

ORIGINAL

IN THE SUPREME COURT OF OHIO

KARL FRIEDERICH JENTGEN, et al.)
)
 Plaintiffs-Appellants,)
)
 v.)
)
 ASPLUNDH TREE EXPERT CO., et al.,)
)
 Defendants-Appellees.)
)
)
)

CASE NO. 2015-0225

ON APPEAL FROM THE DELAWARE
COUNTY COURT OF APPEALS, FIFTH
APPELLATE DISTRICT, CASE NO. 14
CAE 04 0028

MEMORANDUM IN RESPONSE TO APPELLANTS'
MEMORANDUM IN SUPPORT OF JURISDICTION

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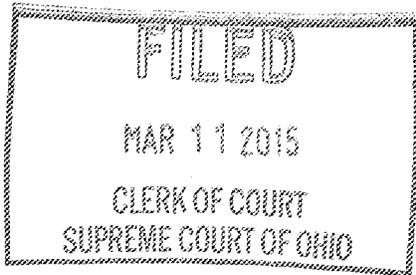


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**EXPLANATION OF WHY THIS IS NOT A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This case was decided by the Fifth District Court of Appeals (“Court of Appeals”) through the application of this Court’s unambiguous, well-reasoned, and recent precedent in *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009 (2009) and *Wimmer v. Pub. Util. Comm.*, 131 Ohio St.3d 283, 2012-Ohio-757, 964 N.E.2d 411 (2012) (“*Wimmer II*”). Consequently, this Court should decline jurisdiction over this appeal.

This case arises from Appellees’ (collectively referred to as “Ohio Edison”) vegetation management along an electric transmission corridor that traverses Appellants’ property. Appellants filed suit against Appellee, Asplundh Tree Expert Co. (“Asplundh”), in the Delaware County Common Pleas Court (“Trial Court”), in order to prevent necessary vegetation management from occurring. The Trial Court held that the vegetation management at issue is permitted by the easement (“Easement”) on Appellants’ property held by Appellee, Ohio Edison Company (“Ohio Edison”). The Trial Court also correctly determined that Appellants’ argument that certain of the trees at issue should be trimmed, rather than removed, is a service-related issue within the exclusive jurisdiction of the Public Utilities Commission of Ohio (“PUCO”).

Although hardly a model of clarity, the chief arguments in Appellants’ Memorandum in Support of Jurisdiction (“Memorandum”) appear to be that (1) the Court of Appeals’ decision (“Decision”), which affirmed the Trial Court’s judgment, purportedly creates confusion over the appropriate venue for a dispute involving vegetation management along an electric transmission corridor; and (2) the Decision somehow expands the scope of the PUCO’s exclusive jurisdiction over service-related issues. Appellants’ arguments are meritless and should be rejected.

This Court has recently delineated the jurisdictional framework applicable to vegetation management along an electric transmission corridor. In *Corrigan*, 2009-Ohio-2524, this Court

held that a property owner's complaint regarding the reasonableness of an electric utility company's decision to remove a tree, the removal of which was permitted by the applicable easement, is a service-related issue within the exclusive jurisdiction of the PUCO. The *Corrigan* Court further noted that the PUCO's exclusive jurisdiction over service-related issues does not affect the basic jurisdiction of Common Pleas Courts in other areas of possible claims against electric utility companies, including pure tort and contract claims. *Id.* at ¶9 (citation omitted).

In *Wimmer II*, this Court held that issues of easement interpretation identical to the ones involved in this case are within the jurisdiction of Common Pleas Courts, but that the reasonableness of an electric utility company's removal of trees is a service-related issue within the exclusive jurisdiction of the PUCO. As in *Wimmer*, the Easement in this case unambiguously permits the vegetation management at issue. In fact, *Wimmer* involved the following operative easement language, which is identical to the operative language of the Easement: Ohio Edison has "the right to trim, cut, remove or otherwise control at any and all times such trees, limbs, underbrush or other obstructions within or adjacent to said right-of-way as may interfere with or endanger said structures, wires or appurtenances, or their operation." In *Wimmer*, this Court held that such language—including the term "adjacent"—is unambiguous and enforceable, and that it vests a utility company with the sole discretion to determine whether particular trees "may interfere with or endanger" a transmission line. *Id.* at ¶7.

