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**WHY THIS CASE DOES NOT PRESENT AN ISSUE
OF PUBLIC AND GREAT GENERAL INTEREST**

The safe delivery of electric power is of public and great general interest!

That having been said, this case presents a question of real property law. Both the trial and appellate courts determined the property rights granted by and reserved in an easement to a parcel of real property ... and nothing more. The fear of the specter of darkness following the complete shut-down of electrical power, rendering millions of customers powerless, will have to find a cause other than a majestically mature and healthy silver maple tree or the decision of the Eighth Appellate District Court of Appeals.

The essence of the parties' dispute is as common and as ordinary as they come and are regularly presented to and resolved by trial and appellate courts. The courts below were asked to determine whether the language in the instrument creating the easement giving the Appellant-Grantee full authority to cut and remove any tree which may interfere or threaten to interfere with Appellant's transmission lines, allowed or prohibited the grantee from engaging in certain conduct, i.e., the cutting and removal of a tree that does not interfere or threaten to interfere with Appellant's transmission lines. The courts below were asked to determine the rights reserved to the easement's grantor and whether such included the right to prevent the destruction of their tree which stands on their property, albeit within the easement.

Construing an instrument does not depend upon who the parties are as courts interpret a deed, lease, license, or easement applying the same rules of construction. Appellant is entitled to no advantage or special treatment because it is a public utility, and the interest in and rights of

property owners to their property are not minimized nor are they placed at a disadvantage because they are not (a public utility).

There is nothing novel, unique, or of general or great public interest about this concept.

Appellant asks this Court to designate the Public Utilities Commission of Ohio (“PUCO”) as the arbiter of all things real estate, concluding that the PUCO is better suited to interpret and declare the rights set forth in an instrument creating an easement just because the grantee to that instrument happens to be a public utility. This Court soundly rejected any such proposition 87 years ago by distinguishing between the general authority and plenary power of the common pleas courts with the PUCO’s exclusive, but limited jurisdiction:

The judicial power of the state is vested in courts, the creation of which and their jurisdiction is provided for in the judicial article of the constitution, Article IV. The public utilities commission is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights.

New Bremen v. PUC (1921), 103 Ohio St. 23, 30-31.

Appellant, in its Memorandum in Support of Jurisdiction (“Juris. Memo.”) has not called this Court’s attention to anything having occurred in the intervening 87 years since *New Bremen* warranting this Court to reconsider, revise, or reverse its decision therein or any of the above-cited three self-evident truths, i.e., (1) the judicial power of the state is vested in courts, the creation of which and their jurisdiction is provided for in Art. IV of the Ohio constitution, (2) the PUCO is in no sense a court, and (3) the PUCO has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights.

This case is not about the maintenance of electrical transmission conductors in accordance with industry guidelines.¹ Appellant has successfully maintained its transmission conductors which have crossed over the subject property for more than 35 years without the interference or the threat of interference to Appellant's equipment. This case is about property owners enforcing the limitations set forth in the easement Appellant drafted.

The language Appellant employed in its Juris. Memo., i.e., "clear and unequivocal right to remove [the tree]"² reflects Appellant's refusal to acknowledge that any property owner retains any rights to his/her property within the easement. Appellant's rights exist only if a court decrees it, not because Appellant says so. Here, the trial and appellate courts both determined that the facts as presented did not support, as a matter of law, the claimed "clear and unequivocal right to remove [the silver maple tree]" as said tree did not interfere or threaten to interfere with Appellant's transmission lines. What is clear and unequivocal is that Appellant is unaccustomed to having a court rule against it!

Finally, this case does not present issues relating to standard industrial practices,³ nor does it demonstrate any lack of uniformity regarding utility practices.⁴

The evidence presented to the trial court and affirmed by the appellate court supported the conclusion that both the lone tree within the easement [and on the property] and the Appellant's transmission lines have peacefully co-existed, with neither causing harm or threatening to cause

¹ Juris. Memo., at 3.

² Id.

³ Juris. Memo. at 4.

