

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00725-CV

Kenneth M. Jasinski, Appellant

v.

Public Utility Commission of Texas and Oncor Electric Delivery Company LLC, Appellees

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT
NO. D-1-GN-16-000424, HONORABLE DARLENE BYRNE, JUDGE PRESIDING**

MEMORANDUM OPINION

Kenneth M. Jasinski, appearing pro se, appeals the trial court’s order affirming an order of the Public Utility Commission dismissing his complaint regarding tree trimming activities of Oncor Electric Delivery Company LLC. In three issues Jasinski argues that the Commission: (1) erred in dismissing his claim for failure to state a claim for which relief could be granted; (2) erroneously failed to rule on his proposed findings of fact and conclusions of law; and (3) erred by permitting Oncor to implement a “tree clearance distance rule” without requiring it to be filed as a tariff change. We will affirm.

BACKGROUND

Jasinski, a resident of Dallas, filed a complaint with the Commission after Oncor trimmed a live oak tree located on Jasinski’s property. According to Jasinski, on February 11, 2015, Oncor “side-trimmed” his live oak tree to provide ten feet of clearance between the tree’s branches

and a distribution line passing through Jasinski's property. At the time of the trimming, Oncor's Vegetation Management Report, filed with the Commission as required by Commission rules, included the following practice related to clearance between Oncor's conductors and vegetation:

SR 25.96(f)(1)(B)¹
Trimming Clearance and Scheduling Approach

Clearances between conductor and vegetation, at the time of work, is a minimum of seven to ten feet from conductors energized at 600 volts or more, and three to five feet from conductors energized at less than 600 volts.

Projects are selected based on circuits with 1) high vegetation related outages and open wire secondary and 2) mainline projects based on risks. Projects are scheduled by circuit for efficiencies of work.²

See Oncor Electric Delivery Company LLC's Annual Vegetation Management Report Pursuant to Substantive Rule §25.96 (May 1, 2014) at 6 (the 2014 Vegetation Management Report); see also 16 Tex. Admin. Code §§ 25.96(e)(1) (Pub. Util. Comm'n of Tex., Vegetation Mgmt.) (requiring utility to maintain vegetation management plan that includes description of utility's tree pruning methodology, trimming clearances, and scheduling approach); 25.96(f)(1)(B) (requiring utility to file with Commission report summarizing vegetation management plan including trimming clearances and scheduling approach). According to the 2014 Vegetation Management Report, this

¹ "SR 25.96(f)(1)(B)" is a reference to the section of the Commission's vegetation management rule requiring filing a Vegetation Management Report that includes a summary of the utility's "trimming clearances and scheduling approach." *See* 16 Tex. Admin. Code § 25.96(f)(1)(B) (Pub. Util. Comm'n of Tex., Vegetation Mgmt.).

² Jasinski refers to this section of the 2014 Vegetation Management Report as "Oncor's Former Clearance Rule."

practice conformed to the vegetation management standards set forth in section 218 of the National Electric Safety Code,³ which provides in pertinent part:

A. General

1. Vegetation that may damage ungrounded supply conductors should be pruned or removed. Vegetation management should be performed as experience has shown necessary.

NOTE 1: Factors to consider in determining the extent of vegetation management required include, but are not limited to: line voltage class, species' growth rates and failure characteristics, right-of-way limitations, the vegetation's location to the conductors, the potential combined movement of vegetation and conductors during routine winds, and sagging of conductors due to elevated temperatures or icing.

NOTE 2: It is not practical to prevent all tree-conductor contacts on overhead lines.

In his complaint to the Commission, Jasinski alleged that the side-trimming of the live oak on his property to an "excessive and unnecessary" ten-foot clearance distance was contrary to the Public Utility Regulatory Act, NESC section 218.A.1, Commission policy, standards of "Good Utility Practice," the clearance practices set forth in Oncor's 2014 Vegetation Management Report, and Oncor's tariff. Specifically, Jasinski alleged that "[s]aid pruning caused by Oncor was about forty-two percent (42%) more than needed to satisfy Oncor's 'adequate space' goal stated in Oncor's 2013 Rule 25.96 Report and in Oncor's 2014 Rule 25.96 Report, and to comport with PURA,⁴

³ The National Electrical Safety Code (NESC) is a United States standard for the safe installation, operation, and maintenance of electric power and communication utility systems including power substations, power and communication overhead lines, and power and communication underground lines.

