ORIGINAL

IN THE SUPREME COURT OF OHIO

THOMAS & DERRELL WILKES	)	**CASE NO.** 11-0737
	)	
	)	
	)	**On Appeal from the Decision of the Public Utilities Company of Ohio in Case No.09-682-EL-CSS**
Complainants-Appellants,	)	
	)	
	)	
vs.	)	
	)	
	)	**NOTICE OF APPEAL**
OHIO EDISON COMPANY	)	
	)	
	)	
	)	
Respondent-Appellee.	)	

Now come the complainants-appellants, through counsel, and hereby give notice that they are appealing the decision by the Public Utilities Commission of Ohio dismissing the Appellants' Complaint in Case No. 09-682-EL-CSS on February 23, 2011, and the denial of the Appellants' Application for Rehearing on April 4, 2011. Attached hereto is the proposed Assignments of Error to be raised.

RECEIVED
MAY 03 2011
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAY 03 2011
CLERK OF COURT
SUPREME COURT OF OHIO

PROPOSED ASSIGNMENTS OF ERROR

The Appellants propose to raise the following assignments of error in the above appeal:

ASSIGNMENT OF ERROR I:

THE PUBLIC UTITILITES COMMISSION OF OHIO ACTED UNLAWFULLY AND UNREASONABLY IN DISMISSING THE APPELLANTS' COMPLAINT AGAINST OHIO EDISON WHEN IT RAISED A CLEAR SERVICE-RELATED ISSUE WHERE OHIO EDISON ADMITTED THAT THE LOCATION OF ITS 69KV TRANSMISSION LINES WERE IN VIOLATION OF THE NATIONAL ELECTRICAL SAFETY CODE AND IN DEROGATION OF THIS COURT'S CLEAR HOLDING IN *CORRIGAN V. ILLUMINATING COMPANY* (2009), 122 OHIO ST.3D 265.

ASSIGNMEN T OF ERROR II:

THE PUBLIC UTILITIES COMMISSION OF OHIO ACTED UNLAWFULLY AND UNREASONABLY WHEN IT DISMISSED THE APPELLANTS' COMPLAINT BY RULING THAT SINCE THE SAME SUBJECT MATTER WAS RULED UPON IN THE CONTEXT OF AN EASMENT DISPUTE IN THE MAHONING COUNTY COMMON PLEAS COURT IT LACKED JURISDICTION.

ASSIGNMENT OF ERROR III:

THE PUBLIC UTILITIES COMMISSION OF OHIO ACTED UNLAWFULLY AND UNREASONABLY WHEN IT DISMISSED THE APPELLANTS' COMPLAINT AS TO THE UNJUSTLY DISCRIMATORY TREATMENT IT WAS RECEIVING FROM OHIO EDISON IN THE ENFORCEMENT OF ITS EASMENT WITHOUT A HEARING AND THE TAKING OF TESTIMONY.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served upon the following via regular U.S. Mail on this 27th day of April 2011:

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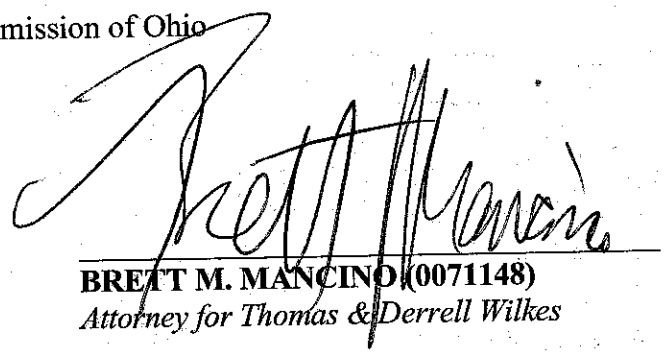

BRETT M. MANCINO (0071148)
Attorney for Thomas & Derrell Wilkes

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Thomas & Derrell Wilkes,	)	
Complainants,	)	
v.	)	Case No. 09-682-EL-CSS
Ohio Edison Company,	)	
Respondent.	)	

ENTRY

The Commission finds:

(1) On August 5, 2009, Thomas and Derrell Wilkes (the Wilkes or complainants) filed a complaint against Ohio Edison Company (Ohio Edison). In the complaint, the Wilkes allege that Ohio Edison operates a 69kV transmission line that runs too close to structures on the Wilkes' property and that Ohio Edison should move the line to comply with the National Electrical Safety Code (NESC). In the alternative, the Wilkes request that the Commission determine whether Ohio Edison's 69kV line is located at a safe distance from their property.

