ORIGINAL

In The
Supreme Court of Ohio

Wimmer Family Trust & Kurt Wimmer,	:	
	:	Case No. 11-563
Appellants,	:	
	:	On appeal from the Public Utilities Commission of Ohio, Case No. 09-777-EL-CSS, *In the Matter of the Complaint of Kurt Wimmer/Wimmer Family Trust vs. Ohio Edison Company to Prevent Removal of Trees on Property.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

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

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INTRODUCTION

The dispositive issue in this case is whether Ohio Edison Company (the Company) acted reasonably when it identified for removal certain vegetation growing within its right-of-way. The operative facts in this case are not in dispute. Appellants Wimmer Family Trust and Kurt Wimmer (the Wimmers) do not contest the validity of the Company's easement, nor do they dispute that it grants the Company the right to remove incompatible vegetation within its right-of-way. It is uncontroverted that the fast-growing vegetation designated for removal poses a threat to the Company's transmission line. Nor is there any dispute that vegetation removal is authorized under the Company's Commission-approved utility vegetation management (UVM) plan where that vegetation

may interfere with transmission lines. Finally, there is no dispute regarding the negative consequences of vegetation contacting a transmission line – consequences that could include fires and power outages for thousands of customers.

Based upon this undisputed evidence, the Commission determined that the Wimmers failed to prove that the Company's decision was unreasonable. Because the evidence supports the Commission's decision, the Commission's decision should be affirmed.

STATEMENT OF THE FACTS AND CASE

1. The Company has a valid easement that gives it the right to remove vegetation within its right-of-way.

In 1983, the Wimmers granted an easement (the Easement) and right-of-way to the Company. Easement, Supp. at 51-54.[1] The Easement gave the Company a right-of-way for purposes of constructing and maintaining a high voltage transmission line (the power line). *Id.* The Easement grants to the Company the "right to trim, ***remove*** or control by any other means at any and all times such trees, limbs, and underbrush within or adjacent to said right-of-way as may interfere with or endanger said structures, wires, their appurtenances, or their operations." *Id.* (emphasis added). The Wimmers do not dispute the validity of the Easement or the Company's right to remove vegetation within the right-of-way granted under the Easement. Tr. at 17, 18, 26; Supp. at 40, 41, 42.

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[1] References to the appellants' appendix are denoted "Appellants' App. at ___;" references to the appellee's appendix are denoted "App. at ___;" references to appellee's supplement to the record are denoted " Supp. at ___."

2. The Company's utility vegetation management plan states that incompatible vegetation must be removed.

In 2001, the Company submitted a UVM plan that was later approved by the Commission. *In the Matter of the Complaint of Kurt Wimmer/Wimmer Family Trust vs. Ohio Edison Company to Prevent Removal of Trees on Property*, Case No. 09-777-EL-CSS (hereinafter *In re Wimmer*) (Opinion and Order at 3, 9) (January 27, 2011), Appellants' App. at 14, 20; Direct Test. of R. Spach at 4, Supp. at 6.[2] The UVM permits removal of vegetation that could potentially interfere with the Company's transmission lines instead of merely pruning such vegetation. Direct Test. of R. Spach at 6, Supp. at 9. In fact, the UVM states that the Company should remove all "incompatible vegetation" within the transmission clearing zone corridor. *Id.* "Incompatible vegetation" is defined in the Company's UVM as "all vegetation that will grow tall enough to interfere with overhead electric facilities." Direct Test. of R. Spach at 6, Ex. RS-2 at 25 (UVM Specifications), Supp. at 23.[3]

In addition to obtaining approval of its UVM, the Company instituted a more aggressive approach to addressing incompatible vegetation issues after the infamous August 2003 blackout that affected tens of millions of customers in the eastern United States and in Canada. *Id.* at 9, Supp. at 11. The blackout was caused, in part, by vegetation coming in contact with transmission lines and, in its aftermath, triggered industry-

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2 "UVM" plans are written right-of-way vegetation control plans submitted to the Commission by electric utilities. These plans establish the preventative measures each electric utility will take to maintain safe and reliable service. Ohio Admin. Code § 4901:1-10-27(E) (West 2011), App. at 3-4.

3 See a discussion of the terms of Company's UVM below at page 12.

wide changes for how electric utility companies manage vegetation around their power lines. *Id.* at 9, Supp. at 11; Direct Test. of S. Cieslewicz at 6-8, 11, 12, Supp. at 29-31, 32.

3. The Company discovered incompatible vegetation within the right-of-way and informed the Wimmers that it intended to remove the incompatible vegetation.

While inspecting the right-of-way, the Company discovered numerous fast-growing trees within its right-of-way that, if left addressed, would contact or interfere with the power line. Direct Test. of R. Spach at 10, Supp. at 12. Under the terms of the UVM, the Company determined that these trees were "incompatible vegetation" and they notified the Wimmers that removal of the incompatible vegetation was necessary. *Id.*; Tr. at 12, Supp. at 39. The Wimmers then attempted to prevent removal of the vegetation by filing a complaint in the Lorain County Court of Common Pleas.