⁴ Juris. Memo. at 6.

harm to the other, and that they can continue in that relationship. Demonstrating its concern for the uniformity regarding utility practices, the appellate court below extensively discussed the leading case relied upon by Appellant, i.e., *Beaumont v. FirstEnergy Corp.*, 11th Dist. No. 2004-G-2573, 2004-Ohio-5295, when arriving at the conclusion that the tree did not interfere or threaten to interfere with Appellant's transmission lines.

Beaumont (also involving this Appellant), where the easement at issue was virtually identical to the easement at issue herein, held that “[Appellant herein does] not have the complete authority to remove every tree from the entire easement premises.” *Beaumont*, ¶33. The only difference between the decision below and in *Beaumont* is that herein the appellate court found from the evidence that the easement did not grant the privilege to destroy a tree, whereas the evidence in *Beaumont* did support such action by the utility. The two courts applied the law uniformly; the facts differed.

The issue presented to the appellate court below and upon which it ruled involved a question of real property, not the operation of a utility. Neither the issue presented nor the decision rendered rises to the level of public and great general interest for which further review is needed, and Appellant will continue to provide Ohio with the safe delivery of electric power.

STATEMENT OF THE CASE AND FACTS

This case involves the interpretation of the rights granted and rights reserved in an easement. The subject easement runs through the back portion of the property owned by Appellees Mary-Martha and Dennis Corrigan (“Corrigans”) and was in effect at the time the Corrigans’ acquired their property in 1975. The easement granted Appellant, The Illuminating Company (“CEI”), the right to, inter alia, construct, inspect, protect, repair, or remove CEI

towers, poles, wires, fixtures and appliances, together with “full authority to cut and remove any trees, shrubs, or other obstructions upon the above described property which may interfere or threaten to interfere with the construction, operation and maintenance of said transmission lines.”

For as long as the Corrigan's have lived and raised their family at 4520 Outlook Drive, Brooklyn, Ohio, there has been a majestic silver maple tree providing shade, comfort, and recreation⁵ in their back yard. And until 2004, CEI pruned and otherwise maintained this silver maple tree consistent with recognized and accepted industry standards. Having been so maintained by CEI's forestry department, the silver maple tree thrived without interfering or threatening to interfere with the construction, operation and maintenance of CEI's transmission lines, and vice versa.

2004 saw no change in industry standards, regulatory guidelines, or tree maintenance practice. However, in 2004, the Corrigan's received notice from CEI that it intended to cut and remove this tree. CEI's reason (in so many words) – “because we can, easement says;” CEI's support for taking this drastic action (in so many words) – “because we say so.”

For almost two generations, the tree that had been compatible and non-threatening to anyone or anything, CEI now declared the tree as incompatible vegetation, constituting a threat to its (CEI's) transmission lines, mandating its destruction.

The Corrigan's initiated an action in the Cuyahoga County Common Pleas Court seeking a declaratory judgment as to each party's rights under the easement and for injunctive relief to preserve their tree.

⁵ A rope swing still hangs from a tree branch.

Evidence before the common pleas court demonstrated that the tree as maintained did not present itself in such a condition that would interfere or threaten to interfere with CEI's transmission lines, and with proper care and maintenance, the tree would not interfere or threaten future interference with CEI's transmission lines. The trial court (1) declared that the easement did not grant CEI the right to remove the Corrigans' tree and (2) granted relief enjoining CEI from removing the Corrigans' silver maple tree.

In affirming the trial court's decision, the appellate court majority concluded that: (1) the issue before the trial court involved the interpretation of the contractual language of the easement which "does not require PUCO's administrative expertise to resolve the issue." Slip Op., at 3; (2) CEI "does not have the [unfettered] right to remove any and/or all trees within its easement," Slip Op., at 6; and (3) the trial court's judgment was supported by competent credible evidence in that the Corrigans' tree did and does not pose a possible threat to the transmission lines at issue, i.e., does not interfere or threaten to interfere. Slip Op., at 10.

CEI has taken its appeal to this Court.