More specifically, the Wilkes allege that in 1993 they constructed a storage shed and a swimming pool on their property. Relying upon the affidavit of Ohio Edison's engineer, the Wilkes contend that the location of Ohio Edison's 69kV line does not comply with the NESC because of its proximity to the storage shed and swimming pool. According to the affidavit, the distance of the 69kV line from the swimming pool is 20.7 feet. To comply with the NESC, the distance should be 25.7 feet. The distance of the 69kV line from the shed is 10 feet. To comply with the NESC, the distance should be 13.2 feet.

(2) On August 25, 2009, Ohio Edison filed an answer and a motion to dismiss. In its motion to dismiss, Ohio Edison alleges that

the complaint should be dismissed for lack of subject matter jurisdiction and for failure to state reasonable grounds.

Ohio Edison contends that this complaint arises from an action for declaratory and injunctive relief to enforce a public utility easement. Ohio Edison discloses that it filed an action for injunctive relief in the Mahoning County Court of Common Pleas.[1] Ohio Edison states that it obtained an easement for its Boardman-Pidgeon South 69kV transmission line (69kV line) in 1949.[2] In its complaint, Ohio Edison seeks to compel the defendants to remove the swimming pool and the storage shed from the right of way granted by the easement. Moreover, Ohio Edison claims that it has the right to clear obstructions within a distance of 50 feet of the center of the right of way.

When Ohio Edison discovered the encroachments in October 2008, it immediately requested that the Wilkes remove the structures from the right of way. When the Wilkes refused to remove the swimming pool and storage shed, Ohio Edison states that it responded by filing a complaint for declaratory and injunctive relief. As of the filing of its motion to dismiss, Ohio Edison states that the case is still pending.

Ohio Edison points out that the material facts are not in dispute. The Wilkes admit in their complaint that their swimming pool and storage shed are located in Ohio Edison's right of way and too close to Ohio Edison's transmission line. Rather than compelling Ohio Edison to relocate its line, Ohio Edison asserts that the appropriate remedy is to have the Wilkes remove the two encroachments.

(3) Ohio Edison argues that the Commission lacks subject matter jurisdiction because this matter arises from Ohio Edison's enforcement of property rights granted by an easement. Such property matters, according to Ohio Edison, are properly adjudicated in a court of common pleas. By contrast, Ohio Edison contends that the Commission's jurisdiction under Section 4905.26, Revised Code, extends only to service-related complaints.

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1 *Ohio Edison v. Thomas W. Wilkes, et al.*, Case No. 2009-CV-01280 (filed April 9, 2009).

2 In its answer filed concurrently with its motion to dismiss, Ohio Edison states that it constructed the 69kV line in the early 1960s.

In effect, Ohio Edison believes that the complainants are improperly requesting the Commission to decide that the Wilkes right to construct a swimming pool and storage shed on their property in 1993 supersedes Ohio Edison's right to maintain an easement obtained in 1949. Citing Ohio case law, Ohio Edison concludes that its position is correct.

(4) In addition to a lack of subject matter jurisdiction, Ohio Edison urges the Commission to dismiss the complaint for failure to state reasonable grounds. Ohio Edison contends that the complainants fail to identify any policy or practice by Ohio Edison that would be cognizable under Section 4905.26, Revised Code. Reiterating that the appropriate remedy is for the complainants to remove the swimming pool and storage shed, Ohio Edison advocates the dismissal of the complaint.

(5) On September 3, 2009, the complainants filed a memorandum contra Ohio Edison's motion to dismiss. In their memorandum, the complainants contend that the Commission has exclusive jurisdiction to hear service-related and safety-related issues. Relying on the affidavit of Ohio Edison's transmission engineer, the complainants argue that the 69kV line presents an unsafe and hazardous condition in violation of the NESC. Moreover, the complainants point out that the affidavit of Ohio Edison's transmission engineer proclaims that the location of the transmission lines "unduly interferes with the safe and efficient operation of the 69kV transmission lines." The complainants argue that the Commission has exclusive jurisdiction over matters relating to the NESC. In addition, the complainants believe that the Commission's expertise is needed to determine whether there is a violation of the NESC.

