STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

MATTHEW SOVA, JANE SNELL, JAMES LAMB, SCOTT KUCHAR, ADAM ENGEL, SAMANTHA ENGEL, and all those similarly situated in Saginaw County, Michigan,
Plaintiffs,

v.

CONSUMERS ENERGY COMPANY and ARBORMETRIC SOLUTIONS, LLC,
Defendants
_____/

Case No.: 25-002533-CH
Honorable Julie Gafkay

RESPONSE

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PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT CONSUMERS ENERGY'S MOTION FOR SUMMARY DISPOSITION

Consumers Energy wants a statewide permission slip to leave its limited public easement whenever it chooses and do whatever it wants to privately-owned trees on private property across Saginaw County. Michigan law has never recognized such a right.

This case does not concern how utilities trim trees if within its lawful easement; it concerns *where Consumers Energy may lawfully enter or go*. The sued electric company attempts to reframe a trespass and easement-scope case as a challenge to regulated vegetation-management policy. But Plaintiffs do not challenge statewide trimming cycles, reliability metrics, or the design of any MPSC program. Instead, Plaintiffs challenge a private utility's decision to enter upon private land (outside any actual easement), without consent, and mark, paint, and threaten the destruction of trees that do not interfere with power lines. These are classic trespass allegations rooted in centuries of Michigan *property* law. They fall squarely within the judicial function of this Court and far outside the jurisdictional reach of the Michigan Public Service Commission. The MPSC does not have jurisdiction over private property right disputes.

Consumers Energy hopes that by flooding the record with fact sheets, audits, trimming statistics, and regulatory history, this Court will defer to an agency that has no authority to interpret deeds, adjudicate property boundaries, determine the scope of easements, or assess damages for tree injury or trespass. But the doctrine of primary jurisdiction does not divest courts of their role in resolving *private property disputes*. It applies only when the issues presented are within the agency's statutory competence and when the agency is capable of providing the relief sought. Neither is true here.

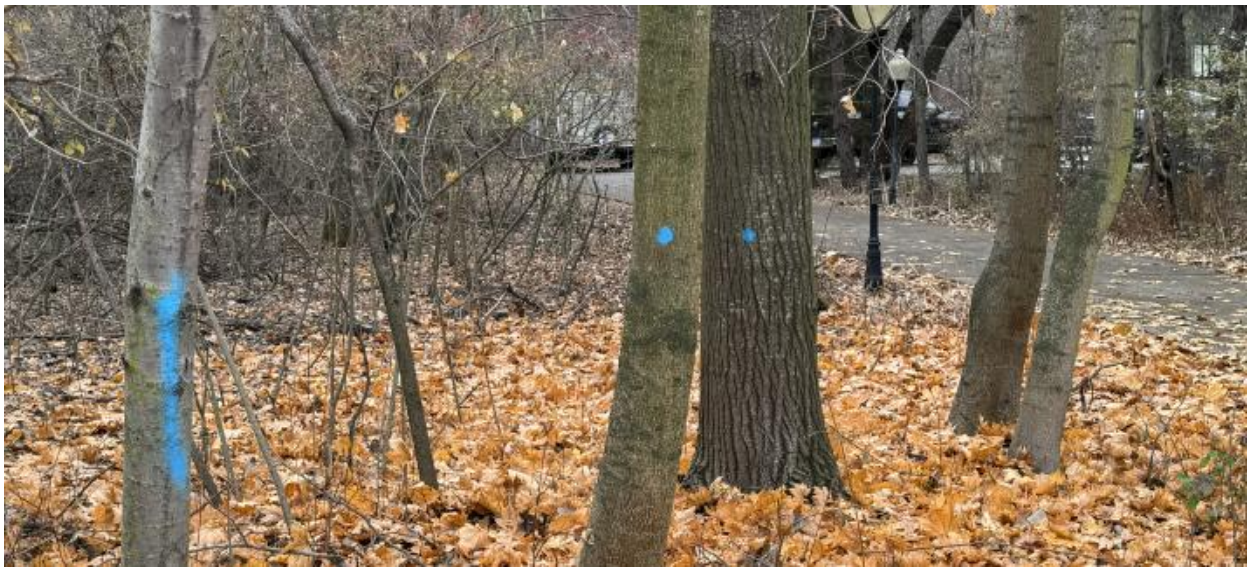
Instead, this case concerns the sanctity of private land and private property, and the right to exclude unwanted intrusions by unlawful invaders. Plaintiffs are asking this Court to enforce those rights as Michigan courts have always done. Put in another way, Consumers is acting like a mail carrier who believes that because the Postal Service is federally regulated, he can walk through your house, open the fridge, take a beverage,

