

**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 June 29, 2021

{¶ 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 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Ohio Department of Health (ODH) to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of ODH regarding this public health emergency in order to protect their health and safety. The Executive Order was effective immediately and will remain in effect until the COVID-19 emergency no longer exists. The ODH is making COVID-19 information, including information on preventative measures, available via the internet at [coronavirus.ohio.gov/](https://coronavirus.ohio.gov/).

{¶ 15} Pursuant to R.C. 3701.13, the ODH has supervision of "all matters relating to the preservation of the life and health of the people" and the "ultimate authority in matters of quarantine and isolation." On March 12, 2020, the Director of ODH issued an Order indicating that "all persons are urged to maintain social distancing (approximately six feet away from other people) whenever possible."

{¶ 16} 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.

{¶ 17} 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.

{¶ 18} 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.

{¶ 19} 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.

{¶ 20} 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.

{¶ 21} 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.

{¶ 22} 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.

{¶ 23} By Entry issued on December 22, 2020, the attorney examiner found that reasonable grounds for the complaint had been presented and that, due to the continued COVID-19 state of emergency declared by the governor in Executive Order 2020-01D, a hearing using remote access technology was necessary. Accordingly, the attorney examiner established the following procedural schedule: discovery requests (except as to notices of deposition) were permitted until April 22, 2021; parties were directed to file testimony by

May 25, 2021; a prehearing conference and technology test session was scheduled for May 27, 2021; and the hearing was set to commence on June 8, 2021.

{¶ 24} On May 17, 2021, the Director of ODH issued an Order indicating that “except in certain limited circumstances, fully vaccinated persons may safely do most activities without a facial covering and without socially distancing.” This Order was intended to align the state of Ohio’s health orders with new guidance from the Center for Disease Control and Prevention. These new guidelines became effective in the state of Ohio on June 2, 2021.

{¶ 25} On May 18, 2021, the parties filed a joint motion to modify the procedural schedule. In support of their motion, the parties stated that Ohio Edison recently retained new counsel who has scheduling conflicts with the prehearing and hearing dates and, therefore, request that the Commission modify the existing procedural schedule. According to the proposed schedule, parties would file testimony by June 21, 2021, the prehearing conference and technology session would be held on June 30, 2021, at 10:00 a.m., and the evidentiary hearing would commence on July 8, 2021, at 10:00 a.m.

{¶ 26} By Entry issued May 24, 2021, the attorney examiner granted the joint motion to modify the procedural schedule, in part. The attorney examiner noted that scheduling conflicts existed on the dates proposed in the joint motion and that the attorney examiner consulted with the parties regarding new procedural dates. Accordingly, the following procedural schedule was established: parties would file testimony by July 19, 2021; a prehearing conference would be held on July 30, 2021, at 10:00 a.m. to briefly discuss hearing procedure, as needed; and, the evidentiary hearing would commence on August 5, 2021, at 10:00 a.m. The attorney examiner stated that further details and directions regarding participating in the prehearing conference and evidentiary hearing would be provided by subsequent entry.

{¶ 27} To participate in the July 30, 2021 prehearing conference, the parties shall call 614-721-2972 and enter 425 633 52 #, when prompted.

{¶ 28} In light of the updated health-safety guidelines, the attorney examiner finds it appropriate to schedule the August 5, 2021 evidentiary hearing in this matter as an in-person hearing. Therefore, the evidentiary hearing set for August 5, 2021, at 10:00 a.m., will commence at the offices of the Public Utilities Commission of Ohio, Hearing Room 11-C, 11th floor, 180 East Broad Street, Columbus, Ohio 43215-3793. The parties should register at the lobby desk and then proceed to the 11th floor in order to participate in the hearing. Consistent with CDC Guidelines and the May 17, 2021 Ohio Department of Health Order, individuals who are not fully vaccinated should continue to wear face coverings and socially distance. Any accommodations necessary to ensure availability of social distancing and plexiglass dividers should be made in advance of the hearing. As pandemic restrictions are evolving, instructions regarding further safety requirements or accommodations for the hearing room will be forthcoming, either posted on the Commission website or communicated to the parties.

{¶ 29} The remaining procedural deadlines set forth in the May 24, 2021 Entry will remain the same.

{¶ 30} It is, therefore,

{¶ 31} ORDERED, That the parties participate in the July 30, 2021 prehearing teleconference in accordance with Paragraph 27. It is, further,

{¶ 32} ORDERED, That the August 5, 2021 evidentiary hearing be held in-person at the Commission's offices in accordance with Paragraph 28. It is, further,

{¶ 33} 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



**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**6/29/2021 11:33:37 AM**

**in**

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

Summary: Attorney Examiner Entry ordering that the parties participate in the July 30, 2021 prehearing teleconference in accordance with Paragraph 27 and ordering that the August 5, 2021 evidentiary hearing be held in-person at the Commission's offices in accordance with Paragraph 28.

electronically filed by Kelli C. King on behalf of Matthew Sandor, Attorney Examiner, Public Utilities Commission of Ohio