

IN THE SUPREME COURT OF OHIO

In the Matter of the Complaint of Thomas :
& Derrell Wilkes : Case No. 11-0737
 :
 :
 v. : Appeal from the Decision of the
 : Public Utilities Commission of
 Ohio Edison Company : Ohio in Case No. 09-682-EL-
 : CSS.

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

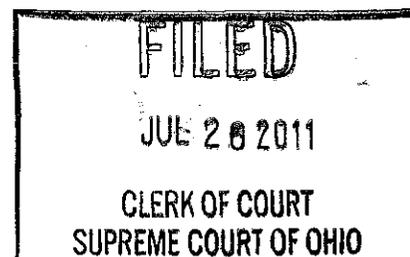
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**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

This case presents a dispute over competing property rights. It involves two residential property owners who constructed a swimming pool and storage shed within an existing utility right-of-way for an electric transmission line. The property owners filed a complaint asking the Public Utilities Commission of Ohio (Commission) to order the utility to move the power line. The Commission, however, is not the proper forum to resolve this property dispute. Only a court of common pleas can resolve this dispute and, in fact, a court has already ordered the property owners to move their structures. The Commission correctly dismissed the complaint.

STATEMENT OF THE FACTS AND CASE

On August 5, 2009, Thomas and Derrell Wilkes (Wilkes or appellants) filed a complaint before the Commission against Ohio Edison Company (Ohio Edison). In their complaint, the Wilkes alleged that Ohio Edison operated a 69 kV transmission line near structures on their property and that this proximity violated the National Electric Safety Code (NESC). The Wilkes stated that they had placed the structures (a swimming pool and storage shed) on their property in 1993. They offered an affidavit from Ohio Edison's expert to support their contention that the location of the transmission line near the pool and shed did not comply with the NESC. To achieve compliance, the Wilkes sought an order requiring Ohio Edison to move the transmission line. Alternatively, the Wilkes sought a determination that the location of the line did not present a safety hazard.

Prior to the filing of the Wilkes' complaint, Ohio Edison had filed an action against the Wilkes for injunctive relief in the Mahoning County Court of Common Pleas. In that action, Ohio Edison sought to enforce the easement that it had acquired in 1949. This litigation resulted in a judgment entry ordering the Wilkes to remove the pool and shed from Ohio Edison's right-of-way. The trial court denied the Wilkes' request for a stay pending appeal and the Wilkes were later found in contempt for failing to comply with the order to move the structures.

In the Commission proceeding, Ohio Edison filed a motion to dismiss for lack of subject matter jurisdiction. In an entry dated February 23, 2011, the Commission determined that it lacked jurisdiction and therefore dismissed the complaint. *In the Matter of the Complaint of Thomas and Derrell Wilkes v. Ohio Edison Company*, Case No. 09-682-

EL-CSS (hereinafter *In re Wilkes*) (Entry)(February 23, 2011), Appellant's App. at 22.¹ The Wilkes then filed an application for rehearing that was denied by the Commission. *In re Wilkes* (Entry on Rehearing) (April 5, 2011), Appellant's App. at 34. This appeal followed.²

Proposition of Law No. I:

Reasonable grounds for complaint must exist before the Public Utilities Commission, either upon its own initiative or upon the complaint of another party, can order a hearing, pursuant to R.C. 4905.26. *Ohio Utilities Co. v. Pub. Util. Comm'n*, 58 Ohio St. 2d 153, 389 N.E.2d 483, Syl. ¶ 2 (1979).

Ohio law permits parties to file complaints against public utilities before the Commission. That does not mean, however, that the Commission is required to hold a hearing in response to every complaint. The filing of a complaint stating reasonable grounds is a statutory prerequisite to further proceedings before the Commission. The Appellants (complainants below) have failed to satisfy this prerequisite.

Complaints filed before the Commission are governed by R.C. 4905.26. That statute provides:

¹ References to appellant's appendix are denoted "Appellant's App. at ____;" references to appellee's appendix attached hereto are denoted "App. at ____."