Referring to a brief filed by Ohio Edison before the Ohio Supreme Court in *DeLost v. FirstEnergy Corp. et al.*, Case No. 2008-1329 (*DeLost*), the complainants highlight that Ohio Edison argued that the Commission has exclusive jurisdiction over safety standards. The complainants further point out that Ohio Edison reasoned in its brief that the Commission must have exclusive jurisdiction to ensure consistent statewide regulations related to electric utilities. Further explaining Ohio Edison's position, the complainants add that Ohio Edison argued that judges and courts do not have current knowledge

and expertise to resolve issues relating to the delivery of electric service.

The Wilkes believe that the action filed in common pleas court is irrelevant to this case because the Wilkes are calling upon the Commission's expertise to interpret and enforce the NESC. The Wilkes reject the notion that their placement of the swimming pool and storage shed has any effect on the Commission's jurisdiction. The Wilkes point out that the Ohio Administrative Code does not speak to how or when an object's proximity to an electric transmission line became a violation of the NESC. Thus, the Wilkes conclude that the Commission has exclusive jurisdiction to consider NESC issues.

The Wilkes also reject the notion that this matter concerns the determination of property rights. Instead of property rights, the Wilkes emphasize that they seek to enforce the NESC against Ohio Edison. Similarly, the Wilkes reject Ohio Edison's claim that this matter concerns an easement dispute filed in common pleas court. Even though Ohio Edison seeks to enforce an easement, the Wilkes maintain that the Commission is not divested of its jurisdiction. The Wilkes regard Ohio Edison's action to enforce an easement in common pleas court as unreasonable, unjustly discriminatory, and a violation of law.

The complainants admit that the location may be a technical violation of the NESC. They note, however, that their neighbors have structures that infringe upon the same 69kV line and that Ohio Edison has not sought to enforce the NESC against their neighbors. The Wilkes find that this is unjustly discriminatory. The Wilkes proclaim that it is unreasonable and unjust for Ohio Edison to seek the removal of their swimming pool and storage shed from their present location after 15 years without incident. As a final point, the Wilkes argue that it is against the law for Ohio Edison to attempt to enforce the NESC against them because the law charges Ohio Edison with compliance with the NESC.

(6) Ohio Edison filed a reply on September 11, 2009. Ohio Edison reiterates that the right-of-way granted by its 1949 easement grants it the right to clear any "trees, bushes, and other obstructions within a distance of fifty feet from the center of

said right-of-way." From this, Ohio Edison concludes that it may seek a mandatory injunction from a common pleas court to compel the removal of encroachments.

Noting that there is no dispute that a violation of the NESC exists from proximity of the complainants' structures to the 69kV line, Ohio Edison concludes that the only issue is whether a common pleas court is the proper forum to enforce the terms of the easement. Ohio Edison relies on *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265 (2009) (*Corrigan*) for the principle that the Commission does not have jurisdiction to interpret and enforce a public utilities easement. Ohio Edison, therefore, concludes that *Corrigan* prevents the Commission, for jurisdictional reasons, from compelling Ohio Edison to move its 69kV line.

Ohio Edison rejects the complainants' reliance upon *DeLost* as inapposite.[3] Ohio Edison distinguishes *DeLost* because it did not involve the enforcement of an easement. Instead, according to Ohio Edison, the court determined whether it was reasonable vegetation management for Ohio Edison to remove trees instead of trimming them.

Ohio Edison disagrees with the Wilkes' characterization of its engineer's affidavit. Ohio Edison denies that its engineer states that the transmission lines present an unsafe and hazardous condition. Instead, Ohio Edison clarifies that the structures placed by the Wilkes create an unsafe and hazardous condition. Ohio Edison adds that the Wilkes have wrongfully prevented Ohio Edison from removing the encroachments from the right-of-way.