Also as in *Wimmer*, this case involves a decision by Ohio Edison to trim or remove trees in the area ("Adjacent Area") adjacent to the defined right-of-way ("Right-of-Way") granted by the Easement, and Appellants are challenging the reasonableness of the vegetation management decisions made by Ohio Edison. Notwithstanding the similarity between the instant case and *Wimmer*, Appellants' Memorandum fails to cite *Wimmer*.

Corrigan and *Wimmer* are well-reasoned decisions that clearly establish the jurisdictional framework applicable to vegetation management along an electric transmission corridor. There is nothing about this case that requires further guidance from this Court. In short, this case does not involve a matter of public or great general interest, and this Court should decline jurisdiction.

STATEMENT OF FACTS¹

Pursuant to the Easement, Appellants' property ("Property") in Delaware County is encumbered by Ohio Edison's 69 kV electric transmission line and its associated facilities (collectively, the "Line"). The condition of the trees in the Adjacent Area constitutes a threat to the safe operation and reliability of Ohio Edison's transmission and distribution system. Ohio Edison proposes to remove or trim the trees in the Adjacent Area that may interfere with or endanger the Line.

Every public utility, like Ohio Edison, has a duty to furnish necessary and adequate service and to provide instrumentalities and facilities that are adequate and in all respects just and reasonable. *See*, R.C. 4905.22. Transmission lines such as the one running across the Property, are interconnected to the national grid to transport energy from generation plants across the country to millions of people. These lines transmit power as a pathway of electricity to other electric service providers. If Ohio Edison is not permitted to properly maintain these lines, its ability to fulfill its significant statutory duties will be undermined.

Tree trimming is an important and ongoing process for a public utility such as Ohio Edison. Ohio Edison is responsible for removing incompatible vegetation in order to maintain thousands of miles of transmission lines. As such, utility arborists make decisions on a daily basis as to whether particular trees or other vegetation interfere or may interfere with the

¹ With the exception of the incorrect statement at page 6 of Appellants' Memorandum that the Trial Court's *ex parte* December 20, 2012 temporary restraining order was entered "after notice and hearing," Ohio Edison does not dispute the accuracy of the Statement of the Case set forth at pages 5-7 of Appellants' Memorandum, and Ohio Edison will not burden the Court by reiterating the procedural history of this litigation herein.

transmission lines. In order to successfully maintain the lines and to react to constantly changing conditions, Ohio Edison and Appellee American Transmission Systems, Incorporated (“ATSI”) developed the Inspection, Maintenance, Repair and Replacement Programs, which has been approved by the PUCO. This document, together with the FirstEnergy Transmission Vegetation Management Contractor Specifications, make up Ohio Edison’s vegetation management program (the “Program”). Ohio Edison’s tree contractors, including Asplundh, are trained to follow the Program. The Program requires the removal of trees that may interfere with a transmission line because they are dead, dying, diseased, leaning, or significantly encroaching on the corridor.

The Program sets forth the tree trimming and removal specifications necessary to achieve daily adequate clearance on a five-year maintenance cycle for each transmission span. The Program was developed from years of experience and data gathered by qualified arborists and engineers throughout FirstEnergy’s public utility companies. The Program is consistent with industry standards and practices and ensures compliance with the requirements of the National Electrical Safety Code (NESC) with regard to clearance distances between electrical conductors and vegetation (which have been adopted as Ohio law). The Program takes into account a multitude of factors, including the location, species, growth pattern of the tree, and displacement of the tree or transmission wires due to wind. Further, the position of the transmission lines can change, minute to minute, due to ice, wind, load on the line, or temperature. As a result, the height of the transmission lines can vary by several feet and may fall or “sag” closer toward the vegetation below. All these factors must be taken into account over the five-year maintenance cycle when determining whether an incompatible tree must be removed on a given day.

