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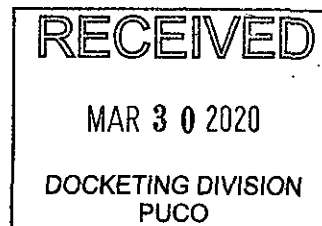
IN THE PUBLIC UTILITIES COMMISSION OF OHIO

Linda Kirby,	:	CASE NO: 18-691-EL-CSS
	:	
Complainant,	:	
	:	
v.	:	
	:	
Ohio Edison Company	:	
	:	
Respondent,	:	

 2020 MAR 30 PM 5:23
 PUCO
COMPLAINANT LINDA KIRBY'S MOTION TO REOPEN CASE

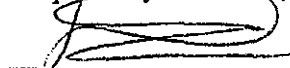
Now comes Complainant, Linda Kirby, by and through counsel, and hereby respectfully requests the above-referenced matter be reopened. By way of history, pursuant to the adjudication of the above-referenced matter, Complainant filed suit in the Trumbull County Common Pleas Court on March 6, 2019. *See*, Complaint attached hereto as Exhibit A. Complainant discussed the history of this matter with this agency in its Memorandum in Opposition to Defendant's Motion to Dismiss. *See*, Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss attached hereto as Exhibit B. Finally, on December 23, 2019, the Eleventh District Court of Appeals found that the Trumbull County Court of Common Pleas did not have jurisdiction over this matter. Instead, the Eleventh District found that this agency has jurisdiction over this matter. *See*, December 23, 2019 Per Curiam Opinion attached hereto as Exhibit C. Accordingly, Complainant respectfully requests this case be reopened pursuant to the attached Exhibits.

Also, when this matter was previously before this agency, Complainant, Linda Kirby was *pro se*. As this agency will note, the proper Complainant is Double K Kirby Farms which was the party named in the court proceedings.



This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
 Technician YDA Date Processed 3/31/20

Respectfully submitted,

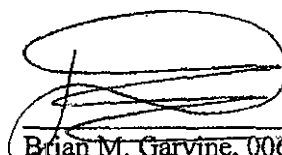


Brian M. Garvine, 0068422
Law Office of Brian M. Garvine
5 E. Long Street, Suite 1100
Columbus, Ohio 43215
614-223-0290
614-221-3201-facsimile
Brian@garvinelaw.com
Attorney for Complainant

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 30th day of March 2020 a true copy of the foregoing was sent via electronic mail to the following:

John T. Dellick
Harrington, Hoppe & Mitchell, Ltd.
26 Market Street, Suite 1200
Youngstown, Ohio 44501
Jdellick@hhmlaw.com
Attorney for Respondent



Brian M. Garvine, 0068422
Attorney for Complainant

IN THE TRUMBULL COUNTY COMMON PLEAS COURT
WARREN, OHIO

DOUBLE K KIRBY FARMS
2222 Cooks Lane
N. Bloomfield, Ohio 44450

CASE NO. 19CV46

PLAINTIFF

v.

OHIO EDISON COMPANY
C/O STATUTORY AGENT
CT CORPORATION SYSTEM
4400 Easton Commons Way, Suite 125
Columbus, Ohio 43219


DEFENDANT

2019 MAR - 6 A 11:54

INSTRUCTIONS FOR SERVICE

TO THE CLERK OF THE TRUMBULL COUNTY COMMON PLEAS COURT:

Please issue summons and serve it along with the Complaint upon the defendant(s) by Certified Mail, postage prepaid, return-receipt requested, at the address set forth in the caption above.



Brian M. Garvine (0068422)
Law Office of Brian M. Garvine, LLC
5 East Long Street, Suite 1100
Columbus, Ohio 43215
Tel: 614/223-0290; Fax: 614/221-3201
Email: brian@garvinelaw.com
Counsel for Plaintiff

EXHIBIT

tabbier

**IN THE TRUMBULL COUNTY COMMON PLEAS COURT
WARREN, OHIO**

DOUBLE K KIRBY FARMS
2222 Cooks Lane
N. Bloomfield, Ohio 44450

:

CASE NO.: _____

PLAINTIFF

:

v.

:

OHIO EDISON COMPANY
C/O STATUTORY AGENT
CT CORPORATION SYSTEM
4400 Easton Commons Way, Suite 125
Columbus, Ohio 43219

:

:

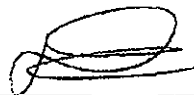
DEFENDANT

:

INSTRUCTIONS FOR SERVICE

TO THE CLERK OF THE TRUMBULL COUNTY COMMON PLEAS COURT:

Please issue summons and serve it along with the Complaint upon the defendant(s) by Certified Mail, postage prepaid, return-receipt requested, at the address set forth in the caption above.



Brian M. Garvine (0068422)
Law Office of Brian M. Garvine, LLC
5 East Long Street, Suite 1100
Columbus, Ohio 43215
Tel: 614/223-0290; Fax: 614/221-3201
Email: brian@garvinelaw.com
Counsel for Plaintiff

**IN THE TRUMBULL COUNTY COMMON PLEAS COURT
WARREN, OHIO
CIVIL DIVISION**

DOUBLE K KIRBY FARMS
2222 Cooks Lane
N. Bloomfield, Ohio 44450

:

PLAINTIFF

:

v.

:

CASE NO.: _____

COMPLAINT

OHIO EDISON COMPANY
C/O STATUTORY AGENT
CT CORPORATION SYSTEM
4400 Easton Commons Way, Suite 125
Columbus, Ohio 43219

:

:

DEFENDANT

:

JURY DEMAND ENDORSED HEREON

PARTIES AND VENUE

1. Plaintiff, Double K Kirby Farms ("Double K"), is a farm doing business at 2222 Cooks Lane, N. Bloomfield, Ohio 44450, Trumbull County.
2. Defendants Ohio Edison Company ("Ohio Edison") c/o Statutory Agent CT Corporation System ("CT Corp."), is a public utility company.
3. Jurisdiction and venue are proper in this Court because all relevant matters occurred in Trumbull County, Ohio and all Parties either reside in or conduct business in Trumbull County, Ohio.