² Although the Wilkes named Ohio Edison as the Appellee in the caption of their Notice of Appeal, the Commission is the proper appellee. Ohio Rev. Code Ann. § 4903.13 (West 2011), App. at 1. Under this Court's precedent, this is a non-jurisdictional defect. *Consolidated Rail Corp. v. Pub. Util. Comm'n*, 40 Ohio St. 3d 252, 254, 533 N.E.2d 317, 319 (1988).

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unjust, unreasonable, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Ohio Rev. Code Ann. § 4905.26 (West 2011), App. at 1. Applying this statute, the Court has held that “[r]easonable grounds for complaint must exist before the Public Utilities Commission, either upon its own initiative or upon the complaint of another party, can order a hearing” *Ohio Utilities Co. v. Pub. Util. Comm’n*, 58 Ohio St. 2d 153, 389 N.E.2d 483, Syl. ¶ 2 (1979).

As the Court has repeatedly held, where the relief sought exceeds the Commission’s jurisdiction, reasonable grounds do not exist and dismissal of the complaint is appropriate. *See Pledger v. Pub. Util. Comm’n*, 109 Ohio St. 3d 463, 467, 849 N.E.2d 14, 18 (2006) (dismissal proper where respondent landlord was not a public utility); *Haning v. Pub. Util. Comm’n*, 86 Ohio St. 3d 121, 128, 712 N.E.2d 707, 712 (1999) (dis-

missal proper where Commission lacked jurisdiction over respondent propane supplier); *Lucas County Comm'rs v. Pub. Util. Comm'n*, 80 Ohio St. 3d 344, 349, 606 N.E.2d 501, 504 (1997) (dismissal proper where Commission lacked authority to order refund sought in complaint). In this case, the relief sought was beyond the Commission's jurisdiction and the Commission properly dismissed the complaint.

In their complaint, the Wilkes sought an order requiring Ohio Edison to move its transmission line in order to comply with a violation of the National Electrical Safety Code that both parties agreed existed by virtue of where the Wilkes placed their storage shed and swimming pool. Essentially, they sought an order from the Commission determining that their property rights trump Ohio Edison's right to enforce its easement. Such a determination is beyond the Commission's purview.

As a creature of statute, the Commission may exercise only that jurisdiction conferred on it by statute. *Time Warner AxS v. Pub. Util. Comm'n*, 75 Ohio St. 3d 229, 234, 661 N.E.2d 1097, 1101 (1996); *Columbus Southern Power Co. v. Pub. Util. Comm'n*, 67 Ohio St. 3d 535, 537, 620 N.E.2d 835, 838 (1993). The Commission has exclusive jurisdiction over utilities' rates and services. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 152, 573 N.E.2d 655, 659 (1991). The scope of the Commission's authority over public utilities, while broad, is not unlimited. As this Court has observed, "[t]he PUCO is not a court of general jurisdiction, and therefore has no power to determine legal rights and liabilities with regard to contract rights or property rights, even though a public utility is involved." *Marketing Research Serv. v. Pub. Util. Comm'n*, 34 Ohio St. 3d 52, 56, 517 N.E.2d 540, 544 (1987). *See also State ex rel. Ohio*

Edison Co. v. Shaker, 68 Ohio St. 3d 209, 219, 625 N.E. 2d 608, 610 (1994) (Commission’s jurisdiction over utility rates and service issues does not diminish “the basic jurisdiction of the court of common pleas . . . in other areas of possible claims against utilities, including pure tort and contract claims.”).

