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**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. STATEMENT OF FACTS .....	3
A. If Vegetation Contacts The Abbe-Johnson No. 1 Transmission Line (A 69kV Line), The Results Could Be Disastrous, Not Only For System Reliability, But Also For The Safety Of Both Persons And Property .....	3
B. Ohio Edison Has Long Had Difficulty Maintaining The Required Separation Between Appellants' Vegetation And The Abbe-Johnson No. 1 Transmission Line.....	6
C. After A Hearing, The Commission Determined That Ohio Edison Could Remove The Vegetation Pursuant To Ohio Edison's Commission-Approved Utility Vegetation Management Plan.....	8
D. The Commission Denied Appellants' Application For Rehearing, Again Finding That The Easement Was Unambiguous Per This Court's Holding In <i>Corrigan</i> , And That The Record Evidence Demonstrated That Ohio Edison Was Exercising Its Rights Under The Easement In A Reasonable Manner .....	10
III. STANDARD OF REVIEW .....	11
IV. ARGUMENT .....	11
<u>Proposition of Law No. 1:</u> Although the Public Utilities Commission of Ohio may not interpret easements, the Commission acts within its jurisdiction when it determines that a utility's decision to remove vegetation, which the utility otherwise has the established legal right to do so, was reasonable. ....	12
<u>Proposition of Law No. 2:</u> The Commission may properly rely on objective, undisputed facts in determining that vegetation interferes with or endangers a utility's transmission lines. ....	15
<u>Proposition of Law No. 3:</u> In Commission proceedings, the Complainants bear the burden of proof, and where Complainants fail to meet their burden, the Commission properly finds for Respondent .....	21
V. CONCLUSION.....	23

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Cincinnati Bell Tel. Co. v. Pub. Util. Comm.</i> (1984), 12 Ohio St.3d 280.....	17
<i>Cincinnati Gas &amp; Elec. Co. v. Pub. Util. Comm.</i> (2004), 103 Ohio St.3d 398.....	17
<i>City of Columbus v. Pub. Util. Comm.</i> (1979), 58 Ohio St.2d 103.....	22
<i>Constellation NewEnergy, Inc., v. Pub. Util. Comm.</i> (2004), 104 Ohio St.3d 530.....	10
<i>Corrigan v. The Illuminating Co.</i> (2009), 122 Ohio St.3d 265.....	<i>passim</i>
<i>Gissiner v. Cincinnati</i> , 2008-Ohio-3161, .....	13
<i>Grossman v. Pub. Util. Comm.</i> (1966), 5 Ohio St.2d 189.....	10, 22
<i>In re Application of Columbus Southern Power Co. to Adjust Their Development Cost Recovery Rider</i> , Slip Op. No. 2011-Ohio-4129.....	17
<i>Ohio Bell Tel. Co. v. Pub. Util. Comm.</i> (1990), 49 Ohio St.3d 123.....	22
<i>Ohio Consumers' Counsel v. Pub. Util. Comm.</i> (2010), 127 Ohio St.3d 524.....	10
<i>Sunoco, Inc. (R&amp;M) v. Toledo Edison Co.</i> , Slip Op. No. 2011-Ohio-2720.....	10, 15
<i>Village of New Bremen v. Pub. Util. Comm.</i> , (1921) 103 Ohio St. 23.....	3, 12, 13
<del><i>Wimmer Family Trust v. FirstEnergy Corp.</i></del> (Lorain Cty. App.) 2008-Ohio-6870, <i>vacated on other grounds</i> (2009) 123 Ohio St.3d 144.....	12, 13

**STATUTES**

Ohio Revised Code Section 4903.10 .....17  
Ohio Revised Code Section 4903.13 .....10  
Ohio Revised Code Section 4905.22 .....18

**OTHER AUTHORITIES**

Rule 4901-1-10-27 .....17  
Rule 4901:1-10-27(D)(2) .....18

## I. INTRODUCTION

The Public Utilities Commission (the "Commission") properly dismissed the Complaint filed by appellants The Wimmer Family Trust and Kurt Wimmer ("Wimmer" or "Appellants"). Ohio Edison Company ("Ohio Edison") has an easement that grants it the right to manage trees and other vegetation on Appellants' property to ensure the safety and reliability of Ohio Edison's transmission line. In *Corrigan v. The Illuminating Co.* (2009), 122 Ohio St.3d 265, this Court reviewed easement language that Appellants concede is virtually identical to that at issue here. In that case, this Court concluded that this language "unambiguous[ly]" authorized the removal of any tree that "could pose a threat to the transmission lines," so long as the removal is consistent with the utility's vegetation management plan ("UVM plan"). *Id.* at 269.

Because the easement unambiguously authorizes Ohio Edison to remove trees that could pose a threat to its transmission lines, the only issue is whether the Commission correctly determined that the utility's exercise of its unambiguous right under the easement to remove trees (as opposed to, for example, trimming them), was appropriate under its UVM plan, which calls for removal of vegetation that could potentially interfere with the safe and efficient operation of transmission lines. (*See* Opinion and Order dated Jan. 27, 2011 ("Order"), Appendix ("Appx.") at 14.) This is a question of fact, of course, subject to review under the deferential "manifest weight of the evidence" standard. Here, not only does the Commission decision meet the manifest weight standard, but the record unequivocally shows that the Commission was undoubtedly correct to find that Ohio Edison's decision to remove the trees at issue was proper.