In sum, Ohio Edison believes that the Wilkes are attempting to obtain an improper order from the Commission determining that the Wilkes' property rights supersede Ohio Edison's easement. To Ohio Edison, it is clear that the Commission has no jurisdiction to issue such an order. Moreover, Ohio Edison contends that the Commission does not have jurisdiction to

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3 In *DeLost*, 119 Ohio St. 3d 1469, 894 N.E. 2d 330 (2008), the Ohio Supreme Court acknowledged that *Corrigan* and *DeLost* set forth conflicting rulings. The Court stated the issue as "Does a complaint seeking to prevent the removal of trees and vegetation within an easement owned by the utility company fall within the exclusive jurisdiction of the Public Utilities Commission of Ohio or is it a pure contract case in which jurisdiction lies with the common pleas court?"

order Ohio Edison to move the 69kV line. For these reasons, Ohio Edison urges the Commission to dismiss the complaint for lack of jurisdiction and failure to state reasonable grounds.

(7) On August 30, 2010, the complainants filed a pleading entitled "Request for Ruling on Motion to Dismiss." Their pleading requests a ruling from the Commission on Ohio Edison's August 25, 2009, motion to dismiss. The complainants seek an order from the Commission compelling Ohio Edison to move its 69kV line to comply with the NESC. In the alternative, the complainants request an order from the Commission establishing that the 69kV line is located at a safe distance from the complainants' property.

(8) On September 1, 2010, Ohio Edison supplemented its motion to dismiss and provided supplemental authority. In further support of its contention that jurisdiction of this matter lies with the Mahoning County Court of Common Pleas, Ohio Edison points to an August 16, 2010, magistrate's decision in which the court asserted jurisdiction and granted Ohio Edison's request for a mandatory injunction.[4] The magistrate found that the complainants' swimming pool and storage shed are located within Ohio Edison's right-of-way. Moreover, the magistrate determined that the location of the structures conflict with the NESC. The magistrate, therefore, ordered the complainants to relocate their swimming pool and storage shed.

Relying on precedent from the Ohio Supreme Court, Ohio Edison adds that a court of common pleas has the authority to determine its jurisdiction over the subject matter of a dispute. Moreover, it may adjudicate the whole issue and settle the rights of the parties. Furthermore, in the exercise of its jurisdiction, the court excludes all other tribunals.

(9) On November 8, 2010, the attorney examiner scheduled a settlement conference to take place on December 15, 2010.

(10) On November 23, 2010, Ohio Edison filed a supplemental memorandum in support of its motion to dismiss. Ohio Edison also moved to cancel the settlement conference. Ohio Edison

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4 Ohio Edison attached a copy of the magistrate's decision to its pleading.

explained that it had obtained a final judgment in its favor from the Mahoning County Common Pleas Court. In its final judgment, the court ordered the complainants to move the swimming pool and shed. With a final judgment from a common pleas court in hand, Ohio Edison challenged the Commission's jurisdiction to hear the issues raised by the complaint. Consequently, Ohio Edison labeled the settlement conference as unnecessary and inappropriate.

(11) On December 2, 2010, the complainants opposed Ohio Edison's motion to cancel the settlement conference. The complainants reiterated their arguments that the Commission has exclusive jurisdiction to hear issues relating to the NESC.

(12) Ohio Edison filed a reply on December 9, 2010. In its reply, Ohio Edison emphasized that the Mahoning County Common Pleas Court has issued a final judgment resolving the NESC and easement issues. Ohio Edison, therefore, concluded that the Commission must dismiss the complaint for lack of jurisdiction and failure to state a claim.

(13) On December 15, 2010, the attorney examiner issued an entry denying Ohio Edison's motion to cancel the settlement conference. The parties convened for the settlement conference as scheduled.

(14) On February 7, 2011, the complainants filed a motion renewing their request for an order compelling Ohio Edison to move its power line to comply with the NESC. They did not resolve any issues.

(15) Ohio Edison filed a memorandum contra on February 16, 2011. Ohio Edison states in its memorandum that the complainants have been issued a court order to move their swimming pool and shed by February 17, 2011. The appellate court has denied the complainants' motion for a stay of the order. Ohio Edison believes that the complainants' motion is an attempt to evade the court order.

Ohio Edison contends that the complainants' motion is procedurally and substantively flawed. By seeking the immediate relocation of Ohio Edison's power line without a hearing, Ohio Edison contends that the complainants are, in effect, requesting a summary judgment. Ohio Edison points

out that there is no provision for summary judgment in the Commission's rules.