In determining whether trees will or may interfere with the transmission lines, Ohio Edison must take into account the fact that electricity can jump or “arc” from a line to a tree, particularly when the line is carrying high voltage. This arc potential varies according to

conditions such as load, moisture conditions, and voltage. A tree does not need to actually touch the lines for there to be a hazard. If electricity were to come into contact with a tree limb, there is significant risk that the tree will burn, creating a danger to persons and property in the vicinity, as well as jeopardizing the operation of the transmission lines. This could result in a power outage, affecting potentially millions of customers.

The Program expressly provides that “[n]othing in this Vegetation Management Program, the Company’s Contractor Guidelines or the Commission rules and regulations is intended to limit or modify the grant of legal rights to the Company under a right-of-way or easement.”

The condition of the Adjacent Area constitutes a threat to the safe operation and reliability of Ohio Edison’s transmission and distribution system, posing an unreasonable risk of outages that would affect operations and safety of Ohio Edison, ATSI, customers, area residents, and consumers of electricity throughout the Delaware County area. In preparation for the preliminary injunction hearing in this case, representatives of Ohio Edison and Asplundh inspected the trees along the Right-of-Way and Adjacent Area that have been marked for trimming or removal. That inspection resulted in the creation of an inventory and map of the trees at issue. The inspection also confirmed that the Easement permits, and the Program requires, that every one of the marked trees be trimmed or removed.

At the October 14, 2013 hearing in the Trial Court, Appellants’ arborist, Christin Ahlum, testified that there are 86 trees on the Property that were marked for vegetation management, and that the only disagreement between the parties was with respect to 8 of those trees.² The record contains a written inventory of the 86 trees, which Mr. Ahlum relied upon in providing his testimony. *See*, Joint Hearing Exhibit 13. Mr. Ahlum testified that the vast majority of the 86

² On November 5, 2014, while Ohio Edison was stayed by order of the Delaware County Court of Common Pleas from engaging in vegetation management on the Property, an outage occurred on the Line, which was caused by an ash tree on the Property that had fallen into the Line. That tree was one of the trees marked for removal on the tree inventory and is an issue currently pending before the PUCO in Case No. 15-245-EL-CSS.

marked trees were within 20 feet of the edge of the Right-of-Way, with a couple of marked trees up to 20 or 30 feet from the edge of the Right-of-Way. Mr. Ahlum further testified that “[t]his is certainly not [a situation] with trees marked for management either for removal or trim that are hundreds of feet from the edge of the right-of-way.” Mr. Ahlum also testified that, “with respect to [the] eight trees [in dispute], [he] believes that the appropriate action is to prune those trees or trim them rather than remove them.” Mr. Ahlum clarified that the “area of disagreement...really comes down to how long [the parties’ respective arborists think] it is going to take for...[seven of] these eight trees...to interfere with or endanger the line” (the disagreement about the eighth tree in dispute deals with decay and structural stability). In other words, Mr. Ahlum testified that he does not dispute that these seven trees will eventually become a threat to the Line; he just believes it will take more than five years for that to happen. But Mr. Ahlum conceded that these trees could threaten the Line within five years due to a weather event like an ice storm.

James Jentgen testified that Appellants have no problem with the removal of dead trees in the Adjacent Area pursuant to the Easement, but that he believes Ohio Edison should only trim—and not remove—what he considers to be healthy trees in the Adjacent Area.

Applying the established precedent from this Court regarding the proper scope of its jurisdiction, the Court of Appeals found that the use of the word “adjacent” in the Easement was unambiguous and enforceable, and that such term encompassed objects that could potentially interfere with or endanger the Line, even though they may not actually touch the Right-of-Way. *Decision*, ¶22. The Court of Appeals further determined that Ohio Edison has discretion under the Easement to determine whether any particular vegetation may interfere with or endanger its equipment or the operation thereof. *Id.* However, the Court of Appeals properly noted in the *Decision* that any challenge to the reasonableness of Ohio Edison’s decision to remove rather than trim certain vegetation falls within the purview and jurisdiction of the PUCO. *Id.* at ¶28.