and rearrange your furniture on his way out. Regulation of the ***service*** does not expand the ***right of entry.*** Plaintiffs do not ask this Court to regulate vegetation management, review trimming standards, or second-guess any MPSC order; they ask only that Consumers Energy remain ***within*** property boundaries as existing and ***stay out*** of those it does not. The motion for pre-answer dismissal must be denied.

FACTS

This case arises from a simple but profound dispute about private property. Plaintiffs are homeowners across Saginaw County who have lived with, cared for, and invested in the trees that stand on ***their*** own private land. Neither the trees nor land where they are planned is owned by Consumers Energy. The trees are mature, ornamental, long-standing natural features that contribute shade, wind protection, aesthetics, environmental value, and the quiet sense of neighborhood identity and personal pride that trees often bring. Many have stood for decades without ever interfering with the electric lines that run nearby.

Consumers Energy, through its contractor ArborMetrics, undertook a county-wide marking campaign in 2025. Without seeking permission, without verifying easement boundaries, and without determining whether any tree posed a hazard, crews entered private yards and placed permanent blue paint markings on trees across Saginaw County.



Some markings were dots, others slashes, others X-shaped symbols. To homeowners, the meaning was unmistakable: these trees—healthy, non-interfering, and well outside any clearance zone required by safety—had been targeted for cutting, heavy trimming, or removal.

Permission was never sought from the home owners by these entries. No Plaintiff authorized the defacement of their trees by permanent blue paint. Even now, Consumers Energy has never produced any written easement granting a right to mark or deface trees on their land. To place the blue paint, Consumers or its agents had to trespass outside

the public right of way to spray the blue marks. Even where easements exist, they generally authorize only what is reasonably necessary to maintain the line itself. They never authorize any so-called 15-foot clearances, they do not authorize permanent defacing paint markings and permanent defacement, and they do not authorize alterations to trees that pose no present or foreseeable danger to the conductors. And Michigan law is crystal clear: Consumers Energy cannot "make improvements" (i.e. changes) "to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement." *Blackhawk Dev'l Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). An "use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). The extent of a party's rights under an easement is always a question of fact. *Blackhawk,* 473 Mich at 40.

The First Amended Complaint alleges that the trees at issue have never contacted the lines under normal conditions. Many are situated significantly outside any reasonable clearance distance. Plaintiffs allege, and will show, that the marked trees were not interfering with Consumers Energy's lines, were not predicted to interfere under foreseeable growth patterns in the required 'every four' rule, and were not in a condition that required trimming for safety, reliability, or maintenance. They were chosen because Consumers Energy adopted an internal policy of imposing a blanket corridor—approximately 30 feet in width—regardless of actual interference.

This blunt-force cutting approach disregarded easement boundaries entirely. Rather than determine whether a specific easement permitted the intrusion, Consumers Energy acted as though regulatory oversight by the Michigan Public Service Commission

supplied the missing authority. It did not. The MPSC does not grant utilities the right to enter private land outside an easement, nor does it create new property rights by regulation. Yet Consumers Energy's crews proceeded as though regulatory policy alone superseded deeded property boundaries and supplanted the longstanding rule that easements are strictly construed in favor of the servient estate.

Homeowners reacted with confusion and alarm. Trees that had shaded their homes and added value to their properties for years suddenly bore symbols of destruction. This is a recent example from Thomas Township—

The results are ugly and often times results in the inevitable death of trees. More threatened cutting, if carried out, would permanently alter the structure, appearance, and health of the affected trees. Once a mature tree is cut or crowned, the injury is permanent. Monetary damages cannot restore decades of natural growth.