Ohio Edison argues again that the Commission has no jurisdiction over this matter because the Mahoning County Common Pleas Court has properly exercised jurisdiction and has rendered a final judgment concerning the facts and issues presented to the Commission. Moreover, Ohio Edison cites case law that establishes that where a court properly exercises jurisdiction over a dispute it has authority to adjudicate the whole issue and settle the rights of the parties to the exclusion of all other tribunals. Because the common pleas court has asserted jurisdiction over the NESC issues, Ohio Edison deduces that it has effectively barred the Commission from hearing the complaint. Ohio Edison, therefore, concludes that the complaint should be dismissed. In addition, Ohio Edison warns that the complainants' motion to enlist the aid of the Commission is tantamount to improper collateral attacks on a judgment rendered by a state court.

In its analysis of the complaint, Ohio Edison concludes that the complainants have failed to state reasonable grounds for complaint. Whether Ohio Edison failed to move power lines or discriminated against the complainants, Ohio Edison rejects that the complainants have asserted cognizable claims. To Ohio Edison, refusal to move its power line cannot be unjust, unreasonable, or unlawful where subsequently built structures have been located too close to the power line.

Ohio Edison rejects the complainants' allegation that it enforces its easement in a discriminatory manner. Ohio Edison points out that the Commission's rules require that the facts that support an allegation of discrimination must be alleged with particularity. Ohio Edison highlights that the complainants did not plead discrimination at all in the complaint. The first allegation of discrimination appears as one sentence in the complainants' response to Ohio Edison's motion to dismiss. There, the complainants note that Ohio Edison has not enforced its easement rights against the complainants' neighbors. Ohio Edison declares that this falls short of the pleading standard set forth in the rule. The complainants do not identify the location of the structures, whether the structures are located in the easement, what the distance is between the structures and the

power lines, whether there are violations of the NESC, or the location of the neighbors. Given these flaws, Ohio Edison concludes that the complainants have not stated reasonable grounds for discrimination.

Ohio Edison contends that the Commission's administrative expertise is not required to resolve the disputes raised by the complaint. Ohio Edison argues that the complainants have failed to show that the Commission's expertise is needed to interpret NESC rules. There is no dispute concerning the NESC. There is no need for the Commission to engage in any calculation or analysis. The parties agree that there are insufficient clearances and that there is a resulting violation of the NESC. The only dispute concerns the remedy, i.e., whether the complainants' property or the power lines should be moved. The NESC only establishes minimum clearances. It does not provide guidance on whether the structure or facility should be moved. Ohio Edison, therefore, concludes that there are no NESC issues that require the Commission's expertise to adjudicate.

(16) The parties present the issue of whether the location of a swimming pool and storage shed within a public utility easement and in violation of the NESC must be resolved by the Commission or a court of common pleas. Upon consideration of the pleadings, we conclude that it is appropriate to grant Ohio Edison's motion to dismiss.

For its decision in *Corrigan*, the Ohio Supreme Court applied a two-part test for jurisdiction that it adopted[5] in *Allstate Insurance Co. v. Cleveland Electric Illuminating Co.*, 119 Ohio St. 3d 301, 893 N.E. 2d 824 (2008) (*Allstate*). Two questions determine whether the Commission has exclusive jurisdiction. The first is whether the Commission's administrative expertise is required to resolve the issue in dispute. The second is whether the act complained of constitutes a practice normally authorized by the utility. If the answer to either question is in the negative, the claim is not within the exclusive jurisdiction of the Commission. *Corrigan*, 122 Ohio St. 3d 267, 910 N.E. 2d 1012 (2009).

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5 Adopted from the Ohio Eighth District Court of Appeals in *Pacific Indemnity Insurance Co. v. Illuminating Co.*, 2003 WL 21710787 (2003).

(17) In *Corrigan*, the Court determined that the removal of a tree from an easement was a matter within the exclusive jurisdiction of the Commission. Applying the *Allstate* test, the Court reasoned that tree removal was governed by the utility's vegetation management plan, which is regulated by the Commission. Thus, the Commission's administrative expertise was necessary to determine whether removal of the tree was reasonable. Accordingly, the Court answered in the affirmative for part one of the *Allstate* test. The Court also answered in the affirmative for part two of the test. Vegetation management, the Court stated, is a practice normally authorized by the utility to maintain safe and reliable electric service. Answering both questions in the affirmative, the Court determined that the case fell within the exclusive jurisdiction of the Commission.

