believe that the vegetation at issue in this case poses an actual risk of

¹⁸³ See, e.g., Adams Testimony at 10, lines 21-22.

causing a blackout. Indeed, Mr. Adams testified that such an event occurring as a result of activity on these transmission lines is “highly unlikely” due to the fact that the lines at issue in this case operate at lower voltages than the lines that caused the blackout.¹⁸⁴

Moreover, the report on the 2003 blackout that is linked in Mr. McLoughlin’s testimony paints a much fuzzier picture of the causes of that blackout, with causes ranging from inadequate preparation and assessment of the electric system by FirstEnergy (the company operating the transmission lines that caused the blackout), to ambiguous direction from NERC, to poor vegetation management, to the inability to access real-time diagnostic support as the events unfolded.¹⁸⁵ With regard to the vegetation that caused the outages, the report noted that FirstEnergy had inadequately patrolled the lines to determine whether certain trees needed to be trimmed, which resulted in many trees growing to a point where they were an unsafe distance from the transmission wires.¹⁸⁶

Complainants do not seek to have Duke disregard vegetation management as FirstEnergy did leading up to the 2003 blackout. Rather, Complainants want Duke to act responsibly and reasonably by performing vegetation management as needed to prevent trees and other vegetation from growing too close to the transmission lines as has been the practice prior to the announced change. Complainants unanimously agreed in their unopposed testimony that they do not object to Duke trimming, pruning, or otherwise performing reasonable vegetation management, and would not object to the removal of a specific tree if the tree was deemed to be dangerous, and

¹⁸⁴ Adams Testimony at 8, lines 16-19.

¹⁸⁵ See McLoughlin Testimony at 2, line 9, Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations at 18-19 (2003 Blackout Report).

¹⁸⁶ 2003 Blackout Report at 58-59.

threatening the safety and reliability of the system.¹⁸⁷ Rather, Complainants object to the unreasonable approaches to vegetation management that Duke proposes in this proceeding.¹⁸⁸

The difference between what Complainants ask from Duke and the type of vegetation management that causes large-scale system failures is made evident through a comparison of the measures that Complainants request (essentially a reversion to Duke's prior practices) and the events at issue in Attachment 1 to Mr. McLoughlin's testimony, the FERC/NERC report entitled "Report on Transmission Facility Outages During the Northeast Snowstorm of October 29-30, 2011."¹⁸⁹ On cross-examination, Mr. McLoughlin discussed this report extensively, and it was revealed that the only tree-related outage on the 345 kV line at issue in that snowstorm was caused by a 65-foot tree inside the right-of-way falling into the transmission line.¹⁹⁰ That report also addressed the issue of "danger trees," which are defined as trees that, if they fell, could contact a transmission line.¹⁹¹ The report concluded that the removal of danger trees from the rights-of-way at issue in that storm could have prevented a dozen different outages.¹⁹²

To be abundantly clear, Complainants are not proposing that Duke not address danger trees, or allow trees anywhere near 65 feet tall to remain at that height in areas where they can fall into the transmission wires. Complainants would not object to Duke trimming and removing trees as needed to prevent an event like this one from occurring along its transmission lines. But taking

¹⁸⁷ See Complainants' Ex. 2-18.

¹⁸⁸ Id.

¹⁸⁹ See McLoughlin Testimony, Attachment 1.

¹⁹⁰ Tr. Vol. III at 544, line 14-545, line 6; McLoughlin Testimony, Attachment 1 at 29.

¹⁹¹ Tr. Vol. III at 540, lines 17-23.

¹⁹² McLoughlin Testimony, Attachment 1 at 32.

these measures is not synonymous with the unreasonable, unambiguous removal of all trees within the easement or within the wire zone as Duke proposes here.

- iii. No Federal Regulations Exist that Require Duke to Clear Cut or Remove All Trees from the Area Around the Transmission Wires Because the Entities Issuing Regulations Regarding Vegetation Management Have Not Determined that Such Regulations Are Necessary.