In September of 2009, after unsuccessfully seeking relief in the courts, the Wimmers filed a complaint with the Commission.[4] After a full hearing on the matter, the

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[4] This case is not the first time the Wimmers have sought relief from this Court on this issue. On February 3, 2009, the Wimmers appealed a decision of the Lorain County Court of Appeals, upholding the Lorain County Common Pleas Court's denial of the Wimmers' motion for a preliminary injunction. *Wimmer Family Trust vs. First Energy*, Case No. 2009-0249. The Court of Appeals rejected the Wimmers' argument that the Company should be required to exercise options other than outright removal of the vegetation, noting that the unambiguous easement language permitted removal. *Wimmer Family Trust vs. First Energy*, Lorain App. No. 9392, 2008-Ohio-6870, at ¶ 16, App. at 12-13. The decision of the Court of Appeals was vacated on the authority of *Corrigan v. Illuminating Co.* because the Ohio Supreme Court determined that the Wimmers' claims fell within the exclusive jurisdiction of the Commission. *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 270, 910 N.E.2d 1009, 1014 (2009). Although *Corrigan* primarily addressed a jurisdictional question, the Court's reasoning is instructive for this case as explained later in the brief.

Commission concluded that the Wimmers failed to prove that the Company's decision to seek removal of the incompatible vegetation was unreasonable or unlawful. *In re Wimmer* (Opinion and Order at 10) (January 27, 2011), Appellants' App. at 21. The Commission later denied the Wimmers' application for rehearing. *Id.* (Entry on Rehearing at 5) (March 16, 2011), Appellants' App. at 10. The Wimmers then filed this appeal.

ARGUMENT

A Commission order shall be reversed, vacated, or modified by this Court only when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 820 N.E.2d 885, ¶ 50 (2004). The Court will not reverse or modify a Commission decision as to questions of fact if the record contains sufficient probative evidence to show that the Commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 571, 820 N.E.2d 921, ¶ 29 (2004) (citations removed).

The Wimmers bear the burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.* The Court has consistently refused to substitute its judgment for that of the Commission on evidentiary matters. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 84, 765 N.E.2d 862, 866 (2002). The Court should refuse to do so here.

Proposition of Law No. I:

The Commission's Order should be affirmed because the Wimmers failed to prove the Company's decision to remove the vegetation was unreasonable.

A. It is undisputed that the Easement allows the Company to remove vegetation that may interfere with its high voltage transmission line.

The Easement gives the Company the right to remove vegetation within the right-of-way that may interfere with its transmission lines. Easement, Supp. at 51-54. While the Wimmers do not dispute this, they nonetheless challenge the Company's decision to target offending vegetation for removal rather than simply pruning it. Tr. at 17, 18, 26, Supp. at 40, 41, 42. The Court's *Corrigan* decision is instructive. *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 910 N.E.2d 1009 (2009). The language of the easement before the Court in *Corrigan* is virtually identical to the Easement here, which states:

> [The Company has] the right to trim, ***remove*** or control by any other means at any and all times such trees, limbs, and underbrush within or adjacent to said right-of-way ***as may interfere with or endanger*** said structures, wires, their appurtenances, or their operations.

Easement, Supp. at 51-54 (emphasis added).

In *Corrigan*, the Court concluded that "the broad language of the easement . . . allows the utility to remove trees within its easement that ***may interfere or threaten to interfere*** with its power lines." *Corrigan*, 122 Ohio St. 3d at 269, 910 N.E.2d at 1014 (emphasis added). The Court there specifically stated that that case was "not about an easement" because there was "no question that the company ha[d] a valid easement and that the tree [was] within the easement." *Id.*

Like *Corrigan,* this case is "not about an easement." There is no dispute that the Easement gives the Company the right to remove the vegetation within the right-of-way. The only question is whether the Company's decision to remove the vegetation was reasonable. This is a service-related question, and a purely factual matter for the Commission to determine.

B. The Company presented substantial, unchallenged evidence that supports removal of the incompatible vegetation.

As complainants before the Commission, the Wimmers had the burden of proving that the Company's decision to remove vegetation was unjust, unreasonable, or in violation of the law. *In re Wimmer* (Opinion & Order at 2) (January 27, 2011), Appellants' App. at 13; Ohio Rev. Code Ann. § 4905.26 (West 2011), App. at 1; *Luntz Corp. v. Pub. Util. Comm'n*, 79 Ohio St. 3d 509, 513, 684 N.E.2d 43, 46 (1997); *Grossman v. Pub. Util. Comm'n*, 5 Ohio St. 2d 189, 190, 214 N.E.2d 666, 667 (1966). Therefore, the Wimmers' contention that the "utility failed to meet its burden" is a misstatement of the law. Appellants' Merit Brief at 17-19 (Prop. of Law 3).[5] The Wimmers carried the burden of proof, not the Company, and the Wimmers failed to meet their burden.

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[5] The Wimmers also refer to an "objective standard of reasonableness." Appellants' Merit Brief at 17-18 (Prop. of Law 3). They fail, however, to cite any authority articulating what the "objective standard of reasonableness" is, let alone explain why the Commission was obligated to apply this "standard."

The Commission thoroughly considered all the evidence, and that evidence supports the Commission's decision. *In re Wimmer* (Opinion and Order at 2-6) (January 27, 2011), Appellants' App. at 13-17.