The Court rejected the argument that the case is about an easement. The Court even acknowledged that the easement granted the utility the right to remove any tree within the easement that could pose a threat to the transmission lines. However, the Court emphasized that the property owners did not challenge the language of the easement. Instead, the property owners challenged the company's decision to remove the tree instead of pruning it. From this, the Court concluded that the property owners asserted an attack on the utility's vegetation management plan, a service-related issue.

(18) In *DeLost*, the property owners sought an injunction to prevent Ohio Edison from cutting down trees and other vegetation that were located within the company's easement. The *DeLost* court concluded that vegetation removal is a service-related practice requiring the Commission's administrative expertise. The court thus found that the removal of the trees was an issue within the exclusive jurisdiction of the Commission.

(19) Unlike the *Corrigan* and *DeLost* cases, this case is not about whether the Commission's expertise is needed to resolve vegetation management issues. To secure the Commission's jurisdiction, the complainants argue that the Commission's administrative expertise is needed to resolve issues relating to the NESC. We disagree. Both parties rely on the affidavit of David Kozy, Manager of Transmission Engineering for FirstEnergy Service Company. Neither party disputes his finding that the proximity of the swimming pool and storage

shed to the 69kV line violate the NESC. The parties merely dispute the remedy that should be applied to bring about compliance with the NESC. The Wilkes advocate moving the 69kV line. Ohio Edison urges the removal of the structures. Both parties acknowledge that there is a violation of the NESC and that removal of the structures pursuant to Ohio Edison's easement rights would resolve the NESC violation.

We agree with Ohio Edison that the Commission has no special expertise with respect to interpreting easements. Courts of common pleas are better suited to apply equitable and legal principles to resolve competing property rights. Consequently, we must answer in the negative the question of whether the Commission's administrative expertise is needed to resolve issues relating easements. The question of how to resolve the NESC violation would require the Commission's expertise only if the decision of the Mahoning County Common Pleas Court were to be reversed and it was found that the easement did not provide a basis for compelling removal of the structures to a safe distance.

(20) The second part of the *Allstate* test requires the Commission to consider whether the act complained of constitutes a practice normally authorized by the utility. In *Corrigan*, the Court determined that vegetation management by an electric utility is necessary to maintain safe and reliable service. The Court, therefore, answered in the affirmative the second part of the *Allstate* test.

Unlike the removal of trees and vegetation or location of a power line, the removal of structures from the property of a private landowner is not a practice authorized by a utility. We must, insofar as the issue can be resolved based on the terms of the easement, answer in the negative the second part of the *Allstate* test. We believe, as Ohio Edison has done, that the most prudent first course of action is for a utility to seek authority from a court of common pleas to remove the encroachments.

Answering in the negative both parts of the *Allstate* test, we conclude that, to the extent this matter can be resolved by the application of the terms of the easement, it is properly within the jurisdiction of the common pleas court to adjudicate the

competing property rights. Given that implementation of the Mahoning County Court's ruling will resolve any NESC violation, we grant Ohio Edison's motion to dismiss the complaint.

It is, therefore,

ORDERED, That, in accordance with Finding (20), Ohio Edison's motion to dismiss the complaint be granted. It is, further,

ORDERED, That the complaint be dismissed for lack of jurisdiction and failure to state reasonable grounds for complaint. It is, further,

ORDERED, That copies of this entry be served upon the parties, their counsel, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Steven D. Lesser, Chairman

Paul A. Centolella

Valerie A. Lemmie

Cheryl L. Roberto

LDJ/vrm

Entered in the Journal
FEB 23 2011

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Thomas and Derrell Wilkes,	)	
Complainants,	)	
v.	)	Case No. 09-682-EL-CSS
Ohio Edison Company,	)	
Respondent.	)	

ENTRY ON REHEARING

The Commission finds:

(1) On August 5, 2009, Thomas and Derrell Wilkes (the Wilkes or complainants) filed a complaint against Ohio Edison Company (Ohio Edison) seeking an order from the Commission compelling Ohio Edison to move its 69kV transmission line to comply with the National Electrical Safety Code (NESC). The complaint states that the proximity of Ohio Edison's power line and the complainants' swimming pool and shed violate the safe distance requirements specified by the NESC.

