

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**Fredrick William Vonderhaar,** )  
 ) Case No. 23-1102-EL-CSS  
Complainant, )  
 )  
v. )  
 )  
**Duke Energy Ohio, Inc.,** )  
 )  
Respondent. )  
 )  
 )

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**MOTION TO DISMISS CERTAIN CLAIMS FOR LACK OF JURISDICTION  
OF RESPONDENT DUKE ENERGY OHIO, INC.  
AND REQUEST FOR EXPEDITED RULING**

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Now comes Duke Energy Ohio, Inc. (Duke Energy Ohio or Company) and respectfully moves, pursuant to O.R.C. 4905.26, O.A.C. 4901-1-12(C) and 4901-9-01(C), to dismiss any and all of the claims of Mr. Fredrick William Vonderhaar (Complainant) in this proceeding which pertain or could be construed to pertain to erosion, property damage, aesthetic values, diminution of enjoyment of property, emotional distress, and/or diminution of property value. These claims should be dismissed with prejudice because such claims “fall outside the exclusive jurisdiction of this Commission.”<sup>1</sup>

In addition, in light of the fact that the hearing currently is scheduled to start on May 8, 2024, and direct testimony is due May 1, 2024, Duke Energy Ohio respectfully requests an expedited ruling. A memorandum of law in support of this motion is attached.

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<sup>1</sup> *In the Matter of the Complaint of Citizens Against Cleaer Cutting, et al.*, Case No. 17-2344-EL-CSS, Entry, p. 20 (March 8, 2018).

Respectfully submitted,

/s/ Larisa M. Vaysman

Rocco O. D'Ascenzo (0077651)

Deputy General Counsel

Larisa M. Vaysman (0090290)

Associate General Counsel

Elyse H. Akhbari (0090701)

Senior Counsel

Duke Energy Business Services LLC

139 East Fourth Street, 1303-Main

Cincinnati, Ohio 45202

(513) 287-4320 (telephone)

(513) 370-5720 (fax)

[rocco.dascenzo@duke-energy.com](mailto:rocco.dascenzo@duke-energy.com)

[Larisa.vaysman@duke-energy.com](mailto:Larisa.vaysman@duke-energy.com)

[Elyse.Akhbari@duke-energy.com](mailto:Elyse.Akhbari@duke-energy.com)

Willing to accept service via email

*Attorneys for Respondent Duke Energy Ohio, Inc.*

## MEMORANDUM OF LAW

### I. INTRODUCTION

As best Duke Energy Ohio can discern from Complainant's filings,<sup>2</sup> the primary focus of Complainant's complaint is to challenge the performance of vegetation management work identified by the Company, specifically to challenge—and thereby prevent—the removal of any trees on the three properties at issue (collectively the Properties).<sup>3</sup> However, in addition to this primary focus, Complainant appears to assert (1) additional claims pertaining to alleged damages from past vegetation management work and (2) claims of anticipated alleged damages that Complainant believes would result from the performance of the identified vegetation management work. Complainant's allegations in this regard could be construed as allegations pertaining to erosion damage, property damage, aesthetic values, diminution of enjoyment of property, emotional distress, and/or diminution of property value. In this Motion to Dismiss, the Company requests the dismissal of all such claims with prejudice, as they plainly “fall outside the exclusive jurisdiction of this Commission.”<sup>4</sup>

The Company also intends to file a separate motion to dismiss pertaining to Complainant's other claims; however, because the above-listed claims would involve substantially different expertise and testimony, the Company respectfully requests an expedited ruling on these claims to avoid having to address the above claims in filed testimony due May 1, 2024, and/or in hearing on May 8, 2024.

### II. THE CLAIMS AT ISSUE IN THIS MOTION

Although Complainant's primary focus in this proceeding appears to be the prevention of

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<sup>2</sup> Complainant filed two complaints on November 30, 2023, and then an “Amended Complaint” on December 4, 2023.

<sup>3</sup> See Answer of Duke Energy Ohio, Inc., p. 2 (identifying each property) (December 20, 2023).