As discussed above, there has been a great deal of discussion throughout this proceeding regarding the applicability of federal regulations to Duke's vegetation management activities along the 138kV lines at issue in this case. Notably, Duke does not contend that any regulations actually compel Duke to engage in the clear cutting it proposes to undertake on Complainants' properties. FERC does regulate vegetation management activities of utilities along some transmission lines, and has issued regulations, through NERC, outlining its standards. The latest available NERC standard regarding transmission vegetation management is FAC-003-4.¹⁹³ Importantly, this standard does not actually apply to the lines at issue in this case, as it only applies to transmission lines with voltages of 200kV or higher,¹⁹⁴ a fact that Duke Witness McLaughlin conceded in his testimony.¹⁹⁵

Nonetheless, Mr. McLoughlin claims that Duke relies on this regulation even for lines, like the 138kV lines at issue in this case, to which it does not apply.¹⁹⁶ Given that the NERC standards do not apply to the transmission lines at issue in this case, Mr. McLoughlin's statements in his testimony that failure to follow the regulations on transmission lines can result in fines of up to \$1 million per day is not actually applicable to the lines at issue in this case.¹⁹⁷

¹⁹³ See Complainants' Ex. 24; McLoughlin Testimony at 3, lines 18-19.

¹⁹⁴ Complainants' Ex. 24 at 4.4.2.

¹⁹⁵ McLoughlin Testimony at 3, lines 1-2.

¹⁹⁶ McLoughlin Testimony at 3, lines 13-15.

¹⁹⁷ See id. at 4, lines 16-18; Tr. Vol. III at 539, lines 1-5.

Mr. McLoughlin defends this adherence to inapplicable guidelines by speculating that, at some point in the future, the FAC-003-4 regulations may be amended to apply to transmission lines like those on Complainants' properties.¹⁹⁸ Mr. McLoughlin, however, does not and cannot cite to any evidence demonstrating that any efforts have begun to adjust the regulation to apply to 138kV lines or to the likelihood that his crystal ball is accurate. Instead, he notes that the vast majority of the reliability standards issued by NERC and adopted as regulations by FERC have been adopted for lines 100 kV and above, except for the transmission vegetation management standards.¹⁹⁹ Contrary to Mr. McLoughlin's representations, however, this is not a reason to enforce the regulations on these 138 kV lines, it is a reason not to.

These regulations were first adopted in 2007, and have since been amended several times.²⁰⁰ The Commission should trust that when NERC and FERC issue regulations related to reliability, they tailor each regulation to address reliability concerns in the area in which the regulation is issued. The fact that for most of the 83 reliability regulations that have been issued apply to lines of 100kV and above while the transmission vegetation management regulations only apply to lines of 200kV and above is not an indication that the transmission vegetation management regulations should apply to lower voltage lines, but rather a sign that after careful consideration, NERC and FERC determined that those regulations did not need to be imposed on lines of 100-199kV in order to ensure reliability. Regulators have had 11 years and four iterations of the transmission vegetation management regulations to apply those regulations to lines like the ones on Complainants' properties, but have consistently and deliberately chosen not to do so. While Mr. McLoughlin may take this as a sign that they will change the regulations in the future,

¹⁹⁸ Id. at 3, lines 10-12.

¹⁹⁹ Tr. Vol. III at 532, line 20-533, line 9,

²⁰⁰ Id. at 537, lines 1-14.

a more logical approach is that the regulations do not need to apply to these lines in order to ensure safety and reliability.

Even if the Commission determines, counter to the text of these regulations, that they should apply to 138kV lines, FAC-003-4 does not mandate clear cutting or the type of unreasonable transmission vegetation management that Duke proposes on Complainants' properties.²⁰¹ Bottom line, Duke is not compelled by any regulations to conduct vegetation management in the unjust and unreasonable manner that is proposes to do in this case.

iv. Duke's Claims Regarding Environmental Stewardship Are Improper and Should be Rejected.