1. The Company targeted for removal only vegetation that will contact or interfere with the power line.

The Commission was persuaded by the testimony of Ms. Rebecca Spach regarding the growth patterns of the subject vegetation within the right-of-way. *In re Wimmer* (Opinion and Order at 3, 4, 5, 9) (January 27, 2011), Appellants' App. at 14, 15, 16, 20. Ms. Spach, manager of vegetation management for the Company, examined vegetation within the right-of-way to determine if there was any "incompatible vegetation" as defined by the Company's Commission-approved UVM. Direct Test. of R. Spach at 10, Supp. at 12. Ms. Spach is a certified arborist, and has held that certification since 1998. *Id.* at 2, Supp. at 4. In determining whether a particular species is incompatible vegetation, the Company's UVM focuses on (1) identifying the particular types of species underneath and around the power line and (2) determining the possibility of the vegetation contacting the power line. *In re Wimmer* (Opinion and Order at 4) (January 27, 2011), Appellants' App. at 15; Direct Test. of R. Spach at 6-8, Supp. at 8-10. After examining the vegetation, Ms. Spach identified vegetation that will contact or interfere with the Company's transmission line if allowed to grow untreated. Direct Test. of R. Spach at 10, Supp. at 12.

Ms. Spach decided this vegetation must be removed based upon undeniable facts, not her subjective belief. The portion of the power line within the right-of-way is

approximately 45 to 65 feet from the ground. *Id.* at 13, Supp. at 15. It is undisputed that the trees designated as "incompatible vegetation" have the potential to grow to a mature height of 30 to 80 feet from the ground. *Id.* at 13-15, Supp. at 15-17. Furthermore, the majority of the vegetation targeted for removal is located directly beneath the power line and will grow to 80 feet at maturity. *Id.* at 13, Supp. at 15. The Wimmers argue that the Company should simply continue to trim the vegetation, but Ms. Spach explained that continuous pruning would only further accelerate growth of the trees. For example, willow trees, which are among the incompatible vegetation, typically grow to an average mature height of 70 feet. *Id.* at 14, Supp. at 16. These trees can grow approximately two feet per year without pruning, and may grow seven or more feet per year in response to pruning. *Id.* Sugar maples and sugar maple brushes, which are currently located directly beneath the power line, can grow to 80 feet at maturity. *Id.* at 13, Supp. at 15. In fact, with pruning, sugar maples can grow as rapidly as five feet per year. *Id.* The Company exercised good operational judgment in determining, as both the Easement and its UVM permit, that incompatible vegetation should be removed.

Although the Wimmers imply that the vegetation never violated the National Electric Safety Code's (NESC) 8.2 foot minimum standard clearance, Ms. Spach testified that vegetation did, in fact, grow close enough to the power line to constitute a violation of the

NESC standard.[6] One month before the Commission hearing on this matter, a pin oak tree, which can grow to 70 feet at maturity, was within four feet of the power line. *Id.* This condition violated the 8.2 foot minimum clearance standard, and the Company had to perform emergency maintenance on this tree just one week before the hearing. Tr. at 65, Supp. at 45. This fact further solidifies the Company's contention that simply trimming the vegetation is not an efficient or cost-effective way to protect the power line.

The species of incompatible vegetation identified for removal are fast growing and may interfere with or contact the Company's transmission line. The Company's decision to remove these trees is authorized under both its Easement and its Commission-approved UVM.

2. Electric transmission lines are dynamic and prone to movement, which increases the likelihood of contact with the incompatible vegetation.

Mr. David Kozy, manager of transmission engineering for the Company, explained why vegetation management is important to ensure safe, adequate and reliable service for customers. Mr. Kozy testified that the power line is, like most electric lines, dynamic and its height and position are constantly changing. Direct Test. of D. Kozy at 6, Supp. at 27. The power line can vary in height as much as six feet in a single day and as much as ten feet from season to season. *Id.* This drooping or "sagging" of the line can

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[6] The Wimmers state in their brief that none of the vegetation violated the minimum 8.2 -8.7 feet minimum when the Company surveyed the property in February of 2008. Appellants' Merit Brief, at 4 -5. However, a February 2008 survey by the Company discovered that the NESC's minimum standards were violated. Direct Test. of R. Spach at 14, Supp. at 16; Tr. at 65, Supp. at 45.

be caused by ambient temperature, wind, or the amount of electricity traveling through the line at a particular time. *Id.* Mr. Kozy testified that the power line can sag as much as 12 feet. Tr. at 48-49, Supp. at 43-44. In addition, winds can cause the power line to sway as much as five feet from center. Direct Test. of D. Kozy at 6, Supp. at 27.

Mr. Kozy also explained the various economic and safety issues the Company considered when making its decision to remove the vegetation. *Id.* at 4-5, Supp. at 25-26. Mr. Kozy explained that the potential consequences of vegetation contacting the power line could be grave. For example, vegetation contacting or interfering with the power line could cause the line to fail, which would result in an immediate loss of power for over 13,000 residential and commercial customers. *Id.* at 4, Supp. at 25. These customers include, but are not limited to, Elyria Water Pollution Control, Lorain Community College, and Honeywell. *Id.* In addition, if the power line were to fail when another transmission line was out of service, this could easily result in an overload in other lines and power outages extending to the Medina and Sandusky areas. *Id.* at 5, Supp. at 26.