Jurisdictional determinations cannot be made solely from the allegations in a complaint. Rather, it is necessary to consider the substance of the claims to determine if they are actually related to rates or services. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St. 3d 349, 352, 810 N.E.2d 953, 957 (2004). This Court has adopted a two-part test to determine whether the Commission has jurisdiction over a matter. *Allstate Ins. Co. v. Cleveland Electric Illuminating Co.*, 119 Ohio St. 3d 301, 304, 893 N.E. 2d 824, 838 (2008). This test asks first whether the Commission’s administrative expertise is needed to resolve the issue in dispute. The second question is whether the act in act in dispute constitutes a practice normally authorized by the utility. Both parts of the test must be answered affirmatively in order for the claim to fall within the Commission’s exclusive jurisdiction. *Id.* Applying this test, the Court in *Allstate* determined that the Commission’s expertise was not required to resolve a claim that a utility was negligent in responding to emergency calls. *Id.*

In a subsequent case, the Court applied the *Allstate* test and determined that the removal of a tree from an easement was a matter within the Commission’s exclusive jurisdiction. *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 910 N.E.2d 1009 (2009). The Court first reasoned that the Commission’s expertise was necessary to assess the reasonableness of the utility’s vegetation management plan, thus satisfying the first part of

the *Allstate* test. Secondly, the Court stated that, because vegetation management is a regular practice for the utility, the second part of the test was also met.

In this case, the Commission applied the *Allstate* test to the claims raised in the *Wilkes* complaint and determined that both parts of the test must be answered in the negative. *In re Wilkes* (Entry at 10-11) (February 23, 2011), Appellant's App. at 31-32. This determination was reasonable and should be upheld.

Unlike the *Corrigan* case, the Commission's expertise is not needed to resolve the dispute between the Wilkes and Ohio Edison. There is no need to interpret the NESC or to perform any studies. Both parties agree that the swimming pool and storage shed were placed within the utility right-of-way and that the proximity of the structures to the line violates the NESC. Indeed, the Wilkes themselves rely on an affidavit from the Ohio Edison employee who concluded there was a violation of the NESC. Thus, there is no genuine issue concerning the NESC that requires the Commission's expertise.

Fundamentally, this case concerns Ohio Edison's right to enforce its easement against encroaching structures placed by the Wilkes. The Commission has no special expertise in the law of easements. Rather, this is a matter that is properly within the equitable jurisdiction of a common pleas court. As one Court of Appeals has noted, "[w]hen a party invokes the trial court's equitable jurisdiction, the trial court possesses discretionary authority to weigh the parties' competing interests and exact an equitable division of their property rights." *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App. 3d 57, 71, 740 N.E.2d 328, 337 (2000). While the Wilkes have asserted that Ohio Edison acquiesced to the placement of the pool and shed and that Ohio

Edison has ignored encroaching structures placed by other property owners, these are equitable arguments that can be raised and tested before a court. Because the Commission's expertise is not needed to resolve this dispute over property rights, the first part of the *Allstate* test must be answered in the negative.

While it was not necessary to proceed to the second part of the test, the Commission did so and further found that the removal of structures from a right-of-way is not a normal utility practice. *In re Wilkes* (Entry at 11) (February 23, 2011), Appellant's App. at 32. Here, unlike the facts in *Corrigan*, there is no management plan for structure removal on file with the Commission. If the property owner refuses to remove the structures, the utility's recourse is to seek an injunction from a court of common pleas, as Ohio Edison has done. Therefore, the second *Allstate* question must also be answered in the negative.

Under this Court's test established in *Allstate* and reaffirmed in *Corrigan*, jurisdiction over the dispute between the Wilkes and Ohio Edison lies solely with the common pleas court. Therefore, the Commission properly dismissed the complaint and this decision should be affirmed.

Proposition of Law No. II:

Where a court properly exercises jurisdiction over a dispute, it “acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.” *State ex rel. Phillips v. Polcar*, 50 Ohio St. 2d 279, 364 N.E.2d 33, Syl. (1977).

