

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

**THE CLEVELAND ELECTRIC
ILLUMINATING CO.
6896 Miller Road
Brecksville, Ohio 44141**

Plaintiff,

vs.

**CITY OF CLEVELAND
601 Lakeside Avenue
Cleveland, Ohio 44114**

and

**CLEVELAND PUBLIC POWER
1300 Lakeside Avenue
Cleveland, Ohio 44114**

Defendant.

CASE NO. _____

JUDGE _____

**COMPLAINT FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

Plaintiff The Cleveland Electric Illuminating Co. (“CEI”) states for its Complaint as follows:

INTRODUCTION

1. CEI brings this action to enjoin Cleveland Public Power’s (“CPP”) dangerous and uncommunicated trespass onto CEI’s energized power lines in Brooklyn, Ohio. Without disclosing CPP’s construction plans, engineering drawings, or even the fact that CPP intended to interact with CEI’s active power grid, CPP has begun affixing equipment to CEI’s active power lines and placing CPP’s new wires on top of – and in physical contact with – CEI’s existing energized conductor lines, which are distributing over 13,000 volts of electricity. Despite repeated verbal and written warnings from CEI, CPP has outright refused to rectify this perilous

condition or provide the engineering plans to allow CEI to make the project safer for everyone affected.

2. This is not sensationalized. Should CPP's unauthorized power line(s) create a short in CEI's local grid, it could create an arc event that is powerful enough to melt the steel components on the poles, including those keeping the wires elevated and taut. Potential effects to the vicinity would include, among other things: spraying molten metal, electrical arcing to nearby conductors, and falling energized power lines. On a larger scale, it could include loss of power lines with the potential to blow out industrial breakers. In either case, nearly 2,400 people would immediately lose power.

3. These preventable conditions present an immediate risk of injury or death to CPP's workforce, CEI's workforce, and the public in Brooklyn, Ohio. These issues, as well as others that CEI cannot identify due to CPP's refusal to involve CEI in its construction decisions or even provide CPP's engineering drawings, will continue until this Court enjoins CPP's construction. CEI simply requests an injunction preventing further work by CPP for a reasonable time to ensure that CPP adequately informs and involves CEI in the project to ensure CPP performs the project safely and avoids injury to persons and damage to CEI's property.

PARTIES, JURISDICTION AND VENUE

4. Plaintiff CEI is an electric distribution company located in Brecksville, Ohio that has been providing electrical services to residential and commercial locations in Cleveland and Northeast Ohio for decades. CEI is a public utility that has the right and obligation to construct, operate, and maintain the equipment and facilities needed to provide electricity to the public. CEI proudly serves more than 700,000 customers in Northeast Ohio.

5. Defendant City of Cleveland (“Cleveland”) is a municipal corporation in Ohio. Cleveland owns and operates Defendant CPP.

6. Defendant CPP is an electricity generation and distribution company in Cleveland, Ohio that provides electrical service to residential and commercial locations in the City of Cleveland as well as neighboring municipalities. CPP is a municipal public utility owned and operated by Defendant City of Cleveland.

7. The Court possesses jurisdiction over the subject matter of this dispute pursuant to Ohio Rev. Code § 2305.01 et seq.

8. Venue is proper in this Court as Cuyahoga County is the county in which all or part of the claim for relief arose.

FACTS COMMON TO ALL CLAIMS

9. In 1928, Brooklyn Village granted a franchise to CEI’s predecessors to construct electrical facilities to serve its residents. In 1950, Brooklyn Village incorporated and became the City of Brooklyn. CEI has continued to serve the City of Brooklyn and its residents by operating and maintaining 13.2-kilovolt distribution lines and associated facilities. CEI built primary and secondary service lines for that purpose.

10. Including Brooklyn, CEI serves more than 700,000 residents across Northeast Ohio.

11. Cuyahoga County and Brooklyn partnered with IGS Solar, a company based in Columbus, Ohio, to build a solar farm over 17 acres of a closed landfill in Brooklyn. The project is estimated to generate approximately five million kilowatt-hours of power per year. If correct, this would likely be sufficient to service approximately 500 homes.