In a further attempt to portray its vegetation management approach as reasonable, Duke offered the testimony of Scott Fletcher to explain how "Duke Energy takes great care to ensure that rights of way maintenance activities do not adversely impact the environment."²⁰² As an initial matter, the Commission has already ruled that it cannot properly rule on issues related to the environmental impact of Duke's policies, finding that Complainants could not put issues related to soil erosion or the run-off of toxic herbicides into waterways.²⁰³ In making that decision, the Commission stated that under *Allstate Ins. Co. v. Cleveland Electric Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d. 824, ¶¶ 12-13, these environmental issues were not within the Commission's jurisdiction.²⁰⁴ The Commission found that issues related to the environmental impact of Duke's policies were precluded from being a part of this case because *Allstate's* requirement that the Commission's administrative expertise be necessary to resolve an issue before

²⁰¹ See Complainants' Ex. 24.

²⁰² Fletcher Testimony at 3, lines 11-12.

²⁰³ Entry at ¶ 48 (March 8, 2018).

²⁰⁴ Id.

it can be put before the Commission was not met. Specifically, the Commission stated that its “expertise lies, among other things, in evaluating whether rates and tariffs are unjust or unreasonable and evaluating utility programs to promote reliability.”²⁰⁵ Yet, despite the Commission’s clear statement that the negative environmental impacts of Duke’s policies could not properly be put before the Commission, Duke offered the testimony of Mr. Fletcher to talk about the good work Duke purports to do in service of the environment as part of its vegetation management activities.

Aside from the fact that the Commission has already stated that it does not have the administrative expertise to evaluate the substance of Mr. Fletcher’s testimony, Mr. Fletcher himself admitted on cross-examination that he was not qualified to assess the practices actually taking place on the ground on Complainants’ properties. He testified that he did not actually visit any of the areas of Duke’s service territory that are involved in this case at any point in preparing his testimony.²⁰⁶ Moreover, he had not spoken with any of the Complainants or even the contractors who were charged with actually implementing Duke’s vegetation management plan, practices, and procedures on the ground.²⁰⁷ He ultimately agreed that he has not actually observed whether or not the environmental stewardship measures discussed in his testimony were actually followed in this case.²⁰⁸

In explaining that he would be aware of the failure by Duke’s employees or contractors to follow environmental stewardship policies, Mr. Fletcher cited that Duke would know if the policies were not being followed because customers would file Complaints or governmental regulators

²⁰⁵ Id.

²⁰⁶ Tr. Vol I at 116, line 25-117, line 2.

²⁰⁷ Id. at 117, lines 3-12.

²⁰⁸ Id. at 120, lines 13-21.

would inform Duke of violations.²⁰⁹ But Mr. Fletcher later offered testimony demonstrating that he may actually not be aware of violations when he admitted that he was unaware of environmental complaints brought by Complainants in this very proceeding.²¹⁰

Perhaps if Mr. Fletcher had visited the sites where Duke is proposing to conduct vegetation management work on Complainants' properties, he would have realized that the environmental stewardship standards discussed in his testimony were not actually being followed. For instance, Mr. Fletcher said that Duke's policies enabled "low-growing, compatible vegetation to grow and thrive"²¹¹ Yet, Complainants offered evidence that Duke's representatives were not practicing these environmental stewardship measures, and were instead saying that Complainants' properties would have the appearance of "craters on the surface of the moon."²¹² Further, photographic evidence of the areas that Duke already clear cut shows that Duke has not left even any "low-growing" vegetation, but rather the equivalent of a 100-foot-wide wasteland where no vegetation appears to be growing at all.²¹³ In short, Mr. Fletcher's testimony is neither borne out by his own observations or the observations of those who have actually observed Duke's practice and should be rejected.

v. Duke's Claims that It Cannot Make Property-Specific Assessments of Vegetation Prior to Removal Are Inconsistent with Both Duke's Past Practices and Its Current Practices.

In response to Complainants' overwhelming evidence—and concessions by Duke's own witnesses—that Duke's transmission vegetation management as proposed in this case results in

²⁰⁹ Id. at 123, line 2-124, line 6.

²¹⁰ Id. at 124, line 19-126, line 20.

²¹¹ Fletcher Testimony at 6, lines 8-9.

²¹² Mackey Testimony at 4, lines 8-9.