Ohio Edison witnesses testified, without contradiction, that the Company's policy is to remove vegetation that, by virtue of its species, will grow tall enough to interfere with Ohio Edison's overhead line. Thus, contrary to Appellants' claims, Ohio Edison did not remove the

trees at its “personal whim.” (Appellants’ Merit Brief (“Applts. Br.”) at 17.) Rather, the record shows that the Company used an objectively reasonable standard in defining the threshold for removal. Notably, no one disputes that the vegetation here met this threshold. And, while Appellants claim that the Company should trim rather than remove the vegetation, Appellants have no response to the evidence showing that frequent off-cycle maintenance<sup>1</sup> of their vegetation was necessary to keep that vegetation at a safe distance from the overhead line. Indeed, just three days before the hearing below, and despite Ohio Edison’s off-cycle, almost bi-annual maintenance, three of Appellants’ trees were discovered to be dangerously close to the line – one within four feet – a fact Appellants fail to mention. Nor do Appellants point to any provisions of Ohio Edison’s Commission-reviewed UVM plan that Ohio Edison purportedly violated. Further, Appellants fail to account for evidence showing that Ohio Edison has increased its emphasis on vegetation removal (rather than trimming) because of the lessons utilities learned from the massive multi-state August 2003 blackout and the subsequent industry-wide effort to reclaim rights-of-way to prevent similar situations from occurring.

Rather than address all of this *relevant* evidence, Appellants seek to muddy the water by focusing on irrelevant arguments. For example, they assert that the Commission should have required Ohio Edison to demonstrate a “reasonable probability” of interference between the tree and transmission line. That standard, however, appears nowhere in any statute, Commission rule or other authority. And in any event, the record shows that the proposed vegetation removals here easily meet it. Where a tree, by virtue of its species, has the genetic disposition to grow as

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<sup>1</sup> Ohio Edison schedules regular maintenance on vegetation in or around its rights-of-way to occur at least every five years. (OE Ex. C (Spach Dir.) at 4.) Thus, it conducts regular maintenance activities on a five-year cycle. Ohio Edison inspects its transmission lines annually. (*Id.* at 5.) If such inspections (or other indications) reveal the need for further maintenance, such “off-cycle” maintenance is scheduled. (*Id.* at 5-6.)

tall or higher than the transmission line, and where vegetation grew within four feet of a line, it has a reasonable probability of interfering with the line.

Appellants also suggest that Ohio Edison's easement across their property requires a "balancing" of their private property rights and Ohio Edison's right to control vegetation. This is nonsense. Appellants granted Ohio Edison an easement, for which they received \$5,000. The easement expressly authorizes Ohio Edison to remove incompatible vegetation – without any need for "balancing" – so long as the vegetation may interfere with Ohio Edison's lines. Simply put, the easement provides no "balancing;" Appellants cite no easement language to support their view, and regardless the Commission lacks authority to adjudicate property law interpretations of easements. *See Village of New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, 30-31.

Appellants further argue that the burden of proof in this action falls on Ohio Edison. They are wrong. Under well-settled law, in cases like this one brought under Ohio Revised Code Section 4905.26, the complainant bears the burden of proof. Appellants are no different here. In the proceeding below, they bore the burden of proof. The Commission properly determined that they failed to meet it. The Commission's decision should be affirmed.

## II. STATEMENT OF FACTS

### A. **If Vegetation Contacts The Abbe-Johnson No. 1 Transmission Line (A 69kV Line), The Results Could Be Disastrous, Not Only For System Reliability, But Also For The Safety Of Both Persons And Property.**

The Abbe-Johnson No. 1 line is a 69 kilovolt ("kV") transmission line serving customers in Ohio Edison's service territory. (OE Ex. E (Kozy Dir.) at 3.) Transmission lines like the Abbe-Johnson line form the "backbone" of the electric grid, carrying electricity at relatively high voltages over long distances to cities and neighborhoods. (*Id.*) The Abbe-Johnson line spans 14.3 miles in Elyria, Ohio and is connected to the transmission grid through five 138 kV lines and nine 69 kV lines. (*Id.* at 3, 4.) The portion of the Abbe-Johnson line that crosses Appellants'

property is a “radial feed,” which is a line that branches from a main line and does not connect to another line at the end. (*Id.* at 3.)

Ohio Edison engineer David Kozy testified that vegetation contact with the Abbe-Johnson line would result in severe consequences. Most immediately, a contact would cause a short-circuit or “fault” on the radial feed, resulting in an outage for 13,000 residential and nonresidential customers including the Elyria Water Pollution Control plant, Lorain Community College and Honeywell. (*Id.* at 4.) Mr. Kozy further testified that, depending on what was otherwise occurring on the grid, a fault on the Abbe-Johnson line could trigger a cascading outage across other portions of the transmission system. This potentially could affect tens of thousands of additional customers as far away as Medina and Sandusky. (*Id.* at 5.)

The evidence also established that a vegetation contact on the Abbe-Johnson line would pose a serious safety hazard. The vegetation might catch fire and spread to homes and other structures, resulting in catastrophic property damage. For example, in southern California, vegetation contact with a 12 kV distribution line – a line at a far lower voltage than the 69 kV Abbe-Johnson line – recently caused a fire that damaged 1,000 homes and cost approximately \$1 billion. (Hearing Transcript (“Tr.”), 221:24-222:9 (Cieslewicz Re-Dir.))