12. CPP entered into an agreement with IGS Solar to purchase all power generated by the solar farm to mix with electricity generated from other sources. CPP intends to sell that power to Brooklyn residents, among others.

13. In April 2017, Brooklyn consented to CPP's construction of electric distribution facilities and granted CPP a non-exclusive franchise to provide electricity service to customers in Brooklyn.

14. Brooklyn's consent and non-exclusive franchise is contingent upon CPP meeting all applicable code requirements and regulations.

15. The 13.8-kilovolt ("KV") distribution line is currently being constructed along approximately a mile-long section of Memphis Ave from the Brooklyn Landfill facility to W. 63rd St.

16. CEI's pre-existing electric distribution lines, however, already run along Memphis Ave. and connecting streets. (Affidavit of Nicholas Austin ("Austin Aff.") at ¶ 2. A true and accurate copy of the Affidavit of Nicholas Austin is attached hereto as Exhibit A).

17. As a result, CPP decided to construct its new poles and lines above CEI's existing lines.

18. Per ordinances issued by Brooklyn and Cleveland, CPP must adhere to the National Electrical Safety Code ("NESC") for installation of overhead electrical equipment.

19. CEI, as a non-municipal utility, must also satisfy NESC. This requirement is codified in Ohio's Administrative Code ("OAC"). (OAC at 4901:1-10-06) ("Each electric utility and transmission owner shall comply with the 2012 edition of the "American National Standard Institute's," "National Electrical Safety Code" approved by the "American National Standards Institute" and adopted by the "Institute of Electric and Electronics Engineers.")

20. At the outset, NESC provides that “The levels at which different classes of conductors are to be located should be standardized by agreement of the utilities concerned.” (2012 NESC, at Section 220).

21. Yet, at no point in the project’s development or before or during construction did CPP notify CEI of its intent to work around or physically manipulate CEI’s power lines. (Austin Aff. at ¶¶ 3-5). Nor did CPP notify CEI of specific locations along the intended construction path that would necessarily affect CEI equipment and facilities. (*Id.*)

22. CPP failed to do so despite the fact that, to erect the poles and install electric lines above CEI’s existing lines, CPP at various points in the planned path must cross CEI’s energized wires that run along connecting streets. (*Id.*) And CPP failed to do so despite the fact that it knew CEI might have crews working on lines in the area that could be affected by CPP’s ongoing construction.

23. For instance, at the intersection of Memphis Ave. and Ridge Rd., CPP intends to install a line traveling West to East along Memphis Ave. and, in the process, cross over CEI’s existing lines running North-South along Ridge Rd. (*Id.* at ¶ 9). The following photograph, taken at the Northwest corner of the intersection by a CEI employee on May 3, 2018, illustrates the hazard created by CPP’s unilateral conduct.



24. The red circles show the intersection of CPP's lines above CEI's existing lines on Ridge Rd., which runs left to right (North to South) in the photograph. (Austin Aff. at ¶ 9).

25. From street level, it appears that at least one of CPP's construction or electrical wires is physically perched on CEI's primary conducting lines. (*Id.* at ¶ 7). CEI believes that this overlaying equipment is non-energized, but because it appears to be in physical contact with an energized line, here 13.2 KV, it poses a safety risk to anyone in the vicinity. (*Id.* at ¶ 13).

26. Because CPP is aware of the extraordinary danger, CPP installed the yellow rubber tubes, known as "cover-ups," on four of CEI's lines. (*Id.* at ¶ 5). Cover-ups provide a

layer of electrical protection while a crew is working in a general area, such as brush protection. (Austin Aff. at ¶ 6). They are not intended or designed to serve as working surfaces between energized power lines and other equipment. (*Id.*)

27. CPP installed these cover-ups on lines for which CEI is responsible without notifying CEI. (*Id.* at ¶ 5). In addition to the potentially catastrophic dangers described below, CEI must be notified about these cover-ups because they add weight to the power lines. (*Id.* at ¶ 11). Over time, they can wear away the wires or put stress on the connections at the pole on either side. (*Id.*)

28. More importantly, CPP violated national safety standards by resting wires directly on top of CEI's active wires. NESC provides that there must be a vertical clearance measured in terms of meters between conductors and other wires. (*See* NESC at Table 233-1, labeled "Vertical Clearance between wires, conductors, and cables carried on different supporting structures."). There are a number of reasons for these clearances, the first and foremost of which is safety.