As a result, Appellants recently filed a complaint with the PUCO challenging the reasonableness of Ohio Edison's vegetation management decisions. That claim remains pending.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. 1

The Courts below correctly applied the jurisdictional framework applicable to vegetation management along an electric transmission corridor, as set forth in *Corrigan* and *Wimmer*, and there is no reason to alter that jurisdictional framework.

This Court's recent decisions in *Corrigan* and *Wimmer* delineate the jurisdictional framework applicable to vegetation management along an electric transmission corridor. Notwithstanding Appellants' argument to the contrary, that jurisdictional framework is understandable and workable, and it was correctly applied by the Courts below.

Corrigan involved a decision by the Illuminating Company to remove a tree located within the right-of-way conferred by an easement, which granted the Illuminating Company "full authority to cut and remove any trees, shrubs or other obstructions upon the...property which may interfere or threaten to interfere with the construction, operation and maintenance of...[the subject] transmission lines." *Corrigan*, 122 Ohio St.3d at 266, at ¶18. It was undisputed in *Corrigan* that the easement at issue permitted removal of the tree. Rather, the dispute was whether the decision to remove, rather than trim, the tree should be upheld as reasonable. This Court addressed the issue of whether the PUCO or a Common Pleas Court is the appropriate forum for the resolution of such a dispute.

In *Corrigan*, this Court recognized that: "[t]he General Assembly enacted R.C. 4901.01 et seq. to regulate the business activities of public utilities and created PUCO to administer and enforce these provisions." *Id.* at ¶8 (citation omitted). This Court further reasoned that "R.C. 4905.26 provides that PUCO shall hear complaints filed against public utilities alleging that '...any regulation, measurement, or practice affecting or relating to any service furnished by the

public utility...is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential.” *Id.* “This...jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state * * * is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive.” *Id.* (citations omitted). “The broad jurisdiction of PUCO over service-related matters does not affect “the basic jurisdiction of the court of common pleas * * * in other areas of possible claims against utilities, including pure tort and contract claims.” *Id.* at ¶9 (citation omitted).

This Court in *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶ 12–13 (2008) established a two-part test to determine whether the PUCO had exclusive jurisdiction over the dispute before it, which was applied by this Court in *Corrigan*. The first part of the test considers whether the PUCO’s administrative expertise is required to resolve the issue in dispute. The second part of the test considers whether the act complained of constitutes a practice normally authorized by the utility. *Id.* at ¶11 (citation omitted). “If the answer to either question is in the negative, the claim is not within PUCO’s exclusive jurisdiction.” *Id.* at ¶12 (citation omitted).

With respect to the first part of the *Allstate* test, this Court in *Corrigan* made clear that an electric utility company’s “decision to remove a tree is governed by its vegetation-management plan, which is regulated by PUCO.” *Id.* at ¶15. Accordingly, the PUCO’s administrative expertise is required to resolve the issue of whether removal of a tree is reasonable.” *Id.* This Court also held that the second part of the *Allstate* test was satisfied because “[v]egetation management is necessary to maintain safe and reliable electrical service.” *Id.* at ¶16 (citation omitted). Thus, this Court determined that the case fell within the PUCO’s exclusive jurisdiction.

Thus, the precedent from this Court is clear. Under *Corrigan*, a property owner’s complaint regarding the reasonableness of a utility company’s decision to remove a tree, the

removal of which is permitted by the applicable easement, is a service-related issue within the PUCO's exclusive jurisdiction. Other areas of possible claims against electric utility companies, including pure tort and contract claims, which do not require PUCO's administrative expertise and do not relate to any practice that is normally authorized by the utility, remain within the jurisdiction of Common Pleas Courts.

In *Wimmer II*, this Court again delineated the jurisdictional framework applicable to vegetation management along an electric transmission corridor, holding that issues of easement interpretation identical to the ones involved in this case are within the jurisdiction of Common Pleas Courts. In contrast, the reasonableness of an electric utility company's removal of trees is a service-related issue within the exclusive jurisdiction of the PUCO.