RELEVANT FACTS

4. Plaintiff repeats, realleges and incorporates by reference all of the foregoing paragraphs.

5. Ohio Edison is a public utility company; Ohio Edison provides electric power to Double K.

6. On or about April 2017, Double K witnessed abnormal behavior in their cows as they entered the milking parlor, accessed feed and recorded in herd milk production decrease.

7. On or about October 2017, Double K believed stray electric voltage existed on their farm in the form of neutral-to-earth voltages.

8. As a result, in the fall of 2017, cow contact surfaces at Double K were tested for stray voltage.

9. Double K contacted Precision Ag Automation ("Precision Ag") to test for stray electric voltage; Precision Ag tested in Double K's barn and found excessive voltage. *See*, Exhibit A.

10. Double K contacted New Pittsburg Large Animal Clinic ("New Pittsburg") for an evaluation of their cows. New Pittsburg opined the stray electric voltage caused by Ohio Edison caused substantial damage to Double K's cows. *See*, Exhibit B.

11. Double K's cows were being electrically shocked when milking, eating and drinking. The stray electric voltage was also burning the tissue in the cows' udders causing poor health and death; many cows did not recover to prior production levels and were either culled for beef or dried out of production.

12. In excess of twenty-five (25) cows of Double K's died from the stray electric voltage, another thirty-two (32) cows had to be sold for slaughter because the prescribed medicines did not cure the mastitis caused by the stray voltage.

13. As a result of the stray electric voltage, Double K used its own generator as a power source to enable milking, Double K also contacted Ohio Edison and requested Ohio Edison install a neutral isolation device to reduce the neutral to earth voltages. Ohio Edison denied the request.

14. On December 6, 2017, Precision Ag installed a neutral isolation device. *See*, Exhibit A.

LEGAL CLAIMS

Count One **Negligence**

15. Plaintiff repeats, realleges, and incorporates by reference all of the foregoing paragraphs.

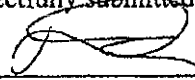
16. At all times herein, Ohio Edison owed a duty to Double K to properly administer electrical power to the farm; Ohio Edison further had a duty to install an appropriate device to reduce the neutral-to-earth voltage once discovered.

17. Ohio Edison breached its duty to Double K by failing to provide proper and appropriate electrical voltage to Double K's farm and by failing to install an appropriate device to reduce the neutral-to-earth voltages.

18. As a result of Ohio Edison's breach of the above-mentioned duties, Double K suffered substantial damage to their cows including, but not limited to, reduced milk production, loss profits, veterinarian costs, sale of livestock as well as the death of livestock.

WHEREFORE, Plaintiff Double K Kirby Farms demands judgment against Ohio Edison Company in an amount in excess of \$25,000.00, plus interest, costs, expenses, punitive damages and reasonable attorney fees incurred in this litigation and any and all other legal and/or equitable relief deemed appropriate by this Court.

Respectfully submitted,



Brian M. Garvine, 0068422
Law Office of Brian M. Garvine, LLC
5 E. Long Street, Suite 1100
Columbus, Ohio 43215
614-223-0290 Tel
614-221-3201 Fax
brian@garvinclaw.com
Attorney for Plaintiff

JURY DEMAND

Plaintiff herein demands a trial by jury on all issues of fact.



Brian M. Garvine, 0068422
Attorney for Plaintiff

Precision Ag Automation
4739 WEBB DR
ANDOVER, OH 44003
(440) 228-7675



INVOICE

INVOICE # 382
DATE 12/06/2017
DUE DATE 12/06/2017
TERMS Due on receipt

BILL TO
Kevin Kirby
2222 Cooks Lane
North Bloomsfield, OH 44450
North Bloomsfield, Ohio 44450

Please detach top portion and return with your payment.

ACTIVITY	QTY	RATE	AMOUNT
Service Investigated damage resulting from low voltage delivered to farm during "brown out" conditions. Found 7 failed well pump motors, 6 failed control PCB boards on parlor auto detaching automation, and damaged pulsation control PCB.	8	65.00	520.00
43342 Replacement Master puls board for Dellatron, 12VDC	1	538.50	538.50
3/4GD10 Goulds 3/4 Hp submersible well pump	7	788.00	5,516.00
85350 Replacement Circuit Board for ACR#1 And ACR-SS	6	233.80	1,402.80

Note: North East Ohio power grid suffered major power brown outage resulting in low voltage entering farm electrical circuits Nov 22, 2017. These power outages were concurrent with above mentioned equipment failures.

BALANCE DUE

\$7,977.30





December 13, 2017

Re: Kevin Kirby

I am the veterinarian of record for Kevin Kirby and can provide narrative of health and production for his dairy cow herd.

During the fall of 2017 the dairy cow farm experienced numerous repercussions of stray voltage. These problems included but were not limited to mastitis, decreased feed intake and decreased milk production. Many cows could not recover from mastitis and were culled at beef price. Other cows experienced subclinical mastitis reflected by increased somatic cell counts(SCC), raising the bulk tank SCC to a point where the Kirby milk price was discounted on quality.

By Kevin Kirby's discovery and request, the power company recently has provided relief by means of an isolation transformer which has corrected the stray voltage issue at the farm level. However many cows did not recover to prior production levels and were either culled for beef or dried out of production.

Losses include but are not limited to drug treatments, discarded milk following treatment, decreased milk production and future milk opportunities, discounted milk pricing due to lesser quality of high SCC milk, culled and dead cows.