The Wilkes have engaged in forum shopping. The Mahoning County Court of Common Pleas has already decided the issue presented in this case, namely determining the appropriate remedy for the safety hazard created by the placement of structures within Ohio Edison’s right-of-way. The magistrate assigned to hear the case determined that the swimming pool and shed unlawfully interfered with Ohio Edison’s use of its easement and that both structures must be relocated. *Ohio Edison v. Wilkes*, Case No. Case No. 09 CV 1280 (Magistrate’s Decision) (September 14, 2010), App. at 6-12. In its judgment entry, the court overruled the defendants’ objections, affirmed the magistrate’s decisions, and ordered the defendants to move the pool and shed within 120 days. *Ohio Edison v. Wilkes*, Case No. 09 CV 1280 (Judgment Entry) (October 21, 2010), App. at 4-5. The court then denied the Wilkes’ request for a stay pending appeal. *Ohio Edison v. Wilkes*, Case No. 09 CV 1280 (Judgment Entry) (December 1, 2010), App. at 2.³

Because the Court of Common Pleas had properly exercised jurisdiction to hear and decide the issue in this case, the Commission properly declined to permit duplicative proceedings. As this Court has held, “[a]s between courts of concurrent jurisdiction, the

³ The Wilkes were later held in contempt for failing to comply with the Court’s order. *Ohio Edison v. Wilkes*, Case No. 09 CV 1280 (Judgment Entry) (May 5, 2011), App. at 3. They were allowed until June 10, 2011 to purge the contempt by removing the pool and shed. *Id.* If they have finally complied with the order, this case would be moot.

tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.” *State ex rel. Phillips v. Polcar*, 50 Ohio St. 2d 279, 364 N.E.2d 33, Syl. (1977). In *Phillips*, the relators had filed suit in a common pleas court for specific performance of a real estate purchase contract. The defendants in that action then filed a suit for damages in a municipal court. Although the two actions sought different relief, this Court held that the exercise of jurisdiction by the first court deprived the second court of jurisdiction. *Id.* at 212, 364 N.E.2d at 35. See also *State ex rel. Racing Guild of Ohio v. Morgan*, 17 Ohio St. 3d 54, 476 N.E.2d 1060 (1985) (filing of complaint by labor union concerning picketing dispute precluded later suit by employer over same dispute). As in the *Phillips* and *Racing Guild* cases, the Wilkes’ complaint seeks relief over the same dispute that was before the Court of Common Pleas.

Additionally, the Wilkes’ complaint before the Commission was a collateral attack on the judgment of the common pleas court. Such attacks on valid judgments are disfavored and rarely permitted. *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St. 3d 375, 380, 875 N.E.2d 550, 556 (2007). As this Court has stated, “[i]n our jurisprudence, there is a firm and longstanding principle that final judgments are meant to be just that—final.” *Id.* Appellants should not be permitted to circumvent the order of the common pleas court by seeking a conflicting order from the Commission.

Appellants argue that collateral attacks are permissible before the Commission, citing *Western Reserve Transit Auth. v. Pub. Util. Comm’n*, 39 Ohio St. 3d 16, 313 N.E.2d 811 (1974). That decision is inapposite, however, as it only concerned challenges

to prior *Commission* orders. Appellants have cited no authority to support a collateral attack on a previous decision by a court.

Because the Court of Common Pleas has issued a valid, final judgment adjudicating the only real issue in this case, *i.e.*, the appropriate remedy for the safety hazard created by the placement of structures within an easement, the Commission properly declined to permit re-litigation of the same issue. The Wilkes may pursue an appeal of the trial court's decision but they should not be permitted to attack that decision indirectly.

CONCLUSION

This case is essentially about competing property rights. This sort of dispute should be adjudicated by a court of common pleas. The Commission properly recognized its lack of jurisdiction and properly dismissed the complaint. The Commission's decision is reasonable and lawful and should be affirmed.

Respectfully submitted,

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Section Chief

*Thomas G. Lindgren for authority of
July 25, 2011 by [Signature]*

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief** was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 26th day of July, 2011.

*Thomas G. Lindgren / per authority of
July 26, 2011 by [Signature]*
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APPENDIX

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4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

4905.26 Complaints as to service.

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

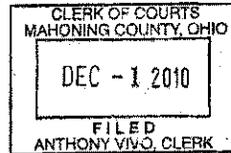
The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

Effective Date: 09-29-1997

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

Case # 09 CV 1280



OHIO EDISON)
Plaintiff) JUDGE JAMES C. EVANS
vs.) JUDGMENT ENTRY
THOMAS E. WILKES, et al.,)
Defendant)

This matter came before the Court on Defendants' Motion to Stay the Execution of Judgment and Plaintiff's Memorandum in Opposition to Defendants' Motion to Stay Execution of Judgment Pending Appeal.

