

**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	)	

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**JOINT REPLY BRIEF OF  
THE COMPLAINANTS, CITIZENS AGAINST CLEAR CUTTING,  
AND  
INTERVENOR, THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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## I. INTRODUCTION

The record is clear. Duke Energy Ohio, Inc. (“Duke” or “Company”) is 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 and intervenor, the Office of the Ohio Consumers’ Counsel (“OCC”) hereby seek an order from the Public Utilities Commission of Ohio (“Commission”) to stop Duke from engaging in these unlawful and unreasonable practices. This includes preventing Duke from implementing its plan 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 plans to remove actually impact the safety or reliability of Duke’s electric service.

Faced with a record that does not support the Company’s unjust, unreasonable, and unlawful plan, policies, and practices, Duke used bluster to attempt to do what the evidence could not: sustain its unreasonable and unlawful vegetation management practices. Specifically, in its initial post-hearing brief, Duke attempts to defend its unjust, unreasonable, unlawful, and unnecessary practices of indiscriminately removing trees and other vegetation from the properties of Complainants in this case by substituting personal attacks for substantive critiques,<sup>1</sup> relying on information that is not part of the record, and dismissing any evidence that hurts its case as “self-serving.”<sup>2</sup>

Duke’s hyperbole falls flat and cannot overcome the fact that Complainants have met their burden of showing that Duke is unjustly and unreasonably planning to remove trees from Complainants’ properties that do not, and could not, affect the safety or reliability of Duke’s

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<sup>1</sup> See Post-Hearing Brief of Duke Energy Ohio, Inc. at 28 (December 17, 2018) (“Duke Brief”).

<sup>2</sup> See *id.* at 2.

transmission system. Indeed, Duke does not refute the testimony of the 17 Complainants, who detailed example after example of trees that do not, and will not, endanger the safe and reliable transmission of electric service. The testimony of the 17 Complainants was not refuted or challenged, and, thus, there is no genuine issue of material fact regarding any of the statements, assertions, or observations contained therein. This undisputed testimony from Duke's own customers, along with the testimony of CACC Witness Tim Back, an arborist with decades of experience in treating and analyzing trees in the very community that Duke serves and where its transmission facilities exist, and the testimony of Complainants/OCC Witness James Williams demonstrate that Complainants have met their burden of proving the allegations in the Second Amended Complaint and are entitled to the relief requested therein.

Pursuant to the Entry issued December 19, 2018,<sup>3</sup> the Complainants, Citizens Against Clear Cutting, and intervenor OCC hereby file their Joint Reply Brief.

## **II. ARGUMENT**

As provided by R.C. 4905.26, Complainants have stated reasonable grounds for its Second Amended Complaint and have met their burden of demonstrating that Duke has violated Ohio law and acted unjustly and unreasonably in implementing its vegetation management plan. Specifically, Complainants have shown that Duke has:

- violated Ohio Adm. Code 4901:1-10-27 and the Complainants' easements 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;

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<sup>3</sup> Entry (December 19, 2018).

- violated R.C. 4905.22 in its unjust, unreasonable, and discriminatory implementation of its policies, practices, and vegetation management plan, including its failure to adhere to the requisite minimum clearances;
- violated Ohio Adm. Code 4901:1-10-27(E)(2) and (F)(1), Ohio Adm. Code 4901:1-10-24(D), and R.C. 4905.22 when it acted unjustly, unreasonably, and improperly in modifying its vegetation management plan with misleading statements and by failing to provide the requisite justification; and
- violated Ohio law inasmuch as it lacks the authority to engage in the complete removal or destruction of trees and other vegetation by clear cutting, including the use of herbicides, on Complainants' properties.

In defending its unjust, unreasonable, and unlawful plan, policies, and practices, Duke offers three overarching points in its brief (which make up Sections A, B, and C of the “Discussion” portion of Duke’s brief). First, Duke attempts to argue that Complainants have not met their burden of proof in this case. Second, and despite the Commission’s prior ruling in this case, Duke attempts to argue that Complainants may not attack Duke’s vegetation management plan through this proceeding. And third, Duke attempts to rely solely on its own testimony, which Duke apparently believes to be sufficient to compensate for the fact that it did not contest the testimony of any of the Complainants in this case.<sup>4</sup> Herein, Complainants and OCC respond to each of those unsupported points in detail to assist the Commission in its consideration of Duke’s unjust, unreasonable, and unlawful vegetation management plan, policies, and practices and the implementation of such.

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<sup>4</sup> See Duke Brief.

**A. Complainants Have Sustained Their Burden of Proof in This Case.**

In order to meet Complainants' burden, Complainants and OCC presented a detailed explanation, made up of hundreds of pages of testimony, attachments, and exhibits to demonstrate that Duke's vegetation management plan, policies, and practices and their implementation on Complainants' properties are unjust and unreasonable. Contrary to claims by Duke in Section A of its brief, the uncontroverted collective testimony of 17 Complainants and a professional commercial and residential arborist is absolutely adequate to satisfy Complainants' burden of proof in this case.<sup>5</sup> Additionally, the rebutting of Duke's witnesses provides further evidence in support of the Complaint, bolstering Complainants undisputed evidence and solidifying the fact that Complainants did meet their burden of proof.

The vast majority of the remainder of Duke's brief attempts to present Duke's own affirmative case. But Duke's brief does not dispute the fact that the testimony of Complainants, professional arborist Tim Back, and Complainants/OCC Witness James Williams meticulously supports Complainants' burden of proof as to each claim brought in the Second Amended Complaint. Before turning to the various arguments put forth in the rest of Duke's brief, however, Complainants and OCC demonstrate how the record in this case supports each count brought and allegation made by Complainants.

**i. Count I: Duke Improperly Seeks to Remove Vegetation from Consumers; Properties in Violation of Ohio Adm. Code 4901:1-10-27(E)(1)(f), (E)(2), and (F)(1).**

Ohio Adm. Code 4901:1-10-27(E)(1)(f) directs electric utilities to control right-of-way vegetation in order to maintain safe and reliable service. The language of this Commission rule does not allow unbridled or unjust and unreasonable vegetation management activities, only

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<sup>5</sup> See Duke Brief at 5.

those that are necessary to maintain safe and reliable service. Thus, in order for Duke's vegetation management program to be in compliance with Ohio Adm. Code 4901:1-10-27, it must be related to the provision of safe and reliable service. Here, Duke's vegetation management plan is unrelated to those twin objectives.

Each Complainant who filed testimony in this proceeding testified that Duke has not previously pursued indiscriminate clear cutting as a form of vegetation management, and has been able to maintain safe and reliable service under those prior policies of trimming and pruning.<sup>6</sup> Similarly, Complainants' expert witness Tim Back described in detail how various trees on Complainants' properties did not and would not interfere with the transmission wires and/or that Duke could use standard methods of pruning and growth regulation to maintain the trees at issue in this case without resorting to the complete removal that Duke proposes here.<sup>7</sup> If a tree even threatened to encroach into the transmission wires that are on roughly 40-60 feet high,<sup>8</sup> Duke could and should deploy Mr. Back's less extreme methods in order to maintain safety and reliability, as Ohio Adm. Code 4901:1-10-27 requires, without resorting to the complete removal of trees and other vegetation.

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<sup>6</sup> See Complainants' Ex. 2, Testimony of Kim Carrier at 2, lines 18-33 ("Carrier Testimony"); Complainants' Ex. 3, Testimony of Karen Dabdoub at 2, lines 11-23 ("Dabdoub Testimony"); Complainants' Ex. 4, Testimony of Dr. Randall Fick at 3, lines 5-17 ("Fick Testimony"); Complainants Ex. 5, Testimony of Joseph Grossi at 3, lines 3-15 ("Grossi Testimony"); Complainants' Ex. 6, Testimony of John Gump at 3, lines 15-29 ("Gump Testimony"); Complainants' Ex. 7, Testimony of Jim Haid at 2, lines 11-23 ("Haid Testimony"); Complainants' Ex. 8, Testimony of Nicole Hiciu at 2, lines 4-8; 2, line 23-3, line 5 ("Hiciu Testimony"); Complainants' Ex. 9, Testimony of Jonathan Mackey at 2, lines 3-15 ("Mackey Testimony"); Complainants' Ex. 10, Testimony of Nicole Menkhaus at 2, lines 11-22 ("Menkhaus Testimony"); Complainants' Ex. 11, Testimony of Mike Preissler at 5, lines 1-18 ("Preissler Testimony"); Complainants' Ex. 12, Testimony of Steve Schmidt at 2 ("Schmidt Testimony"); Complainants' Ex. 13, Testimony of Olga Staios at 9, line 17-10, line 7 ("Staios Testimony"); Complainants' Ex. 14, Testimony of Kim Wiethorn at 2, lines 8-21 ("Wiethorn Testimony"); Complainants' Ex. 16, Testimony of Fred Vonderhaar at 4, lines 15-29 ("Vonderhaar Testimony"); Complainants' Ex. 17, Testimony of Dennis Mitman at 1, lines 24-28 ("Mitman Testimony"); Complainants' Ex. 18, Testimony of Melisa Kuhne at 2, lines 4-15 ("Kuhne Testimony").

<sup>7</sup> See Complainants' Ex. 35, Direct Testimony of Tim Back ("Back Testimony").

<sup>8</sup> See *id.*, Attachments A-I.

The evidence revealed that not only would more reasonable methods of tree pruning and maintenance achieve safety and reliability, but also that Duke has failed to make the requisite determinations that the individual trees it seeks to remove present a threat to safety or reliability in the first place.<sup>9</sup> Even though the Commission's rules only permit Duke to conduct vegetation management to ensure safety and reliability, Duke wrongly believes it has the right to remove trees from Complainants' properties without ever establishing that those trees are a threat to either safety or reliability. This practice violates the Commission's rules governing vegetation management as well as the Company's easements on Complainants' properties, as discussed further below.

**ii. Count II: Duke's Implementation of Its Vegetation Management Program Harms Consumers and Is Unjust and Unreasonable, in Violation of R.C. 4905.22.**

R.C. 4905.22 requires that all services rendered by a public utility be just and reasonable. Duke is a public utility as defined by R.C. 4905.02 and 4905.03. Thus all of its services rendered to customers, including services related to vegetation management, must be just and reasonable. The Supreme Court of Ohio ("Court") has held that the Commission has jurisdiction over matters that require the Commission's administrative expertise. Specifically, the Court held that questions related to whether certain trees may be removed under a utility's vegetation management plan are "manifestly service-related" and are within the Commission's exclusive jurisdiction.<sup>10</sup> In order to prevail under this count of the Complaint, Complainants were required to show that Duke's practices under its current vegetation management plan are unjust and unreasonable in violation of R.C. 4905.22. This showing has been made.

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<sup>9</sup> Grossi Testimony, Attachment B.

<sup>10</sup> See *Corrigan v. Cleveland Elec. Illum. Co.*, 122 Ohio St.2d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 21.



Complainants offered testimony that Duke's employees and representatives were not able to provide a coherent, consistent rationale for the removal of trees. Much of the Complainants' testimony discussing interactions with Duke representatives focused on Steve Holton, who was sent by Duke to discuss customer concerns with the proposed vegetation management.<sup>11</sup> Mr. Holton proved himself unable to offer a consistent justification for Duke's actions.