The physical entry, the painting of trees, and the threatened removal of healthy, non-interfering trees caused Plaintiffs significant distress. They experienced anxiety, loss of quiet enjoyment, disruption of their peace of mind, and the indignity of seeing their property altered without legal authority. Each Plaintiff, and many members of the putative class, now face the risk of irreversible property damage if Consumers Energy proceeds with its plan.

The pattern of conduct was consistent across Saginaw County. Consumers Energy did not confine its actions to the boundaries of any documented right-of-way. It did not seek consent before marking trees. It did not restrict its approach to trees that interfered with or threatened the lines. Instead, it imposed a uniform clearance regime that effectively treated all private land within an arbitrary corridor as subject to its control, regardless of the legal limits of any easement.

This case arises not from a dispute about trimming cycles or technical vegetation-management standards, but from the tangible, physical, and unlawful intrusion of private land and the unauthorized marking, defacement, and threatened removal of healthy trees situated outside the scope of any easement held by Consumers Energy. Plaintiffs seek to restore the longstanding balance between utility maintenance and Michigan property rights by asking this Court to declare, consistent with common law, that an easement does not become a roving license to take, paint, or destroy what lawfully belongs to private landowners.

ARGUMENT

This case is about private property rights and—

> [t]he general concept of "property" comprises various rights— a "bundle of sticks," as it is often called which is usually understood to include "[t]he exclusive right of possessing, enjoying, and disposing of a thing." *** As this latter characterization suggests, the right to exclude others from one's land and the right to quiet enjoyment of one's land have customarily been regarded as separate sticks in the bundle. *** Thus, possessory rights to real property include as distinct interests the right to exclude and the right to enjoy, violations of which give rise to the distinct causes of action respectively of trespass… [and more].

Adams v Cleveland-Cliffs Iron Co, 237 Mich App 51, 57-59; 602 NW2d 215 (1999) (citations omitted). What Consumers Energy seeks to obscure is that this case is not about forestry science or trimming cycles—it is about the legal boundary between two competing private entities control over and use of privately owned land. That boundary is not drawn in Lansing; it is drawn in deeds and plats enforced by the courts. Michigan property law strictly prohibits any third party, including a utility, from expanding an easement beyond what is reasonably necessary for its operation. *Blackhawk* and *Delaney* remain the controlling authorities, and nothing in the regulatory framework can self-enlarge easement rights and conversely take away property rights of property owners. Consumers Energy must answer the Saginaw County homeowners' claims as a matter of property law in this court here and here alone.

I. Threshold Procedural Objection: Consumers Energy's Motion Is Misdirected and Improperly Framed

As a threshold matter, Consumers Energy's motion is procedurally defective because it seeks dismissal under MCR 2.116(C)(8) and (C)(10) for an issue that, by Consumers Energy's own theory, sounds only in temporary abeyance at most. The doctrine of primary jurisdiction does not test the legal sufficiency of the pleadings, nor

does it test whether factual disputes exist. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 206-207; 631 NW2d 733 (2001). It concerns whether a court should ***defer*** consideration, ***not dismiss***, of a claim because the Legislature has placed initial decision-making authority in an administrative agency. *Id.* at 207 (approvingly outlining how a "stay further proceedings" is the remedy).

Consumers Energy's attempt to shoehorn a primary-jurisdiction argument into a merits-based motion is not a harmless labeling error. A motion under (C)(8) assumes the truth of Plaintiffs' factual allegations and asks only whether those facts state a cognizable claim. See *El-Khalil v. Oakwood Healthcare, Inc*, 504 Mich 152; 934 NW2d 665 (2019). A motion under (C)(10) asks whether material facts are genuinely disputed. *Id.* Neither rule authorizes dismissal based on alleged administrative primacy. Allowing dismissal under (C)(8) or (C)(10) on this ground would improperly convert a discretionary sequencing doctrine into a merits adjudication, depriving Plaintiffs of their right to judicial resolution of property-rights claims. Even if the Court were to erroneously accept the substance of Consumers Energy's wrongly-made argument, it would not justify dismissal under the rules invoked. Plaintiffs object.