(2) In its answer filed August 25, 2009, Ohio Edison stated that the complainants have encroached upon its public utility easement and that it had filed an action in common pleas court to enforce its easement rights.[1] Characterizing the action as a property matter, Ohio Edison concluded that the Commission lacked subject matter jurisdiction to hear the case. Ohio Edison agreed with the complainants that there is a violation of the NESC because the complainants have placed their swimming pool and shed too close to Ohio Edison's power line.

(3) On February 23, 2011, the Commission issued an entry in which it granted Ohio Edison's motion to dismiss.

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1 *Ohio Edison Company v. Thomas E. Wilkes and Derrell C. Wilkes*, Case No. 09 CV 1280 (Mahoning County Ohio C.P.).

(4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

(5) On March 8, 2011, pursuant to Section 4903.10, Revised Code, the complainants filed an application for rehearing. Through its application for rehearing, the complainants seek an order from the Commission to enforce the NESC. The complainants assert that, under Rule 4901:1-10-06, Ohio Administrative Code (O.A.C.),[2] Section 4901.01, Revised Code, et seq., and the Ohio Supreme Court's decision in *Corrigan v. Illuminating Company* (2009), 122 Ohio St.3d 265 (*Corrigan*), the Commission has exclusive jurisdiction to enforce the NESC.

The complainants contend that the ruling of the Mahoning County Court of Common Pleas is irrelevant. It is the complainants' argument that Section 4905.26, Revised Code, should be read broadly to allow collateral attacks. Moreover, the complainants claim that the Commission's jurisdiction over service-related matters does not affect the jurisdiction of the common pleas court. In this instance, the complainants believe that the Commission has jurisdiction to decide whether Ohio Edison's transmission lines violate the NESC. According to the complainants, the common pleas court's consideration of the easement claim does not preclude the Commission from exercising jurisdiction over the NESC issue. Relying on their interpretation of *State ex rel. Illuminating Company v. Cuyahoga County Court of Common Pleas* (2002), 97 Ohio St.3d 69 (*State ex rel. Illuminating Company*), the complainants argue that the court and the Commission may address the easement and NESC issues, respectively, on parallel tracks.

In sum, the complainants believe that the Commission has exclusive jurisdiction over the NESC claims and that it should issue an order requiring Ohio Edison to move its power lines to comply with the NESC.

(6) On March 18, 2011, Ohio Edison filed a memorandum contra. Contrary to the complainants' assertion, Ohio Edison

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2 Each electric utility and transmission owner shall comply with the 2007 edition of the "American National Standard Institute's," "National Electrical Safety Code" approved by the "American National Standards Institute" and adopted by the "Institute of Electric and Electronics Engineers."

emphasizes in its memorandum contra that this case is not about the NESC. Ohio Edison believes that the complainants' application for rehearing is merely another attempt to evade a court order.

Outlining the court proceedings, Ohio Edison explains that the court addressed the same issues that the complainants have presented to the Commission. Ohio Edison states that it sought from the Mahoning Common Pleas Court an order compelling the Wilkes to move their swimming pool and shed. The Wilkes countered by asking the court to issue an order compelling Ohio Edison to move its power lines. Through summary judgment, the magistrate issued an order compelling the Wilkes to move their swimming pool and shed. The Wilkes filed objections. The court overruled the objections and adopted the magistrate's order. The Wilkes filed motions to stay the order in both the trial court and the appellate court. Both courts denied the motion. The case is currently pending before the Seventh District Court of Appeals.[3]

(7) Ohio Edison argues that the complainants' application for rehearing should be denied for three reasons, each sufficient by itself. First, Ohio Edison argues that the case is moot. The common pleas court has decided that the complainants' swimming pool and shed must be moved. Consequently, Ohio Edison contends that there is nothing to decide.

As a second basis for dismissal, Ohio Edison declares that the application for rehearing merely asserts arguments that the Commission has already considered and rejected. As an example, Ohio Edison points out that, in reliance upon *Corrigan*, the complainants concluded that the Commission has exclusive jurisdiction to enforce the NESC against public utilities. Ohio Edison finds this to be a repetition of a previous argument.