Mr. Holton told Complainants Witness Vonderhaar (and others) that the change in vegetation management approach resulted from changes to laws, which Mr. Holton claimed now allowed Duke to do whatever it wanted with regard to vegetation management.<sup>12</sup> He even added that Congress passed a new law regarding vegetation management.<sup>13</sup> Mr. Holton told Complainants Witness Preissler that Duke faced fines resulting from new federal regulations if it did not pursue clear cutting as a form of vegetation management.<sup>14</sup> Mr. Holton failed to point to a regulation that required this activity when pressed to do so by Mr. Staios and Mr. Grossi.<sup>15</sup> For one Complainant, Complainants Witness Menkhaus, Mr. Holton just stated that this was a new policy, and did not provide any reason at all.<sup>16</sup> He told Complainants Witness Kuhne that Duke would cut down trees and then threatened to fill in part of a lake near her property and that there would be no exceptions.<sup>17</sup> He told Complainants Witness Wiethorn that it was a "shame" that Duke was being required to remove some of her trees, because the ornamental trees would not

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<sup>11</sup> See, e.g., Staios Testimony at 5, lines 18-22.

<sup>12</sup> Vonderhaar Testimony at 6, line 27-7, line 1.

<sup>13</sup> Id. at 7, lines 3-4.

<sup>14</sup> Preissler Testimony at 8, lines 15-19.

<sup>15</sup> Staios Testimony at 6, lines 15-24.

<sup>16</sup> Menkhaus Testimony at 5, lines 3-6.

<sup>17</sup> Kuhne Testimony at 3, lines 16-19.

actually impact the transmission wires.<sup>18</sup> Mr. Holton told Complainants Witness Haid that he (Mr. Holton) was the decision-maker behind these new policies.<sup>19</sup>

At hearing, Duke did not refute any of the Complainants' testimony regarding the unjust and unreasonable actions of Duke's representatives. In fact, Mr. Holton was not even called to dispute the allegations against him. Additionally, Duke was unable to justify or support any of Duke's purported claims regarding the reason(s) for the change in vegetation management practices and policies, and, in fact, did not even attempt to do so. Duke did not point to any state or federal regulations that compelled this form of vegetation management on 138 kV lines and did not offer any testimony or evidence about a state or federal law that was new or that had been changed to justify its new plan and policies.

Apparently, Mr. Holton represented Duke in an unreasonable and discriminatory fashion in violation of R.C. 4905.26. Mr. Holton also appeared to be operating in a deceitful manner in violation of Ohio Adm. Code 4901:1-10-24(D), misrepresenting federal and state laws and Duke's vegetation management plan on file with the Commission. Mr. Holton also misrepresented his position of authority at Duke, as Company Witness Adams testified that Mr. Holton was not in charge of Duke's vegetation management decisions because he himself was in charge.<sup>20</sup>

These failures on the part of Duke do not just represent an inability to provide a consistent, just and reasonable message to its customers. They also show that as Duke went about implementing its new, modified vegetation management program, it was unable to offer a consistent justification that could stand up to scrutiny. Its inability to do so demonstrates that the

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<sup>18</sup> Weithorn Testimony at 7, lines 1-8.

<sup>19</sup> Haid Testimony at 3, lines 19-23.

<sup>20</sup> Duke Ex. 2, Direct Testimony of Ron Adams at 1, line 12 (Adams Testimony).

plan, as conceived, was never just or reasonable to begin with and is not within the bounds of the law.

In addition to finding unreasonableness and unlawfulness in Duke's inability to coherently explain its modified vegetation management plan to customers, the record reveals that the unreasonableness of Duke's modified plan, practices, and policies manifested itself in other, more property-specific ways as well. For instance, Complainants Witness Staios was told by Duke (or its predecessor) that she should remove trees on her property and instead plant (at her own expense) certain other types of trees on her property. Despite following Duke's specific instructions of the type of trees to plant that would be compatible with the transmission wires, she is now being told that those same trees are unauthorized and must be removed.<sup>21</sup> For Ms. Staios, this is not a case of trees growing without Duke's knowledge, but rather of a customer who worked with her electric utility to plant trees compatible with the utility's infrastructure at her own expense. But, despite Ms. Staios's efforts to work with Duke, the Company is now unjustly and unreasonably seeking to unilaterally remove her trees that were previously deemed compatible. The Company has failed to offer an explanation as to why the trees that Ms. Staios planted at their direction were previously safe and compatible and now are not.

Similarly, photographic evidence further highlights the unreasonableness of Duke's proposed actions. Complainants captured this unreasonableness by providing photographs and diagrams of their properties as examples of how Duke's proposed actions are unreasonable. All of these photographs and diagrams were uncontested and are in the record of the case. Specifically, Complainants Witnesses Wiethorn, Gump, and Preissler attached drone

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<sup>21</sup> Staios Testimony at 2, line 23-5, line 8.

photographs to their testimony.<sup>22</sup> As can be seen from these photographs, many of which were taken from near and along the transmission wires, much of the vegetation that Duke seeks to remove is not close enough to contact the transmission wires or come within any sort of minimum clearance as required by Duke's vegetation management plan. Other photographs taken from ground level further show that Duke has targeted trees for removal that do not have any chance of contacting the transmission lines or coming close enough to the lines to cause an air gap flash-across,<sup>23</sup> which Duke claims is a concern.

Additionally, Duke's unjust and unreasonable insistence that it must clear cut everything in the wire zone (and possibly the border zone) and cannot make exceptions is curious given that there is clear record evidence that Duke has made exceptions to its vegetation management policies in some cases. Three Complainants—Complainants Witnesses Gump, Hiciu, and Carrier—testified that Duke was willing to compromise on specific trees either through written agreements,<sup>24</sup> oral agreements,<sup>25</sup> or simply moving the markers used to indicate which trees were to be removed.<sup>26</sup> Further, a log prepared by Duke and/or its contractors admitted into the record shows that Duke has made exceptions and has allowed special circumstances for several customers.<sup>27</sup> It is not just or reasonable for Duke to subject almost all customers to its extreme vegetation management policies while making exceptions for select customers. It is also discriminatory treatment in violation of R.C. 4905.26. Ultimately, Duke's willingness to make

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<sup>22</sup> See Wiethorn Testimony, Attachment Gump Testimony, Attachment D; Preissler Testimony, Attachment I.

<sup>23</sup> See Carrier Testimony, Attachment E; Dabdoub Testimony, Attachment B; Fick Testimony, Attachments C-D; Grossi Testimony, Attachment G; Gump Testimony, Attachment C; Haid Testimony, Attachment D; Hiciu Testimony, Attachment B; Kuhne Testimony, Attachment J; Mackey Testimony, Attachment G; Preissler Testimony, Attachment G; Vonderhaar Testimony, Attachment C; Wiethorn Testimony, Attachment E.

<sup>24</sup> See Gump Testimony, Attachment F.

<sup>25</sup> See Carrier Testimony at 3, lines 10-26.

<sup>26</sup> See Hiciu Testimony at 3, line 18-4, line 8.

<sup>27</sup> See Vonderhaar Testimony at 7, line 15-9, line 10 and Attachment I.

exceptions in some cases demonstrates that Duke's modified or new approach to vegetation management is not necessary to ensure safety and reliability.

**iii. Count III: Duke's Modification of Its Vegetation Management Plan was Improper Under Ohio Adm. Code 4901:1-10-27(E)(2) and (F)(1), to the Detriment of Consumers.**

Ohio Adm. Code 4901:1-10-27(E)(2) provides that when an electric utility files its vegetation management plan, the filing "must include supporting justification and rationale based on generally accepted industry practices and procedures." The Commission's rules also provide that utilities may not commit unfair or deceptive acts in connection with their provision of services, including the omission of material information.<sup>28</sup>

Duke's previous vegetation management plan focused on "maintenance" of the right-of-way. It involved the removal of some trees from the wire zone and the trimming of others.<sup>29</sup> The previous plan also emphasized working with and communicating with property owners regarding the removal of trees from transmission rights-of-way. But in April 2016 Duke filed an amended vegetation plan that emphasizes Duke's "right to cut down and remove vegetation" from the rights-of-way.<sup>30</sup> Instead of maintenance, Duke's vegetation management philosophy changed to what is called "Integrated Vegetation Management" ("IVM"). The modified plan is more aggressive and involves the complete removal of all vegetation within the wire zone in order to allow shorter vegetation to grow underneath. This concept is not discussed in the vegetation management plan Duke submitted to the Commission in 2016. This change in practice resulted in trees on the properties of Complainants and others being removed, or the threat of their removal, instead of trimmed and pruned as had been done in the past.

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<sup>28</sup> See Ohio Adm. Code 4901:1-10-24(D).

<sup>29</sup> Wiethorn Testimony, Attachment G.

<sup>30</sup> See Complainants-OCC Joint Exhibit 1A ("Williams Supplemented Testimony"), Attachment JDW-3 at 5.

In filing this modified vegetation management plan, Duke filing was “made simply to clarify and make terms more coherent.”<sup>31</sup> Given Duke’s statement that it was not making substantive changes to the program and that it was only making terms “more coherent,” the Company never provided the requisite justification and rationale for its 2016 modification of the vegetation management plan as required by Ohio Adm. Code 4901:1-10-27(E)(2). The plan, however, did much more than clarify the terms of the then-existing vegetation management plan.

Complainants/OCC Witness James Williams explained how the changes proposed in Duke’s 2016 filing were more than mere clarifications.<sup>32</sup> He discussed how the previous program included provisions that involved Duke working with customers before removing a tree unless Duke had a legal right to remove and there was an emergency, but how the modified plan unreasonably does not provide for any such coordination.<sup>33</sup>

The notion that Duke’s modified vegetation management plan was not substantively modified is further undermined by the temporal relationship between the filing of the modified vegetation management plan and the implementation of Duke’s modified approach to vegetation management. Company Witness Ron Adams testified that Duke began focusing its implementation of new vegetation management methods on its 138 kV lines in Ohio in 2016,<sup>34</sup> the same year that Duke filed the modified vegetation management plan. Duke’s use of an IVM plan and methods represented an undeniable shift in Duke’s approach to vegetation management, as Company Witness Adams testified.<sup>35</sup> Thus, Duke is essentially asking the Commission to

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<sup>31</sup> Wiethorn Testimony, Attachment G at 1.

<sup>32</sup> See Williams Testimony at 7, lines 8-12.

<sup>33</sup> Id.

<sup>34</sup> Adams Testimony at 11, lines 7-8.

<sup>35</sup> Id. at 10, lines 1-2 (“What the Company has done in the past is perform vegetation maintenance; the plan moving forward is to perform vegetation management”).

ignore the substantive modifications made to its revised plan and the substantive modifications made to how that plan is being implemented in that same year. It is not a coincidence that Duke fundamentally changed its practices, policies, and implementation of its vegetation management plan during the same year that it filed a modified plan with the Commission. Any claim to the contrary is implausible and should be rejected.

The Commission should find that Duke improperly modified its vegetation management plan when it made substantive changes to the plan while stating that those changes were only clarifications and without the requisite justification and rationale in violation of Ohio Adm. Code 4901:1-10-27(E)(2) and Ohio Adm. Code 4901:1-10-24(D). The Commission should also find that Duke's modification was unjust and unreasonable in violation of R.C. 4905.22.