Sincerely

Richard E Wiley DVM



IN THE TRUMBULL COUNTY COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

Double K Kirby Farms	:	CASE NO: 19CV416
	:	
Plaintiff,	:	JUDGE ANDREW D. LOGAN
	:	
v.	:	
	:	
Ohio Edison Company	:	
	:	
Defendant,	:	

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO
DISMISS**

2019 APR 26 AM 9:44
 TRUMBULL COUNTY
 CLERK OF COURTS
 TRUMBULL COUNTY, OHIO

I. INTRODUCTION

Plaintiff Double K Kirby Farms ("Double K"), through its owner Linda Kirby, already filed this matter before the Public Utilities Commission of Ohio ("PUCO"), *See*, Kirby v. Ohio Edison Company, Case No.: 18-0691-EL-CSS. In the PUCO matter, Double K represented itself *pro se*. The PUCO matter was dismissed, without prejudice. The reason the PUCO matter was dismissed without prejudice is because Defendant was correct PUCO did not have jurisdiction. Now, Defendant is reversing its position and indicating PUCO has jurisdiction. Despite Defendant's inconsistent positions, Defendant's Motion to Dismiss should be denied for the reasons stated by PUCO.

II. RELEVANT FACTS

On or about April 2017, Double K witnessed abnormal behavior in their cows as they entered the milking parlor, accessed feed and recorded in herd milk production decrease. *See*, Double K's Complaint ¶ 6. On or about October 2017, Double K believed stray electric voltage existed on their farm in the form of neutral-to-earth voltages. *See*, Double K's Complaint ¶ 7. As



a result, in the fall of 2017, cow contact surfaces at Double K were tested for stray voltage. *See*, Double K's Complaint ¶ 8.

Double K contacted Precision Ag Automation ("Precision Ag") to test for stray electric voltage; Precision Ag tested in Double K's barn and found excessive voltage. *See*, Double K's Complaint ¶ 9. Double K contacted New Pittsburg Large Animal Clinic ("New Pittsburg") for an evaluation of their cows. New Pittsburg opined the stray electric voltage caused by Ohio Edison caused substantial damage to Double K's cows. *See*, Double K's Complaint ¶ 10.

Double K's cows were being electrically shocked when milking, eating and drinking. The stray electric voltage was also burning the tissue in the cows utter causing poor health and death; many cows did not recover to prior production levels and were either culled for beef or dried out of production. *See*, Double K's Complaint ¶ 11. In excess of twenty-five (25) cows of Double K's died from the stray electric voltage, another thirty-two (32) cows had to be sold for slaughter because the prescribed medicines did not cure the mastitis caused by the stray voltage. *See*, Double K's Complaint ¶ 12.

As a result of the stray electric voltage, Double K used its own generator as a power source to enable milking, Double K also contacted Ohio Edison and requested Ohio Edison install a neutral isolation device to reduce the neutral to earth voltages. Ohio Edison denied the request. *See*, Double K's Complaint ¶ 13. On December 6, 2017, Precision Ag installed a neutral isolation device. *See*, Double K's Complaint ¶ 14.

III. LAW AND ARGUMENT

In the PUCO matter, in its Answer, Defendant asserted, "the Commission lacks subject matter jurisdiction over some or all of Complainant's claims." *See*, Answer of The Ohio Edison Company, ¶ 7, attached hereto as Exhibit A.

Defendant then filed a Motion to Strike Certain Portions of the Complaint brought forth by Linda Kirby ("Double K"). Defendant argued:

"The Commission may only exercise the jurisdiction conferred upon it by statute. *Lucas County Commissioners v. Pub. Util. Commission of Ohio* (1997), 80 Ohio St.3d 344, 347. The Commission is not a court and has no power to ascertain and determine legal rights and liabilities. *DiFranco v. FirstEnergy Corp.* (2012), 134 Ohio St.3d 144, 148. Additionally, the Commission does not have the authority to award monetary damages to a complainant. *In the Matter of the Complaint of Delmer Smith v. Dayton Power & Light Company*, WL 1813877, slip op. at 1 (Ohio P.U.C. January 29, 2004). More specifically, the Commission only has authority to determine whether or not there is a violation of a utility tariff, Commission rules, regulations and orders. *Id.* See Ohio Revised Code §4905.26.

While Complainant has every right to have her Complaint heard by the Commission, there is no corresponding right or authority for recovery of monetary damages. As a result, the portions of the Complaint that seek damages should be stricken."

See, Defendant's Motion to Strike Certain Portions of Complaint, p.2, attached hereto as Exhibit B.

On November 13, 2018, PUCO granted Defendant's Motion to Strike that portion of the Complaint seeking monetary damages. PUCO correctly agreed it did not have jurisdiction over those claims:

{¶ 9} Ohio Edison's motion to strike that portion of the complaint seeking monetary damages should be granted. In *In re the Complaint of Delmer W. Smith v. Dayton Power & Light Co.*, Case No. 03-2544-EL-Css, Entry (Jan. 29, 2004), the attorney examiner, in ruling on a motion to dismiss a demand for monetary damages, stated as follows:

The Commission's powers are conferred by statute and its authority is thereby limited. The Commission is vested with the authority to determine if a public utility, under its jurisdiction, has complied with the utility's tariff, Commission rules, regulations and orders in the provision of service to its customers. However, this Commission's jurisdiction is different from a court of general jurisdiction with the authority to award compensatory and punitive monetary damages. To the extent that the complainant alleges that the quality of service was

inadequate and that he has been harmed as a result of the alleged inadequate service, the request is equivalent to a request for damages and, thus, is beyond the jurisdiction of the Commission. As such, the complainant's request for monetary damages in this matter must be presented to a court of competent jurisdiction ***.

{¶ 10} For relief, the Complainant urges the Commission to conduct an investigation into the effects of stray voltage and to determine the damages to be paid by the Company. It is well-established and clear from precedent that the Commission does not have the authority to award monetary damages. The Commission's inquiry is limited to whether Ohio Edison has complied with its tariff, the Commission's rules, regulations, and orders. Consequently, Ohio Edison's motion to strike must be granted.

