

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF DOUBLE K KIRBY
FARMS,**

COMPLAINANT,

CASE NO. 18-691-EL-CSS

v.

OHIO EDISON COMPANY,

RESPONDENT.

ENTRY

Entered in the Journal on December 23, 2020

{¶ 1} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 2} Ohio Edison Company (Ohio Edison or Company), is a public utility as defined in R.C. 4905.02. As such, Ohio Edison is subject to the Commission's jurisdiction.

{¶ 3} The attorney examiner notes that, as described in more detail below, this case was initially brought to the Commission by Linda Kirby (Ms. Kirby) on April 16, 2018, and subsequently dismissed by the Commission on January 16, 2019, in response to Ms. Kirby's request for dismissal. On March 30, 2020, counsel for Double K Kirby Farms filed a motion requesting that the case be reopened.

{¶ 4} On April 16, 2018, Ms. Kirby filed a complaint against Ohio Edison. Ms. Kirby alleged that stray voltage from Ohio Edison's facilities resulted in elevated levels of stress on Ms. Kirby's cows resulting in a decrease in milk production. After the Company initially denied any electrical effects, Ms. Kirby alleged that a utility technician later detected stray voltage and installed a remedial device. Ms. Kirby alleged that her cows returned to normal behavior and increased milk production.

{¶ 5} For relief, Ms. Kirby requested damages and that the Commission conduct an investigation into the validity of the effects of stray voltage and determine liability for damages.

{¶ 6} On May 4, 2018, Ohio Edison filed an answer to the complaint. Ohio Edison denied all allegations related to the health of the Ms. Kirby's cows. Ohio Edison admitted that it tested and found elevated neutral-to-earth voltage and alleged that it promptly installed a neutral isolator after finding elevated neutral-to-earth voltage. Ohio Edison asserted that Ms. Kirby failed to state reasonable grounds for complaint and that the Commission lacked subject matter jurisdiction over some or all of Ms. Kirby's claims.

{¶ 7} By Entry issued on July 5, 2018, the attorney examiner scheduled a settlement conference for August 7, 2018. The parties appeared for the conference but did not resolve the dispute.

{¶ 8} On September 6, 2018, Ohio Edison filed a motion to dismiss Ms. Kirby's claim for monetary damages.

{¶ 9} On October 24, 2018, the attorney examiner scheduled a November 28, 2018 hearing.

{¶ 10} On October 31, 2018, Ohio Edison moved for a continuance of the hearing in order to complete discovery and prepare its case.

{¶ 11} By Entry issued November 13, 2018, the attorney examiner granted Ohio Edison's motion for continuance and its motion to dismiss Ms. Kirby's claim for monetary damages, deciding that, in conformance with Commission precedent, the Commission does not have the authority to award monetary damages and that the Commission's inquiry is limited to whether Ohio Edison has complied with its tariff, the Commission rules, regulations, and orders.

{¶ 12} On December 13, 2018, Ms. Kirby, through counsel, moved to dismiss the

complaint, explaining that Ms. Kirby intended to pursue the claim in common pleas court.

{¶ 13} On January 16, 2019, the Commission, upon Ms. Kirby's request, issued an Entry dismissing the complaint without prejudice.

{¶ 14} On March 30, 2020, Double K Kirby Farms (Double K or Complainant), through counsel, filed a motion to reopen this case in front of the Commission. In support of the motion, the Complainant discussed the events that occurred subsequent to the Commission's dismissal and also attached legal filings made in other venues after the Commission case closed. The Complainant noted that, after the complaint with the Commission was dismissed, Complainant filed suit in the Trumbull County Court of Common Pleas (Common Pleas Court) on March 6, 2019, in Case No. 2019-CV-416, in which Double K alleged that Ohio Edison breached its duties 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. Double K demanded a monetary award against Ohio Edison as a result of damage suffered to its cows including, but not limited to, reduced milk production, loss profits, veterinarian costs, sale of livestock, as well as the death of livestock.

{¶ 15} In the above matter, Ohio Edison filed a motion to dismiss, arguing that Double K's claims were service complaints subject to the exclusive jurisdiction of the Commission; however, the Common Pleas Court denied Ohio Edison's motion. *Double K Kirby Farms v. Ohio Edison Co.*, Trumbull C.P. No. 2019 CV 416 (Aug. 8, 2019). In turn, Ohio Edison filed a writ of prohibition to prevent the Common Pleas Court from proceeding with the complaint, arguing that the Commission possesses exclusive jurisdiction over Double K's allegations, pursuant to R.C. 4905.26, and the Common Pleas Court lacked jurisdiction to decide the matter. On December 23, 2019, the Eleventh District Court of Appeals, in *State Ohio Edison Co. v. Trumbull Cty. Court of Common Pleas*, 11th Dist. Trumbull No. 2019-T-0062, 2019-Ohio-5313, granted Ohio Edison's writ of prohibition, deciding that the Commission, not the Common Pleas Court, had jurisdiction over Double K's service complaints, and, once

a determination was made by the Commission, redress for monetary damages could be sought at the Common Pleas Court, if applicable. Consequently, the Complainant requested this case be reopened to allow the Commission to consider the initial complaint. The Complainant also noted that Double K Kirby Farms is the proper title for the Complainant.