**iv. Count IV: Duke's Vegetation Management Plan Is Unjust and Unreasonable in Violation of R.C. 4905.22 and R.C. 4905.26, and fails to comply with Ohio Adm. Code 4901:1-10-27.**

As discussed above, R.C. 4905.22 requires that all services rendered by a utility must be just and reasonable. As the Supreme Court of Ohio has held, vegetation management activities by electric utilities constitute services,<sup>36</sup> and, thus, must be just and reasonable. To assist in its oversight of electric utilities, the Commission has created rules governing vegetation management, specifically requiring electric utilities to have a vegetation management plan on file with the Commission.<sup>37</sup> Thus, a utility's vegetation management plan on file with the Commission must, like all services by public utilities, be just and reasonable. Importantly, the presumption of adequate service set forth in Ohio Adm. Code 4901:1-10-02 does not apply to Ohio Adm. Code 4901:1-10-27.

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<sup>36</sup> See *Corrigan v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶ 21.

<sup>37</sup> See Ohio Adm. Code 4901:1-10-27(E) and (F)

As demonstrated in the record, Duke's vegetation management plan does not meet the just and reasonable standard for two reasons: (1) it completely removes customer input from the vegetation management process; and (2) Duke's implementation of the plan is unjust and unreasonable and inconsistent with the Company's actual vegetation management practices. For each of these reasons, the Commission should rule that Duke's vegetation management plan is unjust and unreasonable.

The record states that, in the past, Duke would work with customers to address vegetation related concerns around its transmission wires. Complainants Witness Bryant testified that in his 12-and-a-half years as a township trustee, Duke has never clear cut or removed vegetation on this scale. Mr. Bryant also testified that customers were generally satisfied with Duke's vegetation management practices in the past and had not raised concerns about safety or reliability.<sup>38</sup>

In a more specific example, as discussed above, Complainants Witness Staios collaborated with Duke to determine appropriate trees to plant after agreeing with Duke's recommendation to remove trees that were deemed to be not compatible.<sup>39</sup> The process that led Ms. Staios to plant the trees in the first place (under Duke's previous vegetation management plan) demonstrates that collaboration with customers is a reasonable process. By proactively working with Duke—both to remove problematic trees and in planting replacements—Ms. Staios demonstrated that she was not indifferent to the need to prevent vegetation-related disruptions to Duke's transmission service. At the same time, Duke showed that it could permit the planting of vegetation near its transmission wires as long as it was of such a nature that it would not threaten

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<sup>38</sup> Complainants' Ex. 15, Direct Testimony of Kenneth Bryant at 9, line 7-10, line 8 ("Bryant Testimony").

<sup>39</sup> See Staios Testimony at 2, line 23-5, line 8.



the safety or reliability of service. As Ms. Staios testified, there have not been any issues with safety or reliability since she planted the Duke-approved replacement trees.<sup>40</sup>

Similarly, Complainants Witness Vonderhaar testified that he has worked with Duke in the past to reach a compromise regarding vegetation management.<sup>41</sup> As Mr. Vonderhaar described, he agreed to allow Duke to remove some trees that Duke deemed to be incompatible with the transmission wires while allowing some trees to remain and be maintained as needed.<sup>42</sup> The record demonstrates that Duke even worked with Mr. Vonderhaar to address soil erosion concerns that could result from its removal of trees.<sup>43</sup> Mr. Vonderhaar followed through on his commitments under the agreement that he reached with Duke,<sup>44</sup> and he has not had any vegetation-related issues with safety or reliability on his property since.<sup>45</sup>

These prior experiences stand in stark contrast to Duke representative Steve Holton's refusal to compromise with Complainants Witness Wiethorn regarding trees that he acknowledged would never impact the safety or reliability of service.<sup>46</sup> Duke's refusal to coordinate with its customers and the complete removal of customer input from the vegetation management process is unjust and unreasonable in violation of R.C. 4905.22 and 4905.26.

As noted above, Duke's prior vegetation management plan on file with the Commission provided for this sort of collaboration, but that language was removed when Duke substantively modified its plan. It is unreasonable for a regulated public utility, like Duke, to abandon all

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<sup>40</sup> See Staios Testimony at 2, 11-16.

<sup>41</sup> See Vonderhaar Testimony at 2, line 12-3, line 17.

<sup>42</sup> Id.

<sup>43</sup> Id. at 3, lines 8-10.

<sup>44</sup> See id. at 3, lines 18-24.

<sup>45</sup> Id. at 4, lines 15-20.

<sup>46</sup> See Wiethorn Testimony at 7, lines 1-8.

attempts to work with its customers on matters affecting their properties, especially given that Duke's easements for Complainants' properties require such coordination.

In addition to Duke's apparent desire to dictate policy to its customers without room for reasonable input or compromise, Duke's modified vegetation management plan is unjust and unreasonable because the filed plan either authorizes unreasonable vegetation management practices or Duke is implementing the plan in a manner that is unjust, unreasonable, and inconsistent with the filed plan.

Duke has contended throughout this proceeding that its vegetation management plan authorizes the practices that Complainants dispute in this case.<sup>47</sup> Contrary to Duke's contention, however, the filed vegetation management plan does not authorize indiscriminate clear cutting. Instead, it authorizes the maintaining of minimum clearances to help maintain and improve safe and reliable service. Specifically, the filed plan states that the "overhead electric line vegetation management requirements are intended to establish minimum clearing cycles by Duke Energy Ohio, and minimum clearances of vegetation from Duke Energy Ohio overhead electric line facilities following such clearing cycles."<sup>48</sup>

The only caveat is that Duke can remove vegetation if it has the legal right to do so.<sup>49</sup> "Legal right to do so" is defined to include "statue, recorded easement grant, easement by prescription, license, condemnation order, etc."<sup>50</sup> The established minimum clearance for transmission lines is 15 feet.<sup>51</sup> Thus, Duke is required to have a 15-foot clearance between the vegetation and energized conductor when the clearing is completed. If Duke desires to remove

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<sup>47</sup> See, e.g., Duke Brief at 31.

<sup>48</sup> See Wiethorn Testimony, Attachment G at 3.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id. at 5.

vegetation instead of maintaining the 15-foot clearance, it can only do so if a statute or easement specifically authorizes Duke's actions.

As discussed below, the easements applicable to the properties at issue in this case also do not allow indiscriminate clear cutting. The easements require a finding that the vegetation may endanger the safety of or interfere with the construction, operation or maintenance of said system.<sup>52</sup>

Additionally, Ohio Adm. Code 4901:1-10-27 requires that "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." The rule requires that Duke's vegetation management plan be established and implemented only in a manner that is necessary to maintain safe and reliable service. It does not authorize indiscriminate clear cutting. Therefore, Duke's proposal to completely remove, level to the ground, or destroy trees and other vegetation on Complainants' properties even though doing so is not necessary, will not improve the safety or reliability of its service, and has not been justified, as required by Ohio Adm. Code 4901:1-10-27, and thus, is unjust and unreasonable in violation of R.C. 4905.22 and 4905.26.

A closer review of Duke's modified vegetation management plan on file with the Commission also reveals a conspicuous lack of language describing the IVM program that Duke claims to be implementing, which includes clear cutting and the concept of border and wire zones.<sup>53</sup> The modified plan does not mention IVM, or clear cutting, or border zones and wire zones, or compatible or incompatible vegetation, or special characteristics of tree species, or any

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<sup>52</sup> See Grossi Testimony, Attachment A.

<sup>53</sup> See Wiethorn Testimony, Attachment G.

of the terms that Duke focuses on in this proceeding.<sup>54</sup> In short, a Duke customer who read the modified plan on file with the Commission would have no way of knowing what Duke's vegetation management plan looks like in practice or the fact that Duke was intending to implement a comprehensive, modified program it calls IVM.

In fact, if a customer read Duke's modified plan, he or she would be left with the impression that Duke trims and prunes along its transmission lines every six years to maintain a clearance of 15 feet between the vegetation and the nearest wire at the time that vegetation clearing is completed.<sup>55</sup> Duke has failed to refute the plain language of its modified plan and adequately explain how its vegetation management plan justifies clear cutting. Duke has further failed to explain why, throughout its case, Duke has treated the concept of minimum line clearances as an impossibility and unsafe and impractical deviation from industry standards when its modified plan in fact requires such minimum clearances to be maintained.<sup>56</sup>

If Duke intended to implement IVM and remove vegetation in the manner described in this case, it is unreasonable for it to have filed a vegetation management plan that only describes specific standards for pruning trees, with no discussion of specific standards for tree removal. Given that Duke is required to have its actual vegetation management practices on file with the Commission, and that the practices on file do not contain language supporting Duke's activities in this case, Complainants and OCC submit that Duke's practices are not in alignment with its own filed vegetation management plan and are, thus, unjust and unreasonable.

Further, to the extent that the Commission finds that the modified plan actually authorizes Duke to clear cut without justification and demonstrating that such action is necessary to

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<sup>54</sup> See *id.*

<sup>55</sup> *Id.* at 8.

<sup>56</sup> Duke Energy Ohio Ex. 5, Direct Testimony of John Goodfellow at 3, lines 2-3 (“Goodfellow Testimony”).

improve the safety or reliability of the system or service, the modified plan itself is unjust and unreasonable in violation of Ohio law.

**B. The Commission Has the Authority to Review Duke’s Vegetation Management Program in This Case.**

Duke next advances the argument that this proceeding is not the proper forum to address Duke’s modified vegetation management plan as a whole because that plan was approved, by rule, under Ohio Adm. Code 4901:1-10-27.<sup>57</sup> This is not the first time that Duke has put this argument before the Commission in this proceeding. Duke advocated this interpretation of Ohio law and Commission rules in its February 4, 2018 Motion to Dismiss, stating that “Complainants may not collaterally attack Duke Energy Ohio’s modified vegetation management plan through their Second Amended Complaint. Instead, much like in the case of a collateral challenge to a tariff, the Commission should, in the interest of judicial economy and efficiency, dismiss a complaint against a Commission approved vegetation management plan . . .”<sup>58</sup> Not only do the doctrines of res judicata and collateral estoppel bar reconsideration of the same issue, as Complainants noted in their Memorandum Contra Duke’s Motion to Dismiss, there is no support in Ohio law or in the Commission’s rules or precedent for Duke’s unfounded interpretation.<sup>59</sup>

Duke fails to offer adequate support for its resurrection of this defeated argument. It cites a different case where the Commission found that a review of a utility’s vegetation management program was not appropriate given the facts of that proceeding,<sup>60</sup> while ignoring the reality that the Commission has already determined that Complainants can challenge the validity of Duke’s vegetation management plan—despite the fact that it has already been automatically approved by

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<sup>57</sup> Duke Brief at 6.

<sup>58</sup> Motion to Dismiss of Respondent Duke Energy Ohio, Inc. (February 4, 2018) (internal citations omitted).

<sup>59</sup> See Memorandum Contra Duke Energy Ohio, Inc.’s Motion to Dismiss (February 20, 2018).