{¶ 11} It is, therefore,

{¶ 12} ORDERED, that Ohio Edison's motion to strike that portion of the complaint seeking monetary damages is granted.

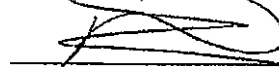
See, November 13, 2018 Entry, ¶ 9-12, attached hereto as Exhibit C.

Defendant was correct the first time. And, PUCO agreed. This Court is the proper forum for Double K's claims. Accordingly, Defendant's Motion to Dismiss should be denied.

IV. CONCLUSION

Again, Defendant was correct the first time. PUCO agreed. This Court is the proper forum for Double K's claims. Accordingly, Defendant's Motion to Dismiss should be denied.

Respectfully submitted,



Brian M. Garvine, 0068422
Law Office of Brian M. Garvine
5 E. Long Street, Suite 1100
Columbus, Ohio 43215
614-223-0290
614-221-3201-facsimile
Brian@garvinelaw.com
Attorney for Plaintiff

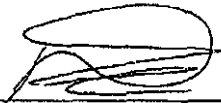
CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 25th day of April 2019 a true copy of the foregoing

Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss was sent via

electronic mail to the following:

John T. Dellick
Harrington, Hoppe & Mitchell, Ltd.
26 Market Street, Suite 1200
Youngstown, Ohio 44501
Jdellick@hhmlaw.com
Attorney for Defendant



Brian M. Garvine, 0068422
Attorney for Plaintiff

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

LINDA KIRBY

Complainant,

v.

OHIO EDISON COMPANY

Respondent.

Case No. 18-0691-EL-CSS

ANSWER OF THE OHIO EDISON COMPANY

The Ohio Edison Company ("Ohio Edison") is a public utility company as defined by §4905.03(C) of the Ohio Revised Code, and is duly organized and existing under the laws of the State of Ohio. In accordance with Rule 4901-9-01(D), Ohio Administrative Code, the Respondent, Ohio Edison Company for its answer to the Complaint of Linda Kirby ("Complainant") states:

Complainant's Complaint consists of random facts within unnumbered paragraphs. To the extent that an allegation is not specifically addressed below, it is hereby denied.

1. Ohio Edison denies all allegations related to the behavior and health of Complainant's cows.
2. Ohio Edison denies all allegations related to any findings or tests not performed by Ohio Edison personnel.
3. Ohio Edison admits it tested and found elevated neutral-to-earth voltage ("NEV").
4. Ohio Edison admits it promptly installed a neutral isolator after finding elevated NEV.



AFFIRMATIVE DEFENSES

5. The Complaint fails to set forth reasonable grounds for Complaint, as required by Section 4905.26, Revised Code.
6. The Complaint fails to state a claim upon which relief can be granted.
7. The Commission lacks subject matter jurisdiction over some or all of Complainant's claims.
8. Ohio Edison reserves the right to raise other defenses as warranted by discovery in this matter.

WHEREFORE, Ohio Edison respectfully requests an Order dismissing the Complaint and granting Ohio Edison all other necessary and proper relief.

Respectfully submitted

/s/ Scott J. Casto
Scott J. Casto (0085756)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7835
scasto@firstenergycorp.com

Attorney for Ohio Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was served by U.S. mail to the following person on this 4th day of May 2018.

Linda Kirby
2222 Cooks Lane
N. Bloomfield, OH 44450

/s/ Scott J. Casto
Attorney for Ohio Edison Company

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

LINDA KIRBY)	
)	
Complainant,)	
)	Case No. 18-0691-EL-CSS
v.)	
)	
OHIO EDISON COMPANY)	
)	
Respondent.)	
)	

Respondent, Ohio Edison Company ("Ohio Edison") hereby moves to strike certain portions of the Complaint brought forth by Linda Kirby ("Complainant"). As set forth fully in the attached Memorandum in Support, The Commission does not have the authority to grant the relief sought by Ms. Kirby.

Respectfully submitted,

/s/ Scott J. Casto
Scott J. Casto (0085756)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7835
scasto@firstenergycorp.com

Attorney for Ohio Edison Company



MEMORANDUM IN SUPPORT

Complainant filed a complaint against Ohio Edison on April 16, 2018, alleging that stray voltage on her property caused her financial loss related to her dairy cattle. Ohio Edison filed an Answer on May 4, 2018.

The Commission may only exercise the jurisdiction conferred upon it by statute. *Lucas County Commissioners v. Pub. Util. Commission of Ohio* (1997), 80 Ohio St.3d 344, 347. The Commission is not a court and has no power to ascertain and determine legal rights and liabilities. *DiFranco v. FirstEnergy Corp.* (2012), 134 Ohio St.3d 144, 148. Additionally, the Commission does not have the authority to award monetary damages to a complainant. *In the Matter of the Complaint of Delmer Smith v. Dayton Power & Light Company*, WL 1813877, slip op. at 1 (Ohio P.U.C. January 29, 2004). More specifically, the Commission only has authority to determine whether or not there is a violation of a utility tariff, Commission rules, regulations and orders. *Id.* See Ohio Revised Code §4905.26

While Complainant has every right to have her Complaint heard by the Commission, there is no corresponding right or authority for recovery of monetary damages. As a result, the portions of the Complaint that seek damages should be stricken.

WHEREFORE, Respondent respectfully requests that its motion be granted.

Respectfully submitted,

/s/ Scott J. Casto
Scott J. Casto (0085756)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7835
scasto@firstenergycorp.com

Attorney for Ohio Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. mail to the following person on this 6th day of September 2018.

Linda Kirby
2222 Cooks Lane
N. Bloomfield, OH 44450

/s/ Scott J. Casto
Attorney for Ohio Edison Company

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
LINDA KIRBY,

COMPLAINANT,

v.

CASE NO. 18-691-EL-CSS

OHIO EDISON COMPANY,

RESPONDENT.

