



office memorandum

DATE: January 11, 2019

TO: Honorable Mayor and Councilmembers

FROM: Kathryn L. Walker, Interim City Attorney

RE: Vegetation Management

Background

In August 2018, Council was asked to consider adopting Ordinance No. O-1718-1, which would send to the voters the question of renewing the franchise that gives OG&E the right to access our rights of way to provide electricity in Norman. Council voted on several amendments to the agreement, including, a provision that would require approval by Council before OG&E sprayed chemicals for the purpose of killing trees or other vegetation, approval by a property owner prior to removal trees of a certain size, and a posted notice five days in advance of trimming, removing or mowing vegetation, shrubs and smaller trees. OG&E, by letter dated September 25, 2017 committed to work in good faith with the City to develop a vegetation management plan that would address chemical use, tree trimming and tree removal for all companies and government entities operating within the City's rights-of-way. Ordinance No. O-1718-1 was ultimately rescinded and Staff has been working with outside counsel to negotiate a new franchise agreement with OG&E. One of the suggestions from outside counsel was to draft an ordinance to address concerns related to vegetation management so that such provisions could be applied to all utilities simultaneously. Staff has been working with representatives from OG&E and OEC to develop such an ordinance. The Community and Planning Transportation Committee discussed the ordinance at its April, August, October and November 2018 meetings. The purpose of this memorandum is to provide the regulatory framework already in place for vegetation management and to outline the provisions of the proposed ordinance.

Existing Regulatory Framework related to Vegetation Management

The Federal Power Act, codified at 16 USCA §824 et seq., empowered the Federal Energy Regulatory Commission (FERC) was created to regulate the public utility industry transactions made in interstate commerce, primarily the sale of power from one utility to another. In 2005, after rolling blackouts impact large areas of the United States and Canada, the Energy Policy Act was adopted to improve electric grid reliability. FERC's jurisdiction was expanded under this Act to all users, owners and operators of the bulk power system, except facilities limited to local distribution. Local distribution facilities are usually governed by State agencies, like the Oklahoma Corporation Commission. Although most of OG&E and OEC infrastructure in Norman is related to local distribution, there are major transmission lines in Norman that could be impacted by a vegetation management ordinance.

FERC, through the adoption of Reliability Standard FAC-003-4, requires that vegetation be managed to prevent encroachment into the Minimum Vegetation Clearance Distance of transmission lines. The minimum distance requirements vary from 1.1 feet to 14.3 feet based upon the maximum system voltage and it is noted in the standards that prudent vegetation management practices dictate that substantially greater distances will be achieved at the time of vegetation management. Vegetation inspections of transmission lines and vegetation work plans are required annually.

The Oklahoma Corporation Commission (OCC) is granted general supervision over all public utilities in 17 Okla. Stat. §152, and is empowered to fix rates and promulgate rules affecting services, operation, management and conduct of business. According to *People's Electric Co-Op, Inc. v. State ex rel. Oklahoma Corporation Commission*, 50 P.3d 579 (2002), the term “public utilities” includes rural electric cooperatives even if they have voted to exempt themselves from OCC regulation regarding rates. Rules promulgated by the OCC prevail over city ordinances that materially affect rights and duties of franchised utilities where the activity under consideration affects the utility's duty to repair, maintain, or install its equipment. *City of Chickasha v. Arkansas Louisiana Gas Co.*, 625 P.2d 638 (1981). This is true in rate setting or in regulation of day-to-day affairs of the utility. *Id.*

The OCC rules related to vegetation management are focused on distribution reliability. Each utility is required to have a reliability program that limits the frequency and duration of electric service interruptions and to maintain acceptable electric service reliability levels and to sustain it over time. OAC 165:35-25-14. The program must address all the factors that impact the reliability of the distribution system, including, but not limited to, the age, distribution, and location of equipment on each circuit; the number, density, and location of customers on each circuit; the location and density of trees on the system; an annual vegetation plan; and impacts on distribution system reliability of animals, winds, storms, ice and automobile accidents. *Id.* The reliability program must also include inspection, maintenance, repair and replacement standards to ensure timely and efficient service restoration. *Id.*