<sup>60</sup> See Duke Brief at 6

rule—in *this* proceeding.<sup>61</sup> To address Duke’s argument in Section B of its brief, the Commission need only repeat its own words from last March:

Additionally, the Supreme Court of Ohio has previously held that R.C. 4905.26 is extremely broad and gives the Commission authority to review matters already considered in a prior proceeding and permits what might be strictly viewed as a collateral attack in many cases. *Western Reserve Transit Authority v. Pub. Util. Comm.*, 39 Ohio St.2d 16, 18, 313 N.E.2d 811 (1974). Moreover, Commission review is appropriate here due to the unique facts presented in this proceeding, including the number of Complainants in this proceeding, the magnitude of the stay in place, and Duke’s current practice of clear cutting vegetation in comparison to its past practice of trimming vegetation. Finally, as we noted before, although Duke has an approved vegetation management plan. Commission approval of the plan does not preclude Complainants from challenging, pursuant to R.C. 4905.26, Duke’s practices under the vegetation management plan.<sup>62</sup>

Duke raised an argument once, and was rebuffed by the Commission. It now raises the same argument for a second time. The Commission should reject it once more as Duke is barred from raising an issue that has already been litigated and decided due to the doctrines of res judicata and collateral estoppel.

**C. Duke’s Distractions Fail to Overcome the Fact that Complainants Have Met Their Burden of Proof with Record Evidence.**

To counter the record showing that Complainants have met their burden, Duke raises nine distractions for the Commission’s consideration in its brief. Some of these red herrings are statements of testimony (offered with varying levels of accuracy), some are statements devoid of support anywhere in the record, and some are characterizations of testimony that do not hold up to scrutiny. Ultimately, however, this amalgam of dubious arguments and misstatements of the

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<sup>61</sup> See Entry at ¶ 42.

<sup>62</sup> Id.

record fails to persuasively counter the reality that Complainants have sustained their burden of proof in this proceeding with record evidence.

**i. Distraction One: The Breadth and Functionality of Duke’s Transmission System.**

The first point that Duke raises in its brief is one about the size and importance of its transmission system.<sup>63</sup> Duke states that it and its affiliates “manage 31,645 miles of transmission lines across six states, providing transmission grid security, safety and reliability in compliance with state and federal regulations.”<sup>64</sup> These statements, while they may be true, are irrelevant to this case. The Commission, of course, does not have any authority regarding transmission lines managed by Duke’s affiliates in other states, and Duke Energy Ohio, Inc. has no obligation to conduct vegetation management—or any management at all—on transmission lines that are not in Ohio. Duke ultimately acknowledges that only a small fraction of these 31,645 miles of transmission lines are actually located in Ohio, with 734 miles of 138 kV transmission lines in the state.<sup>65</sup>

In considering the extent of Duke’s transmission system, and therefore the reasonableness of particular methods of vegetation management, the Commission should consider the transmission circuits in Ohio, which are the only circuits that Duke Energy Ohio is responsible for managing or maintaining. Moreover, as discussed at length in other portions of this brief and in the initial briefs of Complainants and OCC, no party to this case has proposed that Duke either not manage vegetation in accordance with state or federal regulations or manage vegetation in a manner that does not promote security, safety, or reliability.

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<sup>63</sup> See Duke Brief at 7-8.

<sup>64</sup> Id. at 7.

<sup>65</sup> Id.

Duke is fully capable of considering the characteristics and minimum line clearances of individual trees while also ensuring safety and reliability, as it did for decades prior to the change in policies and practices that led to the implementation of the IVM and subsequently this case. Nothing in Part 1 of Section C of Duke's brief provides the Commission with justification for allowing Duke to continue with the unjust, unreasonable, and unnecessary destructive vegetation management activities that it proposes to implement on Complainants' properties.

**ii. Distraction Two: Applicability of the Company's Easements.**

Contrary to Duke's assertions in its brief,<sup>66</sup> Duke's easement rights are in dispute in this case. Complainants plainly do not believe that Duke's easements allow the Company to remove trees on Complainants' properties, as evidenced by the fact that they filed the Second Amended Complaint to prevent Duke from doing just that, citing to the easements and lack of authority for Duke to clear cut under those easements.<sup>67</sup>

Ohio courts have been clear about how they interpret rights granted under an easement. "When the question is the scope of an easement, the court must look to the language of the easement to determine its extent."<sup>68</sup> As Duke notes, the language in the various easements at issue in this case gives Duke "the right to cut, trim, or remove any trees, overhanging branches or other obstructions both within and without the limits of the above described right of way and easement 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.**"<sup>69</sup> Duke states that

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<sup>66</sup> Duke Brief at 9

<sup>67</sup> See, e.g., Grossi Testimony at 2 (stating that the requirements for Duke to remove trees under the easement have not been met in this case).

<sup>68</sup> See *Murray v. Lyon*, 95 Ohio App.3d 215, 219, 642 N.E.2d 41 (9th Dist. 1994) (citing *Columbia Gas Transm. Corp. v Bennett*, 71 Ohio App.3d 307, 318, 594 N.E.2d 1, 8 (2d Dist. 1990)).

<sup>69</sup> See Grossi Testimony Attachment A; Duke Brief at 9 (emphasis added).



this language is “clear and unambiguous.”<sup>70</sup> Complainants and OCC agree; Duke may remove trees, overhanging branches, or other obstructions **when Duke’s engineers have determined that those trees, branches, or other obstructions endanger the safety of or interfere with the construction, operation, or maintenance of Duke’s transmission system.**

Given the clear and unambiguous language of the easement, Complainants sought to determine to what extent the requirements for tree removal in the easement had been met by submitting an interrogatory to Duke pursuant to the Commission’s rules governing discovery.<sup>71</sup> Complainants specifically asked: “In reference to Duke’s Easements relating to Complainants’ properties, have Duke’s engineers assessed every tree that Duke intends to remove on Complainants’ properties?”<sup>72</sup> Duke first attempted to evade the question. It objected that the interrogatory required Duke to speculate (despite the fact that the question requested information regarding Duke’s own actions) and that the interrogatory sought information unrelated to the Second Amended Complaint (despite the fact that the question specifically noted that it was requesting information related to easements on Complainant properties).<sup>73</sup> Then, after being forced to provide adequate discovery responses when the Complainants’ motion to compel was granted,<sup>74</sup> Duke provided a supplemental response admitting that its engineers had not assessed each tree that Duke intended to remove.<sup>75</sup>

Moreover, if Duke truly believed that its rights under the easements at issue in this case were clear and indisputable, it seems unlikely that Duke would have filed two pieces of

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<sup>70</sup> Duke Brief at 9.

<sup>71</sup> See Grossi Testimony, Attachment B.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> See Transcript Citizens Against Clear Cutting vs. Duke Energy Ohio, Inc., Hearing Held on May 1<sup>st</sup>, 2018 at 88, lines 1-4 (May 18, 2018).

<sup>75</sup> Grossi Testimony, Attachment B.

testimony that deliberately misstated the terms of the easements. Company Witness McLoughlin, when asked about how Duke goes about conducting vegetation management, stated that the Company had “the legal right to cut, trim, or remove any trees, overhanging branched, or other obstructions both within and without the limits of the ROW, which the Company’s engineers **or other professionals responsible for vegetation management** believe may endanger the safety, reliability and maintenance of the transmission lines and equipment.”<sup>76</sup> On cross-examination, Mr. McLoughlin admitted that he had inserted the language underlined above into his testimony, saying that it was the Company’s interpretation of the easements.<sup>77</sup>

Of course, this “interpretation” was really just the addition of new words to an otherwise near-verbatim recitation of the unambiguous text of the actual easements; additional words which could change a determination of whether the requirements for tree removal under the easement had been met. Similarly, Company Witness Adams provided a verbatim recitation of the easement terms except for the addition of “**and other subject matter experts**” to the list of those who could render an opinion allowing the Company to remove trees under the easement.<sup>78</sup> At hearing, Company Witness Adams admitted that his characterization had added “other subject matter experts” to an otherwise verbatim recitation of the easement language.<sup>79</sup>

Duke’s final tactic, after attempting to evade discovery and misstate the terms of the easements through testimony, is to cite other cases where the Supreme Court of Ohio found that easement language allowed a utility to remove specific trees.<sup>80</sup> As noted above, Ohio courts

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<sup>76</sup> Duke Ex. 3, Direct Testimony of Kevin McLoughlin at 6 (“McLoughlin Testimony”) (emphasis added).

<sup>77</sup> See Tr. Vol. III at 550-51.

<sup>78</sup> Adams Testimony at 5 (emphasis added).

<sup>79</sup> Tr. Vol. II at 295-97.

<sup>80</sup> See Duke Brief at 9 (citing *Wimmer v. Pub. Util. Comm.*, 131 Ohio St.3d 283, 2012-Ohio-757, 964 N.E.2d 411, ¶¶6-7 (“*Wimmer*”); *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶19 (“*Corrigan*”)).

have determined that the scope of any easement is defined by its explicit terms. The fact that courts may have held that other easements, held by other utility companies, on other properties, allowed those utility companies to remove trees on other people's property (under the specific circumstances of that case) is hardly material to a determination of what the property owners' easements allow Duke to do in this case.

In *Wimmer*, the Court noted that the issue of the easement's provisions had not even been before the Commission when it determined whether the electric utility had the right to remove a tree on a customer's property because an earlier state court proceeding had already interpreted the easement.<sup>81</sup> In finding that the easement at issue in *Corrigan* allowed tree removal, the Court stated the easement's language.<sup>82</sup> That easement's language, unlike the language before the Commission here, does not contain any limitations regarding the necessary and required findings made by utility company engineers.<sup>83</sup>

After finding that the easement did allow the utility company to remove trees that threatened transmission lines, the *Corrigan* Court found that the tree removal was really not an issue of easement language at all, but rather an attack on the utility's vegetation management program.<sup>84</sup> As made clear by the *Corrigan* Court, a utility's obligation to provide just and reasonable service under R.C. 4905.22 does not expire when it has an easement that may otherwise grant it the right to take unreasonable actions in rendering its service to customers. That service still must be just and reasonable, and that determination is left to the Commission.

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<sup>81</sup> See *Wimmer* at ¶ 5.

<sup>82</sup> See *Corrigan* at ¶ 18.

<sup>83</sup> *Id.*

<sup>84</sup> *Corrigan* at ¶ 19.

Thus, even if the easement arguably allowed the tree removal at issue in this case, Complainants would still be able to challenge Duke's implementation of its vegetation management plan as unjust and unreasonable under Ohio law . Complainants also could challenge the necessity of the tree removal under the Commission's rules.<sup>85</sup>

**iii. Distraction Three: Seriousness of Potential Outages.**

Duke's third distraction discusses the seriousness of theoretical outages that could occur along Duke's transmission lines.<sup>86</sup> Neither Complainants nor OCC dispute the description of Duke's transmission system (including the system's ability to withstand outages on a single transmission circuit) or the manner in which outages can occur. Specifically, all parties agree that vegetation could cause transmission line failure either through physical contact or through an air-gap flash across. In Part 3 of Section C of its brief, Duke describes the ways that vegetation could cause a failure on the transmission lines and the consequences of such a failure. Duke then states, without record evidence: "That is precisely why, in this case, Duke Energy Ohio moved away from *maintaining* vegetation along its transmission lines to proactively *managing* that vegetation."<sup>87</sup> That conclusion, however, simply does not flow from the argument that preceded it. Those risks exist, but no party in this case is proposing that the Company ignore the risks or take any action that would allow trees to potentially cause a failure on the transmission lines.

Preventing physical contact between a tree or other vegetation and a transmission line should be fairly straightforward. During the vegetation management cycle, the tree should not be allowed to grow to the point where it either contacts the transmission wire or has the potential to

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<sup>85</sup> Id.