²¹³ See Bryant Testimony, Attachment A.

the removal of trees that do not pose a threat to the safety or reliability of the transmission system, Duke asserts that it is not reasonable or efficient to manage vegetation on a property-by-property or tree-by-tree basis.²¹⁴ This claim cannot be squared with Duke's actions taken in the past, or in this case.

First, Duke has demonstrated a consistent ability to manage vegetation along these transmission lines on a property-specific basis while working with property owners in the past, as discussed at length above. Previously, Duke trimmed trees and other vegetation as needed in order to ensure safety and reliability, and the record is devoid of evidence that Duke's approach at that time caused any major issues. Mr. Vonderhaar even testified that Duke worked with him to address vegetation on his property in a reasonable manner as recently as 2011, going so far as to provide Mr. Vonderhaar with funds to address concerns that Duke's work would lead to soil erosion.²¹⁵ In order to accept Duke witness Adams's claim that property-specific vegetation management is not feasible, the Commission would necessarily have to conclude that Duke practiced an inefficient and unreasonable approach to vegetation for decades prior to adopting the current practices and policies.

Second, Duke is already engaging in a significant degree of tree- and property specific vegetation management assessments. Duke already visits individual properties to notify property owners of planned vegetation management work prior to executing the work.²¹⁶ Further, as evidenced by the discussions Complainants had with Mr. Holton, Duke sends representatives to the properties to further discuss planned work with customers. Mr. Adams presents these initial

²¹⁴ See Adams Testimony at 19, lines 7-9.

²¹⁵ Vonderhaar Testimony at 2, line 22-3, line 17.

²¹⁶ Adams Testimony at 24, lines 10-18.

interactions as formulaic and standard for every property, but Duke's log²¹⁷ that was discussed above contradicts that assertion. As noted, that log contains instructions under the column titled "Special Conditions" that are different for each property. In order to record those instructions, someone representing Duke would need to have interacted individually with every property owner and the individuals performing the vegetation management would need to consult the log for each property in order to determine how to perform the work on that property.

Moreover, if Duke is adopting the approach in its vegetation management materials wherein it allows trees that mature at heights of less than 15 feet to exist in the "border zone"²¹⁸ it would necessarily have to assess whether a given tree in the border zone does or does not have the capacity to grow to a height of over 15 feet. Additionally, if Duke adopts its vegetation management materials, Duke would have to assess vegetation in the wire zone to determine whether the vegetation is a bush or a tree as tree species are prohibited but certain bushes are allowed.²¹⁹ If the assessment determines that the vegetation is a bush, then a determination would need to be made as to whether the bush has the capacity to grow to a height of over 7 feet.²²⁰ When asked about the necessity of assessing different trees, Duke witness Goodfellow testified that "[t]he contractor that actually performs the work just knows whether its compatible or incompatible."²²¹ And this is exactly the point. Duke has contractors who are able to look at a tree and assess whether it is compatible with the standards that Duke has established for its IVM program. This ability, of

²¹⁷ Vonderhaar Testimony, Attachment I.

²¹⁸ Wiethorn Testimony, Attachment C.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Tr. Vol. III at 756, lines 17-22.

course, requires Duke's contractors to have knowledge of trees and their growth rates. Therefore, it would follow, those same contractors would be able to quickly look at a tree and assess whether it complies with any other standards, such as one that would ask whether a tree has the potential to either fall into the transmission line or grow within specified minimum line clearance distances as set forth in Duke's filed vegetation management plan.

Ultimately, any form of transmission vegetation management would require Duke to make assessments of the locations and heights of specific vegetation to assess whether those trees or vegetation are located in the border or wire zones, the type vegetation, and the growth potential. As such, property-by-property analysis to determine whether specified trees pose a threat to the transmission lines would hardly, if at all, be more burdensome to Duke than the practices that it uses now. Any arguments to the contrary should be rejected.

vi. Duke Has Failed to Present Compelling Evidence that It Is Following Industry Standards.