There are also serious safety concerns with vegetation contacting or growing close to the power line. *Id.* If vegetation contacts the power line, this could start a brush fire, threatening surrounding vegetation or structures. *Id.* Furthermore, there does not need to be actual contact between the vegetation and the power line to start a fire. Electricity has the ability to "arc" or "jump" from transmission lines to nearby objects. *Id.* In regards to the high power transmission line in this case, electricity can arc to objects approximately three feet from the line. *Id.*

Mr. Kozy's testimony shows that the Company responsibly considered the dynamic and dangerous nature of high voltage transmission lines in reaching its decision to remove the incompatible vegetation that posed a threat to its transmission line. Although the Wimmers' interest in their trees is understandable, it is outweighed by the Company's responsibility to provide safe and reliable service for all its customers.

3. The Company's decision to remove incompatible vegetation is authorized under its Commission-approved utility vegetation management plan that conforms to industry-wide utility vegetation management standards.

Testimony regarding the Company's UVM refutes the Wimmers' claims that the Company's decision was arbitrary. The importance of utility vegetation management is underscored in the Commission's rules. For example, O.A.C. 4901:1-10-27(E)(1) and (2) require utilities to perform periodic inspections of their transmission facilities in accordance with Commission-approved plans for vegetation control. Ohio Admin. Code § 4901:1-10-27(E)(1), (2) (West 2011), App. at 3. As the Court recently noted, these sections show that vegetation management is manifestly a "service related issue." *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 270, 910 N.E.2d 1009, 1014 (2009). The Company's utility vegetation management plan (or "UVM" plan), which requires the removal of incompatible vegetation, was previously approved by the Commission and in force before the vegetation was designated for removal. *In re Wimmer* (Opinion and Order at 9) (January 27, 2011), Appellants' App. at 20. The UVM states that the Company should

remove all "incompatible vegetation" within the transmission clearing zone corridor.[7] "Incompatible vegetation" is defined as "all vegetation that will grow tall enough to interfere with overhead electric facilities." Direct Test. of R. Spach at 6, Supp. at 8. The UVM also provides that "all incompatible vegetation must be removed with herbicide or be removed mechanically along with herbicide. . . ." *Id.*, Ex. RS-2 (UVM Specifications-definition of "control") at 24, Supp. at 22.

Mr. Stephen Cieslewicz, President and Chief Operating Officer of CN Utility Consulting, testified regarding utility standards and vegetation management practices across the country. Mr. Cieslewicz testified that the Company's approach to enforcing easement rights and removing incompatible vegetation is the industry norm following the mass August 2003 blackout. Direct Test. of S. Cieslewicz at 6-8, 11, 12, Supp. at 29-31, 32, 33. The blackout was caused in part due to vegetation contacting transmission lines. *Id.* The blackout led to a national investigation into electric utility vegetation management. *Id.* A number of recommendations regarding best management practices were made due to this blackout investigation. Mr. Cieslewicz, one of the principal authors of the recommendations, testified that the Company incorporated these recommendations into its UVM and currently has a UVM that is consistent with industry standards. *Id.* at 15-18, Supp. at 34-37. He stated that the Company's UVM now favors the removal of incompatible vegetation instead of merely pruning it, which is consistent with how most trans-

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7 "Transmission clearing zone corridor" is defined as the areas around and below the transmission lines. Direct Test. of R. Spach at 6, Supp. at 8.

mission line vegetation management is handled. *Id.* at 17, Supp. at 36; Tr. at 183-184, Supp. at 46-47.

Mr. Cieslewicz also refuted the Wimmers' claim that the Company should merely comply with NESC minimum standards. He testified that NESC standards are the "absolute bare minimum requirements," and that these minimums are "not a safe clearance." Tr. at 189, Supp. at 48. Once vegetation surpasses the NESC minimum clearance standard, the Company is in violation. *Id.* at 189, 212-213, Supp. at 48, 49-50. Therefore, for safety purposes, and in order to avoid violating national standards, the Company established clearance zones beyond the "bare minimum standards" of the NESC. *Id.* at 212-213, Supp. at 49-50.

Both Ms. Spach's and Mr. Cieslewicz's testimony prove that the Company acted in accordance with the Commission-approved UVM and establish that the Company's more aggressive approach to vegetation removal was part of an overall industry-wide effort to control vegetation that may threaten transmission lines.

Proposition of Law No. II:

The Commission cannot adjudicate property rights because it lacks jurisdiction to do so.

The Commission properly refused to examine the Wimmers' alleged property rights because it lacks authority to adjudicate such rights. This Court has consistently held that the Commission is not a court of general jurisdiction and 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 Services, Inc. v. Pub. Util.*

Comm'n, 34 Ohio St. 3d 52, 56, 517 N.E.2d 540, 544 (1987); *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St. 2d 211, 215, 358 N.E.2d 526, 529 (1976) (the Commission has no jurisdiction to construe or enforce an easement contract); *Incorporated Village of New Bremen v. Pub. Util. Comm'n*, 103 Ohio St. 23, 31, 132 N.E. 162, 164 (1921) ("The Public Utilities [C]ommission 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").