<sup>4</sup> *In the Matter of the Complaint of Citizens Against Cleaer Cutting, et al.*, Case No. 17-2344-EL-CSS, Entry, p. 20 (March 8, 2018).

certain vegetation removal, Complainant also appears to make allegations about both alleged damage from past vegetation management work and potential future damage from not-yet-performed vegetation management work.

Among other things, Complainant alleges safety issues, property damage, imminent property damage, generally “costs,” and possibly also emotional distress:

In 2016/2017 duke girdled/sprayed trees and low growing brush, killing the vegetation. These actions left a safety issues of falling trees and caused erosion to the creek bed that runs through the property. This erosion has now settled near the house on Fox Run Drive, which causes a potential flooding issue, which happened previously in 2001 to the Fox Run property. Duke offered to fix the erosion issue in exchange for clear cutting the property, which would cause significant new damage. . . .<sup>5</sup>

Duke plans to take approximately 50 additional trees . . . . This action would further the erosion issue and cause significant new damage to the property.<sup>6</sup>

Duke . . . girdled and sprayed vegetation. These actions killed the vegetation which caused significant safety issues and erosion damage to the property.<sup>7</sup>

Duke wants to . . . remove approximately 50 additional trees/vegetation which will cause significant additional damage and cost to the property owner.<sup>8</sup>

[Duke] has caused significant stress and sleepless nights with the threats of clear cutting my properties.<sup>9</sup>

As explained further in the next section, such claims are outside the scope of the Commission’s jurisdiction and should be dismissed with prejudice.

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<sup>5</sup> Complaint, p. 4 (November 30, 2023).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, p. 5.

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

<sup>9</sup> *Id.*

### III. ARGUMENT

The Commission has jurisdiction to consider complaints “regarding any rate, service, regulation, or practice relating to any service furnished by the public utility,” and this includes jurisdiction over “[v]egetation management activities within rights-of-ways and easements,” which are considered “inherently service-related.”<sup>10</sup> However, this jurisdiction does not extend to “pure tort or contract claims better suited for the Ohio courts.”<sup>11</sup> In order to distinguish between the two, the Supreme Court of Ohio has a long-established test.

The Supreme Court of Ohio asks two questions in order to determine whether a claim is within the Commission’s jurisdiction, both of which must be answered in the affirmative in order for the Commission to exercise jurisdiction over the case: (1) “[I]s PUCO’s administrative expertise required to resolve the issue in dispute?”; and (2) “[D]oes the act complained of constitute a practice normally authorized by the utility?”<sup>12</sup>

In accordance with Commission precedent, any claims that Complainant may be asserting regarding erosion, property damage, aesthetic values, diminution of enjoyment of property, emotional distress, and/or diminution of property value, are beyond the Commission’s jurisdiction and should be dismissed with prejudice. Indeed, when various complainants made similar allegations in *In the Matter of the Complaint of Citizens Against Clear Cutting, et al.*, Case No. 17-2344-EL-CSS, the Commission explained why it lacked jurisdiction over claims of erosion damage and similar damages:

With regard to Complainants’ allegations that they have been injured because of Duke’s use of toxic herbicides and soil erosion as part of its vegetation management program, the Commission ***answers the first question of the Allstate test in the negative.*** . . . Similarly,

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<sup>10</sup> See *In the Matter of the Complaint of Citizens Against Clear Cutting, et al.*, Case No. 17-2344-EL-CSS, Entry, p. 17 (March 8, 2018).

<sup>11</sup> *Id.*, p. 18.

<sup>12</sup> *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301,2008-Ohio-3917,893 N.E.2d. 824, ¶12.; *id.* ¶13, (“If the answer to either question is in the negative, the claim is not within PUCO’s exclusive jurisdiction.”).