⁴ "PURA" refers to the Public Utility Regulatory Act found in Title 2 of the Texas Utilities Code, a title "enacted to protect the public interest inherent in the rates and services of public utilities" and to "establish a comprehensive and adequate regulatory system for public utilities to

NESC 218.A.1, the Commission’s policy, ‘Good Utility Practice,’ Oncor’s Former Clearance Rule and its tariff.”

In May 2015, Oncor filed its 2015 Vegetation Management Report. Regarding Oncor’s practice related to clearance between Oncor’s conductors and vegetation, the 2015 Report stated:

**SR 25.96(f)(1)(B)
Trimming Clearance and Scheduling Approach**

Clearances between conductor and vegetation, at the time of the work, is a minimum of ten (10) feet from primary, seven (7) feet on open wire secondary, and three (3) to five (5) feet on bundled secondary and neutrals.

Projects are selected based on previous prune date and VM SAIDI.⁵ Projects are scheduled by circuit for efficiencies of work.⁶

In his complaint, Jasinski alleged: “No justification for Oncor’s New Clearance Rule has been provided to the Commission, and said new rule is much worse for Complainant, and others, than Oncor’s former rule.” According to Jasinski, the clearance standard described in the 2015 Vegetation Management Report “does not reflect an electric industry-approved standard, does not constitute ‘Good Utility Practice,’ as defined by the Commission,⁷ and does not comport with

assure rates, operations, and services that are just and reasonable to the consumers and to the utilities.” Tex. Util. Code § 11.002(a).

⁵ “VM SAIDI” is an acronym for “Vegetation Management System Average Interruption Duration Index,” which is used to identify locations with vegetation-caused performance issues.

⁶ Jasinski refers to this section of the 2015 Vegetation Management Report as “Oncor’s New Clearance Rule.”

⁷ Commission rules define “good utility practice” as:

Any of the practices, methods, and acts engaged in or approved by a significant

PURA, NESC Section 218.A.1 or the said Commission policy relating to tree trimming.” Jasinski alleged that, by conducting “excessive side-pruning of [his] live oak tree,” Oncor violated PURA sections 38.001, 38.003, and 38.004 as well as section 3.2 of Oncor’s tariff. *See* Tex. Util. Code §§ 38.001 (providing that electric utility “shall furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable”), .003 (governing electric utility’s rules and standards), .004 (requiring that distribution line owned by electric utility must be maintained, as to clearances, in manner described by NESC as adopted by American National Safety Institute and in effect at time of construction); *Oncor Electric Delivery Company LLC Tariff for Retail Delivery Service* § 3.2.⁸

Jasinski’s complaint alleged that:

Because Oncor’s New Clearance Rule is unjustified and unreasonable in that it permits a minimum of 42% of excessive and unnecessary side-pruning clearance distance for non-interfering trees and does not comply with NESC Section 218.A.1

portion of the electric utility industry during the relevant time period, or any of the practices, methods, and acts that, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. Good utility practice is not intended to be limited to the optimum practice, method, or act, to the exclusion of all others, but rather is intended to include acceptable practices, methods, and acts generally accepted in the region.

16 Tex. Admin. Code § 25.5(56) (Pub. Util. Comm’n of Tex., Definitions).

⁸ Section 3.2 of Oncor’s tariff states, in pertinent part:

Company will construct, own, operate, and maintain its Delivery System in accordance with Good Utility Practice for the Delivery of Electric Power and Energy to Retail Customers that are located within the Company’s service territory and serviced by Competitive Retailers.