<sup>86</sup> See Duke Brief at 10-11.

<sup>87</sup> Duke Brief at 11.

contact the transmission wire on the way to the ground should it fall. This is the precise reason that Duke's modified vegetation plan (as well as its previous vegetation management plan) require maintaining minimum line clearances and a six-year vegetation management cycle. In its discussion of these issues, however, Duke does not point to any specific tree that is either contacting the transmission wire or has the potential to contact the transmission wire on the way to the ground should it fall.<sup>88</sup> But even if Duke could point to such a tree, Complainants have presented a clear solution. Every single Complainant who filed testimony in this case stated that he or she would be supportive of Duke trimming trees as needed to ensure safety.<sup>89</sup>

In fact, multiple Complainants identified trees on their properties that they believed should be addressed in order to ensure safety due to their height and proximity to the transmission wires.<sup>90</sup> Duke's insistence on completely removing trees and other vegetation that does not have the ability to contact the transmission wires while inadequately addressing trees that do have such potential demonstrates that Duke's new IVM program or the implementation of its vegetation management plan is not tailored to prevent contact between trees and the transmission wires as required by the Commission's rules and Duke's modified vegetation plan filed with the Commission. Complainants Witness Bryant testified about a Symmes Township-owned property beneath Duke's transmission lines that contains substantial vegetation.<sup>91</sup> Mr.

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<sup>88</sup> See *id.*

<sup>89</sup> See Complainants Ex. 2-18.

<sup>90</sup> See Fick Testimony at 8-9 (identifying trees just off of Duke's easement that Duke does not appear to be addressing even though they are of such a height that they could contact the transmission wires should they fall towards those transmission wires); Grossi Testimony at 12-13 (describing a shagbark hickory tree that is tall enough to contact the transmission wires and how Duke representatives told him that they would be shearing the side of the tree, which would not change the fact that the tree would be tall enough to contact the transmission wires upon a fall).

<sup>91</sup> See Bryant Testimony at 8, lines 4-9 and Attachment F.

Bryant explained how Duke is not planning to implement its new IVM program on this property, despite the urgent safety need that Duke has claimed throughout this proceeding.<sup>92</sup>

As for the issue of air gap flash-across, the evidence shows that this is not as prevalent of a phenomenon as Duke would like to lead the Commission to believe. The ANSI Standards that Duke relies on extensively in its brief provide that the minimum clearance distance at which trees should be maintained for 138 kV transmission lines is only 2.3 feet.<sup>93</sup> Company Witness McLoughlin relied on this standard in preparing his testimony and confirmed on cross-examination that 2.3 feet is the minimum clearance distance for these transmission lines.<sup>94</sup> No Complainant or witness in this case has suggested that Duke not maintain this distance in maintaining vegetation along the transmission wires (or that Duke prune trees in such a manner that they would encroach on this distance prior to the next vegetation management cycle). Again, Complainants and OCC have proposed that Duke use its own prior methods of vegetation management and those stated in the modified vegetation management plan on file with the Commission in order to prevent transmission circuit failures.

In order to see the efficacy of the vegetation management methods that Complainants propose, the Commission need look no further than the results of Duke's prior vegetation management efforts. Duke previously maintained trees and other vegetation in a manner that accommodated property owners' desires.<sup>95</sup> When identifying outage events related to vegetation, Duke stated that it had identified a single event and could not provide more information other than that it was related to vegetation.<sup>96</sup> In his testimony on behalf of Duke,

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<sup>92</sup> Id. at 10-19.

<sup>93</sup> See Complainants Ex. 24 at 16.

<sup>94</sup> Tr. Vol. III at 530, line 22-531, line, 4.

<sup>95</sup> Adams Testimony at 8, lines 22-23.

<sup>96</sup> See Menkhaus Testimony, Attachments B and C.

Company Witness Adams provided additional outage data for Duke's 138 kV transmission lines. That data demonstrated that in every year surveyed but one, Duke Energy Ohio/Kentucky had lower outage rates than the rest of the Duke Energy's states.<sup>97</sup> On cross-examination, Company Witness Adams confirmed that Ohio and Kentucky had out-performed the other states that he supervises over the years discussed in his testimony.<sup>98</sup>

Complainants/OCC Witness Williams's research confirms that Duke's past practices had not caused issues. Mr. Williams reviewed Duke's 2017 Annual Report filed with the Commission.<sup>99</sup> That Annual Report shows that, by Duke's own assessment, the condition of its transmission system "exceeds industry standards and customer expectations for the delivery of safe and reliable electric service."<sup>100</sup> Given Duke's own assessment that it was meeting or exceeding both industry standards and customer expectations for safety and reliability without clear cutting trees on Complainants' properties, the Commission should reject Duke's claims that returning to its prior vegetation management practices would jeopardize safety or reliability. The evidence from Duke's past practices shows that the outage events described in this section of Duke's brief would simply not befall the Company or its customers should Complainants prevail in this case.

#### **iv. Distraction Four: Regulatory Requirements and Past Outage Events.**

Duke next turns to past outage events in other parts of the country and the regulations that resulted from those events as a justification for its purported new policy and implementation of its IVM program.<sup>101</sup> As it did throughout its testimony, here Duke invokes the 2003 Northeast

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<sup>97</sup> Adams Testimony at 12;

<sup>98</sup> Tr. Vol. I at 215, lines 8-15.

<sup>99</sup> See Williams Testimony, Attachment JDW-10.

<sup>100</sup> Id., Attachment JDW-10 at 12.

<sup>101</sup> See Duke Brief at 11-14.

Blackout and a 2011 outage event in another state in order to stoke fears of repeat events occurring should the Commission order Duke to return to prior practices.<sup>102</sup> Company Witness McLoughlin, however, discussed both of these events on cross-examination and, in doing so, revealed that the circumstances that led to the outages would not be replicated here should the Commission adopt the Complainants' and OCC's position in this case.

Regarding the 2003 Northeast Blackout, Company Witness McLoughlin confirmed that the trees at issue had essentially grown into the transmission wires, exceeding even the minimum vegetation management clearance distances required discussed above. The utility in charge of vegetation management had been so derelict in its conduct of such management that it had allowed a 42-foot tree to grow directly beneath the transmission wires.<sup>103</sup> But Complainants and OCC are not asking the Commission to allow trees to grow to such heights beneath the transmission wires in this case. The Commission is also not required to make a binary choice between allowing trees to grow to such extreme heights as the ones that caused the 2003 Northeast Blackout or adopt Duke's approach of not allowing any trees at all beneath the wires or the wire zone that extends 20 feet from the outermost transmission wire, regardless of height. Furthermore, Mr. McLoughlin acknowledged that the lines that caused the blackout in 2003 were of a much higher voltage and that other factors completely unrelated to vegetation management had exacerbated the severity of that event.<sup>104</sup>

In discussing the 2011 outage event referenced in his testimony,<sup>105</sup> Mr. McLoughlin explained how the Federal Energy Regulatory Commission ("FERC") and the North American

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<sup>102</sup> Id.

<sup>103</sup> See Tr. Vol. III at 529, line 15-531, line 1.

<sup>104</sup> See Tr. Vol. III at 526, line 8-529, line 14.

<sup>105</sup> See McLoughlin Testimony at 5, line 15-6, line 2.



Energy Reliability Corporation's ("NERC") review of that event focused on the concept of danger trees, which are defined as those trees that are tall enough that, if they fell, they could contact a transmission wire.<sup>106</sup> Similar to the 2003 Northeast Blackout, the 2011 storm involved trees that were much taller than the ones at issue here. Specifically, Mr. McLoughlin admitted that the only tree-caused outage on the 345 kV line at issue in that storm was caused by a 65-foot tree.<sup>107</sup> Again, such a tree would not be permitted to remain under or near Duke's transmission lines even if Complainants were to prevail in this case.

The Commission should not accept Duke's tactics of stirring up fears of massive outage events by referring to dissimilar cases involving lines and vegetation unlike that which is at issue in this case and unlike any relief sought in this case. The Commission can simultaneously prevent the inadequate vegetation management that caused those outages without permitting Duke's extreme clear cutting, including the use of herbicides, policies it seeks to have the Commission preserve in this case.

When Duke is not discussing unrelated outage events in Part 4 of Section C of its brief, it is discussing inapplicable regulations. It even titles this portion of its brief "Regulatory requirements for vegetation management."<sup>108</sup> Despite Duke's attempts to muddy the waters regarding the regulatory framework underlying the vegetation management proposed to be performed on Complainants' properties, the Commission should not be mistaken: there are no federal regulations that mandate Duke to implement the proposed vegetation management plan on Complainants' properties. None.<sup>109</sup>

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<sup>106</sup> See Tr. Vol. III at 540, lines 17-23.

<sup>107</sup> See Tr. Vol. III at 545, lines 4-6.

<sup>108</sup> Duke Brief at 11.

<sup>109</sup> See Complainants' Ex. 24.

The latest NERC transmission vegetation management regulations only apply to transmission lines greater than 200 kV, and do not apply to these lines, as Company Witness McLoughlin admitted at hearing.<sup>110</sup> When Duke states in its brief that electric utilities may not choose to ignore NERC standards, it leaves out an important fact. Duke fails to note that it would not have to ignore any NERC standard to continue its reasonable prior practices of working with customers to conduct vegetation management desirable to both Duke and the customer and/or properly implement its modified vegetation management plan currently on file that requires a 15-foot minimum line clearance.<sup>111</sup> Duke would not be subject to fines of up to \$1 million per day for failing to follow NERC standards regarding its vegetation management activities (or lack thereof) on the 138 kV lines on or near Complainants' properties as the NERC standards do not apply.<sup>112</sup> In addition to these misleading recitations of the regulatory framework, Duke offers unsupported speculation as to what its customers would prefer regarding vegetation management practices.<sup>113</sup>

Company Witness McLoughlin attempted to justify Duke's decision to follow inapplicable NERC guidelines in a few different ways. First, he stated in his testimony that there was a "strong likelihood" that these standards will eventually apply to 138 kV lines like those on or near Complainants' properties.<sup>114</sup> At hearing, however, when asked if he was "merely speculating" about how the applicability of the NERC standards may change in the future, he

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<sup>110</sup> Id.; Tr. Vol. III at 536, line 6-8.

<sup>111</sup> Duke Brief at 13.

<sup>112</sup> Id.

<sup>113</sup> See Duke Brief at 12 (stating that "[o]ne would think that the Commission and the Company's rate payers would want Duke Energy Ohio to apply more stringent reliability and vegetation management standards to all of its transmission lines" without citing any record support for the claim that customers do desire such vegetation management).

<sup>114</sup> McLoughlin Testimony at 3, lines 10-15.

admitted that he was.<sup>115</sup> Furthermore, Mr. McLoughlin also conceded that the regulations did not apply to 138 kV lines when they were adopted in 2007, and that despite three subsequent amendments, they have not been modified to apply to 138 kV lines.<sup>116</sup> Thus, NERC has had ample opportunity to apply its regulations to the lines at issue in this case, and has repeatedly opted not to do so. There is a reason for that—NERC believes its standards are inapplicable and unnecessary for 138 kV lines to maintain safe and reliable service.