In this case, the Courts below correctly applied *Corrigan* and *Wimmer*. The Trial Court's March 25, 2014 Findings of Fact and Conclusions of Law included the following:

4. Asplundh as Ohio Edison's contractor, Ohio Edison, and/or ATSI is/are permitted pursuant of their Vegetation Management Plan, to trim and remove trees and vegetation "adjacent" to the defined right-of-way area that may interfere with or endanger the transmission lines.

6. Plaintiffs' position that certain trees in the area adjacent to the right-of-way should be trimmed rather than removed constitutes a service-related issue, which is within the exclusive subject matter jurisdiction of the [PUCO]...

In affirming, the Court of Appeals likewise reasoned as follows:

... the use of the word "adjacent" in the easement is unambiguous and enforceable...To place a definitive measurement on the term "adjacent" as appellants seek could potentially interfere with or endanger the structure, wires or appurtenances, or the operation of such...Because trees or limbs located on appellants' property could potentially interfere with or endanger the power transmission lines, no "definitive measurement" can be made. Ohio Edison has discretion to determine whether particular vegetation "may interfere or endanger" its equipment. Any challenge to that discretion falls within the purview and jurisdiction of the PUCO.

As the trial court found, the dispute herein involved the interpretation of an easement, i.e., a declaration of the parties' rights thereunder. The trial court

expressly stated the PUCO had exclusive jurisdiction over the reasonableness of service-related issues. To such extent, we find the trial court did not err... *Decision*, at ¶¶22, 28.

Thus, consistent with *Corrigan* and *Wimmer*, the Courts below resolved the easement interpretation issues, determining that the Easement permits the subject vegetation management. Such interpretation issues were properly within the Courts' jurisdiction. However, the Courts below properly refused to entertain Appellants' challenge to (1) Ohio Edison's decision to remove, rather than trim, particular trees; and (2) Ohio Edison's vegetation management program. There is no error in the Courts' holding in this regard.

This Court should reject Appellants' claims that the Decision (1) purportedly creates confusion regarding the appropriate venue for a dispute involving vegetation management along a transmission corridor; and (2) somehow expands the scope of the PUCO's exclusive jurisdiction over service-related issues. As a decision that properly applies the jurisdictional framework established by *Corrigan* and *Wimmer*, the Decision actually demonstrates the clarity of that framework and provides certainty regarding which issues can be litigated in Common Pleas Court and which issues are within the exclusive jurisdiction of the PUCO.

This Court should also disregard Appellants' complaint that there is no test "to determine if a claim is one of pure tort or contract excluded from mandated administrative jurisdiction in the PUCO; rather it is a determination made by exclusion..." *Memorandum*, 3. Common Pleas Courts are courts of general jurisdiction with statutorily defined limits. *See*, R.C. 2305.01. The *Allstate* test is merely an exception to the default rule of Common Pleas Courts' general jurisdiction. As such, there is no need for a test like the one referenced by Appellants. Parties merely need to follow the clear legal authority that already exists. It is worth noting that the jurisdictional framework established in *Corrigan* and *Wimmer* and applied by the Courts below has functioned properly in this case. Having resolved the easement interpretation issues in this

litigation, Appellants have now filed a complaint in the PUCO in Case No. 15-0245-EL-CSS, challenging Ohio Edison's vegetation management program.

Appellants essentially argue that this Court should add a requirement to the jurisdictional framework established by *Corrigan* and *Wimmer*: that the PUCO's exclusive jurisdiction over service-related issues ends at the edge of the defined right-of-way conveyed by the applicable easement. Throughout their Memorandum, Appellants confuse the terms "easement" and "right-of-way" in support of their claim that the exclusive jurisdiction of the PUCO over service-related issues is confined to vegetation management "within the utility's easement," but that vegetation management "beyond [the] defined right-of-way" is beyond PUCO's jurisdiction. *Memorandum*, 4, 11. Appellants cite no legal authority whatsoever for this proposition.