The term “Good Utility Practice” in the tariff is as defined in Commission rule 25.5(56). *Id.*

and “Good Utility Practice,” and because Oncor cannot use PURA § 38.003 to file a rule or practice that is unreasonable or conflicts with PURA, Oncor violated PURA §§ 38.001, 38.003 and 38.004. The Commission has a legal duty to enforce PURA §§ 38.001, 38.003 and 38.004. [Jasinski] has waited a sufficient period of time for the Commission to act on Oncor’s New Clearance Rule before filing this new complaint under PURA.⁹

The relief Jasinski requested was that the Commission perform an audit of Oncor’s tree trimming practices pursuant to Texas Utilities Code section 14.202 and assess an administrative penalty pursuant to Texas Utilities Code section 15.023. *See* Tex. Util. Code §§ 14.202 (regulatory authority may require examination and audit of accounts of public or municipally owned utility); 15.023 (Commission may impose administrative penalty against person regulated under PURA who violates PURA or rule or order adopted pursuant to PURA). Jasinski also requested that the Commission order that (1) Oncor’s “New Clearance Rule” be changed to provide that Jasinski be “grandfathered” under the “Former Clearance Rule” and (2) Oncor “fully comply with NESC Section 218.A.1 and ‘Good Utility Practice’ [] when deciding the proper clearance distance within the ‘minimum of seven to ten feet’ range set forth in Oncor’s Former Clearance Rule.”

In response to Jasinski’s complaint, Oncor filed a motion to dismiss in which it argued that it had not violated any law or regulation. Commission Staff recommended that the complaint be dismissed for failure to state a claim for which relief could be granted. *See* 16 Tex. Admin. Code § 22.181(a)(1)(G) (Pub. Util. Comm’n of Tex., Dismissal of a Proceeding) (on motion

⁹ Jasinski’s reference to a “42% increased minimum distance” is based on his argument that the “Former Clearance Rule” contemplated the possibility of a seven-foot clearance for qualifying trees; that the “New Clearance Rule” eliminated that possibility; and the three foot difference between a seven-foot clearance and a ten-foot clearance amounts to a 42% increase in the minimum amount of clearance for a tree that could formerly have been trimmed to only a seven-foot clearance.

of presiding officer of any party, presiding officer may recommend that Commission dismiss any proceeding without evidentiary hearing for failure to state claim for which relief can be granted).¹⁰

After considering the motions and Jasinski's response, and without holding an evidentiary or other hearing, the Commission signed an order granting the motion to dismiss pursuant to Commission rule 22.181(a)(1)(G). After his motion for rehearing was overruled by operation of law, Jasinski filed a suit for judicial review in Travis County District Court. *See* Tex. Util. Code § 15.001. The district court affirmed the Commission order, and Jasinski then perfected this appeal.

DISCUSSION

Regulatory Framework

Oncor is an electric utility as defined by PURA. *See id.* § 31.002(6) (defining “electric utility”). Oncor provides transmission and distribution service to parts of the Dallas area, including the area in which Jasinski resides. The regulatory framework applicable to Oncor's delivery of service is found in PURA, the Commission's Rules, and Oncor's tariff,¹¹ which the Commission must approve. PURA requires utilities to “furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable.” *Id.* § 38.001. A utility's transmission and distribution lines must be “constructed, operated, and maintained, as to clearances, in the manner described by

¹⁰ The Commission subsequently revised rule 22.181 with an effective date of January 5, 2017. The revised rule also provides for dismissal for failure to state a claim for which relief can be granted. *See* 16 Tex. Admin. Code § 22.181(d)(8) (Pub. Util. Comm'n of Tex., Dismissal of a Proceeding). Citations to rule 22.181 in this opinion are to the version of the rule in effect at the relevant time period.

¹¹ An electric utility's tariff is a schedule containing all rates and charges stated separately by types of service, the rules and regulations of the utility, and any contracts that affect rates, charges, terms or conditions of service. *See id.* § 25.5(131) (Pub. Util. Comm'n of Tex., Definitions).

the [NESC].” *Id.* § 38.004. The NESC includes a provision that addresses managing vegetation that may come in contact with and possibly damage a utility’s lines. *See* National Electric Safety Code § 218.A.1. PURA requires each electric utility to annually report its vegetation management practices to the Commission. Tex. Util. Code § 38.101.