APPELLEES' RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

Proposition of Law No. 1: A Common Pleas Court May Consider Evidence of Actual Harm Or The Lack Thereof In Determining Whether Vegetation Within An Easement Interferes Or May Threaten To Interfere With A Utility's Electrical Lines.

An easement grants a non-possessory interest in land that entitles the owner of the dominant estate (easement grantee) to the limited use of the serviant estate (easement grantor). *Gans v. Andrulis* (May 18, 2001), 11th Dist. No. 99-P-0118, 2001 Ohio App. LEXIS 2242, *8. The owner of a dominant estate may not increase the burden nor materially enlarge his right over

the servient estate. *Hiener v. Kelley* (July 23, 1999), 4th Dist. No. 98CA7, 1999 Ohio App. LEXIS 3570, *33, discretionary appeal not allowed (1999), 87 Ohio St.3d 1441. The owner of an easement has less control of the land than is normally had by persons who have a possessory interest in the land. *Cleveland v. Clifford* (9th Dist. 1997), 121 Ohio App.3d 59, 62. A clearly expressed limitation upon the grant of an easement will be enforced. *Devoe v. Lavelle*, 5th Dist. No. 03 CA 94, 2004-Ohio-3300, ¶9.

A party to an easement may invoke the equitable jurisdiction of the common pleas court, by way of an injunction, to enforce rights pursuant to the easement. *Murray v. Lyon* (9th Dist. 1994), 95 Ohio App.3d 215, 221. Easement holders, including public utilities, invoke the court's equity jurisdiction to enjoin conduct of the property owner where interference with the easement is claimed, e.g., *Columbia Gas Transmission Corp. v. Adams* (Fairfield CP 1994), 68 Ohio Misc.2d 29, 34 (easement owner secured a permanent injunction ordering the property owner to remove objects within the easement that unreasonably interfered with or obstructed the reasonable and proper enjoyment and use of the easement), *Ohio Power Co. v. Bauer* (5th Dist. 1989), 60 Ohio App.3d 57 (easement owner invoked the equitable jurisdiction of the common pleas court to enjoin defendants from interfering with its use and enjoyment of the easement and access).

Once invoked, the trial court possesses discretionary authority to weigh the parties' competing interests and exact an equitable division of their property rights. *Hiener*, 1999 Ohio App. LEXIS 3570 at *35, *Murray*, at 221. A court may define the scope of an easement by what is reasonably necessary and convenient to accomplish the purpose for which the easement was granted. *Hiener*, 1999 Ohio App. LEXIS 3570 at *34-35.

When a dispute arises over the scope and extent of an easement, the primary purpose is to ascertain the intent of the parties. *Gans*, 2001 Ohio App. LEXIS 2242, at *9. Generally, this will be accomplished by looking at the text of the easement, and if the intent is plain on the face of the instrument, then it is not necessary or permissible to resort to rules of construction or parol evidence to determine the easement's effect. *Id.* If an easement is clear and unambiguous, then its interpretation is a matter of law, and there are no issues of fact to be determined. *Id.* Where express terms of an easement are ambiguous, the trial court may consider the subsequent conduct of the parties in relation to the subject matter as acquiescence of a certain construction of the grant of the easement which estops the assertion of a different construction. *Roebuck v. Columbia Gas Transmission Corp.* (3rd Dist. 1977), 57 Ohio App.2d 217.

Herein, a dispute arose over the interpretation in the language of the easement which would either permit or prevent CEI's removal of the Corrigans' tree. As the court below recognized, CEI did not have the unfettered right to remove the silver maple. The easement granted permission to cut and remove the tree only if it interfered or threatened to interfere with CEI's transmission lines. Whether the silver maple interfered or threatened to interfere with CEI's transmission lines became a judgment call, and the call belonged to the judgment of the common pleas court, not to CEI.