29. NESC also provides that "Precautions shall be taken to prevent wires or cables that are being installed or removed from contacting energized wires or equipment." (*Id.* at Sec. 422(C)(1)). In fact, "Wires or cables that are not bonded to an effective ground and which are being installed or removed in the vicinity of energized conductors shall be considered as being energized." (*Id.*) Additionally, "Precautions shall [] be taken to prevent, as far as is practical, any arc from forming and to prevent any arc that might be formed from injuring or burning any parts of the supporting structures, insulators, or conductors." (NESC, at Sec. 447).

30. To be clear, should the cover up fail—after all it is not intended to serve as an insulator between energized equipment—a series of calamitous events can occur. (Austin Aff. at

¶ 12). Initially, CEI could experience a short in the line, which would reset the corresponding breaker repeatedly, causing surges in the line and overloading the breaker. (Austin Aff. at ¶ 12). When this happens, the line and nearby electrical equipment can catastrophically “fault” creating extremely dangerous conditions including, but not limited to, explosions, flames, and melting electrical equipment. (*Id.*) These catastrophic failures have the potential to create dangerous conditions to employees and members of the public in the vicinity of the failure. (*Id.* at ¶ 13). Moreover, such catastrophic failures, aside from posing a real danger to the public, would require the expense of considerable time and energy for repair purposes, and in the case identified above, would likely outage approximately 2,400 CEI customers until electrical restoration activities concluded. (*Id.*) In short, the possibility of failure creates unnecessary risk for CEI and CPP property and, more importantly, creates an unnecessary risk for members of the public and employees of both CEI and CPP. (*Id.*)

31. CPP’s failure to notify CEI amplifies this problem. If adequately apprised of CPP’s operations, CEI has the ability to set its breakers to a single fault, meaning they will not automatically reset upon a fault. (*Id.* at ¶ 14). This could eliminate some of the occupational and public risk created by CPP’s conduct. Similarly, CEI could present viable solutions for working in and around its equipment, which would certainly entail elevating all wires sufficiently above, and far from contact with, active power lines. (*Id.*)

32. CEI discovered that CPP had accessed CEI’s lines and improperly placed equipment thereon on May 3, 2018. (*Id.* at ¶ 16).

33. Upon discovering these safety and property concerns on May 3, 2018, Nicholas Austin, Director of Operations Services for CEI, authored and faxed a letter to CPP and the City of Brooklyn setting forth our observations, asking all construction to stop until all relevant

parties could confer as to the safety issues raised, and requesting documents to better understand the underlying project. (Attached as Exhibit A to Affidavit of N. Austin, referred to herein as the “May 3 Letter.”).

34. CPP responded to the May 3 Letter via an email on the same date at approximately 4:55pm. (Attached to Austin Aff. as Exhibit B). CPP’s response indicated a willingness to meet, but provided no assurance that the appropriate parties would be present, provided no indication that they would produce documents, and via the email chain, indicated a clear intent to continue with construction despite CEI’s reasonable request for a delay.

35. Mr. Austin responded by requesting a meeting with the appropriate decision-makers and informed and qualified engineers:

From: Austin, Nicholas A
Sent: Thursday, May 03, 2018 5:48 PM
To: 'Leyda, Christine' <cleйда@CPP.ORG>; kbutler@brooklynohio.gov
Subject: RE: First Energy Fax

Good afternoon:

We appreciate your swift response. Given the breadth of our concerns and the fact that several of our subject matter experts are coming to the meeting from across our territory, we would propose a 9:00 a.m. meeting tomorrow morning at our facility in Brecksville. Please let us know if our proposal is agreeable.

Also, we ask that you confirm the attendance of your project site superintendent and your lead engineer, as well as any other lead on the project who understands the project scope, schedule and technical details. We hope to engage in a meaningful technical and safety-based dialogue; given our field observations today, we see an urgent need to collaborate to ensure the safety of all involved.