PURA also requires Oncor to file a tariff with the Commission. *Id.* § 32.101. The tariff must include “each rule that relates to or affects: (1) a rate of the utility; or (2) a utility service, product, or commodity furnished by the electric utility.” *Id.* Oncor’s tariff states that Oncor “will construct, own, operate, and maintain its Delivery Service in accordance with Good Utility Practice for the Delivery of Electric Power and Energy to Retail Customers that are located within [its] service territory.” *Oncor Electric Delivery Company LLC Tariff for Retail Delivery Service* § 3.2. With regard to vegetation management, Oncor’s tariff provides that it may access retail customers’ premises to, among other things, perform tree trimming activities and “tree removal where such trees, in the opinion of [Oncor] constitute a hazard to [Oncor] personnel or facilities, or to the provision of continuous Delivery Service.” *Id.* § 5.4.8.

The Commission has adopted substantive rules applicable to electric service providers. *See* 16 Tex. Admin. Code §§ 25.1-.508 (Pub. Util. Comm’n of Tex., Substantive Rules Applicable to Electric Service Providers). One of those rules requires the annual filing of a Vegetation Management Report describing the utility’s vegetation management practices. *Id.* § 25.96(e), (f). Relevant to this dispute, Oncor’s reports included the following provisions:

2013 Report and 2014 Report

Clearances between conductor and vegetation, at the time of work, is a **minimum of seven to ten feet from conductors energized at 600 volts or more**, and three to five feet from conductors energized at less than 600 volts.

2015 Report

Clearances between conductor and vegetation, at the time of work, is a **minimum of ten (10) feet from primary**, seven (7) feet on open wire secondary, and three (3) to five (5) feet on bundled secondary and neutrals.

(Emphases added.) The provisions do not set a maximum limit on trimming clearances.

Dismissal of Complaint

After reviewing Jasinski's complaint, the Commission dismissed it for failure to state a claim for which relief could be granted. *See* 16 Tex. Admin. Code § 22.181(a)(1)(G). Specifically, the Commission concluded that Jasinski's complaint did not contain allegations that, even if true, stated any violation by Oncor of its tariff, Commission rules, or PURA, or otherwise entitled Jasinski to the relief he sought.

Section 2001.174 of the Texas Government Code provides the standard for review of the Commission's order. *See* Tex. Util. Code § 15.001; Tex. Gov't Code § 2001.174. Under this standard, we must reverse the Commission's order if it prejudices substantial rights because its findings, inference, conclusions, or decisions (1) violate a constitutional or statutory provision; (2) exceed statutory authority; (3) were made through unlawful procedure; (4) were affected by other error of law; (5) are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) are arbitrary or capricious or characterized

by an abuse of discretion or a clearly unwarranted exercise of discretion. Tex. Gov't Code § 2001.174. Jasinski's challenge to the Commission's order in essence complains that the Commission's decision was an error of law—i.e., that the Commission erred in its conclusion that Oncor's actions, as alleged by Jasinski, do not constitute violations of any governing Commission rules, of PURA, or of Oncor's tariff. *See H.G. Sledge, Inc. v. Prospective Inv. & Trading Co.*, 36 S.W.3d 597, 602 (Tex. App.—Austin 2000, pet. denied) (appellate court reviews agency's legal conclusions for errors of law). According to Jasinski, the Commission's conclusion was erroneous because he alleged actions by Oncor that violated PURA sections 38.001, 38.003, and 38.004 and Oncor's tariff section 3.2.