The Court also addressed this issue in *Corrigan* by holding that a utility's decision to remove a tree within its right-of-way was not a property rights question but rather a service-related question within the exclusive jurisdiction of the Commission. *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 270, 910 N.E.2d 1009, 1014 (2009). The Court noted that because the Corrigans were contesting the utility's decision to remove the vegetation, their claim was "really an attack on the company's vegetation-management plan." *Id.* at 269, 910 N.E.2d at 1014. As in *Corrigan,* property or contract rights are not in question here because the Easement grants the Company the right to remove the subject vegetation and such action is further authorized under the Company's UVM where incompatible vegetation is found. The only question is whether the Company's service-related decision to target certain offending vegetation for removal was reasonable based upon the UVM. The Commission found that the Company's decision was reasonable based upon the undisputed evidence and, therefore, its order should be affirmed.

CONCLUSION

Appellants filed a complaint alleging a violation of R.C. 4905.26. The Commission found that the Company responsibly targeted certain vegetation for removal to protect against undesirable service outages. The record shows that the Company's decision to remove vegetation that threatened its transmission line was in accord with its Easement and the Commission-approved vegetation management plan. Being reasonable and supported by the evidence, the Commission order should be affirmed.

Respectfully submitted,

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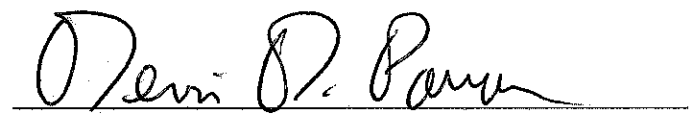

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief,** submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 29th day of August, 2011.

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§ 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.

4901:1-10-27 Inspection, maintenance, repair, and replacement of transmission and distribution facilities (circuits and equipment).

(A) This rule applies to the inspection, maintenance, repair, and replacement of utility transmission and distribution system facilities (circuits and equipment). The rebuttable presumption that an electric utility and/or transmission owner is providing adequate service pursuant to paragraph (F) of rule 4901:1-10-02 of the Administrative Code, does not apply to this rule.

(B) Distribution system performance assessment. For electric distribution circuits, the electric utility shall comply with rule 4901:1-10-11 of the Administrative Code.

(C) Transmission system performance assessment. Each electric utility and transmission owner shall maintain, on file with the staff, a report setting forth its methodology used to assess the reliability of its transmission circuits. That methodology shall be subject to review and acceptance by the director of the utilities department.

(1) Each electric utility or transmission owner shall submit a method to assess circuit reliability based on the total number of sustained outages per circuit per calendar year and other factors proposed by the electric utility, or required by the electric reliability organization (ERO), the regional reliability organization (RRO), or the regional transmission operator, which affect circuit performance, together with supporting justification for that method.

(a) If the electric utility and/or transmission owner and the director of the utilities department can not agree on a method to assess transmission circuit reliability, the electric utility and/or transmission owner shall apply, within ninety calendar days after the submission of its proposal, to the commission for a hearing and shall file a written report along with documentation supporting its methodology.

(b) Revisions to a previously accepted methodology for assessing the reliability of its transmission circuits, shall be submitted for review and acceptance along with supporting justification to the director of the utilities department, no later than ninety calendar days prior to the beginning of the next succeeding calendar year.

(2) Each electric utility or transmission owner shall submit a report on electronic media in a format prescribed by the commission on or before March thirty-first of each year, that identifies the performance of each transmission circuit for the previous calendar year. Each annual report shall, at a minimum, provide the following information for each transmission circuit:

(a) The circuit identification number.

(b) The circuit name (if different from the origin terminus).

(c) The circuit origin and terminus.

(d) The circuit voltage level (KV).

(e) The circuit mileage.

(f) The circuit in-service date, where available.

(g) The number of unplanned outages (sustained and momentary if available) and their causes by circuit.

(h) The substation(s) and/or distribution circuit(s) affected by each of the outages reported for paragraph (C)(2)(g) of this rule, by circuit.

(i) A description of and the rationale for any remedial action taken or planned to improve circuit performance or for taking no remedial action.

(j) The start and completion dates of any remedial action taken or planned.

(k) The applicable ERO standard requirement.

(l) The applicable ERO standard violation.

(3) The annual report shall be submitted in a form prescribed by the commission or its staff.

(D) Transmission and distribution facilities inspections.

Unless otherwise determined by the commission, each electric utility and transmission owner shall, at a minimum, inspect its electric transmission and distribution facilities (circuits and equipment) to maintain quality, safe, and reliable service on the following scheduled basis:

(1) Distribution – at least one-fifth of all distribution circuits and equipment shall be inspected annually. All distribution circuits and equipment shall be inspected at least once every five years.

(2) Transmission – all transmission circuits and equipment shall be inspected at least once every year.

(3) Substations – all transmission and distribution substations and equipment shall be inspected twelve times annually, with no inspection interval exceeding forty calendar days between inspections.

(4) On or before March thirty-first of each year, each electric utility and transmission owner shall submit a report in an electronic medium, in a format prescribed by the commission or its staff, of the electric utility's and/or transmission owner's compliance with the inspection schedule in paragraphs (D)(1) to (D)(3) of this rule for the preceding calendar year. The annual report of inspection compliance shall include:

(a) A listing of distribution circuits inspected during the year and, for each listed circuit, the date(s) such inspection was performed.

(b) A listing of transmission circuits inspected during the year and, for each listed circuit, the date(s) such inspections were performed.

(c) For each substation, the date of each inspection during the year.

(d) The date(s) when any circuits or substations were added or retired during the reporting year.