More importantly, lives are put at risk when trees are too close to electric lines. The record evidence shows that every two weeks, someone working near an electric line – often a utility worker or tree trimmer – is electrocuted. (OE Ex. G (Cieslewicz Dir.) at 6; *see* OE Ex. E (Kozy Dir.) at 5.) In addition, each year, adults and children are tragically electrocuted when climbing trees that are located too close to energized lines. (OE Ex. G at 6.) Others are harmed or killed by fires sparked by tree contacts. When trees are too close to power lines, the threat is real and deadly.

These dangers are heightened because of sagging and arcing. “Sagging” is a condition in which electric lines “sag” or droop due to fluctuations in load, ambient temperature and wind. (OE Ex. E (Kozy Dir.) at 6.) The Abbe-Johnson line can sag as much as six feet in a single day or ten feet from season to season. (*Id.*) Wind may blow the Abbe-Johnson line as much as five feet to the right or left of its natural position. (*Id.*) Because sagging occurs almost every day – and often can vary during a single day – the position of the Abbe-Johnson line routinely changes, potentially bringing the line closer to a wider swath of vegetation. (*See id.*)

There need not even be an actual contact to cause a fault on the line. “Arcing” is a phenomenon in which electricity “jumps” from the transmission line to a nearby object, often vegetation, without actually touching it. (*Id.* at 5.) In traveling across an open distance, “arcing” is similar to a bolt of lightning and, like lightning, can result in outages, fires, serious injuries and death. (*Id.*) For a 69 kV line, arcing can occur anytime vegetation is within a three-foot radius of the line. (*Id.*)

**B. Ohio Edison Has Long Had Difficulty Maintaining The Required Separation Between Appellants’ Vegetation And The Abbe-Johnson No. 1 Transmission Line.**

Appellants’ property is located in North Ridgeville, Ohio, and includes a house and other structures. (OE Ex. C (Spach Dir.) at 10.) In 1983, Ohio Edison purchased an easement from Appellants across the rear of their property. (*See* OE Ex. D (Easement).) Appellants were represented by counsel in their discussions with Ohio Edison, and they received \$5,000 for the easement. (Tr., 21:3-14; 23:25-24:3 (Noele Wimmer Cross).) The right-of-way that Ohio Edison purchased, which crosses the east-west length of the property, is approximately 30 feet wide and located directly beneath the Abbe-Johnson line. (*See* OE Ex. C (Spach Dir.) at 13; OE Ex. B (survey).) As Appellants concede (Applts. Br. at 2), the relevant portion of the easement provides:

The easement rights herein granted shall include the right to...trim, remove or control by any other means at any and all times such times such trees, limbs, and right-of-way as may interfere with or endanger said structures, wires or their appurtenances, or their operation.

This language unquestionably gave Ohio Edison certain rights vis-à-vis the vegetation on Appellants' property; i.e., the right to trim or remove trees in the right-of-way if those trees "may interfere with or endanger" Ohio Edison's line.<sup>2</sup>

In addition to Ohio Edison's rights under the Easement, Ohio Edison's vegetation removal efforts are also subject to its UVM plan. As the Commission noted, that plan, "filed with the Commission in January 2001, defines 'vegetation control' as the removal of vegetation that has the potential to interfere with the safe and efficient operation of the transmission system." (Appx. at 14-15.) "The UVM plan places emphasis on controlling all incompatible vegetation within the transmission clearing zone corridor, and defines 'incompatible vegetation' as any vegetation that will grow tall enough to interfere with overhead electric facilities." (*Id.* at 15.)

Many trees and much brush are spread over Appellants' property, with the most dense vegetation in the north and east of the parcel. (*See* OE Ex. C (Spach Dir.) at 10; OE Ex. B.) This vegetation includes a wide variety of large trees, including sugar maple, black cherry, willow and elm. Much of the vegetation is located underneath the Abbe-Johnson line and within Ohio Edison's easement. No one disputes that all of the vegetation that Ohio Edison seeks to remove is within the boundaries of the easement. (Appls. Br. at 2.)

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<sup>2</sup> Appellants wrongly contend that "Ohio Edison acknowledged that the Easement did not effect [Appellant]'s ownership rights in and to the trees on its property wheresoever located." (Appls. Br. at 2.) What the Ohio Edison witness in fact testified was that while "[t]he Wimmers own the trees" (Tr. 94:22), they own them subject to Ohio Edison's rights to remove trees and other vegetation "at any and all times" as set forth in the Easement. (*Id.*, 92:10-17; 94:15-19.)

Acting pursuant to its authority under the Easement, and consistent with its Commission-approved UVM program, in 2003, Ohio Edison notified Appellants of its intention to remove certain trees that, because of their species and potential height, could interfere with the Abbe-Johnson line. (Tr., 12:14-22 (Noele Wimmer Dir.); OE Ex. C (Spach Dir.) at 11.) Appellants objected. Attempting to accommodate Appellants, Ohio Edison visited the property and instead trimmed vegetation in June 2003, May 2006 and August 2008. (See OE Ex. C at 11.)