Moreover, it is not as if NERC is unaware of the existence of lower voltage transmission lines. Company Witness McLoughlin explained at hearing that “all the other NERC standards” apply to lines of 100 kV or greater and that the vegetation management regulations are “the only outlier.”<sup>117</sup> As Duke states in its brief, NERC has “a zero tolerance for outages.”<sup>118</sup> And NERC has determined that its zero-tolerance standard for outages can be attained without applying the transmission vegetation management standards that Duke invokes in this case to the lines that are actually at issue in this proceeding. While Mr. McLoughlin may describe this as “irony,”<sup>119</sup> it is actually evidence that Duke’s policies with regard to the transmission lines at issue in this case need not conform to the standards it cites in defense of its plan to clear cut trees and other vegetation on Complainants’ properties.

In addition to the reasons discussed above, Duke’s invocation of the 2003 Northeast Blackout and the regulations that followed is curious given Duke’s actions following that event. The report detailing the vegetation management issues underlying that blackout was released in 2004, and the need to over-apply new NERC reliability standards discussed above were first

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<sup>115</sup> Tr. Vol. III at 536, line 21-537, line 1.

<sup>116</sup> Tr. Vol. III at 537, line 20-533, line 9.

<sup>117</sup> Tr. Vol. III at 533, lines 5-13.

<sup>118</sup> Duke Brief at 13.

<sup>119</sup> Tr. Vol. III at 532, lines 23-24.

adopted by FERC in 2007.<sup>120</sup> Following that report, Duke continued with its past practices for nine years, as noted by numerous Complainants who described Duke conducting vegetation management focused on trimming and pruning since 2007, until 2016.<sup>121</sup>

**v. Distraction Five: Duke’s Vegetation Management Program.**

Duke next states that Complainants “do not understand” Duke’s vegetation management program, saying that the program was not changed from the prior version that followed what Duke describes as “industry best practices.”<sup>122</sup> It says that the transmission vegetation management plan did not change substantively as a result of the 2016 modification of the plan on file with the Commission.<sup>123</sup> Substantial record evidence belies these assertions and demonstrates that Complainants do not misunderstand the modified plan.

Duke modified its vegetation management plan on file with the Commission by an application that it filed in April of 2016.<sup>124</sup> In that application Duke claimed that it was not making substantive changes to the plan, but only making modifications to “clarify and make terms more coherent,” similar to the claim it makes in its brief.<sup>125</sup> But internal communications among Duke employees demonstrate that Duke did change its approach to vegetation management in the past few years.

In an internal email, Sally Thelen, a Duke corporate communications employee asked about the transmission vegetation management program, stating, “I know we continue to make a

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<sup>120</sup> McLoughlin Testimony at 2, lines 4-21.

<sup>121</sup> See, e.g., Vonderhaar Testimony at 2, lines 14-16 (describing 2011 vegetation management); Grossi Testimony at 2, line 23-3, line 2 (describing how Duke has trimmed white pine trees on his property in the past seven years).

<sup>122</sup> Duke Brief at 14-15.

<sup>123</sup> Duke Brief at 16.

<sup>124</sup> See Wiethorn Testimony, Attachment G.

<sup>125</sup> Id.

lot of changes when it comes to Transmission Vegetation Management – especially in Ohio.”<sup>126</sup> In addition, Company Witness Adams testified that it was in 2016—the same year that the amended plan was filed—that Duke initiated focus on applying IVM concepts to its 138 kV system in Ohio.<sup>127</sup> Moreover, Complainants who met with representatives from Duke were explicitly told that Duke’s vegetation management policies had changed.<sup>128</sup>

Further, even if the Commission were to determine that Duke did properly modify its vegetation management plan, the modified plan is not consistent with the actions that Duke proposes to take in this case. The modified plan establishes that, for transmission lines, “vegetation shall be no closer than fifteen feet to an energized conductor when the clearing is completed.”<sup>129</sup> Duke has stated ad nauseam that maintaining vegetation around transmission lines by creating clearances (as opposed to removing trees) is impractical and/or unsafe. Yet, when it filed its modified plan, it retained the concept of establishing minimum clearance distances, which was in its prior plan. Nowhere in its plan did Duke state that it needed 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 to maintain safe and reliable service or protect the system. If Duke’s modified plan had in fact provided for the “wire zone” and “border zone” IVM concepts that it appears to be advocating for in this case, the provision about minimum line clearances would never have any effect. Rather than determine that Duke’s modified plan has language that carries no meaning, the Commission should adopt the simpler,

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<sup>126</sup> Kuhne Testimony, Attachment I.

<sup>127</sup> See Adams Testimony at 11, lines 5-8.

<sup>128</sup> See, e.g., Haid Testimony at 4, lines 23-24.

<sup>129</sup> Wiethorn Testimony, Attachment G at 7.

more coherent conclusion that the modified plan establishes minimum clearances of at least 15 feet at the time clearing is completed, as stated in the plan.<sup>130</sup>

Confronted with language that was removed from the modified plan and the lack of language that is consistent with Duke's proposed actions on Complainants' properties on cross-examination, Company Witness Adams consistently referred to the Duke's "technical specs."<sup>131</sup> Notably, Duke has not filed its technical specs with the Commission and neither those specs nor the documents provided to Complainants in this case have been approved by the Commission. Under Ohio Adm. Code 4901:1-10-27, Duke's approved (albeit without Commission action) vegetation management plan is the one that it filed on April 16, 2016. That plan provides for minimum transmission clearances, and does not describe any sort of wire zone or border zone concept or other "technical specs."

Again, Ohio Adm. Code 4901:1-10-27 requires that "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." (Emphasis added). Thus, Duke's decision to clear cut trees on Complainants' property without any mention of such a practice in its modified plan is not only unjust and unreasonable, but also violates the plain language of Duke's vegetation management plan on file at the Commission and Ohio Adm. Code 4901:1-10-27.

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<sup>130</sup> Id.

<sup>131</sup> See, e.g., Tr. Vol. II at 337, line 23-338, line 4; Tr. Vol. II at 264, line 19-265, line 3 (stating that the Company's definitions for incompatible are found with the specifications).

Duke may be of the belief that its demeaning dismissal of Complainants' understanding of Duke's vegetation management plan<sup>132</sup> is a credit to the Company's case. But even if its misstatement of Complainants' understanding were true, and Duke's customers were, in fact, unable to comprehend Duke's vegetation management, that fact would support a conclusion that the plan is unjust and unreasonable. To whatever extent Complainants, or any customers, are unable to understand the vegetation management plan Duke is actually implementing, that misunderstanding can be fairly attributed to the fact that Duke describes its plan differently in different documents and that Duke is implementing its purported plan in an inconsistent manner, which is also unjust and unreasonable.

As discussed above, Duke's plan on file with the Commission provides for minimum clearance distances in conducting transmission vegetation management and does not mention the mass tree removal Duke now seeks to undertake.<sup>133</sup> The technical specs that Company Witness Adams mentioned for the first time on cross-examination allegedly include "more specificity" than the information that is on file with the Commission.<sup>134</sup> The documents provided to Complainants described the wire zone-border zone approach to vegetation management,<sup>135</sup> while other documents available on the Company's website state that "each tree must be considered individually."<sup>136</sup>

With the many conflicting approaches to vegetation management put out by Duke, the Commission has to apply the modified plan that is on file with the Commission, which discusses minimum line clearances as required by Ohio Adm. Code 4901:1-10-27. As to the issue of what

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<sup>132</sup> See Duke Brief at 14-15.

<sup>133</sup> See Wiethorn Testimony, Attachment G.

<sup>134</sup> Tr. Vol. II at 269, lines 10-14.

<sup>135</sup> See, e.g., Grossi Testimony, Attachment E.

<sup>136</sup> See Mackey Testimony, Attachment I.

exactly that modified plan provides, one of two things are true. Either, (1) Duke did not make changes to its prior plan, as it stated in its application to modify its vegetation management plan, and Duke's plan provides for the same sort of transmission vegetation management that it practiced prior to 2016 (i.e., pruning trees to ensure safe clearances); or (2) Duke's modified plan does provide for clear cutting and mass tree removal (despite no language explicitly stating as such). The first alternative means that Duke's practice of clear cutting along its rights-of-way is at odds with its vegetation management plan on file at the Commission. The second alternative means that Duke deceptively modified its prior plan by stating that there were no substantive changes to its approach to vegetation management when, in fact, the modified plan did make substantive changes. Either way, Duke has violated Ohio Adm. Code 4901:1-10-27.

**vi. Distraction Six: Integrated Vegetation Management.**

The next Part of Section C of Duke's brief is devoted to the concept of IVM.<sup>137</sup> Throughout this Part of its argument, Duke describes the wire zone-border zone concept at the core of the IVM program that Duke is apparently attempting to implement on Complainants' properties. Duke tries to justify the removal of Complainants' trees by stating a desire to meet the goals of "safety, reliability, and access" that are at the core of the IVM program. The record, however, demonstrates that Duke need not remove trees on the scale it proposes in order to meet these objectives.

In Part 6 of Section C of the brief, Duke notes the difficulty posed under its previous approach to vegetation management. It described off-cycle management and aerial patrols that were made more difficult by "undesirable topping" and the safety hazards that result when

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<sup>137</sup> Duke Brief at 16-21.



employees must get too close to the transmission lines.<sup>138</sup> Complainants Witness Back, however, explained how many of those risks could be avoided if the Company were to use proper trimming and pruning methods. Specifically, Complainants Witness Back described how pruning done with proper cutting methods will not result in the excessive regrowth rates that Duke describes. Mr. Back noted that cuts made at lateral angles and that are of a proper ratio will protect natural growth habits without the rapid growth that results from improper cuts.<sup>139</sup> Additionally, at hearing, Mr. Back explained how the topping described in Duke's brief<sup>140</sup> should not be done and that pruning and the use of growth regulators would be a more proper approach to maintaining vegetation.<sup>141</sup> Thus, it appears that many of the problems Duke experienced when it was considering individual property owner preferences rather than removing all trees could have been avoided through the use of proper pruning techniques and growth regulators.

Duke also states that Complainants "mistakenly believe that Duke Energy Ohio plans to remove all vegetation from the transmission rights-of-way and to 'clear cut' all trees within the Company's easements. There is no evidence in the record to support those contentions."<sup>142</sup> There is ample evidence for Complainants' contentions, and that evidence is found both in the testimony of Complainants and in that of Duke. Duke's Witness McLoughlin was asked why clear cutting is necessary on some sections of the right-of-way, and he responded, essentially, that Duke's work would "appear[] to leave a clear cut condition."<sup>143</sup>

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<sup>138</sup> Duke Brief at 17.

<sup>139</sup> Back Testimony at 6, lines 7-11.

<sup>140</sup> Duke Brief at 17.

<sup>141</sup> Tr. Vol. II at 442, lines 1-4.

<sup>142</sup> Id. at 18.

<sup>143</sup> See McLoughlin Testimony at 14, lines 4-15.