ENTRY

Entered in the Journal on November 13, 2018

{¶ 1} On April 16, 2018, Linda Kirby (Complainant) filed a complaint against Ohio Edison Company (Ohio Edison or the Company). The Complainant alleged that stray voltage from Ohio Edison's facilities resulted in elevated levels of stress on the Complainant's dairy cattle, resulting in decreased milk production. The Complainant alleged that after the Company initially denied electrical effects on her livestock, a utility technician later detected stray voltage and installed a remedial device. The Complainant alleged that her cows returned to normal behavior and normal milk production.

{¶ 2} On May 4, 2018, Ohio Edison filed an answer to the complaint. Ohio Edison admitted that it tested and found elevated neutral-to-earth voltage. In response, Ohio Edison alleged that it promptly installed a neutral isolator. Ohio Edison asserted affirmative defenses and urged the Commission to dismiss the complaint.

{¶ 3} By Entry issued July 5, 2018, the attorney examiner scheduled a settlement conference for August 7, 2018. The parties were not able to resolve the dispute.

{¶ 4} On September 6, 2018, Ohio Edison filed a motion to dismiss, urging the Commission to dismiss that portion of the complaint seeking monetary damages. Ohio



18-691-EL-CSS

-2-

Edison asserted that the Commission does not have jurisdictional authority to award the relief sought by the Complainant.

{¶ 5} On October 24, 2018, the attorney examiner scheduled this matter for hearing to occur on November 28, 2018.

{¶ 6} On October 31, 2018, Ohio Edison filed a motion to continue the hearing and to obtain a ruling on its pending motion to dismiss. In support of its motion, Ohio Edison states that it needs additional time to complete discovery. Ohio Edison states that it served interrogatories on the Complainant on October 24, 2018. Responses are due November 14, 2018. Expert testimony must be filed by November 21, 2018. Taking into account the schedule imposed by the November 28, 2018 hearing, Ohio Edison points out that it will only have five business days to review the Complainant's responses to discovery requests, identify witnesses who can rebut the Complainant's witness' testimony, and take and file the testimony of any expert witnesses by November 21, 2018. Moreover, Ohio Edison is concerned that the intervening Thanksgiving holiday may make some witnesses unavailable. Ohio Edison believes that a ruling on its motion to dismiss will have a material impact on the parties' resolution of this matter and will likely limit the scope of the hearing.

{¶ 7} The attorney examiner finds that Ohio Edison has stated good cause to continue the hearing. Ohio Edison has demonstrated that it lacks sufficient time to complete discovery and thoroughly prepare for hearing. Accordingly, the motion to continue the hearing shall be granted. The attorney examiner shall consult the parties prior to scheduling a hearing.

{¶ 8} The Complainant did not oppose or respond to Ohio Edison's motion to dismiss. Although time remains for the Complainant to respond to the motion to continue the hearing, the attorney examiner shall issue sua sponte an expedited ruling to

18-691-EL-CSS

-3-

relieve the time constraints of the discovery schedule and the impending date to file testimony.

{¶ 9} Ohio Edison's motion to strike that portion of the complaint seeking monetary damages should be granted. In *In re the Complaint of Delmer W. Smith v. Dayton Power & Light Co.*, Case No. 03-2544-EL-CSS, Entry (Jan. 29, 2004), the attorney examiner, in ruling on a motion to dismiss a demand for monetary damages, stated as follows:

The Commission's powers are conferred by statute and its authority is thereby limited. The Commission is vested with the authority to determine if a public utility, under its jurisdiction, has complied with the utility's tariff, Commission rules, regulations and orders in the provision of service to its customers. However, this Commission's jurisdiction is different from a court of general jurisdiction with the authority to award compensatory and punitive monetary damages. To the extent that the complainant alleges that the quality of service was inadequate and that he has been harmed as a result of the alleged inadequate service, the request is equivalent to a request for damages and, thus, is beyond the jurisdiction of the Commission. As such, the complainant's request for monetary damages in this matter must be presented to a court of competent jurisdiction * * *.

{¶ 10} For relief, the Complainant urges the Commission to conduct an investigation into the effects of stray voltage and to determine the damages to be paid by the Company. It is well-established and clear from precedent that the Commission does not have the authority to award monetary damages. The Commission's inquiry is limited to whether Ohio Edison has complied with its tariff, the Commission's rules, regulations, and orders. Consequently, Ohio Edison's motion to strike must be granted.

18-691-EL-CSS

-4-

{¶ 11} It is, therefore,

{¶ 12} ORDERED, That Ohio Edison's motion to strike that portion of the complaint seeking monetary damages is granted. It is, further,

{¶ 13} ORDERED, That, in accordance with Paragraph 7, Ohio Edison's motion to continue the hearing be granted. It is, further,

{¶ 14} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/L. Douglas Jennings

By: L. Douglas Jennings
Attorney Examiner

JRJ/sc

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/13/2018 3:47:04 PM

In

Case No(s). 18-0691-EL-CSS

**Summary: Attorney Examiner Entry granting motion to continue hearing - electronically filed
by Sandra Coffey on behalf of L. Douglas Jennings, Attorney Examiner, Public Utilities
Commission of Ohio**

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS
DEC 23 2019
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

STATE OF OHIO ex rel. OHIO EDISON
COMPANY,

PER CURIAM OPINION

Relator,

CASE NO. 2019-T-0062

- Vs -

TRUMBULL COUNTY COURT OF
COMMON PLEAS, et al.,

Respondent.

Original Action for Writ of Prohibition.

Judgment: Petition granted.

John T. Dellick, Harrington, Hoppe & Mitchell, Ltd., 26 Market Street, Suite 1200, P.O. Box 6077, Youngstown, OH 44501 (For Relator).

Dennis Watkins, Trumbull County Prosecutor, and *William J. Danso* and *Michael J. Fredericka*, Assistant Prosecutors, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Respondent).

PER CURIAM.