(E) Transmission and distribution inspection, maintenance, repair, and replacement programs.

(1) Each electric utility and transmission owner shall establish, maintain, and comply with written programs, policies, procedures, and schedules for the inspection, maintenance, repair, and replacement of its transmission and distribution circuits and equipment. These programs shall establish preventative requirements for the electric utility to maintain safe and reliable service. Programs shall include, but are not limited to, the following facilities:

(a) Poles and towers.

(b) Circuit and line inspections.

(c) Primary enclosures (e.g., pad-mounted transformers and pad-mounted switch gear) and secondary enclosures (e.g., pedestals and handholes).

(d) Line reclosers.

(e) Line capacitors.

(f) Right-of-way vegetation control.

(g) Substations.

(2) Each electric utility and transmission owner shall file its inspection, maintenance, repair, and replacement programs, instituted pursuant to paragraph (E)(1) of this rule, with the commission, and simultaneously provide a copy of the filing to the director of the service monitoring and enforcement department. The electric utility's and transmission owner's filing shall include supporting justification and rationale based upon generally accepted industry practices and procedures or requirements set by ERO, RRO, or the transmission operator in the case of transmission.

(3) If a filing to establish the electric utility's and transmission owner's inspection, maintenance, repair, and replacement programs is not acted upon by the commission within forty-five calendar days after it is filed, the inspection, maintenance, repair, and replacement programs shall be deemed approved on the forty-sixth day after filing.

(4) Each electric utility and transmission owner shall maintain records sufficient to demonstrate compliance with its transmission and distribution facilities inspection, maintenance, repair, and replacement programs as required by this rule. Each electric utility and transmission owner shall record all deficiencies revealed by inspections or tests and all actions taken to correct those deficiencies. Lines and equipment with recorded defects that could reasonably be expected to endanger life or property shall be promptly repaired, disconnected, or isolated. All remaining deficiencies likely to cause an outage shall be corrected within one year of the completion of the inspection or testing that originally revealed such deficiencies.

(F) Inspection, maintenance, repair, and replacement program revisions and amendments..

(1) All revisions or amendments (including modification to a current program, addition of a new program, or elimination of an existing program) requested by an electric utility or transmission owner be filed with the commission as outlined in paragraph (E)(2) of this rule.

(2) If a filing to revise or amend the electric utility's and transmission owner's inspection, maintenance, repair, and replacement programs is not acted upon by the commission within forty-five days after it is filed, the inspection, maintenance, repair, and replacement programs shall be deemed approved on the forty-sixth day after filing.

[Cite as *Wimmer Family Trust v. FirstEnergy*, 2008-Ohio-6870.]

STATE OF OHIO COUNTY OF LORAIN	))ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
WIMMER FAMILY TRUST Appellant v. FIRSTENERGY Appellee		C. A. No. 08CA009392 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CV155082

DECISION AND JOURNAL ENTRY

Dated: December 29, 2008

SLABY, Judge.

{¶1} Plaintiff-Appellant, the Wimmer Family Trust, appeals an order of the Lorain County Court of Common Pleas that denied its motion for a preliminary injunction and purported to declare the rights and obligations of the parties pursuant to an easement. We affirm.

{¶2} Defendant-Appellee, Ohio Edison, an operating company of First Energy Service Company, ("Ohio Edison") is the beneficiary of a transmission line easement that crosses property owned by the Trust.[1] The easement grants Ohio Edison the right to erect and maintain utility transmission cables across the property owned by the Trust and the ability to "trim, remove, or control by any other means at any and all times such trees, limbs, and underbrush within or adjacent to said right-of-way as may interfere with or endanger said structures, wires or

---

[1] Both the parties and the trial court referred to Ohio Edison and FirstEnergy interchangeably. References to FirstEnergy in this opinion reflect the instances in which that entity name was used in the proceedings below.

their appurtenances, or their operation." Ohio Edison operates a 69,000 volt transmission line known as the Abbe-Johnson Line that passes within the property subject to the easement.

{¶3} On February 4, 2008, the Trust filed a complaint for declaratory judgment and injunctive relief and a motion for a temporary restraining order and preliminary injunction in the Lorain County Court of Common Pleas. The Trust alleged that "in a series of letters beginning May 1, 2006, FirstEnergy notified the Wimmers that it (FirstEnergy) intended to clear-cut all trees upon the Property, i.e., remove all tree species, within a 50-foot wide corridor with the Easement, and to remove such other trees as FirstEnergy determined." The Trust also alleged that "[s]ome of the trees FirstEnergy seeks to remove are located outside of the metes and bounds as described in the Easement." The complaint requested that the trial court "determine and declare the metes and bounds as contained in the legal description of such Easement[.]" The Trust also sought a declaration that FirstEnergy did not have the right to "clear cut" trees within or outside of the easement; a temporary restraining order, preliminary injunction, and permanent injunction prohibiting such "clear cuts"; and a temporary restraining order, preliminary injunction, and permanent injunction prohibiting FirstEnergy from removing vegetation without first designating each item to be removed and providing the Trust with notice and a right to challenge the decision or to prune the vegetation.