As a corollary to the Commission having exclusive jurisdiction to enforce the NESC, Ohio Edison highlights the complainants' argument that the court's assertion of jurisdiction does not change the scope of the Commission's jurisdiction. Ohio Edison, in response, contends that the complainants' argument

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3 *Ohio Edison Company v. Thomas Wilkes et al.*, Case No. 10 MA 174 (Ohio Seventh District Ct. App.).

is nearly a verbatim repetition of their opposition to Ohio Edison's motion to dismiss. Ohio Edison, therefore, concludes that the complainants have merely raised arguments that the Commission has considered and rejected.

As a third basis for dismissal, Ohio Edison declares that the Commission lacks jurisdiction over the complaint. In reaching this conclusion, Ohio Edison agrees with the Commission's application of the two part test in *Allstate Insurance Co. v. Cleveland Electric Illuminating Co.* (2008), 119 Ohio St. 3d 301, 893 N.E. 2d 824 (*Allstate*). In *Allstate*, the two part test is whether the Commission's expertise is required to resolve the dispute and whether the act complained of constitutes a practice normally authorized by the utility. If the answer to either question is in the negative, the claim is not within the exclusive jurisdiction of the Commission.

Because there is no dispute that there is a violation of the NESC, Ohio Edison concludes that the only dispute concerns the appropriate remedy. Ohio Edison argues that the Commission's expertise is not required to issue a remedy for the violation of NESC standards. To the contrary, Ohio Edison regards the dispute as an easement matter in which the Commission has no special expertise. Ohio Edison, therefore, believes that part one of the *Allstate* test must be answered in the negative.

As for the second part of the *Allstate* test, Ohio Edison supports the Commission's finding that the dispute does not involve a practice normally authorized by the utility. Ohio Edison reiterates the Commission's finding that "the removal of structures from the property of a private landowner is not a practice authorized by a utility." Answering in the negative the second part of the *Allstate* test, Ohio Edison concludes that the Commission does not have jurisdiction.

(8) The complainants' application for rehearing should be denied. In their application for rehearing, the complainants seek to compel the exercise of the Commission's jurisdiction based upon the NESC. To support their arguments, the complainants emphasize the Ohio Supreme Court's decisions in *Corrigan* and *State ex rel. Illuminating Company*.

Using *Corrigan* and *State ex rel. Illuminating Company*, the complainants make the argument that because the NESC falls within the statutory framework of Section 4901.01, Revised Code, et seq. and Rule 4901:1-10-06, O.A.C., the Commission has exclusive jurisdiction. We disagree. That the NESC is referenced in the Revised Code and the Commission's rules is not enough. The parties agree that there is a violation of the NESC. It is, therefore, not necessary for the Commission to decide whether there is a NESC violation. The only dispute concerns the appropriate remedy. As stated in our February 23, 2011, entry, "[t]he question of how to resolve the NESC violation would require the Commission's expertise only if the decision of the Mahoning County Common Pleas Court were to be reversed and it was found that the easement did not provide a basis for compelling removal of the structures to a safe distance." We cannot ignore that there is a dispute concerning an easement over which we do not have jurisdiction. Consequently, unless a court decides the easement issue in the complainants' favor, we will not assert jurisdiction to address the NESC issue raised by the complaint.

(9) The complainants also argue that the Commission may proceed independently of the easement issues to decide the NESC issue. In our February 23, 2011, entry we stated that our expertise in resolving the NESC violation would only be required if the appellate court were to reverse the trial court and "it was found that the easement did not provide a basis for compelling removal of the structures to a safe distance." The complainants' arguments do not persuade us to alter our decision in this matter. Overall, the complainants raise no new facts or arguments that would cause us to grant rehearing of the issues raised by the complaint.

It is, therefore,

ORDERED, That the application for rehearing is denied in its entirety. It is, further,

ORDERED, That copies of this entry on rehearing be served upon the parties, their counsel, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Paul A. Centolella

Valerie A. Lemmie

Steven D. Lesser

Cheryl L. Roberto

LDJ/vrm

Entered in the Journal

APR 05 2011

Betty McCauley

Betty McCauley
Secretary