{¶1} Relator, Ohio Edison Company ("Ohio Edison"), has filed an original action seeking a writ of prohibition to prevent respondent, Trumbull County Court of Common Pleas, from proceeding on a complaint, filed against it by a third party, Double K Kirby Farms ("Double K") in Case No. 2019 CV 416. In its petition, Ohio Edison argues the court of common pleas lacks jurisdiction over a complaint filed against it because it



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claims the Public Utility Commission of Ohio ("PUCO") possesses exclusive jurisdiction over the allegations, pursuant to R.C. 4905.26. Relator filed a motion to dismiss the complaint, asserting its jurisdictional argument. Respondent, Trumbull County Court of Common Pleas, however, after considering the motion and the plaintiff's memorandum in opposition, denied the motion. For the reasons that follow, we conclude the Trumbull County Court of Common Pleas lacks jurisdiction to proceed and accordingly grant Ohio Edlson's petition.

{¶2} Factual and Procedural Background

{¶3} In March 2019, Double K filed its complaint in the court of common pleas. The following allegations were set forth in the complaint: In April 2017, Double K observed abnormal behavior in its dairy cows. In October 2017, Double K believed stray electrical voltage existed on its farm in the form of neutral-to-earth voltages. Double K contacted Precision Ag Automation, an apparent agricultural engineering company, to test for stray voltage (the complaint and the parties appear to agree that "neutral-to-earth voltage" and "stray voltage" identify the same electrical phenomenon). Pursuant to the test, Precision Ag found excessive voltage on the farm and equipment damage from low voltage during a "brownout." Double K subsequently contacted New Pittsburg Large Animal Clinic to evaluate its cows. The clinic opined the stray electrical voltage caused substantial damage to its cows. Over 25 cows died from the stray electrical voltage and another 32 had to be sold for slaughter due to complications from the voltage. In light of the foregoing, Double K asserted Ohio Edison breached its duty by failing to provide proper and appropriate electrical voltage and failing to install an

appropriate device to reduce the neutral-to-earth voltages which caused it damages in excess of \$25,000.

{¶4} Ohio Edison moved to dismiss the complaint, arguing Double K's claim was actually a service complaint subject to the exclusive jurisdiction of PUCO. Double K opposed the motion. In its memorandum, Double K noted it had previously filed a claim with PUCO, but, in that matter, Ohio Edison moved to dismiss its prayer for monetary damages. PUCO granted the motion. Double K asserted that, because the prayer for damages was dismissed, the action in tort was properly before the court of common pleas. Ohio Edison filed a reply brief, asserting Ohio's public-utility statutes provide a customer with the ability to have its service claim assessed for a violation, but the process is two-fold. If the service complaint before PUCO is successful and not reversed by the Ohio Supreme Court, a claimant may then bring the matter before the courts to determine whether damages are appropriate. See R.C. 4905.61. The trial court denied Ohio Edison's motion, concluding the claim for damages was properly before it.

{¶5} Ohio Edison subsequently filed the instant petition for writ of prohibition. The matter is before the court on the petition, Ohio Edison's motion for summary judgment, as well as respondent's memorandum in opposition to Ohio Edison's motion.

{¶6} **General Governing Law**

{¶7} Three elements are generally required for a writ of prohibition to issue: the exercise of judicial power, the lack of authority for the exercise of that power, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Elder v. Campese*, 144 Ohio St.3d 89, 2015-Ohio-3628, ¶13. If, however, the absence of

jurisdiction is patent and unambiguous, a petitioner need not establish the third prong, the lack of an adequate remedy at law. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, ¶15.

{¶8} Ohio Edison has established the first prerequisite for the issuance of the writ. Respondent, the court of common pleas, has exercised judicial power in the underlying case by denying Ohio Edison's motion to dismiss Double K's complaint for lack of subject-matter jurisdiction and will continue to exercise judicial power as the case proceeds. We shall therefore proceed to analyze whether, as Ohio Edison asserts in its motion for summary judgment, the trial court patently and unambiguously lacks subject-matter jurisdiction.

{¶9} Subject-matter jurisdiction is the power conferred upon a court to hear and decide a case on the merits. *Morrison v. Steiner*, 32 Ohio St.2d 86 (1972), paragraph one of the syllabus. "Jurisdiction does not relate to the *rights of the parties*, but to the *power of the court*." (Emphasis sic.) *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75 (1998), quoting *Executors of Long's Estate v. State*, 21 Ohio App. 412, 415 (1st Dist.1926).

{¶10} "The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities." *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 150 (1991). "R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers." *Id.* As part of that framework, the General Assembly created PUCO, and "empowered it with broad authority to administer and enforce the provisions of Title 49." *Id.*

{¶11} "R.C. 4905.26 provides that PUCO shall determine any complaint by any person against a public utility alleging that any rate charged or service rendered is in any respect unjust, unreasonable, in violation of law, or inadequate." *Jones v. Ohio Edison Co.*, 11th Dist. Ashtabula No. 2014-A-0015, 2014-Ohio-5466, ¶9. The statutory scheme, consequently, gives PUCO "the right to adjudicate complaints involving customer rates and services." *Kazmaier, supra*, at 151. Further, where PUCO has jurisdiction as provided by this statute, that jurisdiction is exclusive and only subject to review by the Supreme Court of Ohio. *State ex rel. N. Ohio Tel. Co. v. Winter*, 23 Ohio St.2d 6 (1970), paragraph one of the syllabus. The detailed procedure for filing rate and/or service complaints set forth in R.C. 4905.26 expresses the intention of the General Assembly that such powers were to be vested solely in PUCO. *Winter, supra*, at 9.