In his complaint, Jasinski alleged that Oncor was “required by law to continue following Oncor's Former Clearance Rule in accordance with NESC Section 218.A.1 and ‘Good Utility Practice’” when trimming his live oak tree. According to Jasinski, when Oncor trimmed his live oak tree to a ten-foot clearance, it failed to apply its “Former Clearance Rule” in a manner that conformed to NESC 218.A.1 and “Good Utility Practice.” He alleged that this failure constituted a violation of PURA sections 38.001, 38.003, and 38.004 and Oncor's tariff. For these allegations to state a claim for which some type of relief may be granted, Oncor must have violated PURA, a Commission rule, or its tariff when it trimmed Jasinski's tree. We understand Jasinski's complaints to be that (1) Oncor's “New Clearance Rule” does not comply with NESC 218.A.1 because it permits excessive trimming and, consequently, adopting the “New Clearance Rule” is a violation of PURA section 38.004, *see* Tex. Util. Code § 38.004 (transmission or distribution line must be maintained, as to clearances, in manner described by NESC); and (2) if Oncor had properly applied its “Former Clearance Rule” in conformity with NESC section 218.A.1, his tree could only have

been trimmed to a seven-foot clearance and, consequently, the ten-foot side trim Oncor performed was a violation of PURA and its tariff.

For Jasinski to be correct, there must be some prohibition, statutory or otherwise, against Oncor's vegetation management practice of trimming trees to create a ten-foot clearance between the trees and Oncor's distribution lines. Otherwise, Oncor's vegetation management practice is not actionable and Jasinski has failed to state a claim for which relief can be granted with respect to Oncor's actions as alleged in Jasinski's complaint. There is no prohibition in PURA, the Commission rules, or NESC section 218.A.1 that prevents a utility from implementing a vegetation management practice of trimming trees to create a ten-foot clearance from distribution lines. NESC section 218.A.1, to which utilities are required to conform with regard to maintaining clearances between vegetation and transmission and distribution lines, does not require any specific clearance or range of clearance between a utility's lines and vegetation. Note 1 to section 218.A.1 sets forth factors a utility should consider when selecting the appropriate clearance between a line and the vegetation, but does not specify any particular clearance distance for any particular type of tree or other circumstance.

Oncor's 2014 Vegetation Management Report, which it filed with the Commission, plainly states that it trims trees to provide a seven to ten foot minimum clearance. Jasinski's only support for his allegation that a ten-foot clearance is "unreasonable and excessive" and does not comport with "Good Utility Practice" is his own position that his tree qualified for a seven-foot trim under the "Former Clearance Rule" and therefore the ten-foot trim is 42% more than needed to meet Oncor's stated vegetation management goals of obtaining "adequate space" for its utilities, *see*

2014 Vegetation Management Report at 5, and to constitute “Good Utility Practice.” The linchpin of Jasinski’s argument, therefore, is his assertion that the appropriate clearance between his tree and Oncor’s line was seven-feet. This assertion, which is the premise for his ultimate conclusion that a ten-foot clearance is “excessive and unreasonable” is, at best, merely an unsupported legal conclusion as opposed to an allegation of facts supporting that conclusion. Such a legal conclusion need not be taken as true in evaluating Jasinski’s complaint. *See, e.g., City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 826 (Tex. App.—Austin 2014, no pet.) (legal conclusions need not be taken as true in evaluating sufficiency of pleadings). Jasinski provides no other support, nor are we aware of any, for his claim that Oncor’s vegetation management practice violates any statute, rule, or its tariff. We therefore hold that the Commission properly concluded that Jasinski’s allegation that Oncor’s vegetation management practices described in both its 2014 and 2015 Vegetation Management Reports violated any governing statutes, regulations, or its tariff did not state a claim for which relief could be granted.

Jasinski also alleged that Oncor’s “New Clearance Rule” could not be effective since it would be contrary to PURA section 38.003 to impose a vegetation management practice that violated NESC section 218.A.1. *See* Tex. Util Code §§ 38.003 (electric utility may not impose rule except as provided by PURA); .004 (electric utility lines must be maintained as to clearances in manner described by NESC). According to Jasinski, the “New Clearance Rule” could not apply to his tree since it was contrary to PURA and, consequently, the “Former Clearance Rule” with its seven to ten foot minimum clearance range applied to his tree. Thus, in Jasinski’s view, Oncor violated PURA, Commission rules, “Good Utility Practice,” and its tariff by choosing the ten-foot