Defendants' Motion to Stay Execution of Judgment Pending Appeal is hereby Overruled.
ALL THIS UNTIL FURTHER ORDER OF THE COURT.

November 24, 2010

JAMES C. EVANS, JUDGE

CLERK : COPY TO ALL COUNSEL
OR UNREPRESENTED PARTY.

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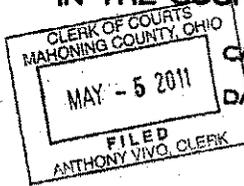


2006 CV
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JUDENT

STATE OF OHIO
MAHONING COUNTY,) SS.

IN THE COURT OF COMMON PLEAS

Ohio Edison Company
PLAINTIFF
VS.
Thomas and Derrell Wilkes
DEFENDANT



CASE NO. 09-CV-1280

DATE May 5 2011

JUDGMENT ENTRY

Upon motion of Ohio Edison to show cause and with the agreement of the parties, the Court hereby enters the following Order:

1. Defendants Thomas and Derrell Wilkes are found to be in contempt of court for failing to remove the swimming pool and storage shed, ^{that are at issue in this case} on their property within 120 day of the Court's judgment entry of October 21, 2010.

2. Defendants shall pay a monetary sanction to Plaintiff Ohio Edison Company in the amount of \$500.

3. Defendants shall have 35 days to purge themselves of contempt by removing the pool and storage shed ^{at issue} from Ohio Edison's right-of-way on or before June 10, 2011. ^{In this case}

If the pool and storage shed are not removed within 35 days on or before June 10, 2011, then Defendants shall pay Ohio Edison an additional \$2500 for the attorney fees incurred and a monetary fine of \$500 per day ^{thereafter} until the pool and shed are removed.



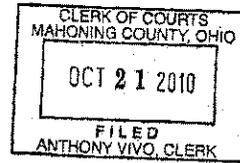
THE CLERK SHALL SERVE NOTICE OF THIS ORDER UPON ALL PARTIES WITHIN THREE(3) DAYS PER CIVIL R. 5.

APPROVED: [Signature] 0000525

ATTORNEY FOR PLAINTIFF
[Signature]
ATTORNEY FOR DEFENDANT

[Signature]
JUDGE

THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
Case # 09 CV 1280



OHIO EDISON)
Plaintiff)
vs.)
THOMAS E. WILKES, et al.,)
Defendant)

JUDGE JAMES C. EVANS

JUDGMENT ENTRY

This matter came before the Court pursuant to Ohio Rules of Civil Procedure Rule 53(E)(3) on the Magistrate's Decision filed August 16, 2010.

The Court further finds that Defendants, Thomas and Derrell Wilkes filed Objections to Magistrate's Decision on August 24, 2010 along with a Request for Findings of Fact and Conclusions of Law.

Pursuant to Ohio Rules of Civil Procedure Rule 53(D)(3)(a) the Magistrate issued a Findings of Fact and Conclusions of Law in support of the August 16, 2010 Magistrate's Decision on September 14, 2010.

On September 23, 2010 Defendants, Thomas and Derrell Wilkes filed Specific Objections to Magistrate's Decision filed September 14, 2010.

On October 4, 2010 Plaintiff filed a Response to Defendants' Objections and objected to the Scope of Proposed Injunction.