II. The MPSC Has No Jurisdiction or Authority Over Trespasses or Scope of Easement Challenges

Primary jurisdiction is not a device for funneling ordinary civil claims into administrative bodies. It is a narrow doctrine that permits a court to pause judicial proceedings when a specialized regulatory body has been given statutory authority to answer the very question in dispute. The MPSC was never granted authority over real property disputes or to adjudicate private property trespass. It cannot decide whether Consumers Energy trespassed. It cannot determine the lawful boundaries of an

easement. It cannot decide what is reasonably necessary under an easement. It cannot award damages for injury to trees. It cannot issue injunctions protecting property owners from further entry. In short, the MPSC lacks jurisdiction and this Court has it. MCL 600.605. The doctrine of primary jurisdiction applies only when 1.) the agency has statutory authority over the issue presented, and 2.) the agency can provide meaningful relief. The MPSC has neither over trespasses, scopes of easements, tree injury damages, and injunctions against entry.[1] The motion thusly fails.

Consumers Energy's motion rests on a simple but dangerous idea: that because a business is regulated, it may step onto private land and do things no ordinary neighbor could do—without permission and without consequence—and then insist that the homeowner must take the dispute to an agency instead of a courtroom. Michigan law has never worked that way. The fact that a utility is regulated does not give it a roaming hall pass to enter yards, mark trees, or alter property wherever it sees fit. A snowplow driver does not get to park in your driveway because the Department of Transportation regulates roads. A mail carrier does not get to wander through your backyard because the Postal Service is federally overseen. Regulation governs *how* services are provided—not *where* a private actor may physically go upon land it does not own and deface objects (i.e. trees) it also does not own.

That is why the doctrine of primary jurisdiction has no place here. The Michigan Public Service Commission does not interpret deeds, does not determine the scope of

[1] Notably, Consumers Energy does not identify any statute, rule, or MPSC procedure by which these affected homeowners could bring a trespass, easement-scope, or tree-injury dispute before the MPSC. Nor does it point to any process allowing a landowner to obtain a hearing, declaratory relief, damages, or an injunction concerning unauthorized entry onto private land. This absence is telling. Primary jurisdiction presupposes not only agency expertise, but the existence of an available administrative forum capable of addressing the dispute presented. Where no such forum exists, deferral serves no purpose other than delay.

easements, does not decide whether a trespass occurred, and does not award damages or injunctions for injury to private property. Those questions have always belonged to the courts, and they belong here. Plaintiffs are not asking this Court to second-guess trimming cycles or reliability metrics; they are asking the Court to answer a far more basic question: did Consumers Energy step where it had no right to step? That question requires no technical expertise, no regulatory balancing, and no agency referral. It requires only the application of settled Michigan property law. When a dispute turns on boundaries, consent, and the right to exclude, it is not an administrative matter—it is a courtroom matter.

Taking a backwards approach, Consumers Energy's motion assumes the conclusion—that MPSC involvement is appropriate—by insisting that because tree trimming is regulated, all disputes touching vegetation (like defacing private property with blue paint) must be sent to Lansing. But the Legislature did not give the MPSC power over easement interpretation or property invasion. Michigan courts interpreting deeds and boundary instruments do not consult the MPSC for guidance. They interpret property issues as a matter of law. The regulatory framework governing utility reliability does not convert the Commission into an arbiter of trespass actions.

A. The Primary-Jurisdiction Doctrine Does Not Apply Under *Travelers* or Any of Its Factors

Michigan courts do not reflexively defer to administrative agencies merely because a regulated entity is involved. As the Michigan Supreme Court made clear in *Travelers Insurance*, the doctrine of primary jurisdiction is a limited, prudential doctrine that applies only when "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative

body." 465 Mich at 197. It is not a jurisdiction-stripping rule, and it does not apply where the agency lacks authority to decide the issues presented or to grant the relief sought. When the doctrine is properly invoked, courts typically consider several overlapping factors, none of which support deferral here.

First, the issues presented (i.e. property rights) do not fall within the specialized expertise of the Michigan Public Service Commission. This case does not ask how often trees should be trimmed, what clearance distances best promote reliability, or how vegetation management programs should be designed. It asks whether Consumers Energy exceeded the lawful scope of its easements by entering private land and marking trees outside any right of access. The interpretation of deeds, plats, and easements—and the determination of whether a trespass occurred—are classic judicial functions governed by settled principles of property law. No technical or policy expertise of the MPSC is required to determine where a utility may lawfully go on land it does not own.