While Appellants claim that they worked cooperatively with Ohio Edison (Tr., 8:16-19; 11:7-14 (N. Wimmer Dir.)), the record shows that in fact the opposite is true. For example, Noele Wimmer testified that Ohio Edison was “never denied” access to trim vegetation on Appellants’ property. (Tr., 8:16-19; 11:7-14 (“Not once have we ever not let them on our property to maintain the trees.”).) But the record shows that appellant Kurt Wimmer admitted telling Ohio Edison UVM personnel to leave his property “many times,” and Mrs. Wimmer confirmed that she instructed Ohio Edison to leave in August 2003. (*Id.*, 238:12-14 (Kurt Wimmer Cross), 29:12-15 (Noele Wimmer Cross).) On multiple occasions, Mr. Wimmer used profanity toward Ohio Edison employees. (*Id.*, 238:15-239:3.) On at least one occasion, Ohio Edison’s trimming crew required a police escort to enter Appellants’ property. (*Id.*, 30:6-10.) As a result of these and other instances of hostility, Appellants’ property is the only parcel along the 14.3 mile Abbe-Johnson line where incompatible vegetation has not been removed. (OE Ex. C (Spach Dir.) at 17.)

On March 23, 2010, despite Ohio Edison’s previous trimming, regular inspections and numerous site visits, the Company sent a contractor to perform emergency maintenance on an oak tree that was, at the time, only three or four feet from the wire. (Tr., 65:7-15 (Kozy Re-Dir.), 166:18-167:2 (Spach Bench Cross).) This condition violated National Electric Safety Code

(“NESC”) minimum clearance standards,<sup>3</sup> and was discovered only after review of a special survey performed in connection with this litigation. (OE Ex. C (Spach Dir.) at 17.) While on the property, the UVM crew also trimmed two other trees that were too close to the line. (Tr., 166:18-167:2.)

**C. After A Hearing, The Commission Determined That Ohio Edison Could Remove The Vegetation Pursuant To Ohio Edison’s Commission-Approved Utility Vegetation Management Plan.**

After a hearing in which the Commission heard testimony and received evidence from four Ohio Edison witnesses as well as representatives of the Appellants, the Commission issued its Opinion and Order on January 27, 2011, dismissing Appellants’ complaint. (Appx. at 12.) Noting that the Appellants had admitted that the easement language here was “virtually identical” to the easement language at issue in *Corrigan*, the Commission concluded that “the Supreme Court’s finding in *Corrigan* mandates a finding that the easement permits [Ohio Edison] to remove any vegetation that may interfere with or threaten to interfere with [Ohio Edison’s] transmission lines.” (*Id.* at 20.) The Commission then determined, “the only issue left for our determination in this proceeding is whether OE reasonably determined that the vegetation in question may interfere or threaten to interfere with the Abbe-Johnson No. 1 line.” (*Id.*)

Turning to the interference question, the Commission found “based on the undisputed facts in the record that the vegetation in question has the genetic disposition to grow to heights tall enough to potentially interfere with the Abbe-Johnson No. 1 line.” (*Id.*) Accordingly, Ohio

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<sup>3</sup> Appellants misstate the record evidence regarding the impact of the NESC. They claim that Ohio Edison “admitted” that the NESC minimum clearances define the scope of “reasonable and responsible,” suggesting that a utility would be irresponsible or unreasonable in seeking greater clearances. (Applts. Br. at 6.) In fact, what Ohio Edison witness Stephen Ceislewicz testified was that the NESC clearance standards are “the absolute, bare minimum.” (Tr., 189:9-18.)

Edison “reasonably determined that this vegetation may interfere or threaten to interfere with the transmission line and should be removed pursuant to [Ohio Edison’s] approved UVM [i.e., Utility Vegetation Management] program.” (*Id.*) Indeed, Appellants “offered no evidence to contravert the testimony” showing that the trees would grow tall enough to interfere with the line. (*Id.*)<sup>4</sup>

**D. The Commission Denied Appellants’ Application For Rehearing, Again Finding That The Easement Was Unambiguous Per This Court’s Holding In *Corrigan*, And That The Record Evidence Demonstrated That Ohio Edison Was Exercising Its Rights Under The Easement In A Reasonable Manner.**

Appellants filed an application for rehearing raising three grounds. Each of the three related to the manner in which the Commission had handled the easement; the Appellants did not assert on rehearing that the removal was inconsistent with Ohio Edison’s UVM policy.

As to the easement, Appellants first claimed that the Commission should have ignored this Court’s easement interpretation in *Corrigan*, and reinterpreted the easement here. (Appx. at 7.) The Commission rejected this argument, finding that the language here was, by Appellants’ own admission, “virtually identical” to the language in *Corrigan*, language that this Court called “unambiguous.” 122 Ohio St.3d at 269. Thus, no interpretation was required. (Appx. at 8.)

Second, Appellants contended that the Commission had failed to apply an “objective standard of reasonableness” in assessing whether the trees posed a potential danger to Ohio Edison lines. (*Id.*) The Commission rejected this argument, noting that its finding that the trees

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<sup>4</sup> Appellants’ attempt to minimize the evidence submitted at hearing by Ohio Edison (Applts. Br. at 5-6) misrepresents the record. The record demonstrates that Ohio Edison demonstrated that all of the vegetation at issue had the disposition to interfere with Ohio Edison’s line, the harm to be avoided from that contact, and the reasonableness of Ohio Edison’s UVM policy. *See, infra*, pp. 14-15.

would grow tall enough to reach the transmission line was “based upon objective facts in the record which were not disputed by [Appellants].” (*Id.* at 9.)

Third, the Appellants asserted that Ohio Edison bore the burden of proof, and had failed to meet it. (*Id.*) The Commission likewise rejected this ground, finding that “the burden of proof in this proceeding rests upon complainants.” (*Id.* at 10 (citing *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189).)