Finally, can you please confirm that you will bring a copy of the project plans diagrams to the meeting so that we may overlay them on our current system configuration.

We await your response.

Nicholas A. Austin
Director, Operations Services
The Cleveland Electric Illuminating Company A FirstEnergy Company

(Email from N. Austin, 5/3/2018, attached to Austin Aff. as Exhibit B).

36. As the email shows, Mr. Austin also requested that CPP provide “a copy of the project plans/diagrams” so that CEI could begin determining the overlay points of CPP’s new construction on CEI’s existing system. (*Id.*)

37. Thereafter, in a series of emails and telephone calls between Mr. Austin and various individuals at CPP, CPP contended that it had not done and was not currently doing anything inappropriate in the field. CPP would not produce documents without a formal public records request, and CPP would not delay or otherwise stop construction. Simply put, CPP indicated it was going to continue working in whatever manner it wished in the field and would not collaborate with CEI. (Austin Aff. at ¶ 18).

38. Therefore, on May 4, 2018, CEI filed a public records request, which is attached to Mr. Austin's Affidavit as Exhibit C. (*Id.* at ¶ 19). The City of Cleveland has adopted a Public Records Policy (available at http://www.city.cleveland.oh.us/sites/default/files/forms_publications/PublicRecordsPolicy12.2017.pdf), which states that “[m]ost routine requests for records should be satisfied immediately if feasible to do so.” Because this is an active project, those documents are almost certainly readily available. Nonetheless, CPP has failed to produce any information or documents to CEI. (Austin Aff. at ¶ 19).

39. As of the filing this Complaint, CPP continues to access CEI's energized lines and create unsafe conditions similar to those shown at Memphis Ave. and Ridge Rd. in Brooklyn, Ohio. (*Id.* at ¶ 20).

40. Over the past 72 hours, CEI has observed several significant safety concerns involving the trespass of CPP personnel and equipment on CEI's without any notice. More significantly, field conditions continue to change rapidly, creating varying degrees of risk and concern such that upon a visual inspection by CEI employees on the morning of May 9, 2018, field conditions are different from those 12 hours prior. This cannot continue without unreasonably risking the safety of workers and members of the public. This further highlights

the importance of why CPP must communicate with and seek permission from CEI before making contact with or cover up CEI lines. Without this collaboration, CPP is unnecessarily putting CEI employees and property at risk, as well as members of the public. (Austin Aff. at ¶ 21).

41. Faced with no other options to protect its workforce, the public, and its property rights, CEI files the instant complaint and accompanying motion for temporary restraining order and preliminary injunction. Specifically, CEI seeks an injunction to enjoin CPP from accessing and/or working on or around CEI's energized power lines with first obtaining permission from CEI. CPP's continued failure to do so creates unsafe conduct as it poses a real and imminent threat to the safety of both CEI and CPP's workforce and the general public. CEI also seeks an Order requiring CPP to collaborate with CEI to reach mutual agreement on CPP's construction to ensure the safety of both workforces and the surrounding public.

**FIRST CLAIM FOR RELIEF
(INJUNCTIVE RELIEF - TRESPASS)**

42. CEI incorporates by reference herein each and every allegation set forth above, the same as if fully rewritten herein.

43. CEI owns a property right, interest in and possession over its electrical facilities, including electrical distribution lines and associated equipment.

44. Ohio law provides that public utilities be required to provide and maintain adequate facilities to properly serve Ohio's residents. As a public utility, CEI is, therefore, responsible for its facilities, including power lines used to distribute power to customers of CEI.

45. Additionally, Ohio law specifically forbids unauthorized persons from interfering with electrical lines.

46. CPP willfully, recklessly, and without CEI's authorization physically interfered with and manipulated CEI's power lines by installing unauthorized equipment and placing wires in physical contact with CEI's energized electrical distribution lines. This is in direct contravention of CEI's exclusive right over its electrical facilities.

47. CPP's physical interference has recklessly created an imminent risk of irreparable harm to the public health and safety and the workforce of both CEI and CPP.