Second, referral would not promote uniformity in the administration of a regulatory scheme. Consumers Energy argues that allowing this case to proceed risks inconsistent outcomes statewide. The opposite is true. Uniformity concerns arise when courts, especially in class actions, are asked to set standards for everyone being subjected to the same wrong. Enforcing easement boundaries and trespass law does not interfere with uniform regulation; it enforces uniform respect for property rights. Michigan property law is already uniform, and courts apply it every day without agency involvement.

Third, judicial resolution will not disrupt or undermine the regulatory framework. The MPSC's authority over utility operations remains fully intact regardless of this Court's resolution of Plaintiffs' claims. A ruling that Consumers Energy must remain within its

easements does not second-guess any MPSC order, invalidate any vegetation-management plan, or dictate how Consumers trims trees within its lawful corridor. It simply enforces the outer boundary of lawful entry. As *Travelers* explains, primary jurisdiction is inappropriate where the court's involvement would not "upset the regulatory scheme" or intrude upon matters the agency is charged with administering.

Fourth, the MPSC is incapable of providing the relief Plaintiffs seek. The MPSC cannot award damages for trespass or injury to trees. It cannot interpret easements. It cannot enter declaratory judgments concerning property boundaries. It cannot issue injunctions forbidding Consumers Energy or its contractors from entering or altering private property. Because the agency cannot fully resolve the dispute or make Plaintiffs whole, deferral would serve no practical purpose. *Travelers* expressly cautions against invoking primary jurisdiction where referral would merely delay judicial resolution without advancing it. Deferral is legally impossible and a complete waste of time.

Finally, this dispute does not present a threshold policy question that must be answered by the agency before the court can act. The factual and legal questions here—where the easement lies, whether Consumers exceeded it, and whether trees were unlawfully marked—can be resolved on a record to be created before this Court. No prior agency determination is necessary, and none would meaningfully aid the Court's analysis.

Taken together, every consideration identified in *Travelers* and its progeny points in the same direction. This is not a case for administrative deferral. It is a case for judicial determination of private property rights. The doctrine of primary jurisdiction therefore

provides no basis for dismissal, stay, or referral, and Consumers Energy's motion must be denied.

III. This Case Does Not Challenge the Vegetation-Management Program

Consumers Energy further attempts to reframe this matter as a dispute over statewide trimming practices. But Plaintiffs are not asking this Court to evaluate the wisdom of a four-year cycle, audit trimming statistics, or review reliability metrics. They challenge a wholly different category of conduct: unauthorized entry onto private property outside any established easement, the marking and defacing of trees that do not interfere with conductors, and the threatened removal of healthy, non-interfering trees.

The distinction is extremely critical. The MPSC regulates trimming practices ***within lawfully-existing easement boundaries*** for purposes of safety and reliability. Here, the lawsuit challenges Consumers' actions of going where it does not have the legal right to go (absent consent). The MPSC has zero authority to force a homeowner to be trespassed upon by utility company or, on the flip side, permit a utility to step off the easement onto private land to paint, mark, scar, or threaten trees that do not require trimming. Even if trimming practices involve technical expertise, the threshold question of where Consumers Energy may lawfully go is not technical; it is legal based on property rights and their limitations. And legal questions belong to the judiciary. Even if vegetation management were within the Commission's regulatory purview, the tort here was complete the moment Consumers Energy stepped off the easement and permanently marked private trees without consent (and where MPSC has not authorized such defacement as a vegetation management obligation for a homeowner).

IV. *Evans* and *Baker* Are Not This Case

Consumers Energy relies substantially on two unpublished Court of Appeals decisions, *Evans* and *Baker*, as if they were talismans that automatically invoke primary jurisdiction for any dispute involving trees. But both cases involved claims that directly challenged the adequacy of trimming practices and the suitability of utility policies for storm response. Neither involved unauthorized entry outside claimed and asserted easement boundaries. Neither involved the marking of trees. Neither involved statutory damages under MCL 600.2919. Neither involved the right to exclude a private actor from land that falls outside the utility corridor.