Another defense offered by Duke is that its practices cannot be considered unreasonable because they comply with the industry-standard practices used by other utilities.²²² But despite facially stating that Duke was taking an industry-standard approach, Duke did not present compelling evidence that it actually was using an industry-standard approach. For instance, Duke did not offer testimony or evidence from any witnesses who were familiar with the transmission vegetation management practices of other Ohio utilities. This failure was not due to a lack of trying. Duke actually appears to have reached out to FirstEnergy regarding FirstEnergy's vegetation management practices.²²³ When it did so, it learned that FirstEnergy does manage on

²²² See, e.g., Adams Testimony at 9, lines 10-12.

²²³ See Complainants' Ex. 19.

a per location basis and makes exceptions for vegetation and small trees that have been there for years and that do not pose a threat to the transmission lines.²²⁴

Additionally, Complainants submitted into the record the vegetation management plans of The Ohio Power Company (AEP Ohio) and the Dayton Power and Light Company (DP&L), two other Ohio utilities.²²⁵ A review of these plans further demonstrates that the draconian, hardline stance that Duke took with Complainants regarding trees and other vegetation near the transmission lines is not consistent with its counterparts across the state. For instance, AEP Ohio states that it manages its transmission system on a prescriptive basis and that work prescriptions will change based on the size and types of vegetation present.²²⁶ In performing its transmission vegetation management work, AEP Ohio states that it strives “to ensure that work is complete, performed in a timely manner, to AEP and industry standards, at reasonable cost, and with courtesy to property owners and the public.”²²⁷ Finally the AEP Ohio plan considers the use of growth regulators in performing transmission vegetation management, just as Mr. Back suggested.²²⁸

Meanwhile the DP&L plan states that DP&L conducts transmission vegetation management based on “line location, clearance requirements, and species of vegetation present.”²²⁹ That plan goes on to state that DP&L will “trim or remove trees and brush as needed. Clearance will vary based on the species of the tree and the voltage class of the line.” DP&L’s plan appears to take into consideration factors such as the characteristics of specific trees in performing transmission vegetation management.

²²⁴ Id.

²²⁵ See Complainants’ Ex. 20-21.

²²⁶ Complainants’ Ex. 20 at 9.

²²⁷ Id.

²²⁸ Id. at 10.

²²⁹ Complainants’ Ex. 21 at 24.

Given the evidence contained in the vegetation management plans of AEP Ohio and DP&L, along with the information about FirstEnergy's approach to transmission vegetation management, it would appear that the industry standard is not as Duke attempts to portray through its testimony. This lack of support for the claim that others in the industry conduct this practice in the same manner in which Duke proposes to in this case demonstrates that Duke's argument that it is acting reasonably based on the industry standards cannot hold water. It also demonstrates that Duke's proposed vegetation management practices and/or the manner in which Duke is implementing its vegetation management plan violate Ohio Adm. Code 4901:1-10-27(E)(2).

VI. PRAYER FOR RELIEF

The Commission should find that Duke has violated Ohio law and its vegetation management plan by threatening to clear cut, remove, or destroy trees without actually determining that such removal or destruction is necessary to ensure safe and reliable service. Ohio Adm. Code 4901:1-10-27 and R.C. 4928.11 and 4905.22. In doing so, the Commission should rule that Duke does not have authority to clear cut by any means, including, but not limited to, cutting down of trees and the use of herbicides. Additionally the Commission should find that Duke unjustly, unreasonably, and improperly modified its vegetation management plan in violation of Ohio Adm. Code 4901:1-10-27 and 4901:1-10-24 and R.C. 4905.22.