In addition, as related in Complainants' own testimony, Complainants' understanding that Duke planned to clear cut Complainants' properties came directly from Duke and its representatives. When Complainants Witness Bryant attempted to discuss resident concerns with Warren Walker, a Duke representative, Mr. Walker refused to meet with the concerned customers as a group, but confirmed that Duke's plan was to "clear cut the entire length of the entire 100-foot right of way."<sup>144</sup> Complainants Witness Preissler was told by Duke's representative that the Company was "clear cutting everything."<sup>145</sup> Complainants Witness Haid was told that, due to a policy change, Duke was "clear cutting all vegetation within Duke's 100-foot easement."<sup>146</sup> Complainants Witness Schmidt was told almost the exact same thing by Duke's representative.<sup>147</sup> This uncontested testimony, along with the testimony of Duke's witness that the implementation of IVM on Complainants property would leave the appearance of a clear cut, emphatically disproves Duke's assertion that Complainants lack record support for the claim that Duke will clear cut the trees and vegetation on their properties.

Furthermore, Duke's claim that it is simply "selectively remov[ing]" incompatible trees, rather than clear cutting, is countered by the door hangers that the Company left with a number of Complainants. The door hangers stated that Duke was "removing all trees 50 ft. of center on both sides."<sup>148</sup> Duke's desire to remove trees from the property of Complainants Witness Mitman further undermines the contention that there is anything "selective" about Duke's approach. Complainants Witness Mitman testified that the trees at issue on his property are located at the bottom of a 35-foot slope, creating an extreme clearance between the trees and the

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<sup>144</sup> Bryant Testimony at 2, lines 13-14.

<sup>145</sup> Preissler Testimony at 9, lines 1-2.

<sup>146</sup> Haid Testimony at 4, lines 23-24.

<sup>147</sup> See Schmidt Testimony at 5-6.

<sup>148</sup> See, e.g., Dabdoub Testimony, Attachment C; Preissler Testimony, Attachment J.

transmission lines.<sup>149</sup> In some cases the clearance between these mature trees and the transmission lines is 30-40 feet.<sup>150</sup> Duke's Witness McLoughlin, even testified on cross-examination that this sort of slope would change the determination as to whether or not a tree is compatible.<sup>151</sup> Yet, Duke is still proposing to remove the trees from Mr. Mitman's property.

Duke justifies its removal of trees by pointing to its wire zone-border zone concept.<sup>152</sup> Through testimony and at hearing, however, Duke's implementation of the wire zone-border zone framework was revealed to be largely arbitrary. In its documents, Duke notes that vegetation can remain in the wire zone when it has a mature height of less than seven feet, but states that no tree species (even those with mature heights of less than seven feet) may remain in the wire zone.<sup>153</sup> Duke fails to explain why tree species should be treated inherently differently than other sorts of vegetation that share the same size characteristics. On cross-examination, Company Witness Goodfellow even admitted that the wire zone-border zone mode of conducting vegetation management would result in the removal of some trees that have no chance of impacting the safety or reliability of Duke's transmission system.<sup>154</sup>

In discussing the wire zone-border zone dynamic, Duke states that Complainants have trees planted in the wire zone and border zone in violation of Duke's "guidelines" (not a filed plan, rule, or law) as if this fact is some sort of smoking gun that undermines Complainants' case.<sup>155</sup> In reality, this fact is anything but a smoking gun. In one instance, the trees that Duke

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<sup>149</sup> Mitman Testimony at 2, lines 1-4 and Attachment B.

<sup>150</sup> Mitman Testimony at 2, lines 11-15.

<sup>151</sup> Tr. Vol. III at 611, lines 2-12.

<sup>152</sup> Duke Brief at 19.

<sup>153</sup> See, e.g., Grossi Testimony, Attachment E.

<sup>154</sup> See Tr. Vol. III at 715, line 24-715, line 25.

<sup>155</sup> Duke Brief at 20.

now objects to within its right-of-way were actually planted at the explicit instruction of Duke.<sup>156</sup> A Duke customer like Ms. Staios who planted trees in accordance with the Company's recommendations cannot be faulted for doing so when the Company returns years later and presents a set of new policies that now declare those same trees to be incompatible.

Duke also argues that findings by Complainants' expert that certain trees need to be removed serves as evidence that Duke should be permitted to remove trees surrounding its transmission wires regardless of the level of risk that an individual tree poses.<sup>157</sup> This is not the case. Complainants' expert's testimony was that certain trees may need to be removed because they cannot be maintained in a healthy manner such that they do not pose a threat to the transmission lines at some point in the future.<sup>158</sup> This is hardly an admission that Duke's proposed practices of clear cutting Complainants' properties are just and reasonable. Rather, it is an unremarkable observation that when a utility does a tree-by-tree analysis to determine which trees threaten the safety and reliability of the transmission system, it will likely conclude that some trees can be maintained without removal.

As discussed above, the past experience of Duke's vegetation management program demonstrates that safety and reliability have not been threatened when Duke has chosen to prune trees rather than remove them en masse. At one point in this portion of its brief, Duke appears to impliedly concede as much, stating that Complainants focus on whether trees could grow to a specific height and/or distance from the transmission conductors (i.e., the factors that determine whether a tree poses a safety or reliability threat) does not overcome the third goal of IVM,

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<sup>156</sup> Staios Testimony at 2, line 23-5, line 8.

<sup>157</sup> Duke Brief at 20.

<sup>158</sup> Back Testimony at 15, lines 1-6.

which is access.<sup>159</sup> Complainants acknowledge that access is an important goal and that vegetation management may need to be performed to provide access. But the record is devoid of any determination by Duke that specific trees on Complainants' property actually prevented access.

Moreover, the issue of access would certainly be one that needs to be assessed on a case-by-case basis, as the specific characteristics of each property would determine the extent to which access is available with trees and vegetation as they currently stand. For example, Complainant Witness Gump testified that Duke's representative raised the access rationale in order to justify removing trees that were not close to contacting the transmission lines even though his trees are located towards the edge of the right-of-way such that Duke's workers would already have unencumbered access to the transmission lines through his neighbor's property.<sup>160</sup> Just like the question of whether a tree presents a safety or reliability threat, the question of whether a tree inhibits access should be addressed on a case-by-case basis, with Duke performing only vegetation management that is necessary to provide access. Access should not be used as a blanket justification for tree removal regardless of whether the removal of trees actually serves the goal of ensuring access.

**vii. Distraction Seven: Reclamation.**

In Part 7 of Section C of its brief, Duke describes its process of "reclaiming" the right-of-way by removing vegetation that it deems to be incompatible.<sup>161</sup> Duke highlights Company Witness Adams's testimony that implementing these vegetation management practices is in the

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<sup>159</sup> Duke Brief at 20.

<sup>160</sup> See Gump Testimony at 8, lines 15-27.

<sup>161</sup> Duke Brief at 21-20.

best interests of all parties and the communities involved.<sup>162</sup> This contention is disputed by the very parties of this case. Notably, OCC, Ohio's advocate for residential customers, disputes Duke's rights to engage in this form of vegetation management in this case, as do the Symmes Township Trustees, as evidenced by the testimony of Township Trustee Kenneth Bryant.<sup>163</sup> While Duke is certainly able to offer testimony and evidence as to what it feels is the best form of vegetation management, this case has shown that the Company cannot speak for the interests of its customers or the communities it serves when it comes to these issues.

Duke also improperly relies on the results of recent aerial patrols as evidence of the hazardous condition of vegetation along the transmission lines.<sup>164</sup> As Company Witness Adams testified at hearing, the survey he referenced was done in the spring and early summer of 2018, after this case had begun, pursuant to agreements reached between the parties to revise the stay put in place during the pendency of the Second Amended Complaint.<sup>165</sup> Aside from the fact that the parties agreed not to use these revisions to the stay as evidence against each other,<sup>166</sup> the fact that Duke identified problematic trees in 2018 is not fatal to a claim that its prior practices had safely maintained vegetation.

Notably, Duke first began its process of conducting vegetation management on these Complainants' properties in 2017, six years after it had last conducted vegetation management on many of these properties, according to Company Witness Adams.<sup>167</sup> Under the six-year

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<sup>162</sup> See Duke Brief at 21-22; Adams Testimony at 10, lines 18-19.

<sup>163</sup> See Bryant Testimony.

<sup>164</sup> Duke Brief at 22, Adams Testimony at 1, lines 10-13.

<sup>165</sup> See Joint Motion to Revise Stay by Agreement (July 6, 2018); Joint Motion to Revise Stay by Agreement (June 20, 2018); Joint Motion to Revise Stay by Agreement (April 4, 2018).

<sup>166</sup> *Id.*; see also Tr. Vol. II at 364, line 19-371 (Complainants objecting to the introduction of this evidence at hearing).

<sup>167</sup> See Tr. Vol. II at 392, lines 10-16.

trimming cycle, Duke should have performed the work on Complainants' properties in 2017, not 2018. Thus, it is not necessarily surprising that some trees and other vegetation had encroached within an unacceptable clearance distance, as those trees and other vegetation were overdue to be maintained. As to the broader point of this case, Duke has not provided evidence that all trees within its right-of-way were deemed incompatible as a result of these surveys. Rather, the evidence actually shows that many trees were not deemed to be incompatible, even seven years after the last transmission clearing cycle.

In describing the process of reclamation, Duke talks about the need to reclaim rights-of-way from "tall, dense amounts of undesirable vegetation."<sup>168</sup> Of course, Duke does not point to evidence that all, or even most, of the vegetation on Complainants' properties is of a tall, dense nature that means the right-of-way is of a condition that requires reclamation.<sup>169</sup> In fact, many Complainants offered testimony and photographic evidence that the vegetation targeted on their properties was neither tall nor dense. The drone and ground pictures for several properties depict a clear line of sight down the transmission corridor.<sup>170</sup> Complainants Witness Preissler described how Duke seeks to remove three isolated, relatively short pine trees that come nowhere near contacting Duke's transmission lines.<sup>171</sup> Photographic evidence confirms that these trees are neither tall nor dense.<sup>172</sup> Complainants Witness Staios provided a diagram showing that many of the trees and other vegetation on her property were of heights less than ten feet.<sup>173</sup> A diagram of Complainants Witness Gump's property shows a single row of trees on the outer edge of the

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<sup>168</sup> Duke Brief at 23.

<sup>169</sup> Id.

<sup>170</sup> See Wiethorn Testimony, Attachment F.

<sup>171</sup> See Preissler Testimony at 5, line 27-6, line 3.

<sup>172</sup> Id., Attachments G and I.

<sup>173</sup> Staios Testimony, Attachment C.

easement that are not nearly tall enough to contact the transmission wires, and photographic evidence confirms that these trees do not come close to threatening the transmission wires.<sup>174</sup> Duke appears to be intent on “reclaiming” its right-of-way from trees and other vegetation that do not credibly threaten the safety or reliability of Duke’s transmission system.

Duke also argues that taking a tree-by-tree approach to vegetation management is impractical, citing the testimony of Company Witnesses Goodfellow and Adams.<sup>175</sup> Duke points to Mr. Goodfellow’s testimony that he is not aware of any utility companies that conduct vegetation management on a tree-by-tree basis, but Complainants actually offered evidence that three such utilities in Ohio do exactly that.<sup>176</sup>

First, Complainants offered an email exchange involving Company Witness Adams wherein Mr. Adams was apprised that the FirstEnergy Companies will allow small brush and trees that would otherwise be removed to remain when the vegetation has been on the property for years and the vegetation is compatible.<sup>177</sup> Next, Complainants offered into evidence the vegetation management plan of the Ohio Power Company (“AEP Ohio”). AEP Ohio’s plan explains that its transmission system is managed on a prescriptive basis and that prescriptions change based on the sizes and types of vegetation present.<sup>178</sup> Finally, Complainants offered the vegetation management plan of the Dayton Power and Light Company (“DP&L”). That plan describes how DP&L will “[t]rim and remove trees and brush as needed” along transmission

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<sup>174</sup> Gump Testimony, Attachments B-D.