The courts in *Evans* and *Baker* deferred because the plaintiffs there sought review of utility decisions that required technical expertise in safety, reliability, and vegetation-management standards. Plaintiffs here seek enforcement *of property rights* that require none of that. The question before this Court is whether Consumers Energy (and its contractor) exceeded the scope of Plaintiffs' property rights. Michigan courts answer that question every day. No technical determination from the MPSC is necessary to determine whether a tree forty feet from a line is outside an easement or whether painting a tree is reasonably necessary as part of an easement. Cases like *Evans* and *Baker* do not govern.

V. The MPSC Does Not Mandate Tree Painting or Marking

Finally, Consumers Energy repeatedly suggests that its blue-dot and blue-X marking system is part of the statewide regulatory framework. But no MPSC rule requires a utility to deface (paint) private trees. No order mandates bark defacement as a safety measure. The blue-paint marking system is Consumers Energy's self-serving choice—a private operational tool, not a regulatory requirement.

The fact that a utility has chosen an operational method does not give that utility the authority to exceed an easement. An internal marking system cannot enlarge property rights. If a utility wishes to mark trees outside its easement, it must obtain consent or legal authority. It has done neither. An agency cannot retroactively bless a trespass merely because the trespass is tied to a regulated field.

VI. Courts, Not Agencies, Interpret Easements

Michigan has long recognized that easement interpretation is a judicial function. A court must determine the width, scope, and permissible uses of an easement. No administrative agency, including the MPSC, can declare that an easement extends beyond its written limits or beyond what is reasonably necessary to operate the line. Consumers Energy's assertion that regulatory policy allows it to impose uniform clearance distances on private land irrespective of the terms of the easement is an invitation for this Court to permit a private entity to expand its rights without negotiation, consent, or compensation. That proposition is incompatible with Michigan property doctrine creating an even deeper constitutional flaw at the heart of Consumers Energy's argument.

Consumer's motion suggests that because the MPSC oversees vegetation-management practices, the utility may continually enter private land, outside the limits of any easement, and physically occupy or alter property whenever the company deems it necessary for "reliability." If this were true—and it should not be accepted even hypothetically—then Michigan has silently authorized perpetual access rights for a private actor to enter, mark, alter, and cut on private land across the state. That would be a taking on scale unlike anything the modern law has ever seen.

The United States Supreme Court addressed precisely this kind of state-authorized physical invasion (for the benefit of third parties) in *Cedar Point Nursery v Hassid*, 594 US 139 (2021). In that case, the Court held that when a regulation grants a private third-party entity the ability to physically enter private land without the owner's consent, the regulation works a per se taking, even if the access is intermittent or burdensome only at certain times. It is also a taking even if done for a valid purpose. *Cedar Point* reaffirmed the foundational principle that the right to exclude unwanted intrusions by third parties is one of the most essential rights in the bundle of property rights, and the government cannot grant access without triggering serious constitutional consequences.[2]

Consumers Energy's theory rests on the premise that regulatory oversight supplies the authorization to enter property outside the easement. Plaintiff rejects that as a matter of property law. Yet *Cedar Point* expressly rejects that premise outright as a matter of constitutional law. A regulation, no matter how comprehensive, does not convert private property into a public right-of-way, nor does it permit permanent or recurring physical occupation without compensation. If Consumers Energy's theory of "regulatory authorization" were adopted, Michigan would be presiding over the largest uncompensated physical-occupation taking in its history. Millions of property owners would have lost the most fundamental aspect of their property rights without a single condemnation proceeding. No court should embrace such a theory when a far narrower

[2] Plaintiffs do not bring a takings claim; they point out only that Consumer Energy's theory—if accepted—creates a constitutional impossibility the Court cannot adopt. If an interpretation can be accomplished to render the applicable framework constitutional over another that is unconstitutional, "the widely accepted and venerable rule of constitutional avoidance" applies. *People v McKinley*, 496 Mich 410, 415-416, 852 NW2d 770 (2014).

basis for decision is available: that a regulated utility must abide by the scope of its easement and may not trespass.