OCC defines vegetation management as “all activities associated with the trimming, removal, or control of plant materials in the proximity of energized electric utility conductors and equipment”. OAC 165-35-25-15. Each utility is required to submit an annual vegetation management plan to the Commission as part of its reliability program. *Id.* The plan must include a definition and calendar of activities, implementation plan, criteria to assess the result of the plan, and the contact information for a company representative who knows the plan, the implementation and the results. *Id.* Utilities must, at a minimum perform vegetation management on a four year cycle. *Id.* All costs of the vegetation management must be tracked by the utility as they are part of the rate justification. *Id.*

The OCC sets forth the timeline for notification of vegetation management activities. The utility is required to make a “reasonable attempt to contact the landowner, customer or tenant at a minimum of 24 hours prior to beginning work on the area”. OAC 165:35-25-

16. In rural area, the notice requirement is different. In a rural area, the utility must make a “reasonable attempt to contact the landowner, customer or tenant, if known, a reasonable time prior to beginning work on the property.” *Id.* The form of the contact isn’t dictated by the OCC – it can be a written notice, a telephone call or an in-person contact. *Id.* If a property owner, customer or tenant wants to be present when the work is done on his or her property, the utility is required to make a reasonable effort to accommodate such request. *Id.* In the case of an emergency repair, no notice is required. *Id.*

Approaches in Other Cities

As stated earlier, vegetation management for distribution facilities by public utilities is typically governed by state public utility commissions and industry standards. City ordinances dealing with utility vegetation management present somewhat of a cautionary tale.

After receiving complaints from citizens about Duke Energy’s vegetation management activities, the City of Greensboro worked collaboratively with Duke Energy to develop a Utility Vegetation Management Ordinance. There were 4 proposed areas of regulation that Duke and the City could not reach agreement on. Those areas involved trimming standards, the length of the trimming cycle, a local appeals process for tree removal, and large debris removal. Duke and the City agreed to present those provisions to the North Carolina Utilities Commission to determine whether or not they were preempted by State law. The North Carolina Utilities Commission found that the City was preempted in all four areas because they all involve service activities upon which Duke has created company-wide plans and policies that have been filed with the Commission and upon which the Commission has jurisdiction.

Proposed Vegetation Management Ordinance

Given recent Legislative attempts to thwart local control through state preemption, CPTC discussed the need to legislate in a cooperative fashion and focus primarily on items not already addressed by State and Federal law. OG&E and OEC vegetation management representatives have worked closely with City staff in good faith to develop the proposed ordinance.

Planned Maintenance

Each year utility companies develop work plans based on a specific regulatory framework, system conditions and budget availability. The implementation of the plan can be affected by many things, such as unexpected changes in conditions or severe weather events. The proposed ordinance requires the utility to work with the City and identify in advance planned maintenance planned in city limits, including the general areas scheduled for maintenance, identification of a certified arborist to serve as a contact person, and identification of any contractors the utility intends to use for the work. City

staff and utility staff have already begun meeting more regularly to review planned vegetation management activities.

Stakeholder Communications

As stated herein, the OCC requires a reasonable attempt to give notice to impact property owners, customers or tenants at least 24 hours in advance. The proposed ordinance codifies the OCC requirement of reasonable attempts of prior notification. If a property owner or resident wants to meet with the utility regarding planned maintenance, the utility is required to make reasonable efforts to meet with the owner or resident and explain the objectives of the planned maintenance on their property, the methods used to achieve them, and any expected impacts to trees. In the case of emergency reactive work, the utility must give as much notice as reasonable and possible under the circumstances. If there is a tree or large shrub that is located in such a place as to constitute a danger to persons or property in the vicinity of the tree, the utility company does not have to notify the City in advance of any maintenance of the tree. However, reasonable notification to the owner or resident is still required.

Best Management Practices

The proposed ordinance adopts the ANSI A300 standards and best management practices for tree maintenance. The ANSI A300 standards are the tree care industry standard of care in the United States and are developed by certified arborists. In addition to setting forth best management practices for pruning, the ordinance also codifies requirements found in Title 2 of the Oklahoma Statutes related to proper chemical control application. Utility companies are responsible for oversight of any contractors it hires to perform vegetation management work and all employees of the utility, or a contractor working on its behalf, is required to present identification to the property owner or resident upon request. Finally, the ordinance imposes requirements for timely removal of debris resulting from vegetation maintenance efforts. Because chemical control methods are typically slow acting, the utility company will return anytime within 120 days of application, to remove woody debris upon request of the property owner.

Conclusion

The proposed ordinance is the result of months of collaboration between City staff and OG&E and OEC staff. City staff will be available at the Study Session on January 15, 2019 for additional discussion.