{¶4} On February 20, 2008, a hearing on the Trust's motion for a preliminary injunction was conducted before a magistrate. The magistrate issued a decision on March 20, 2008, which denied the motion, and the trial court adopted and approved the magistrate's decision on the same date pursuant to Civ.R. 53(E)(4)(e). The trust filed timely objections. On April 24, 2008, the trial court issued two orders, which were time stamped by the Clerk of Courts at 8:35 a.m. The first order states that "this matter came before this Court on Plaintiff's

Objections to Magistrate's Decision *** and Defendant Ohio Edison Company's Response to Plaintiff's Objections[.]" In this order, the trial court reviewed the evidence before the magistrate, overruled the Trust's objections, and determined that Ohio Edison "is entitled to remove from the right-of-way on Plaintiff's property and the area adjacent thereto all vegetation that it determines may interfere with its [69,000 volt] transmission line or the operation thereof." The trial court also stated that it was "denying Plaintiff's claim for injunctive relief" and concluded its opinion as follows:

> "It is therefore ORDERED, ADJUDGED AND DECREED that: (1) Plaintiff's Objections to the Magistrate's Decision are overruled; (2) Plaintiff's Motion for Preliminary Injunction is denied; (3) the Temporary Restraining Order is vacated; and (4) Defendant may remove from the right-of-way on Plaintiff's property and the area adjacent thereto all vegetation that it determines may interfere with or endanger its [69,000 volt] transmission line or it[s] operation. There is no just reason for delay."

The second order stated succinctly:

> "Plaintiff's objections to the Magistrate's Decision are overruled. Plaintiff's Motion for Preliminary Injunction is denied. Temporary Restraining Order is vacated. See Journal."

A further notation, which is typed at the end of the order's text, stated, "Case closed. Costs to Plaintiff." The Trust timely appealed, raising one assignment of error with respect to the denial of its motion for a preliminary injunction.

JURISDICTION

{¶5} As an initial matter, this Court finds it necessary to clarify the basis for our jurisdiction over this appeal. Section 3(B)(2), Article IV of the Ohio Constitution grants courts of appeals the jurisdiction "to review and affirm, modify, or reverse judgments or final orders[.]" Despite the trial court's insertion of the statement "case closed" in its journal entry, a final judgment from which an appeal would lie has not yet been entered in this case. It appears that

the trial court has declared the parties' rights with respect to Ohio Edison's ability to clear cut on the property subject to the easement, but has not determined the description of the easement as requested in the complaint. Although the transcript of the hearing on the Trust's motion for a preliminary injunction indicates that the parties reached some level of agreement on this point, the extent of their agreement is unclear. With respect to this point, the trial court has failed to expressly declare the rights and duties of the parties to the declaratory judgment action. If the Trust was attempting to appeal from this order as a final judgment in the case, we would have to conclude that this Court lacked jurisdiction. See *Haberley v. Nationwide Mut. Fire Ins. Co.* (2001), 142 Ohio App.3d 312, 314.

{¶6} The Trust's appeal and assigned error, however, pertain to the denial of its motion for a preliminary injunction. In this respect, R.C. 2505.02(B) includes within the scope of our jurisdiction certain interlocutory orders. Among these are orders that grant or deny a provisional remedy, or "a proceeding ancillary to an action, including, but not limited to, *** a proceeding for a preliminary injunction[.]" R.C. 2505.02(A)(3). R.C. 2505.02 (B)(4) provides:

> "An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it *** grants or denies a provisional remedy and to which both of the following apply:
>
> "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

See, also, See *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, at ¶16.

{¶7} Because in this case the trial court denied the Trust's motion for a preliminary injunction, the order from which the Trust has appealed relates to a provisional remedy within the meaning of R.C. 2505.02(A)(3). The order determines the action with respect to the

provisional remedy and, as required by R.C. 2505.02(B)(4)(b), the Trust would not be afforded a meaningful or effective remedy in an appeal from final judgment if Ohio Edison proceeds on its intention to remove the trees.

ASSIGNMENT OF ERROR I

"The Trial Court Committed Prejudicial Error Denying [the Trust's] Motion for A Preliminary Injunction, Thus Authorizing The Destruction Of [the Trust's] trees."

{¶8} The Trust's sole assignment of error is that the trial court erred by denying its motion for a preliminary injunction to prevent Ohio Edison from cutting trees on the Trust's property. From the Trust's objections to the magistrate's decision and argument in this Court, it appears that the Trust argues that the trial court erred by concluding that it had little likelihood of success on the merits of its claim for a permanent injunction.

{¶9} "Ordinarily, a party requesting a preliminary injunction must show that (1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction." *Procter & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 267. This Court reviews a trial court's order denying a preliminary injunction for an abuse of discretion. *TGR Ents., Inc. v. Kozhev*, 167 Ohio App.3d 29, 2006-Ohio-2915, at ¶11. In this case, we are also mindful that the trial court referred the Trust's motion for a preliminary injunction to a magistrate pursuant to Civ.R. 53. In reviewing an appeal from a trial court's action on a magistrate's decision, this Court "must determine whether the trial court abused its discretion in reaching its decision. 'Any claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision.'" (Internal citations omitted.) *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9, quoting *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093.