CONCLUSION

This Court, and not the MPSC, is the only forum empowered to determine the existence, scope, and limits of utility easements under Michigan law. And the strength of Michigan's property law has always rested on the simple promise of what is yours cannot be taken, altered, or invaded without lawful authority. Consumers Energy asks this Court to upend that promise by placing private rights into the hands of an agency that has no jurisdiction over them. This case belongs in a Michigan circuit court.

The First Amended Complaint alleges a trespass and other invasions of private property rights sought to be civilly remedied. They seek interpretation of deeds, plats, and other property instruments. They seek damages and declaratory and injunctive relief. These matters lie at the heart of the judicial role and outside the reach of the Michigan Public Service Commission. Consumers Energy's motion attempts to recast concrete invasions of private land as abstract regulatory policy. But regulation does not create rights that do not exist. It does not authorize trespass. It does not enlarge easements. And it does not erase the fundamental principle that private property remains private.

If the Court were to accept the theory advanced by Consumers Energy, it would open the door to a statewide constitutional violation of historic magnitude. *Cedar Point* confirms that no such theory is permissible. The safer and correct course is the traditional one, i.e., enforce the limits of easements as written (as a matter of Michigan law), evaluate the trespass as alleged (as a matter of Michigan law), and deny the motion.

RELIEF REQUESTED

WHEREFORE, the Court is requested to deny the pre-answer motion in full and direct Defendant Consumers Energy Co to answer the amended complaint forthwith.

Date: December 20, 2025

RESPECTFULLY SUBMITTED:

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was provided to and/or served on parties or at least one of his/her attorney of record on the date stated above by the following method(s):

[X]	US mail (Prepaid)	[X]	Email
[ ]	Fax	[ ]	MiFile
[ ]	Hand Delivery	[ ]	Other:

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STATE OF MICHIGAN
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DECLARATION

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DECLARATION OF ATTORNEY PHILIP L. ELLISON

1. I am an attorney licensed to practice law in the State of Michigan (P74117) and am one of the attorneys of record for Plaintiffs in the above-captioned matter.

2. On December 20, 2025, I visited the official website of Defendant Consumers Energy Company at the URL https://www.consumersenergy.com/company/trees-and-power-lines.

3. This webpage contains a section titled “Trees and Power Lines” that explains Consumers Energy’s vegetation management practices, including the use of blue paint marks on trees and bushes.

4. Consumers Energy’s webpage states, in relevant part: “What do the paint marks mean on my trees or bushes? The marks mean one of our Forestry personnel has identified tree and brush work that need to be performed.” It further describes specific blue marks as follows:

- Blue dot (.) marks trees to be trimmed.
- Blue X marks trees to be cut down.
- Blue A marks trees to be cut down if outside the easement right-of-way.
- Blue slash (/) intermittently marks smaller brush to be cleared.

5. The webpage indicates that these marks are applied “well in advance of planned tree maintenance” and are part of Consumers Energy’s internal “Tree Management Team” processes, following “established forestry guidelines and clearance standards based on voltage, tree species, location, and health.”

6. Notably, the webpage does not state that the use of blue paint marks is mandated by the Michigan Public Service Commission (MPSC) or any specific regulatory rule.

7. There is no indication (and I can find none elsewhere) that paint marking itself is a regulatory requirement or mandate under Mich Admin Code R 460.3505 or any

MPSC order but instead appears to be an internal self-made operational process chosen by Consumers Energy and/or its contractors.

8. This Declaration is submitted pursuant to MCR 2.116(H) as facts necessary to support the party's position cannot be presented because such supporting materials are held/known only to persons that Plaintiffs cannot secure by being held by the Michigan Public Service Commission.

9. This Declaration is submitted in support of Plaintiffs' argument that Consumers Energy's blue paint marking is not an MPSC-mandated practice but rather a discretionary internal tool, and thus does not implicate the primary jurisdiction doctrine as claimed in Consumers Energy's motion.

10. The best source of the need information/evidence is believed to be currently held by the Michigan Public Service Commission.

11. Discovery is needed to procure the same and such is not available at this current case juncture.

12. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 20, 2025

Philip L Ellison

Philip L. Ellison