Following review of the above, the Court overrules the objections and hereby affirms the Magistrate's Decision. The Magistrate's Decision is therefore adopted and made the action and judgment of this Court as follows: Plaintiff, Ohio Edison's motion for summary judgment is granted. Defendants' motion for summary judgment and motion to dismiss are denied. Defendants are ordered to remove or move the swimming pool and storage shed identified in Ohio Edison's Verified Complaint, under Ohio Edison's supervision, from Ohio Edison's right-

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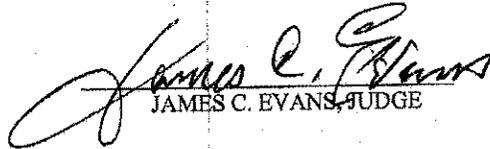


of-way to a location that is more than 50 feet from the center line of the Boardman-Pidgeon South 69kV transmission line within 120 days of this Entry.

Therefore, the Magistrate's Decision is upheld.

Costs to Defendant.

October 20, 2010


JAMES C. EVANS, JUDGE

Clerk: copies to all parties and counsel

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CLERK OF COURTS
MAHONING COUNTY, OHIO
SEP 14 2010
FILED
ANTHONY VIVO, CLERK

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

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|-----------------------------------|---|-----------------------|
| OHIO EDISON, |) | CASE NO. 09 CV 1280 |
| |) | |
| PLAINTIFF, |) | JUDGE JAMES C. EVANS |
| |) | |
| VS. |) | |
| |) | |
| THOMAS E. WILKES, <i>et al.</i> , |) | MAGISTRATE'S DECISION |
| |) | |
| DEFENDANTS. |) | |

Pursuant to Civ. R. 53(D)(3)(a), the following Findings of Fact and Conclusions of Law are issued in support of the Magistrate's Decision of August 16, 2010.

FINDINGS OF FACT

1. Plaintiff Ohio Edison Company ("Ohio Edison") was granted an easement in 1949 for the purpose of constructing and operating electrical transmission lines at the location of the present Boardman-Pidgeon South 69kV transmission line (the "Easement").

2. The Easement was recorded in 1950 with the Mahoning County Recorder's office and put to actual use by Ohio Edison, which constructed a readily observable 69kV transmission line along the northern boundary of Garver's property over 45 years ago in the early 1960s.

3. Defendants Thomas and Derrell Wilkes (the "Wilkes") are the present owners of real property located at 8230 Gardenwood Place, Youngstown, Ohio 44512-5809.

4. An above-ground swimming pool and storage shed are both located with Ohio Edison's right-of-way upon Defendants' property.

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5. The pool and shed are both located in close proximity of the 69kV transmission lines in violation of the National Electrical Safety Code ("NESC").

6. Specifically, the NESC prohibits the location of a storage shed within 13.2 feet of a 69kV transmission line, and prohibits the location of an above-ground swimming pool within 25.7 feet of a 69kV transmission line.

7. The pool is located 20.7 feet from the conductors operating at 212° F and the roof of the storage shed is located 10 feet from the transmission lines operating at 212° F.

8. Thus, the clearances for the pool and the storage shed both violate the NESC and constitute a continuing nuisance that wrongfully interferes with Ohio Edison's right to operate the Boardman-Pidgeon South 69kV transmission line in a safe and reliable manner.

9. Ohio Edison's use of the right-of-way for the transmission of electricity has been open, apparent, notorious, permanent, and continuous for over 45 years, well before the Wilkes purchased their Property and erected their above-ground swimming pool and storage shed in close proximity to the lines.

CONCLUSIONS OF LAW

1. This Court has the subject matter jurisdiction to hear and decide claims relating to the proper interpretation and enforcement of a public utility easement.

Corrigan v. Illuminating Co., 2009-Ohio-2524, ¶ 9-17, 122 Ohio St.3d 265 (2009).

2. "An easement is an interest in the land of another, created by prescription or express or implied grant, that entitles the owner of the easement, the dominant estate, to a limited use of the land in which the interest exists, the servient estate." *Crane Hollow, Inc. v. Marathon Ashland Pipe Line LLC* (2000), 138 Ohio App.3d 57, 66.

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3. "When an easement is created by express grant, the extent and limitations upon the dominant estate's use of the land depends on the language in the grant." *Id.*; *Columbia Gas Transm. Corp. v. Bennett* (1990), 71 Ohio App.3d 307, 594 N.E.2d 1, 7-8.