This appeal followed. In their notice of appeal, Appellants pressed the same three issues that they listed in their application for rehearing.

### III. STANDARD OF REVIEW

Appellants correctly cite the applicable standard of review. (Appls. Br. at 9.) Pursuant to Ohio Revised Code Section 4903.13, the Commission’s decision cannot be reversed unless “upon consideration of the record, the court finds the order to be unlawful or unreasonable.” *Constellation NewEnergy, Inc., v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, 540. This Court “will not reverse or modify a PUCO decision as to questions of fact” unless it is so “manifestly against the weight of the evidence and ... so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, Slip Op. No. 2011-Ohio-2720 ¶ 22. See also *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2010), 127 Ohio St.3d 524, 526 (same). And, while the Court can review the Commission’s legal determinations de novo, the Court “may rely on the expertise of [the Commission] in interpreting a law where ‘highly specialized issues’ are involved and ‘where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.’” *Sunoco*, 2011-Ohio-2720 at ¶¶ 22-23. Moreover, as the Appellants also admit, “[t]he appellant bears the burden of demonstrating that the commission’s decision is

against the manifest weight of the evidence or is clearly unsupported by the record.” (Applts. Br. at 9, quoting *Sunoco*.)

#### IV. ARGUMENT

Although this case involves an easement, the interpretation of that easement is not an issue in this case. The relevant terms of the easement are nearly identical to terms that this Court already has found to be unambiguous, and they are not in dispute. Instead, this case involves the Commission’s review of Ohio Edison’s vegetation management practices, which indisputably is an issue within the Commission’s expertise. Further, this case involves the Commission’s factual determination that “the undisputed facts of record” showed that the vegetation in question may “interfere with or threaten to interfere with” the Abbe-Johnson Line, and thus properly can be removed by Ohio Edison pursuant to its easement and UVM. Not only have Appellants failed to show that the Commission’s decision is against the manifest weight of the evidence, the undisputed facts overwhelmingly show that the evidence supports the Commission’s decision.

**Proposition of Law No. 1: Although the Public Utilities Commission of Ohio may not interpret easements, the Commission acts within its jurisdiction when it determines that a utility’s decision to remove vegetation, which the utility otherwise has the established legal right to do, was reasonable.**

Contrary to Appellants’ argument, this case is decidedly *not* about “real property . . . law” and Appellants’ rights as “the landowner.” (Applts. Br. at 10, 11.) As this Court noted in interpreting nearly identical language in *Corrigan v. Illuminating Co.* (2009), 122 Ohio St.3d 265, “this case is not about an easement.” *Id.* at 269. Rather, this case is about Ohio Edison’s conduct under the unambiguous terms of that easement and its UVM plan as applied to the particular facts relating to the property at issue, an issue that falls squarely within the Commission’s expertise.

This Court reviewed an easement having language virtually identical to that here in *Corrigan*. There, the Court held that: (i) the easement language was valid; and (ii) the easement “unambiguous[ly]” authorized the removal of any tree that “could pose a threat to the transmission lines.” *Id.* Because there was nothing left to interpret under the easement, this Court held in *Corrigan* that the sole remaining issue was whether the utility’s exercise of its unambiguous rights under the easement was appropriate under the utility’s UVM plan, an issue properly directed to the Commission.

The same is true here. The easement authorizes Ohio Edison to “trim, remove or control” vegetation that “may interfere with or endanger” its lines (OE Ex. D at 2; Order at 2-3), language that Appellants *admit* is virtually identical to the language at issue in *Corrigan*. Accordingly, under *Corrigan*, the language is likewise both valid and unambiguous here. Thus, Appellants are simply wrong to contend that “[r]eference must be made to real property, not utility law in defining the Easement’s extent and limitations.” (Appls. Br. at 10.) Rather, as in *Corrigan*, “this case is *not* about an easement.” Indeed, this Court has noted that the Commission lacks authority to adjudicate property law issues. *Village of New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, 30-31.

Thus, contrary to Appellants’ claims, the Commission was absolutely correct in “refus[ing] to involve itself with” easement issues. (Appls. Br. at 11.) In light of the easement’s unambiguous language, the only question here is whether the Commission was correct in determining that Ohio Edison appropriately acted pursuant to its UVM program in exercising its rights under the easement.<sup>5</sup> Appellants were free, of course, to challenge the Commission’s

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<sup>5</sup> Notably, other courts have found the easement here to be unambiguous. In *Wimmer Family Trust v. FirstEnergy Corp.* (Lorain Cty. App.) 2008-Ohio-6870, the Ninth District Court

*factual* determination that Ohio Edison acted properly and reasonably. But Appellants are wrong to chastise the Commission for failing to engage in a free-wheeling inquiry into Ohio property law or reinterpret the easement itself. (See Appls. Br. at 10-11.) There is no room – nor any need – for any such analysis in light of this Court’s decision in *Corrigan*. Nor would the Commission be the correct forum for such an undertaking in any event. See *New Bremen*, 103 Ohio St. at 30-31.