As demonstrated at hearing and in the foregoing brief, Duke's policies and practices under its modified vegetation management plan and implementation of same are unjust and unreasonable in violation of R.C. 4905.22 and 4905.26 and Ohio Adm. Code 4901:1-10-27. As such, the Commission should order Duke to revert back to its prior vegetation management plan and practices. In doing so, it should specifically order that Duke is forbidden from clear cutting, destroying, or otherwise engaging in mass removal of trees and other vegetation. Duke should

only be permitted to remove a tree or other form of vegetation when such removal is actually necessary for the maintenance and operation of its electric transmission and distribution system and Duke is able to demonstrate as much for each specific tree or other form of vegetation that it seeks to remove. Specifically, Complainants ask the Commission to grant the following relief:

1. Find that Complainants have stated reasonable grounds for its Second Amended Complaint pursuant to R.C. 4905.26;
2. Find that Duke has violated Ohio Adm. Code 4901:1-10-27 by threatening to clear cut, remove, or destroy trees and other vegetation without determining that complete removal, leveling to the ground, or destruction is necessary for the maintenance and operation of its electric transmission and distribution system;
3. Find that Duke lacks the authority to engage in the complete removal or destruction of trees and other vegetation by clear cutting or the use of herbicides on Complainants' properties;
4. Find that Duke's modification to its vegetation management plan was unjust, unreasonable, and improper given the misleading statements and lack of justification provided to the PUCO in violation of Ohio Adm. Code 4901:1-10-27 and R.C. 4905.22;
5. Find that Duke's policies, practices, and implementation of its modified vegetation management plan is unjust and unreasonable in violation of R.C. 4905.22;
6. Find that Duke's modified vegetation and management plan is unjust and unreasonable in violation of R.C. 4905.22;
7. Find that Duke's policies, practices, and implementation of its modified vegetation management plan is unjust and unreasonable in violation of R.C. 4905.26 and fails to comply with the provisions of Ohio Adm. Code 4901:1-10-24 and 4901:1-10-27;
8. Order Duke to revert back to its prior vegetation management plan until it properly applies to modify its plan and that application is heard, and approved by the Commission after due process; and
9. Order Duke to not clear cut, destroy, or otherwise engage in mass tree and vegetation removal (e.g., by the use of herbicides) unless that removal is actually necessary for the maintenance and operation of its electric transmission and distribution system and Duke has provided such justification.

Additionally, the Commission should grant Complainants' pending Motion for Sanctions and assess sanctions and/or forfeitures against Duke for its unlawful and obstructive conduct during the discovery process in this case. Specifically, Complainants request that the Commission exercise its authority under R.C. 4905.54 and assess Duke forfeitures of \$10,000 for each day that its violation of discovery rules and Commission orders persisted. Moreover, under the Commission's own rules and precedent, it should direct that those sanctions and/or forfeitures be used to make Complainants whole for the extreme expense they incurred in repeatedly having to seek Commission enforcement of basic discovery rules and orders.

VII. CONCLUSION

Complainants have met their burden of proof in establishing that Duke is unreasonably and unjustly performing vegetation management by completely removing trees from Complainants' properties, regardless of whether those trees could actually impact the safety or reliability of Duke's electric system. Without an assessment as to whether the tree removal is necessary to maintain safe and reliable service, Duke's proposed vegetation management practices and policies are inconsistent with its vegetation management plan on file with the Commission, its easements on the Complainants' properties, and violates the Commission's rules and Ohio law. Additionally, Duke's proposed vegetation management policies and practices are not supported by empirical evidence, its filed vegetation management plan, or the record established in this case.

As such, Complainants respectfully request that the Commission find that Duke's proposed vegetation management policies and practices and implementation of its vegetation management plan are unjust and unreasonable, in violation of Duke's vegetation management plan, and in violation of the Commission's rules and Ohio law. Ohio Adm. Code 4901:1-10-27 and R.C. 4905.22. Complainants also request that the Commission find that Duke lacks the authority to

engage in the complete removal or destruction of trees and other vegetation by clear cutting or the use of herbicides on Complainants' properties, and that Duke's modification to its vegetation management plan was unjust, unreasonable, and improper given the misleading statements and lack of justification provided to the PUCO in violation of Ohio Adm. Code 4901:1-10-27 and R.C. 4905.22;

Complainants ask that the Commission issue sanctions for Duke's unlawful discovery practice in this case, order Duke to revert to its prior vegetation management practices of trimming and pruning, order Duke to maintain minimum transmission line clearances as set forth in its filed vegetation management plan, and issue any other relief which the Commission deems to be just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing brief was served on December 17, 2018 by electronic mail upon the parties listed below.

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