In defining what may or may not interfere or threaten interference, the appellate court correctly took into consideration a variety of factors, including past practices. The court below commented that with proper maintenance, no harm came to CEI's transmission lines, the Corrigans' tree, and the consumers of electric energy. The court below never stated as the sole standard in interpreting the easement that CEI must demonstrate actual harm before it can

remove the Corrigan's' tree. As the easement specified that CEI could remove a tree that interfered or threatened to interfere with CEI's transmission lines, the court below required CEI to prove such fact before sanctioning the authority CEI sought. In doing so, the appellate court considered CEI's evidence from its witnesses, Slip Op., at 7, the testimony from the Corrigan's' witnesses, Slip Op. at 9, and acknowledged that "the community has not experienced any disruption of electrical service resulting from the continued existence of the Corrigan's' tree. Slip Op., at 10. CEI's disagreement with the appellate court's consideration of absence of past harm does not render incorrect the appellate court's decision or the criteria it reviewed in arriving at its decision.

As put forth to the Corrigan's, as put forth to the trial court, as put forth to the court of appeals, and as now put forth to this Court, the only factor which CEI accepts in arriving at the conclusion that the Corrigan's' tree interferes or threatens to interfere with the transmission lines is "because we say so." The Corrigan's, the trial court, and the court of appeals did not accept this as the basis for the silver maple's destruction. Nothing presented by CEI warrants acceptance of this standard as a proposition of law effecting the property rights of Ohio's citizens.⁶ Some evidence going to all the essential elements of the case supported the trial court's judgment commanding its affirmation by the appellate court.⁷ Should this Court accept jurisdiction of this

⁶ The rights related to property, i.e., to acquire, use, enjoy, and dispose of property are among the most revered in our law and traditions and are integral aspects of our theory of democracy and notions of liberty. *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶34.

⁷ *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280.

case, this Court will likewise find that the evidence and the law supports the Corrigan and the continued good health and existence of their silver maple tree.

**Proposition of Law No. 2:
An Easement Granted To A Utility Is No Different Than An Easement
Granted To A Non-Utility And Such Easement Is Construed In Accordance
With The General Principles Of Law By A Common Pleas Court Which
Possesses Subject Matter Jurisdiction To Declare The Rights And
Limitations Contained Within Such Easement.**

CEI's Second Proposition of Law, phrased differently and in a more straight-forward manner, would read as it did when presented to the trial court and appellate court – exclusive jurisdiction to hear and determine the issues raised by the Corrigan in their Complaint rests with the PUCO. See, Slip Op., at 2. The appellate court below properly and quickly dispatched with this issue noting:

In fact, the Illuminating Company relies on a similar case in which the jurisdiction of the common pleas court was never even raised by the parties or questioned by the common pleas court. See *Beaumont v. [FirstEnergy Corp., 11th Dist.]* No. 2004-G-2573, 2004-Ohio-5295.

R.C. Chapter 4901 regulates the business activities of public utilities, creating the PUCO to administer and enforce these provisions. *Kazmaier Supermarket v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150. Because of the comprehensive nature of this statutory scheme, “[the PUCO] has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except the Supreme Court) any jurisdiction over such matters.” *State ex rel. Columbia Gas of Ohio v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, at ¶16, quoting *State ex rel. Cleveland Electric Illuminating Co. v. Cuyahoga County Court of Common Pleas*, 88 Ohio St.3d 447, 450, 2000-Ohio-379.

Over the years, and given opportunities to do so, this Court has not improved upon its language in *New Bremen*, either enlarging that which the PUCO may hear and further limiting that which the common pleas courts may adjudicate, e.g., *State ex rel. Dayton Power & Light Co. v. Riley* (1978), 53 Ohio St.2d 168, 169-170, *Marketing Research Services, Inc. v. Public Utilities Commission* (1987), 34 Ohio St.3d 52, 56, *Hull v. Columbia Gas*, 110 Ohio St.3d 96, 2006-Ohio-3666, ¶31. See also, *Southgate Development Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, 215 (“Neither the Federal Power Commission nor the Public Utilities Commission has jurisdiction to construe or enforce an easement contract. The subject matter of this action arises in contract and the determination of questions of construction or validity, together with the declaration of rights, status or other legal relations under such contracts, by Common Pleas Courts is specifically authorized by R. C. 2721.03”).