4. "The grant of an easement includes the grant of all things necessary for the dominant estate to use and enjoy the easement." *Id.* "Thus, in determining the nature and extent of an easement, the court should construe the easement in a manner that permits the dominant estate to carry out its purpose." *Id.*

5. The plain language of the Easement grants Ohio Edison "the right to clear and keep clear" the right-of-way of all "trees, bushes, and other obstructions within a distance of fifty feet from the center of said right-of-way."

6. This language is broadly written to grant Ohio Edison the right to keep the right-of-way "clear" of any structure or other obstruction that may be erected within 50 feet of the center line. *See Columbia Gas Transmission Corp. v. Large* (1992), 63 Ohio Misc.2d 63, 64, 619 N.E.2d 1215, 1216.

7. A servient landowner has "no right to interfere with the reasonable and proper use of the easement or obstruct or interfere with the use of the easement." *Bayersdorfer v. Winkler*, 2003-Ohio-3296, 2003 WL 21456633, at ¶ 20, (Ohio App. 7 Dist. 2003).

8. Here, the location of the above-ground pool and storage shed violate the plain language of the Easement and constitute a continuing nuisance that wrongfully interfere with Ohio Edison's right to operate the Boardman-Pidgeon South 69kV transmission line in a safe and reliable manner. *Wimmer v. Family Trust v. FirstEnergy Corp.*, 2008-Ohio-6870, ¶ 15-16, 2008 WL 5387640 (Ohio App. 9 Dist. 2008).

9. Under Ohio law, a mandatory injunction is an appropriate and lawful remedy to compel the removal of an encroachment on another's property, including a utility easement. *See, e.g., Columbia Gas Transmission Corp.*, 63 Ohio Misc.2d at 64 (granting mandatory injunction to compel removal of a swimming pool from utility right of way).

10. The pool and storage shed depicted in the photographs appear to be movable. (Vardon Affidavit, Exhibits A and B, attached to Plaintiff's Motion for Temporary Restraining Order and Storage Shed).

11. The hazard and potential for injury created by the location of the pool and shed within the right-of-way in proximity to the 69kV transmission lines outweigh the hardship to the Wiles associated with relocating the pool and storage shed.

12. Ohio Edison does not have an adequate remedy at law.

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13. Plaintiff therefore is entitled to a mandatory injunction to enforce its rights under the Easement and to enjoin the threatened and continuing nuisance by compelling Defendants to remove the pool and shed to a safe distance from its transmission lines.

14. To the extent that Ohio Edison does not have an express easement, it nevertheless has an implied easement and the continuing and permanent right to maintain and operate the 69kV transmission lines in their present location.

15. The existence of an implied easement means that Ohio Edison has the legal right to take any reasonable action necessary to use and enjoy the easement by ensuring the safe and reliable operation of the transmission lines. See *Columbia Gas Transmission*, 63 Ohio Misc.2d at 64 (granting a mandatory injunction ordering the removal of a swimming pool because the utility was entitled to a right-of-way of a sufficient dimension that was "reasonably necessary and convenient" to "maintain, operate and repair the pipeline").

16. Likewise, to the extent that Ohio Edison does not have an express or implied easement, it has a prescriptive easement to maintain and safely operate the 69kV transmission lines by virtue of its open, notorious, adverse, and continuous use of the property for more than 21 years. See *J.F. Gioia, Inc. v. Cardinal American Corp.* (1985), 23 Ohio App.3d 33, 37; *EAC Properties, LLC v. Hall*, 2008 WL 5064949, 2008-Ohio-6224, at ¶ 7 (Ohio App. 10 Dist. 2008) (prescriptive easement can arise if a use of the property is (1) open, (2) notorious, (3) adverse to the neighbor's property rights; (4) continuous; and (5) at least 21 years).

17. Where, as here, a public utility "has maintained its electric lines and right of way across premises for more than 21 years," it "has acquired a prescriptive right to

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maintain the same.” *Shewell v. Board of Education of Goshen Union Local School Dist.* (1950), 88 Ohio App. 1, 3, 96 N.E.2d 323, 325 (Ohio App. 7 Dist. 1950).