{¶12} Courts, however, retain limited subject-matter jurisdiction over "pure tort" claims and certain contract actions involving public utilities. *State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, ¶21. Therefore, we must examine whether Double K's claim is subject to the exclusive jurisdiction of PUCO or is a pure tort claim within the jurisdiction of the common pleas court. *Id.* at ¶21. "[C]asting the allegations in the complaint to sound in tort * * * is not sufficient to confer jurisdiction upon a trial court' when the basic claim is one that the commission has exclusive jurisdiction to resolve." *Id.*, quoting *Higgins v. Columbia Gas of Ohio, Inc.*, 136 Ohio App.3d 198, 202 (7th Dist.2000). Accordingly, courts must look to the *substance of the allegations* in the complaint to determine the proper jurisdiction.

Allstate Ins. Co. v. Cleveland Electric Illuminating Co., 119 Ohio St.3d 301, 2008-Ohio-3917, ¶9.

{¶13} Further, while “trial courts determine their own jurisdiction,” such determinations can be challenged. *Id.* at ¶11. In *Allstate*, the Court adopted a two-part test to assist courts in deciding when a trial court, rather than PUCO, has jurisdiction over a case involving a public utility alleged to have committed a tort, i.e., a “pure tort.” Under this test, a court asks (1) whether PUCO’s administrative expertise is required to resolve the issue in dispute, and (2) whether the act complained of constitutes a practice normally authorized by the utility. If the answer to either question is “no,” the claim is one for a pure tort and is not within PUCO’s exclusive jurisdiction. *Id.* at ¶11-13. Thus, the answer to both questions must be yes in order for the claim to fall within PUCO’s jurisdiction.

{¶14} **Analysis**

{¶15} In support of its motion for summary judgment, Ohio Edison argues that although Double K couched its complaint in terms of negligence, the allegation asserted a claim arising from Ohio Edison’s alleged failure to provide appropriate electrical voltage and failure to minimize or eliminate neutral-to-earth voltages - matters which constitute service complaints which are within the exclusive jurisdiction of PUCO. It maintains there is no genuine issue of material fact that the expertise of PUCO is required to resolve the dispute concerning the electrical phenomena relating to the distribution of electricity of which Double K complains; and, it argues there is no triable issue regarding whether the distribution of electricity, including the attendant

phenomena at the essence of Double K's complaint, constitute a practice normally authorized by electric utilities.

{¶16} I. Is PUCO's expertise required to resolve the issue in dispute?

{¶17} The issue of whether Ohio Edison provided faulty service in voltage maintenance and frequency is expressly governed by Ohio Edison's tariff on file with and approved by PUCO. The General Assembly has given PUCO statutory authority to review and approve tariffs. *Migden–Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, ¶8, fn. 5. "Public utility tariffs are books or compilations of printed materials filed by public utilities with, and approved by, [PUCO] that contain schedules of rates and charges, rules and regulations, and standards for service." *Id.*

{¶18} In *Hull v. Columbia Gas of Ohio*, 110 Ohio St.3d 96, 2006-Ohio-3666, the Supreme Court of Ohio held, "it is readily apparent that the General Assembly has provided for commission oversight of filed tariffs, including the right to adjudicate complaints involving customer rates and services." *Id.* at ¶20, quoting *Kazmaier, supra*, at 151.

{¶19} Section IV(B) of Ohio Edison's tariff provides:

{¶20} **Continuity.** The Company will endeavor, but does not guarantee, to furnish a continuous supply of electric energy and to maintain voltage and frequency within reasonable limits. The Company shall not be liable for damages which the customer may sustain due to variations in electric service characteristics * * *. (Emphasis sic.)

{¶21} Moreover, Section X(B) of the tariff provides:

{¶22} **Limitation on Liability.** The Company shall not be liable for any loss, cost, damage, or expense that the customer may sustain by reason of damage to or destruction of any property, including the loss of use thereof, arising out of, or in any manner connected with, interruptions in service, variations in service characteristics, high or low voltage * * * whether such damages are caused by or involve

any fault or failure of the Company or otherwise except such damages that are caused by or due to the willful and wanton misconduct of the Company. (Emphasis sic.)

{¶23} Claims which “require a consideration of statutes and regulations administered and enforced by [PUCO]” are outside the jurisdiction of the trial court and within PUCO’s exclusive jurisdiction. *The Illuminating Co., supra*, at ¶21.

{¶24} As noted above, R.C. 4905.26 states that PUCO shall determine any complaint against a public utility alleging that any service rendered is in any way unjust, unreasonable, in violation of law, or inadequate. Ohio Edison’s tariffs indicate it will provide voltage and maintain the same within reasonable limits, but it will not be liable for damage due to interruptions or variations in service characteristics, or for high or low voltage absent willful and wanton misconduct.

{¶25} Double K’s complaint alleges damages resulting from stray or neutral-to-earth voltage as well as a brownout condition. “Neutral-to-earth voltage is the measurement at any given time and place of electricity trying to return from where it came, either through the earth or through the neutral wire. Technically, it is the measurement of electricity moving through a conductor that has a resistance to remote earth.” *Offe v. Dayton Power & Light Co.*, 37 Ohio St.3d 33, 34 (1988). A “brownout” is a period of low voltage. *Jones, supra*, at ¶30. Ohio Edison supplies voltage, as a service, and because both neutral-to-earth voltage and a brownout condition are related to voltage, the matters at issue require consideration of statutes and regulations administered by PUCO. See *The Illuminating Co., supra*. Thus, we conclude there is no genuine issue of material fact that PUCO’s expertise is required to resolve whether the

voltage complaints at issue were in any way unjust, unreasonable, in violation of law or inadequate.

{¶26} **II. Do the actions complained of constitute a practice normally authorized by the utility?**

{¶27} We first point out that this court has previously concluded that a brownout condition is "clearly service-related." *Laforge v. Cleveland Elec. Illuminating Co.*, 115 Ohio App.3d 740, 741 (11th Dist.1996). And the tariffs provide (1) Ohio Edison will strive to provide continuous electrical energy and maintain reasonable frequency and (2) are not liable for damages due to variations in service characteristics. Hence, there is no genuine issue of material fact that the circumstances surrounding the brownout condition constitute a practice normally authorized by Ohio Edison.