{¶10} The Trust's likelihood of success on the merits of its claim turns on the scope of the transmission easement in question. Citing testimony from Ohio Edison that fifty trees grow within or adjacent to the easement and "may interfere or endanger the operation of the transmission line," the magistrate concluded that the easement is an easement in gross benefiting Ohio Edison. The magistrate further concluded that the language of the easement itself controlled the dispute. The magistrate ultimately concluded that the Trust "has not satisfied its burden of establishing, by clear and convincing evidence, that it will prevail on the merits of the claim[.]" The trial court reviewed the magistrate's conclusions, concluded that the language of the easement controlled the dispute, and determined that "it is within the sole discretion of Ohio Edison to determine which trees 'may interfere with or endanger' its 'structures, wires, or their appurtenances, or their operation.'"

{¶11} The trust argued that Ohio Edison has options available to it other than the outright removal of trees, suggesting that pruning – which has been done in the past – should also prove sufficient in the future. In other words, it is the Trust's position that the language of the easement is ambiguous and that the trial court incorrectly assessed its probability of success on the merits by failing to hold Ohio Edison to a standard of reasonableness.

{¶12} "Since an easement is set forth in a written agreement, it must be interpreted in the identical manner as any other legal contract; i.e., the primary goal in construing the terms of an easement is to ascertain and enforce the intent of the parties. *** In determining the intent of the parties to an easement, a court is required to first review the specific wording of the document itself." (Internal citations omitted.) *Beaumont v. FirstEnergy Corp.*, 11th Dist. No. 2004-G-2573, 2004-Ohio-5295, at ¶18-19. In *Beaumont*, the Eleventh District Court of Appeals considered FirstEnergy's vegetation management strategy in light of easement language that is

substantially similar to the easement in this case. As in this case, the Court concluded that the inclusion of the word "may" in the easement did not create ambiguity and declined to hold FirstEnergy to a standard of reasonableness. Id. at ¶20-29.

{¶13} This Court cannot conclude that the trial court abused its discretion in so doing. The transmission easement, dated May 1983, granted Ohio Edison the right to maintain vegetation within the easement:

> "The easement rights herein granted shall include the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and along the above described right-of-way across said premises all the necessary structures, wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph, and the right of reasonable ingress and egress, upon, over and across said premises for access to and from said right-of-way, *and the right to trim, remove or control by any other means at any and all times such trees, limbs, and underbrush within or adjacent to said right-of-way as may interfere with or endanger said structures, wires or their appurtenances, or their operation*." (Emphasis added.)

Noele Wimmer, who owned the subject property with her husband before it was transferred into the Trust, testified that she received no notice of potential problems related to the trees on the easement until 2005, when she received a letter from Ohio Edison. She characterized the trees as "huge" and explained that they provide a sound buffer between her residence and an active railroad nearby. Mrs. Wimmer also expressed the opinion that removing the trees would make it impossible to sell the property in the future.

{¶14} Ohio Edison presented the testimony of two witnesses at the hearing. Rebecca Spach, who is employed by Ohio Edison as Director of Vegetation Management, testified that Ohio Edison "fully enforce[es] easement rights" by removing incompatible vegetation. She defined incompatible vegetation as "any vegetation that at maturity has the potential to grow into or get near th[e] transmission line and cause an outage." She characterized transmission lines

such as the Abbe-Johnson line as "a vital link" to other portions of the electrical grid and noted that a failure on the line would "impact thousands of customers." Ms. Spach expressed the opinion that several trees on the easement at issue were incompatible with safe operation of the transmission line.

{¶15} David Kozy, Ohio Edison's Supervisor of Transmission Engineering, echoed Ms. Spach's testimony:

> "The impact on [the Abbe-Johnson] line can overload other lines that have to pick up the load that that line would use. Depending on what time of year, what the loading situation is, it could adversely affect those lines which, as we have seen before, the lines - - the possibility exists of a cascading failure, which would impact lines as far as Medina and into the Sandusky area."

Mr. Kozy explained two particular risks that motivate Ohio Edison's vegetation management strategy: transmission line sagging under variable weather conditions and arcing, or "a phenomenon where the electricity jumps across to another object." As Mr. Kozy explained:

> "Well, if something happens to the line where there's an arc or contact, the line can become de-energized, which would interrupt the reliable and safe operation of the line itself. You would see potentially outages. The object that would come close or make contact would then become energized, which could cause damage to the public up to electrocution. The object could catch on fire. In this case we are talking about a tree. The branch could blow and again endanger the public."

Mr. Kozy also expressed concern that trees within the easement "provide potential for hazards to the operation of the line."

{¶16} As in *Beaumont*, the language of the easement is unambiguous, and it is unnecessary to look beyond that language and imply terms that were not included by the parties to the agreement. That unambiguous language permits Ohio Edison to "trim, remove or control by any other means at any and all times such trees *** within or adjacent to said right-of-way as may interfere with or endanger" the transmission line. Ohio Edison presented testimony that the trees at issue are incompatible with safe operation of the Abbe-Johnson line and outlined the

potential safety hazards presented by incompatible vegetation. The Trust, which had the burden of demonstrating that it was entitled to a preliminary injunction, instead argued that Ohio Edison should use less destructive means to accomplish its end. The trial court's conclusion that the Trust failed to demonstrate a substantial likelihood of success on the merits, and its decision to overrule the Trust's objections and adopt the decision of the magistrate, was not an abuse of discretion.

{¶17} The Trust's assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNN C. SLABY
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR

APPEARANCES:

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