18. Ohio Edison’s use of the land is “adverse” because Ohio Edison has never recognized any authority in the Wilkes “to either permit or prevent” the continuance of the use of the right of way for the maintenance and operation of electrical transmission lines or to take any other action “to put an end to the use.” *EAC Properties, LLC*, 2008-Ohio-6224, at ¶ 7.

19. Defendants’ affirmative defenses lack merit. Ohio Edison’s grant of an easement, either express or implied, is a property right that was designed to be perpetual and not subject to expiration due to the lapse of time. *Gannon v. Kockenga*, 2006-Ohio-2972, 2006 WL 1627122, at ¶ 24 (Ohio App. 9 Dist. 2006). Thus, “equity does not acknowledge the extinguishment of such an easement by recourse to estoppel or laches.” *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska*, 2005-Ohio-3398, 2005 WL 1538259 at ¶ 50 (Ohio App. 11 Dist. 2005).

20. Similarly, Defendants’ statute of limitations defense lacks merit. Defendants’ swimming pool and shed constitute a continuing nuisance that presently interferes with the use and enjoyment of Ohio Edison’s easement. Moreover, Ohio Edison’s easement claim is based upon a present and continuing breach of the easement by Defendants.

21. Based upon the foregoing, the Court concludes that there are no genuine issues of material fact and that Ohio Edison is entitled to judgment in its favor and against Defendants Thomas E. and Derrell C. Wilkes on Counts One through Five of Plaintiff’s Complaint as a matter of law.

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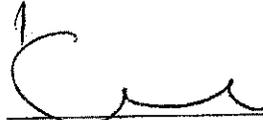
22. Further, Ohio Edison is entitled to summary judgment on all of the Wilkes' Counterclaims. The conduct alleged in Defendants' counterclaims arose from the lawful enforcement of Ohio Edison's legal rights under the Easement. Accordingly, Ohio Edison cannot be held liable for trespass, nuisance, or the intentional infliction of emotional distress as a matter of law.

ORDER

Plaintiff's motion for summary judgment is granted. Defendant's motions for summary judgment and motions to dismiss are overruled. Judgment is entered in favor of Plaintiff Ohio Edison and against Defendants Thomas E. and Derrell C. Wilkes as to Counts One through Five of Plaintiff's Complaint. Judgment is further entered in favor of Ohio Edison as to the Wilkes' Counterclaims. All court costs shall be borne by Defendants, with each party to pay its own attorneys fees.

IT IS THEREFORE ORDERED that Defendants Thomas and Derrell Wilkes shall within thirty (30) days remove the above-ground pool and storage shed to a distance beyond the NESC minimum clearance for the pool and shed, to-wit: 25.7 ft. and 13.2 feet, respectively from the present Boardman-Pidgeon South 69kV transmission lines operating at 212° F. Both parties shall cooperate in determining the relocation of the pool or storage shed if either structure remains within the easement, but beyond the hazardous zone. Defendants shall communicate to Ohio Edison the details of their plans for removal of the pool and shed, in order to facilitate the safest possible removal of the structures.

Dated: September 9, 2010


MAGISTRATE EUGENE J. FEHR

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The parties shall have fourteen (14) days from the filing of this Decision to file written objections with the Clerk of this Court. Any such objections shall be served upon all parties to this action and a copy must be provided to the Court. Except for a claim of plain error, a party shall not assign as error on appeal of the Court's adoption of any finding of fact or conclusion of law, whether or not specifically designated as a finding of fact or conclusion of law, under Civ. R. 53(D)(3)(a)(ii), unless the party, as required by Civil Rule 53(E)(3)(b), timely and specifically objects to that finding or conclusion and supports any objection to a factual finding with a transcript of all evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available.

This is an appealable order and the Clerk of Courts shall serve copies of this Decision upon all Counsel and Defendants within three (3) days of the filing hereof.

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