{¶ 16} By Entry issued on June 10, 2020, the attorney examiner granted the Complainant's motion to reopen the case, limiting the scope of the proceeding to an examination of the Complainant's service allegations, as the claim for monetary damages has already been dismissed. Also, as counsel for Complainant requested, the attorney examiner updated the case caption to reflect Double K Kirby Farms as the Complainant. The attorney examiner also scheduled a settlement conference.

{¶ 17} On August 6, 2020, the parties participated in the settlement conference during which it was determined that the parties would file amended pleadings and a subsequent settlement conference would then be scheduled.

{¶ 18} On August 20, 2020, Double K filed an amended complaint against Ohio Edison. The Complainant alleges that stray voltage in the form of neutral-to-earth voltages from Ohio Edison's facilities shocked Complainant's cows while milking, eating, and drinking, causing poor health, which resulted in decreased milk production and death in some instances. Complainant alleges that Ohio Edison denied any electrical effects and that Ohio Edison denied Complainant's request that a neutral isolation device be installed to reduce the neutral-to-earth charges. As a result, Complainant had to use its own generator as a power source to enable milking and hired a third party to install a neutral isolation device.

{¶ 19} On September 9, 2020, Ohio Edison filed an answer to the amended complaint. Ohio Edison denies all allegations concerning its facilities causing stray voltage and related to the health of the Complainant's cows. Ohio Edison admits that it tested for and found elevated neutral-to-earth voltage. Ohio Edison alleges that it promptly installed a neutral

isolator after finding elevated neutral-to-earth voltage. Additionally, Ohio Edison sets forth several affirmative defenses.

{¶ 20} By Entry issued on September 21, 2020, the attorney examiner, pursuant to Ohio Adm.Code 4901-1-06, accepted the Complainant's August 20, 2020 amendment to the initial complaint and also scheduled the matter for a settlement conference for October 6, 2020. The parties appeared for the conference but did not resolve the dispute.

{¶ 21} It appears that reasonable grounds for the complaint have been presented. Due to the continued COVID-19 state of emergency declared by the governor in Executive Order 2020-01D, the hearing will be held using remote access technology known as Webex. The Commission will email instructions to the parties at their electronic mail addresses on record for participation in the prehearing conference and the hearing prior to the events. After consulting with the parties, the attorney examiner finds that the following procedural schedule is reasonable and should be established for this proceeding:

- a. Discovery requests (except as to notices of deposition) shall be permitted until April 22, 2021.
- b. Parties should file testimony by May 25, 2021.
- c. A prehearing conference and technology test session is scheduled for May 27, 2021, at 10:00 a.m., for the parties to test out the Webex technology which will be utilized during the hearing. The parties should also be prepared to discuss the exchange of exhibits prior to hearing, the scheduling of witnesses, and other logistical issues.
- d. The evidentiary hearing shall commence on June 8, 2021, at 10:00 a.m.

{¶ 22} Although only parties will be able to actively participate, any person interested in attending the prehearing conference as a non-party can access the Webex event by internet at <https://bit.ly/18-961-PHC> and entering PUCO as the password or dialing 1-408-418-9388 and entering 179 289 3412 as the event number. A non-party may also attend the hearing by accessing the Webex event by internet at <https://bit.ly/18-961-EVH> and entering PUCO as the password or dialing 1-408-418-9388 and entering 179 885 1420 as the event number. Additional information is available by contacting the Commission's Consumer Call Center at 1-800-686-7826.

{¶ 23} Counsel and witnesses who will speak during the hearing should join the Webex event through internet access and must have a computer or smart device with a camera, microphone, and speakers; an electronic mail address; and reliable internet service.

{¶ 24} It is, therefore,

{¶ 25} ORDERED, That the procedural schedule set forth in Paragraph 21 be observed by the parties. It is, further,

{¶ 26} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Matthew J. Sandor

By: Matthew J. Sandor
Attorney Examiner

GAP/kck

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Summary: Attorney Examiner Entry establishing procedural schedule. electronically filed by Kelli C. King on behalf of Matthew Sandor, Attorney Examiner, Public Utilities Commission of Ohio