For the same reasons, Appellants are also wrong in attempting to dismiss as dicta this Court’s interpretation of the easement language in *Corrigan*. (Appls. Br. at 11-12.) The Court’s determination that the easement was unambiguous was “necessary for the resolution of the issues”; indeed it was central to the holding of the case. See *Gissiner v. Cincinnati*, 2008-Ohio-3161, ¶ 15 (Hamilton Cty. App.) (“Dicta includes statements made by a court in an opinion that are not necessary for the resolution of the issues.”). The Court in *Corrigan*, as Appellants observe, ultimately “declared that an issue arising out of a utility’s vegetation management policy falls within the PUCO’s exclusive domain.” (Appls. Br. at 12.) But the issue regarding the UVM policy arose only *because* the Court interpreted the easement and decided that the easement gave the utility the right to manage the vegetation. If the easement had *not* provided that right, then the UVM policy would have been irrelevant. Thus, the Court’s decision directing the *Corrigan* case to the Commission rested squarely on the Court’s determination that the easement was “valid,” “unambiguous” and not otherwise subject to dispute. *Corrigan* at 269.

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(continued...)

of Appeals affirmed the trial court’s decision that “it is within the sole discretion of Ohio Edison to determine which trees ‘may interfere with or endanger’ its lines.” *Id.* at ¶ 10, *vacated on other grounds, Wimmer Family Trust v. FirstEnergy Corp.* (2009), 123 Ohio St. 3d 144. There, the appellate court held that the easement language authorizing Ohio Edison to remove vegetation that “may interfere with or endanger its line” is “unambiguous.” *Id.* at ¶ 16.

Because the Commission lacks the authority to adjudicate property rights, the issue could come to the Commission only *after* the dispute about the easement's meaning was resolved. Thus, Appellants are wrong to claim that "the sole effect" of *Corrigan* was to bring "this case to the PUCO and nothing more." (Appls. Br. at 13.) To the contrary, *Corrigan* decided the property law issue of what the easement language allows. That holding was not dicta, and it controls with regard to the essentially identical language at issue here.<sup>6</sup>

Appellants likewise err in attempting to invest this case with constitutional significance by invoking takings concepts. (*See id.* at 14-15.) Because Ohio Edison acted in conformity with the terms of the easement, there was no "taking." Appellants are surely correct that "the rights of a property owner to acquire, use, enjoy, and dispose of property [are] among the most revered in our law and traditions." (*Id.* at 7.) Here, Appellants *exercised* those rights in disposing of parts of their "bundle of property rights" (*id.* at 11) by selling them to Ohio Edison for \$5,000. Through that sale, Appellants relinquished their right to keep on their property any vegetation that "may interfere with or endanger" Ohio Edison's lines. Indeed, if anything, it is Appellants who are seeking to take property rights from Ohio Edison, by asking the Commission (and this Court) to reject Ohio Edison's attempt to exercise the rights that it purchased from Appellants. The Commission rightly declined to act as an accomplice to Appellants' efforts in that regard.

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<sup>6</sup> To the extent that Complainants are asserting that this Court's opinion in *Corrigan* was a "nullity," *see* Appls. Br. at 1, fn. 1, they are mistaken. To be sure, in *Corrigan*, this Court reversed the lower courts' orders and dismissed the case. That decision certainly vacated the lower courts' decisions, rendering them a nullity. But, this Court has appellate jurisdiction to review a lower court's jurisdictional decision, and thus this Court's decision in *Corrigan* regarding the scope of the trial court's jurisdiction was not a nullity. And, as noted above, this Court's determination regarding the meaning of the easement was central to its determination of that disputed jurisdictional issue.

**Proposition of Law No. 2: The Commission may properly rely on objective, undisputed facts in determining that vegetation interferes with or endangers a utility's transmission lines.**

Notwithstanding Appellants' irrelevant property law arguments, Appellants ultimately are forced to concede that the real question here is whether the Commission appropriately concluded that the vegetation at issue "may interfere or threaten to interfere with the construction, operation and maintenance of [Ohio Edison's] transmission lines." (Appls. Br. at 15.) On that issue, despite Appellants' claim that the Commission relied on "subjective speculation," the record is replete with unrebutted objective evidence showing that the vegetation could interfere or threaten to interfere with the Abbe-Johnson line. Of course, this question is a question of fact. Thus, the only question in this Court, as Appellants acknowledge (*see* Appls. Br. at 9), is whether there is "sufficient probative evidence to show [that] the PUCO's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty." *Sunoco*, 2011-Ohio-2720 at ¶ 22. Here, the Commission's determination easily clears that threshold.

In concluding that the proposed removal of Appellants' vegetation is reasonable, the Commission relied on objective, undisputed and unrebutted facts. The record shows that Ohio Edison carefully investigated and analyzed each of the trees and bushes that it proposes to remove. Indeed, Ohio Edison witness Rebecca Spach testified to the species, average height at maturity and average growth rate for each of those trees and each type of brush. (OE Ex. C at 12-15, Ex. RS-4.) It is thus an undisputed objective *fact* that all of the vegetation at issue has the genetic disposition to grow tall enough to interfere with Ohio Edison's line. Likewise, Ohio Edison witness David Kozy testified to the objective *fact* that a tree contact along the line

running above Appellants' property would result in an immediate outage to 13,000 customers, and possibly many more. (OE Ex. E (Kozy Dir.), p. 4.)