However, even assuming, without conceding, that the PUCO only has jurisdiction over an electric utility company's vegetation management that is undertaken "within the utility's easement," Appellants' argument fails because the vegetation management at issue in this case is within the scope of the Easement. *Memorandum*, 4. The Easement gives Ohio Edison the right to engage in vegetation management "within or adjacent to... [the] right-of-way as may interfere with or endanger" the Line. In *Wimmer*, this Court held that operative easement language identical to this is unambiguous and vests the utility company holding the easement with the sole discretion to determine whether particular vegetation "may interfere with or endanger" an electric transmission line and to trim or remove such vegetation.

Wimmer was filed in the Lorain County Court of Common Pleas by property owners seeking to enjoin the removal of trees and other vegetation within and adjacent to a right-of-way. *See, Wimmer Family Trust v. FirstEnergy*, Lorain Common Pleas Case No. 08CV155082, 2008 WL 5868495 (April 21, 2008). The easement at issue in *Wimmer*, like the Easement, granted Ohio Edison 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.”

The Common Pleas Court in *Wimmer* found in favor of Ohio Edison, and the property owners appealed to the Ninth District Court of Appeals in *Wimmer Family Trust v. FirstEnergy*, 9th Dist. No. 08CA009392, 2008 – Ohio – 6870 (Dec. 29, 2008) (vacated on other grounds—as set forth below). The Ninth District affirmed, holding as follows:

...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. *Id.* at ¶ 16 (citation omitted).

The Ninth District also cited with approval the language from the Common Pleas Court’s decision to the effect that Ohio Edison enjoyed the sole and absolute discretion to determine which trees “may interfere with or endanger” the line. *Id.* at ¶ 10.

The property owners in *Wimmer* then successfully appealed to this Court, which disposed of the case in a one-paragraph decision providing as follows: “The judgment of the court of appeals is vacated on the authority of *Corrigan*..., and the cause is remanded to the trial court for a final declaration of the metes and bounds of the easement.” *Wimmer Family Trust v. FirstEnergy Corp.*, 914 N.E.2d 1036, 1036 (2009) (“*Wimmer I*”).

Following *Wimmer I*, the property owners—like Appellants in this case—initiated proceedings in the PUCO. The PUCO ruled in favor of Ohio Edison, and the property owners appealed once again to this Court, raising issues regarding: (1) easement interpretation; and (2) whether the PUCO erred in finding that the removal of the trees was reasonable. This Court affirmed the PUCO’s finding that removal of the trees was reasonable and declined to address the easement interpretation issues because “[t]hose issues were not before the commission and

are not relevant here because they were settled in an earlier proceeding...***[b]y disposing of the Wimmers' earlier litigation on the authority of *Corrigan*, this court decided the easement issues in favor of Ohio Edison. As in *Corrigan*, the utility's easement over the Wimmers' property expressly permits the removal of trees." *Wimmer II*, 131 Ohio St.3d 283, at ¶¶5, 7. "[*Corrigan*] held that the utility's easement permitted tree removal but that the commission, not a court, was required to decide whether removal was reasonable." *Id.* at ¶3.

Thus, in *Wimmer* this Court resolved the easement interpretation issues—which are identical to the ones in this case—in favor of Ohio Edison. Consequently, *Wimmer* compels the conclusion that the operative language of the Easement is unambiguous, and Ohio Edison enjoys the sole discretion to determine which trees “may interfere with or endanger” the Line and to trim or remove such trees. Applying established legal precedent, the Court of Appeals properly concluded that the vegetation management at issue in this case is unambiguously permitted by the Easement, and any challenge to the reasonableness of such vegetation management lies within the exclusive jurisdiction of the PUCO.

Thus, Appellants' Proposition of Law No. 1 is meritless and does not warrant review.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. 2

The Courts below correctly determined that the term “adjacent” in the Easement is unambiguous and properly interpreted that unambiguous term.