{¶28} Neutral-to-earth voltage presents a more difficult question. In their memorandum in opposition to summary judgment, respondent does not directly address the two prongs of the *Allstate* test, but argue there is a genuine issue of material fact relating to the trial court's jurisdiction because at least one court has concluded "stray voltage" is not specifically regulated by PUCO regulations and thus is not necessarily a "service." *State ex re. Ohio Edison Co. v. Morris*, 5th Dist. Stark No. CA-6432, 1984 WL 7590. They further cite a case wherein the trial court exercised jurisdiction over, inter alia, alleged negligence arising from alleged abnormal stray voltage. *Barr v. Ohio Edison Co.*, 9th Dist. Summit No. 16629, 1995 WL 66351 (Feb. 17, 1995).

{¶29} Initially, it is not clear that the utility company in *Barr* moved to dismiss based upon subject-matter jurisdiction. In this respect, that case does not specifically inform our analysis.

{¶30} *Morris*, however, does present factual and procedural issues very similar to this matter. In *Morris*, the plaintiffs moved for damages, alleging installed electrical service was improperly grounded and their dairy barn and cattle were severely affected by stray voltage. The utility company filed a motion to dismiss, alleging the trial court lacked subject-matter jurisdiction. The trial court denied the motion and the utility company filed a petition for writ of prohibition. The utility company argued that the question of what are standard voltages and whether stray voltage is permissible and, if so, to what extent is it a "service characteristic" within PUCO's exclusive jurisdiction. *Id.* at *4. The Fifth District, however, pointed out that PUCO adopted no specific regulations dealing with stray voltage. As such, the court held the plaintiff's complaint "is not a complaint against a public utility charging that service[s] rendered is in any respect a violation of law within the meaning of R.C. 4905.26." *Id.* at *5. The court therefore determined the trial court did not patently lack jurisdiction and was empowered to judicially ascertain the legal rights of the parties.

{¶31} While the facts and issue in *Morris* are ostensibly the same as those in this matter, *Morris* was released well before the Ohio Supreme Court adopted the *Allstate* test and, of some import, its holding is not binding on this court. We consequently find the analysis of the *Morris* court was unduly narrow and unnecessarily rigid, especially in light of the broad and comprehensive nature of the statutory scheme regulating utilities. While the tariffs do not specifically address stray voltage, they do generally address the provision and regulation of voltage, of which stray voltage is a characteristic. "[T]he commission with its expert staff technicians familiar with the utility commission provisions" is in the best position to resolve issues relating to utility service

{¶33} One final point requires attention. Even though the trial court does not have jurisdiction over the issue of whether a violation has occurred, the court of common pleas *does* possess jurisdiction over the issue of damages if PUCO finds a violation. Specifically, if PUCO determines a violation occurred, R.C. 4905.61 authorizes a suit for treble damages against the utility company. In *Milligan v. Ohio bell Tel. Co.*, 56 Ohio St.2d 191 (1978), the Supreme Court held: "A Court of Common Pleas is without jurisdiction to hear a claim seeking treble damages pursuant to R.C. 4905.61 absent a prior determination by the Public Utilities Commission that there was in fact a violation of Chapters 4901, 4903, 4905, 4907, 4909, 4921 or 4925, or an order of the Commission." *Id.* at paragraph one of the syllabus. Accordingly, an allegation that a utility service is unjust, unreasonable, in violation of the law, or inadequate must be first heard by PUCO; if PUCO determines a violation occurs, the prevailing party may file a complaint for treble damages, per R.C. 4905.61, because PUCO has no power to grant monetary damages under that statute. *Milligan, supra*; see also *State ex rel. Dayton Power & Light Co. v. Kistler*, 57 Ohio St.2d 21, 23 (1979) ("Bringing suit for treble damages against a utility, therefore is dependent upon a finding that there was a violation of a specific statute * * * or an order of the commission. Because such finding is within the exclusive jurisdiction of the commission, * * * it follows that before a Court of Common Pleas has jurisdiction to hear a complaint for treble damages under R.C. 4905.61, there first must be a determination by the commission that a violation has in fact taken place.")

{¶34} This bifurcated process was the basis for Ohio Edison's motion to dismiss the damages aspect of Double K's complaint that was originally filed before PUCO.

PUCO granted dismissal of that aspect of the complaint, but before it could hear the allegations vis-à-vis Double K's service complaints, the complaint was dismissed and filed in the lower court.

{¶35} Conclusion

{¶36} In light of the foregoing analysis, we conclude there is no genuine issue of material fact that respondent patently and unambiguously lacks jurisdiction to preside over Double K's complaint. Ohio Edison's petition for writ of prohibition is therefore granted.

CYNTHIA WESTCOTT RICE, J., TIMOTHY P. CANNON, J., MARY JANE TRAPP, J.,
concur.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO ex rel. OHIO EDISON
COMPANY,

JUDGMENT ENTRY

Relator,
- vs -

CASE NO. 2019-T-0062

TRUMBULL COUNTY COURT OF
COMMON PLEAS, et al.,

Respondent.

For the reasons stated in the Per Curiam Opinion of this court, relator's motion for summary judgment is granted. Respondent lacks jurisdiction to proceed. Accordingly, relator's petition for writ of prohibition is granted.

Costs to be taxed against respondent.

FILED
COURT OF APPEALS
DEC 23 2019

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK


JUDGE CYNTHIA WESTCOTT RICE


JUDGE TIMOTHY P. CANNON


JUDGE MARY JANE TRAPP

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614-466-0313

RE: Kirby v. Ohio Edison Company
18-691-EL-CSS

FROM: Barb Ballard
Paralegal to Brian M. Garvine

DATE: March 30, 2020

Number of Pages:
(Including Cover Page) 41

MESSAGE: Please file. Thank you.

PUCO

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