Moreover, while Appellants seek to make much of the fact that Ohio Edison has become more proactive in removing incompatible vegetation than it had been in the past, Ohio Edison witness Stephen Cieslewicz testified to the *fact* that since August 2003, electric utilities across North America have increased their efforts to remove vegetation that threatens transmission lines. (Tr., 186:8-20 (Cieslewicz Cross).) As Mr. Cieslewicz explained, the August 2003 blackout taught utilities across the country a hard lesson regarding vegetation management: the only effective way to prevent tree/line contacts is to remove – not trim – vegetation that can grow tall enough to interfere with an electric line. (OE Ex. G (Cieslewicz Dir.) at 3-4; *see also* Order, Appx. at 17.) As a result, since August 2003, “every utility within the United States and Canada and portions of Mexico that have transmission lines have increased their efforts to reclaim right-of-ways and remove more trees.” (Tr., 186:8-20 (Cieslewicz Cross).)<sup>7</sup> Accordingly, the Commission properly found that Ohio Edison’s proposed removals here were authorized by the Easement and reasonable under Ohio Edison’s UVM policy.

Appellants offered no evidence to rebut any of this testimony. Contrary to Appellants’ arguments here, the vegetation is being removed not because Ohio Edison “says so.” Rather, it is because the undisputed, un rebutted facts show that this removal is permitted under the

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<sup>7</sup> As Ms. Spach testified, pruning or trimming a tree “leaves uncertainty” because Ohio Edison personnel or contractors can only make educated guesses about how much a tree can grow over time and thus how much trimming is necessary to keep the tree a proper distance from a line until the next scheduled maintenance cycle. (OE Ex. C. (Spach Dir.) at 7-8.) Given the uncertainty as to how fast a particular tree may grow at a particularly location (especially in light of the number of trees and lines on Ohio Edison’s system), “the best policy is to remove incompatible vegetation.” (*Id.* at 8.)

Easement, consistent with Ohio Edison's UVM program,<sup>8</sup> and reasonable and necessary to ensure continued safe and reliable service on the Abbe-Johnson No. 1 transmission line.

Unable to rebut these facts, Appellants instead seek to shift the focus by claiming that Ohio Edison did not explain what has changed about Appellants' vegetation to warrant removal now, when trimming has worked in the past. (Appls. Br. at 18.) Yet, this entire tack is largely irrelevant. Appellants essentially concede that Ohio Edison is not required in this proceeding to justify its UVM program, as evidenced by the fact that Appellants have not challenged the Commission's determination that this case "is not the proper forum for a review of [Ohio Edison's] UVM program, which the Commission previously approved in accordance with Rule 4901-1-10-27, O.A.C." (Appx. at 20.) Rather, here the only question is whether Ohio Edison's conduct is consistent with that policy. As shown above, it is.

But even putting that aside, the record provides clear evidence as to what has changed. First, there has there been an industry-wide change in the approach to vegetation management in order to improve system reliability. Moreover, there also have been changes to Appellants'

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<sup>8</sup> Importantly, neither in their application for rehearing, nor in their notice of appeal, did Appellants raise any issue as to whether the removal was consistent with the UVM plan. Rather, each of the three issues raised in their application for rehearing and notice of appeal relate solely to the easement, and to the standard that the easement adopts for removal. Accordingly, Appellants have waived any separate challenge to whether Ohio Edison's actions were consistent with the UVM policy. See R.C. 4903.10 (claimed errors must be raised in application for rehearing); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280, 290 ("It is well-established that that filing of an application for rehearing before the Public Utilities Commission is a jurisdictional prerequisite to an error proceeding from Order of the Commission to this Court, and only such matters as are set forth in such application can be urged or relied upon in an error proceeding in this Court.") (quotations omitted); *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.* (2004), 103 Ohio St.3d 398, 402 ("notice of appeal and its complaints of alleged commission error delimit the issues for this court's consideration"); *In re Application of Columbus Southern Power Co. to Adjust Their Development Cost Recovery Rider*, Slip Op. No. 2011-Ohio-4129 ¶ 16 (holding that Court has "jurisdiction only over arguments raised on rehearing," and that arguments not so raised are "forfeited").

unsatisfactory work. (*Id.* at 22-23.) Were Appellants permitted to arrange for their own trimming, however, Ohio Edison would have no control over the frequency, method and timing of that maintenance, and no right to require correction of sub-standard work. The record provides a complete explanation for why Appellants should not be allowed to maintain their own incompatible vegetation. In short, the reliability of service in the area served by the Abbe-Johnson line should not and cannot be left to Appellants.

In addition to ignoring the uncontroverted evidence and advancing unsupported allegations, Appellants conjure from thin air a new standard that they contend should be used for determining whether vegetation on their property should be removed. Specifically, they seek to impose unilaterally a standard that requires the Company to show a “reasonable probability” of interference between the tree and transmission line. (Appls. Br. at 17.) Two things are notable about this suggestion. First, Appellants cite nothing supporting that standard. Nor could they. That language does not appear in any statute, Commission rule, the easement or Ohio Edison’s UVM program. Appellants have fashioned it from whole cloth.

Second, even if the Court were to take Appellants up on their misplaced suggestion, the proposed removals meet that standard. As Ms. Spach testified, Ohio Edison has not been able to adequately maintain Appellants’ vegetation during the typical five-year cycle. Rather, the vegetation at issue here has required frequent off-cycle maintenance – four separate instances of trimming in eight years alone. (*See* OE Ex. C (Spach Dir.) at 11.) Moreover, despite Ohio Edison’s special attention to this property, just three days before the hearing Ohio Edison was forced to perform emergency maintenance on a tree that had grown undetected to within three or four feet of the line, in violation of the National Electric Safety Code (“NESC”). (Tr., 65:7-15 (Kozy Re-Dir.), 151:12-20 (Spach Re-Dir.); 166:18-167:2 (Spach Bench Cross).) While at

Appellants' property that day, the Ohio Edison contractor discovered two additional trees that were dangerously close to the line. (Tr., 166:18-167:2.)