Complainants *allege removal of trees and vegetation will contribute to soil erosion, which will endanger portions of property that include hills and uneven terrain by creating the risk that homes, decks, and other portions of certain Complainants properties will lose their base of support.* The Commission's administrative expertise lies, among other things, in evaluating whether rates and tariffs are unjust or unreasonable and in evaluating utility programs to promote reliability. *Our administrative expertise is not necessary in evaluating . . . the dangers of soil erosion stemming from tree and vegetation removal.* Furthermore, *our administrative expertise is not necessary in estimating damages to render Complainants whole.* Such an evaluation *is not a service-related matter that is within the Commission's exclusive jurisdiction.* Instead, this is a tort claim over which the courts of common pleas have jurisdiction.<sup>13</sup>

The Commission went on to explain that, even though its answer to the second *Allstate* question was affirmative, this was insufficient for the Commission to exercise jurisdiction because *both* answers had to be affirmative in order to establish Commission jurisdiction.

In accordance with the above, as well as other Commission precedent,<sup>14</sup> the Commission should dismiss any and all claims of Complainant in this case that pertain to erosion, property damage, aesthetic values, diminution of enjoyment of property, emotional distress, and/or diminution of property value. Such claims are plainly outside the jurisdiction of the Commission.

Furthermore, the Company respectfully requests that such dismissal be expedited so that the prefiled testimony in this case, which is due May 1, 2024, and the hearing itself, need not address the above-listed issues. Rather, the Commission's jurisdiction is more apt for the question of whether the Company is complying with its approved Transmission Vegetation Management Program (approved on July 29, 2020, in Case No. 20-944-EL-ESS) and any applicable Commission orders.

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<sup>13</sup> See *In the Matter of the Complaint of Citizens Against Clear Cutting, et al.*, Case No. 17-2344-EL-CSS, Entry, p. 18 (March 8, 2018) (emphasis added; citations omitted).

<sup>14</sup> See, e.g., *In the Matter of the Complaint of Patricia Wildman*, Case No. 18-336-EL-CSS, Entry, pp. 5-6 (March 13, 2019) (dismissing, for lack of jurisdiction, claims related to alleged contamination and/or property damage attributed to release of certain substances during maintenance of a transformer).

#### IV. CONCLUSION

For all of the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission grant this motion and, in an expedited ruling, dismiss with prejudice all claims of Complainant, Mr. Fredrick William Vonderhaar, pertaining to erosion damage, property damage, aesthetic values, diminution of enjoyment of property, emotional distress, and/or diminution of property value.

Respectfully submitted,

/s/ Larisa M. Vaysman

Rocco O. D'Ascenzo (0077651)

Deputy General Counsel

Larisa M. Vaysman (0090290)

Associate General Counsel

Elyse H. Akhbari (0090701)

Senior Counsel

Duke Energy Business Services LLC

139 East Fourth Street, 1303-Main

Cincinnati, Ohio 45202

(513) 287-4320 (telephone)

(513) 370-5720 (fax)

[rocco.dascenzo@duke-energy.com](mailto:rocco.dascenzo@duke-energy.com)

[Larisa.vaysman@duke-energy.com](mailto:Larisa.vaysman@duke-energy.com)

[Elyse.Akhbari@duke-energy.com](mailto:Elyse.Akhbari@duke-energy.com)

Willing to accept service via email

*Attorneys for Respondent Duke Energy Ohio, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Dismiss Certain Claims for Lack of Jurisdiction of Respondent Duke Energy Ohio, Inc. and Request for Expedited Ruling, was served via regular US mail and electronic mail, this 16<sup>th</sup> day of April, 2024 upon the following:

Fredrick William Vonderhaar  
9617 Fox Run Drive  
Mason, OH 45040  
[FredV@LeanEnterpriseTeam.com](mailto:FredV@LeanEnterpriseTeam.com)

*/s/ Larisa M. Vaysman* \_\_\_\_\_  
Larisa M. Vaysman



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Summary: Motion Motion to Dismiss Certain Claims For Lack of Jurisdiction of Respondent Duke Energy Ohio, Inc. and Request For Expedited Ruling electronically filed by Mrs. Tammy M. Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Vaysman, Larisa and Akhbari, Elyse.