48. CEI requests that the Court enjoin CPP's operations immediately and for a reasonable period of time to allow CEI to ensure the safety of CPP's operations. The Court should not permit CPP to resume work until it has first collaborated with CEI on safety while working around CEI's lines.

SECOND CLAIM FOR RELIEF
(INJUNCTIVE RELIEF – NEGLIGENCE AND NEGLIGENCE *PER SE*)

49. CEI incorporates by reference herein each and every allegation set forth above, the same as if fully rewritten herein.

50. CPP owes a duty to CEI, CEI's workforce, and the public to ensure the safety of its construction and operations.

51. CPP owes a duty to CEI to ensure it does not damage CEI's existing electrical facility equipment rightfully installed and operating under Ohio law.

52. CPP is currently breaching its duty to perform all construction safely.

53. CPP knows or should know that its interactions with CEI's energized lines are unsafe and improper.

54. In fact, CPP is currently violating the NESC, including, but not limited to, those Sections cited herein and Part 2, *et seq.* The Ohio Administrative Code mandates that utilities abide by the NESC. (OAC at 4901:1-10-06).

55. CPP's violations of the NESC constitute negligence *per se*.

56. CPP's recklessness in ignoring CEI's written and verbal pleas to collaborate over safety further constitutes gross negligence.

57. Additionally, CPP is breaching its duty to ensure its construction operations do not negatively affect CEI's electrical service facilities.

58. CPP's breaches have created an imminent risk of irreparable harm to the health and safety of CEI's workforce, the public, and CEI's electrical service facilities.

59. CEI requests that the Court enjoin CPP's operations immediately and for a reasonable period of time to allow CEI to ensure the safety of CPP's operations. The Court should not permit CPP to resume work until it has first collaborated with CEI on safety while working around CEI's lines.

**THIRD CLAIM FOR RELIEF
(INJUNCTIVE RELIEF – PUBLIC AND PRIVATE NUISANCE)**

60. CEI incorporates by reference herein each and every allegation set forth above, the same as if fully rewritten herein.

61. As detailed herein, CPP's conduct is intentional, reckless, and unreasonable. CPP's conduct is at a minimum negligent.

62. CPP physically attached cover-ups to CEI's conducting power lines. CPP is also aware of the existing wires resting recklessly on CEI's energized conducting lines. Indeed, CEI has provided photographs of that existing condition.

63. Both CEI and the public are at risk of irreparable human injury due to CPP's ongoing unsafe conduct.

64. CPP is physically interfering with CEI's property, including power lines and affiliated facilities, without authorization.

65. CEI stands to suffer property damage unique to CEI due to CPP's construction conduct.

66. Should CPP's reckless conduct cause damage to CEI's property it will likely create a power-outage event for nearly 2,400 residents of Brooklyn, Ohio.

67. CEI requests that the Court enjoin CPP's operations immediately and for a reasonable period of time to allow CEI to ensure the safety of CPP's operations. The Court should not permit CPP to resume work until it has first collaborated with CEI on safety while working around CEI's lines.

WHEREFORE, CEI demands the following relief:

1. Judgment in favor of CEI on all claims asserted;
2. Ordering CPP to obtain permission from CEI before contacting, manipulating, and/or working on or around CEI's energized power lines, distribution network, and all connected facilities;
3. Ordering a temporary stay of construction;
4. Ordering CPP to provide CEI with all pertinent plan and engineering information at all places through CPP's Brooklyn, Ohio project where CPP anticipates working around CEI's energized lines;
5. Such other equitable relief to which CEI may be entitled.

Respectfully submitted,

s/ Gregory J. Phillips

Gregory J. Phillips (0077601)

Trevor G. Covey (0085323)

BENESCH, FRIEDLANDER, COPLAN
& ARONOFF LLP

200 Public Square, Suite 2300

Cleveland, OH 44114-2378

216-363-4500 Phone

216-363-4588 Fax

gphillips@beneschlaw.com

tcovey@beneschlaw.com

Attorneys for Plaintiff

The Cleveland Electric Illuminating Co.