Appellants misleadingly state that “[a]t the time of the hearing” the trees had been serviced and were “Ohio Edison-compatible.” (Appls. Br. at 18.) To the extent that Appellants’ definition of “compatible” means that the trees were beyond minimum required clearances, the trees were “compatible” only because Ohio Edison performed emergency maintenance. Elsewhere, Appellants’ blame Ohio Edison for its “increased trimming” of their trees “knowing that such would and did cause growth spurts.” (*Id.*) The uncontroverted evidence demonstrated that Ohio Edison only performed “increased trimming” because it was necessary. The record shows that, had Ohio Edison stuck to its standard five-year schedule, it would not have been sufficient to avoid a problem with Appellants’ vegetation coming into contact with the transmission line.

The point of Ohio Edison’s UVM plan – and specifically, its requirement that incompatible vegetation be removed – is to avoid guesswork (of making sure the tree is trimmed enough to avoid contact over a five-year period) and the accompanying risks of contact between trees and power lines. (OE Ex. C (Spach Dir.) at 8-9.) Appellants’ criticism of Ohio Edison not only is misguided, but it actually proves the Company’s point – Appellants’ vegetation is incompatible and must be removed. If the presence of a tree to within three or four feet of a transmission line, despite ongoing off-cycle maintenance, does not suggest a “reasonable probability” of interference, it is hard to know what would. The evidence shows that the dangers and reliability hazards posed by Appellants’ vegetation are not just “worst case scenarios.” They are real, demonstrable threats to Ohio Edison’s service. Apparently Appellants would want

proof that a tree had actually come in contact with a line before Ohio Edison could remove that tree. Ohio Edison – and its customers – cannot afford to live by such an irresponsible standard.

In sum, Appellants are demanding that Ohio Edison ignore the terms of the easement, the evidence and common sense. They seek to force Ohio Edison to continue to perform frequent trimming of their trees, at increased expense and risk to the rest of Ohio Edison's customers. Neither the easement nor the law requires that Appellants be given this special treatment. The Commission properly found that Appellants' vegetation "may interfere with or endanger" the overhead line within Ohio Edison's UVM program and therefore may be removed. The Commission's Order should be affirmed.

**Proposition of Law No. 3: In Commission proceedings, the Complainants bear the burden of proof, and where Complainants fail to meet their burden, the Commission properly finds for Respondent.**

Left with no good response to the record evidence, Appellants seek to put a thumb on the scales. They allege that Ohio Edison bears the "burden of proof" to show that Appellants' vegetation may interfere or threaten to interfere with the lines – presumably under the "objectively reasonable probability" standard that they propose – before Ohio Edison can remove the vegetation. (Appls. Br. at 17; *see also id.* at 8 ("[t]he burden begins and remains with Ohio Edison to justify the removal of any of [Complainants'] trees").) This argument fails both substantively and procedurally.

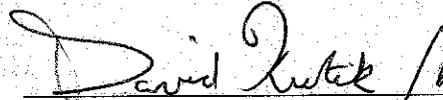
From a substantive standpoint, as demonstrated above, there is no basis for the Court to impose an "objectively reasonable probability" of interference standard. The parties signed an easement that grants the Company the power to remove vegetation that could interfere with its lines. The only question for the Commission, then, is whether the Company is exercising its easement powers in a manner consistent with the Company's UVM policy. There is no basis for importing a "reasonable probability" standard into that analysis.

Equally important, contrary to Appellants' arguments, it is well settled that, as a procedural matter, the *complainant* bears the burden of proof in Commission proceedings. As this Court has explained, "it is elementary that any party complainant before [the C]ommission assumes the duty and obligation of proving all of the material allegations contained in his original complaint." *City of Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 107 (citation omitted). *See also Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1990), 49 Ohio St.3d 123, 126; *Grossman*, 5 Ohio St.2d at 190. Thus, as the Commission properly observed, Complainants – not Ohio Edison – bear the burden of proof here. (Appx. at 13.) The Commission properly rejected Appellants' attempt to foist that burden on Ohio Edison, and also properly found that Appellants failed to meet their burden here.

**V. CONCLUSION**

For the foregoing reasons, the Commission's Order should be affirmed.

Respectfully submitted,

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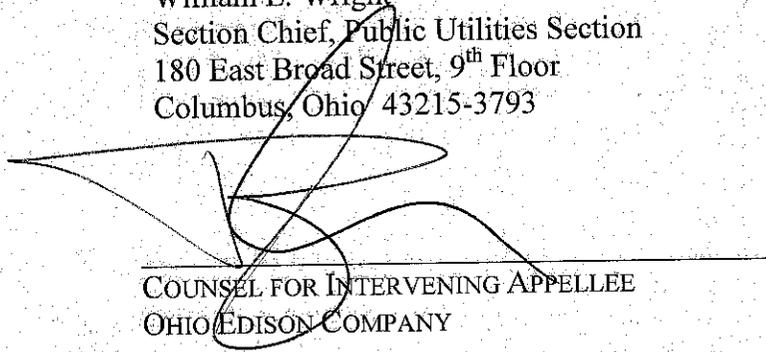
OHIO EDISON COMPANY

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief of Intervenor-Appellee Ohio Edison Company was delivered to the following via regular U.S. mail this 29th day of August, 2011:

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