Arguably, every claim against a public utility is a complaint involving the “service” of or by such utility. *State ex rel. Ohio Edison Co. v. Morris* (Dec. 3, 1984), 5th Dist. No. CA-6432, 1984 Ohio App. LEXIS 11825, at *11-12. What is not within the exclusive realm of the PUCO, i.e., rates and service, remains the subject for the common pleas courts to hear and determine, even where such issues involve utilities regulated by the PUCO. *Pacific Indemnity Insurance Company v. The Illuminating Company*, 8th Dist. No. 82074, 2003-Ohio-3954, ¶10-11.

The Corriganes, as the plaintiffs, cast their Complaint seeking the enforcement of an easement between the parties. *Cleveland v. Cleveland Electric Illuminating Co.* (1996), 115 Ohio App.3d 1, 11, appeal dismissed (1997), 78 Ohio St.3d 1419. The Corriganes’ Complaint did not allege violations of statutes and regulations involving public utilities. *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-

5312, ¶30. In bringing their action the Corrigan's were the masters in deciding the law upon which they will rely. *Cleveland v. Cleveland Electric Illuminating Co.* (1996), 115 Ohio App.3d 1, 12, appeal dismissed (1997), 78 Ohio St.3d 1419.

The trial court reviews the substance of the claims against a utility to determine whether the allegations are sufficient to confer jurisdiction upon itself or seeks relief which only the PUCO can grant. *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common Pleas*, 97 Ohio St.3d 69; 2002-Ohio-5312, ¶21. The Corrigan's' Complaint presented "truth in pleading."

This action sought to adjudicate a controversy between the parties as to their respective property rights – those activities allowed by and the limitations contained within the easement – all of which falls outside the PUCO's limited exclusive jurisdiction over rates and services. Accepting CEI's argument, the common pleas court's authority to enforce easement rights would be limited only to those instances when it is the utility who invokes the trial court's jurisdiction, e.g., *Columbia Gas Transmission Corp. v. Adams* (1994), 68 Ohio Misc.2d 29, 34, *Ohio Power Co. v. Bauer*, 60 Ohio App.3d 57, but not where the action is initiated by the property owner.

From the outset, this case focused on the interpretation and application of a provision contained an easement through an instrument Appellant drafted. CEI failed to produce any evidence of any nature that PUCO's expertise was essential in resolving the interpretation and application of the easement – that is if the PUCO has expertise in interpreting language in an instrument of conveyance or in exercising equity, which, per *New Bremen*, is outside PUCO's jurisdiction.

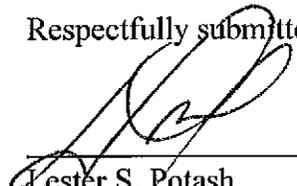
The court below properly concluded that this case presented an issue involving real property rights, that the common pleas court possessed the requisite jurisdiction to hear and

determine an issue involving property rights, and that the common pleas court arrived at the proper decision when doing so.

CONCLUSION

WHEREFORE, for the reasons stated herein, Mary-Martha Corrigan and Dennis Corrigan respectfully submit that this case does not present any issue of public or great general interest, thus does not warrant further review by this Court and that this Court, accordingly, should issue an order which denies jurisdiction.

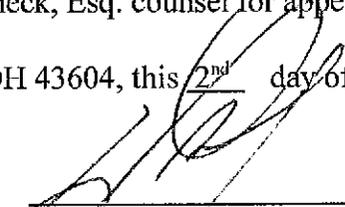
Respectfully submitted,



Lester S. Potash
Counsel for Appellees
Mary-Martha and Dennis Corrigan

CERTIFICATE OF SERVICE

A true copy of the foregoing Appellees' Memorandum Opposing Jurisdiction has been deposited in the United States Mail, postage prepaid, for service upon Denise M. Hasbrook, Esq., Donald S. Scherzer, Esq., and Emily Ciecka Wilcheck, Esq. counsel for appellant, at Roetzel & Andress, LPA, One SeaGate, Suite 999, Toledo, OH 43604, this 2nd day of May, 2008.



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