clearance instead of the seven-foot clearance when trimming his tree. Again, this argument depends on the premise that some statute, rule, or practice imposed a limit on Oncor's discretion to determine the appropriate clearance between its line and Jasinski's tree. Jasinski identifies no such statute, rule, or practice. NESC section 281.A.1 provides that a utility should consider certain factors when determining "the extent of vegetation management" including, but not limited to, the tree's growth rates and failure characteristics, its location relative to the conductors, and the potential combined movement of vegetation and conductors during routine winds. NESC section 218.A.1 does not, however, mandate consideration of these factors or provide any specific guidelines or requirements. While in Jasinski's opinion a seven-foot clearance between his live oak tree and Oncor's power lines would have been adequate, his viewpoint does not make Oncor's different conclusion actionable. Nor does his opinion that a seven-foot clearance would have been adequate make the ten-foot clearance selected by Oncor "unreasonable or excessive" simply because it is 42% more than what Jasinski believed to be an adequate clearance.¹²

¹² In his brief on appeal, Jasinski argues that the "New Clearance Rule" was a change in Oncor's "rules or practices" and that, as a consequence, Oncor was required to file its vegetation management practice as a "rate" or "rule" change to its currently effective tariff. *See* Tex. Util. Code § 32.101 (requiring electric utility to file tariff showing each rule that relates to or affects utility service). This allegation was not included in the complaint Jasinski filed with the Commission and we therefore need not consider it in determining whether the Commission properly dismissed his complaint for failure to state a claim for which relief could be granted. Even if included in his complaint, we do not agree that any changes to Oncor's tree-trimming clearances were required to be included in Oncor's tariff. The only mention of tree trimming in the Commission-approved tariff was related to the utility's right to access a customer's premises in order to perform vegetation management. *See Oncor's Tariff* § 5.4.8. The Commission's pro-forma retail delivery tariff does not include tree-trimming clearances as one of the prescribed service terms. *See* 16 Tex. Admin. Code § 25.214(d) (Pub. Util. Comm'n of Tex., Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities) (providing pro-forma delivery tariff for retail delivery service).

On appeal Jasinski complains that the Commission issued its order granting the motion to dismiss for failure to state a claim for which relief could be granted without ruling on each proposed finding of fact and conclusion of law that he proposed pursuant to Commission rule 22.261(d)(2). *See* 16 Tex. Admin. Code § 22.261(d)(2) (Pub. Util. Comm’n of Tex., Proposals for Decision). According to Jasinski, the Commission’s failure to rule on his submitted findings and conclusions violated Texas Government Code section 2001.141(e). *See* Tex. Gov’t Code § 2001.141(e) (“If a party submits under a state agency rule proposed findings of fact or conclusions of law, the decision or order shall include a ruling on each proposed finding or conclusion.”). The Order granting the motion to dismiss, however, recites: “*All other motions, requests for entry of specific findings of fact and conclusions of law, and any other request for general or specific relief, if not expressly granted herein, are denied.*” (Emphases added). This language constitutes a ruling on the proposed findings of fact and conclusions of law Jasinski submitted.

Jasinski also complains that the Commission dismissed his complaint without providing him an evidentiary hearing and inappropriately resolved evidentiary issues on a motion to dismiss. Rule 22.181 expressly provides that the Commission may dismiss a complaint without an evidentiary hearing if it determines that the complaint fails to state a claim for which relief can be granted. *See* 16 Tex. Admin. Code § 22.181(a)(1)(G). And, as discussed above, in making the determination of whether Jasinski’s complaint states a claim for which relief can be granted, the Commission and this Court did not resolve any evidentiary issues but concluded that, *even taking his allegations as true*, Jasinski’s complaint did not allege actionable conduct by Oncor.

CONCLUSION

Having reviewed the complaint Jasinski filed with the Commission regarding Oncor's vegetation management practices we conclude, as did the Commission, that it fails to state a claim for which relief may be granted. Consequently, the district court's judgment is affirmed.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: June 14, 2017