<sup>175</sup> Duke Brief at 25-27.

<sup>176</sup> Id. at 25.

<sup>177</sup> See Complainants’ Ex. 19.

<sup>178</sup> See Complainants’ Ex. 20, at 9.



lines and how “[c]learance will vary based on the species of the tree and voltage class of the line.”<sup>179</sup>

Duke also points to the need for a “standard specification” that can be executed consistently on all properties.<sup>180</sup> This argument ignores that Duke’s purported IVM plan already requires a significant amount of tree- and property-specific analysis. Complainants presented evidence that Duke keeps a log for its contractors that details property-specific conditions that contractors must account for in performing vegetation management work.<sup>181</sup> This log evidences that Duke already collects property-specific information and provides property specific instructions to customers, ranging from “grind stumps” to “leave small arbs around tower” to “allow customer to keep lilac tree out in border zone.”<sup>182</sup> If Duke can provide that level of instruction to contractors (and expect contractors to consult the log for each property that they visit), it can surely provide instructions of “trim and do not remove” for trees that do not threaten transmission safety and reliability. Additionally, Complainants presented evidence that Duke was allowing trees that would clearly be forbidden under its guidelines to remain at the King’s Island amusement park in Mason, Ohio.<sup>183</sup>

Further, the wire zone-border zone concept itself requires Duke to look at specific trees. As was explored with Company Witness Goodfellow on re-cross examination, the border zone allows trees that can mature at heights of 15 feet or less, which means that a contractor would need to assess trees in the border zone to determine whether they mature at a permissible height

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<sup>179</sup> See Complainants’ Ex. 21 at 24.

<sup>180</sup> Duke Brief at 25-26.

<sup>181</sup> See Kuhne Testimony, Attachment D.

<sup>182</sup> Id.

<sup>183</sup> See Preissler Testimony at 9, line 18-10, line 9; Attachment M.

for the border zone.<sup>184</sup> Ultimately, Mr. Goodfellow agreed that this determination—which Duke must make under the IVM plan it seeks to implement—would be a tree-specific one.<sup>185</sup> If Duke is able to make a tree-specific determination for trees in the border zone, and is able to make specific exceptions on individual properties, then surely an assessment of the threat posed by specific trees throughout the right-of-way is not as inconceivable as Mr. Adams’s and Mr. Goodfellow’s testimonies suggest.

Duke next discusses the issues it believes exist with pruning trees rather than removing them.<sup>186</sup> Duke begins by suggesting, without citing any record evidence, that Complainants would have Duke top trees beneath the transmission wires. Complainants have made no such suggestion, and, as discussed above, Complainants Witness Back even testified that trees should not be topped.<sup>187</sup> Duke also cites the testimony of Company Witnesses Goodfellow and McLoughlin that regrowth rates are unmanageable when Duke prunes trees near its transmission wires.<sup>188</sup> Again, Complainants Witness Back, as a practicing arborist, explained how proper pruning methods can be used to minimize regrowth rates and that growth regulators can further stunt growth without impacting the health of a tree, if necessary.<sup>189</sup>

Even as it proceeds under the assumption that exaggerated regrowth is an unavoidable reality in pruning trees, Duke preposterously suggests, again without citing record evidence, that Complainants have “bitterly objected” to the pruning of trees to greater than 15 feet of clearance along the transmission wires. But Duke ignores the fact that this entire proceeding has been

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<sup>184</sup> Tr. Vol. III at 755, line 7-757, line 11.

<sup>185</sup> Id. at 757, lines 9-11.

<sup>186</sup> See Duke Brief at 26-29.

<sup>187</sup> Tr. Vol. II at 442, lines 1-4.

<sup>188</sup> Duke Brief at 27-28.

<sup>189</sup> Back Testimony at 6, lines 1-11; 14, lines 5-20.

about Complainants' attempt to get Duke to return to its approach of pruning, rather than removing, trees, which is what Duke is required to do by its modified plan.<sup>190</sup> To be clear, nothing in the record suggests that Complainants have disputed, or would dispute, attempts by Duke to prune trees to clearances of greater than 15 feet, should doing so be deemed necessary to protect the safety and reliability of the transmission circuit.

Duke then proceeds to address the testimony of Complainants Witness Back, concluding, without justification, that it has “little, if any, value.”<sup>191</sup> Mr. Back is the only witness who testified regarding the specific ways that trees can be maintained to conform to specified heights and to minimize regrowth. This testimony provides great value to the Commission as it determines whether it is reasonable for Duke to indiscriminately remove trees and other vegetation without regard for whether that vegetation poses any threat to the safety or reliability of electric service. Mr. Back apprised the Commission that much of the vegetation at issue in this case could be maintained safely without removal.<sup>192</sup> He also explained how proper pruning and the use of growth regulators<sup>193</sup> can effectively control the size and growth of a tree.<sup>194</sup> In short, Mr. Back dispelled a number of myths regarding the feasibility of continuing to maintain these trees. The Commission need not adopt the specific recommendations of Mr. Back regarding who should actually be responsible for pruning the trees and other vegetation for it to

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<sup>190</sup> Duke Brief at 27.

<sup>191</sup> Duke Brief at 28-29.

<sup>192</sup> See Back Testimony, Attachments A-I.

<sup>193</sup> In its brief, at footnote 103, Duke suggests that Mr. Back advocates the “indiscriminate use of growth regulators like Cambistat (a type of herbicide).” Here, again, Duke resorts to making claims that are not supported by any testimony or evidence in the record. Mr. Back never testified that this product was an herbicide, and no other witness even addressed its use. In fact, Mr. Back testified that, unlike herbicides, growth regulators do not harm the health of trees. See Back Testimony at 14, line 15-20. The Commission should reject these repeated attempts by Duke to make assertions in its brief that are unsupported by the record.

<sup>194</sup> Back Testimony at 6, lines 1-11; 14, lines 5-20.

recognize the extreme value in Mr. Back's testimony about how trees can be maintained generally.

**viii. Distraction Eight: Consistency with Other Utilities.**

Duke next states that if the Commission does not find for Duke in this case, it would upend the vegetation management practices of other utilities in Ohio who have similar programs.<sup>195</sup> Initially, Complainants and OCC note that Duke only cited the vegetation management plan of one other Ohio utility despite its claims that multiple utility Companies would be impacted by such a decision.<sup>196</sup>

As discussed at length above, Complainants presented evidence regarding the vegetation management programs of the three other major electric distribution utilities in the state, and the plans of FirstEnergy, AEP Ohio, and DP&L all provide for more flexibility than Duke's proposed IVM plan does.<sup>197</sup> As shown by the other utility vegetation management plans that are in evidence, the Commission need not be concerned that a decision in favor of Complainants would drastically shift the mode of vegetation management across the state.

**ix. Distraction Nine: Environmental Stewardship.**

Duke's final distraction in Section C of its brief is that Duke provides environmental benefits through the environmental stewardship portions of its vegetation management programs. Complainants and OCC first reiterate that the Commission has already ruled that these issues are inappropriate for consideration in this case. The Commission found that it cannot properly rule on issues related to the environmental impact of Duke's policies, finding that Complainants could not put forth issues related to soil erosion or the run-off of toxic herbicides into

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<sup>195</sup> Duke Brief at 31-32.

<sup>196</sup> Id.

<sup>197</sup> See Complainants' Ex. 19, Ex. 20 at 9, Ex. 21 at 24.

waterways.<sup>198</sup> 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.<sup>199</sup> The Commission found that issues related to the environmental impacts 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 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.”<sup>200</sup>

But even if Company Witness Fletcher’s testimony was properly before the Commission, it does not assist Duke’s case in any meaningful way. Mr. Fletcher himself admitted on cross-examination that he was not qualified to assess the practices actually taking place or proposed to take place 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 and that he did not evaluate firsthand whether Duke’s or its contractors’ actual practices on Complainants’ properties were environmentally sound.<sup>201</sup>

The Commission should not accept testimony about general benefits (even if they did exist) that Duke could theoretically provide when actual evidence in this case contradicts the idea that those benefits will be accessed in Complainants’ community. Although Mr. Fletcher testified about the purported environmental benefits of this plan, Complainants saw a very

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<sup>198</sup> Entry at ¶48 (March 8, 2018).

<sup>199</sup> Id.

<sup>200</sup> Id.

<sup>201</sup> Tr. Vol I at 116, line 25-117, line 2.

different story. Complainants Witness Mackey was told that when Duke was finished with its vegetation management on his property, it would have the appearance of “craters on the surface of the moon.”<sup>202</sup> Company Witness Bryant personally observed a portion of Duke’s right-of-way after clearing was completed and provided photographic evidence that the environmental stewardship that Duke provides was not actually implemented.<sup>203</sup> The Commission should not consider the generalized testimony of Mr. Fletcher, who has not visited these properties to be more credible as to the environmental impacts of Duke’s vegetation management than the personal observations of Complainants and others in their communities.

**D. The Commission Should Grant Complainants’ Motion for Sanctions.**

As noted in Complainants initial brief,<sup>204</sup> the Commission, in addition to affording Complainants the relief requested in the Second Amended Complaint, should issue sanctions against Duke for the reasons detailed in Complainants’ motion for such, filed on August 10, 2018.<sup>205</sup> Complainants and OCC hereby incorporate their arguments regarding sanctions contained in Complainants’ motion for sanctions and Complainants’ initial brief as if rewritten fully herein. Complainants and OCC also emphasize that Complainants maintain that sanctions and forfeitures should be issued against Duke for its conduct in this case for the reasons stated in Complainants’ prior filings on this subject.

**III: CONCLUSION**

As demonstrated herein, Complainants have stated reasonable grounds for Complaint and met their burden of proof with the record evidence in this case. Thus, Complainants Second

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<sup>202</sup> Mackey Testimony at 4, lines 8-9.

<sup>203</sup> Bryant Testimony, Attachment A.

<sup>204</sup> See Complainants Brief at 6-9.

<sup>205</sup> See Motion to Compel Discovery, Motion to Enforce PUCO Orders and Motion for Forfeitures and Sanctions and Request for Protective Order (August 10, 2018); Complainants’ Brief at 7-11.

Amended Complaint should be sustained and relief granted. The record clearly demonstrates that Duke failed to assess whether tree removal is necessary to maintain safe and reliable service, Duke implements or practices vegetation management in a way that is inconsistent with its plan on file with the Commission, Duke does not conform to its easements on Complainants properties, and Duke's vegetation management plan, practices, and policies and implementation of such violates the Commission's rules and Ohio law. Additionally, Duke's vegetation management practices and policies are not justified by empirical evidence, its filed modified plan, or the record in this case.

Accordingly, Complainants and OCC respectfully ask the Commission to 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 modified vegetation management plan, and in violation of the Commission's rules and Ohio law, specifically Ohio Adm. Code 4901:1-10-27, R.C. 4905.22, and 4905.26. Complainants and OCC 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 Commission in violation of Ohio Adm. Code 4901:1-10-27 and R.C. 4905.22.

Finally, Complainants and OCC ask that the Commission assess sanctions for Duke's unlawful discovery practice and behavior 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**

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on January 18, 2019.

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