Appellants' second proposition of law challenges the Court of Appeals' interpretation of the undefined term “adjacent” in the Easement. However, the standard for the interpretation of undefined terms in a written instrument is well-settled, and Appellants identify no novel or unique issues or facts that might justify re-visiting that standard. Consequently, Appellants' second proposition of law fails to set forth any matter of public or great general interest.

As a threshold matter, the uncontroverted evidence in this case demonstrates that (1) there is no legitimate dispute regarding the meaning of the term “adjacent”; and (2) the parties agree that the trees at issue are all located within the Adjacent Area. Appellants have no objection to Ohio Edison trimming the trees at issue in the Adjacent Area. Rather, Appellants only object to Ohio Edison removing trees in the Adjacent Area that they believe are healthy and/or will not threaten the Line within a 5-year period.

However, even assuming, without conceding, the existence of a legitimate dispute regarding the meaning of the term “adjacent,” as used in the Easement, Appellants’ argument fails because the Court of Appeals correctly interpreted the term. In response to Appellants’ argument that the term “adjacent” should be interpreted to mean “contiguous” or “adjoining,” the Court of Appeals looked to Black’s Law Dictionary and noted the following: “[a]djacent” is defined in Black’s Law Dictionary 41 (1990) as: “Lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch, * * * while adjoining imports that they are so joined or united to each other that no third object intervenes.” *Decision*, ¶22. This Court has recently held that it is appropriate for a Court to consult Black’s Law Dictionary in order to determine the ordinary meaning of an undefined term in a written instrument. *See, e.g., Summit Cty. Children Servs. Bd. v. Communication Workers of Am., Local 4546*, 113 Ohio St.3d 291, 865 N.E.2d 31, ¶14 (2007) (citation omitted). Thus, there is nothing erroneous in the Court of Appeals’ reliance upon Black’s Law Dictionary. Nevertheless, Appellants argue the term “adjacent” should be defined in accordance with (1) this Court’s decision in *City of Middletown v. McGee*, 39 Ohio St.3d 284, 530 N.E.2d 902 (1988); and (2) the definition of “adjacent” found on the website Dictionary.com. This Court should reject Appellants’ argument.

McGee was an annexation case, in which this Court addressed “the contiguity

requirement” contained in Ohio statutes governing the annexation of land by a municipality. *Id.* at 287, 905. The *McGee* Court observed that the terms “adjacent,” “contiguous” and “adjoining” are considered synonymous in the annexation context. *McGee* is distinguishable, and the definition of “adjacent” from the annexation context should not be applied for purposes of easement interpretation. In the annexation context, the contiguity requirement exists in order to further the public policy that a municipality remain a singular place, rather than a series of different places. *Id.* However, a different policy objective underlies easement interpretation: an easement must be interpreted in a manner permitting the dominant estate to carry out its purpose, in this case the safe and reliable delivery of electric supply to customers and ultimately the electric grid. *See, Myers v. McCoy*, 5th Dist. No. 2004 CAE 07059, 2005 – Ohio – 2171, at ¶17 (May 4, 2005) (citing *Alban v. R.K. Co.*, 15 Ohio St.2d 229 (1968)). Thus, the Court should decline Appellants’ invitation to re-write established legal precedent regarding easement interpretation in order to create a new definition of the term of “adjacent” in this context.

This Court should also reject Appellants’ claim that the definition of “adjacent” found on the website Dictionary.com should apply, as opposed to the definition of “adjacent” found in Black’s Law Dictionary. As this Court has held, dictionary definitions are merely a tool to assist a Court in interpreting undefined terms, and a Court has discretion regarding which, if any, dictionary definition to accept. *See, e.g., Ritchey Produce Co., Inc. v. Ohio Dept. of Adm. Serv.*, 85 Ohio St.3d 194, 273, 707 N.E.2d 871, 926-27 (1999). In short, nothing about the Court of Appeals’ reliance upon Black’s Law Dictionary justifies discretionary review of this case.

Thus, Appellants’ Proposition of Law No. 2 is meritless and does not warrant review.

CONCLUSION

For the foregoing reasons, this Court should decline to exercise jurisdiction over this discretionary appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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