

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Double K Kirby Farms,	)	
	)	
Complainant,	)	
	)	
vs.	)	CASE NO. 18-0691-EL-CSS
	)	
Ohio Edison Company,	)	
	)	
Respondent.	)	
	)	

**COMPLAINANT’S INITIAL BRIEF**

Now comes Complainant, Double K Kirby Farms’ (“Double K”), by and through counsel and submits its Initial Brief pursuant to the Public Utilities Commission of Ohio (“PUCO”) Hearing Officer’s Order at the August 5, 2021 hearing.

**I. APPLICABLE LAW**

“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.*, 11<sup>th</sup> 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.

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, 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.”)

## **II. RELEVANT FACTS**

On August 20, 2020, Double K filed an Amended Complaint against Ohio Edison. Double K indicated stray voltage in the form of neutral-to-earth voltages from Respondent Ohio Edison’s (“Ohio Edison”) facilities shocked Double K’s cows while milking, eating, and drinking, causing poor health, which resulted in decreased milk production and death in some instances. *See*, Amended Complaint. Ohio Edison initially denied any electrical effects and Ohio Edison denied

Double K's request that a neutral isolation device be installed to reduce the neutral-to-earth charges. *Id.*

On August 5, 2021 an evidentiary hearing was held. At the evidentiary hearing, Linda Kirby ("Kirby"), owner of Double K, testified. Daniel Dismukes ("Dismukes") also testified on behalf of Double K as an expert witness. On behalf of Ohio Edison, Michael Hintz ("Hintz") testified.

Double K has approximately 200 milking cows and 150 heifers and younger animals. *See*, Transcript pg. 7. Double K's farm is approximately 177 acres. *See*, Transcript pg. 7. Double K's main source of income is revenue from milk production. *See*, Transcript pg. 8. In 2017, during the relevant time, Double K had approximately 150 cows. *See*, Transcript pg. 8.

In approximately April 2017, the cows at Double K were suffering from mastitis. *See*, Transcript pg. 9. In response, Double K had its veterinarian come to the farm to diagnose the issue. *See*, Transcript pg. 9. The vet was unable to discover any issues at the farm. *See*, Transcript pg. 9. Subsequently, Kevin Kirby, Linda Kirby's son, spoke to a nearby farmer who suggested Double K check for stray voltage. *See*, Transcript pg. 9.

Double K struggled for several months to determine the cause of its cows' issues. Between April 2017 and October 30, 2017, Double K attempted to determine the cause of the issues with its cattle. *See*, Transcript pg. 34. The issue of stray voltage was never a problem for Double K before 2017. *See*, Transcript pg. 34. As soon as Double K learned of the possibility of stray voltage from a neighboring farmer, Double K acted immediately to remedy the issue. *See*, Transcript pg. 35. Double K acted immediately because Double K's main source of income is its milk production. *See*, Transcript pg. 35.

Dismukes testified as an expert on behalf of Double K. On October 30, 2017, at the request of Double K, Dismukes went to Double K to assess the stray voltage issue. *See*, Transcript pg. 54. Dismukes observed a reading of 1.1 volts. *See*, Transcript pg.54. Dismukes' highest reading that day was 1.7. *See*, Transcript pg. 54.

Dismukes subsequently spoke to Hintz twice within an hour about the excessive voltage. *See*, Transcript pg. 57. In the first conversation, Dismukes explained his testing procedures and how he found the voltages. *See*, Transcript pg. 57. Hintz indicated he was out to Double K and found no elevated readings. *See*, Transcript pg. 57. Dismukes relayed that conversation to Kevin Kirby who requested Dismukes call Hintz back to offer to pay for the \$1,200.00 neutral isolator. *See*, Transcript pg. 57. Hintz declined Dismukes' offer and indicated if elevated voltages were discovered Ohio Edison would install a neutral isolator at their expense. *See*, Transcript pg. 57.

Dismukes was aware Ohio Edison came to the property on October 31, 2017 and did not observe any elevated readings. *See*, Transcript pg. 63. Dismukes found that odd. Dismukes believed, if Ohio Edison used the same procedures he used a day earlier, Ohio Edison would have discovered similar readings to what he found. *See*, Transcript pg. 63. Dismukes believed Ohio Edison easily would have found the same readings because the process is simple, it is "electrical engineering 101." *See*, Transcript pg. 63. Dismukes has done the same types of measurement over 100 times. *See*, Transcript pg. 63.

Dismukes indicated installation of a neutral isolator is not an expensive or time-consuming process. *See*, Transcript pg. 64. Dismukes also discussed his extensive experience with excessive stray voltage causing damage to cattle. *See*, Transcript pg. 65. And, the incident with Double K is the longest delay Dismukes has ever seen with respect to installation of a transformer. This matter is the first time Dismukes has ever observed installation of a neutral isolator take over 24

hours. *See*, Transcript pg. 65. Dismukes also believes it would have been reasonable and prudent for Ohio Edison to perform additional testing on October 31, 2017 knowing an experienced and qualified individual observed elevated readings 24 hours earlier. *See*, Transcript pg. 69.

The article attached to Dismukes' testimony, Exhibit B, was provided by Dismukes for informational purposes for counsel and the Hearing Officer, it did not influence his opinions in any way. *See*, Transcript pg. 66.

Hintz has worked for Ohio Edison for approximately 35 years. *See*, Transcript pg. 77, 78. Hintz agreed installation of a neutral isolator is not an expensive or difficult process. *See*, Transcript pg. 78. Hintz acknowledged Ohio Edison observed an elevated reading on November 8, 2017; in response Ohio Edison installed a neutral isolator. *See*, Transcript pg. 80. Hintz did not recall his two discussions with Dismukes. *See*, Transcript pg. 83.

Even though Ohio Edison observed the elevated readings on November 8, 2017, Ohio Edison did not install the neutral isolator until November 13, 2017. *See*, Transcript pg. 84. The delay was caused by a storm in the area. *See*, Transcript pg. 84. Because of Ohio Edison's internal systems and the storm, Ohio Edison did not learn of the need for and was not able to install the isolator until November 13, 2017. *See*, Transcript pg. 85. Hintz acknowledged if Ohio Edison was aware of the need for the neutral isolator before November 13, 2017, it could have been installed earlier. *See*, Transcript pg. 85.

In June 2020, Double K contacted Ohio Edison regarding issues with the cows. *See*, Transcript pg. 86. In response, and based only upon discussions with Kevin Kirby, Hintz decided to replace the neutral isolator. *See*, Transcript pg. 87. Hintz did not go to Double K to verify the elevated readings observed by Kevin Kirby; Hintz simply took the word of Kevin Kirby. *See*, Transcript pg. 87.

After the neutral isolator was installed, Double K was still experiencing issues. *See*, Transcript pg. 87. In response, Hintz went to the property and discovered Kevin Kirby had a setting on a volt meter incorrectly set; the issue was not caused by the neutral isolator. *See*, Transcript pg. 87.

Hintz elaborated on his decision to replace the neutral isolator in June 2020 based only on his discussions with Kevin Kirby and without going to Double K to verify the elevated readings:

- Q. So in terms of that June 2020, I think you said part of the reason you didn't do any additional testing, the reason that you replaced the isolator was because it was already installed and based on Kevin Kirby's readings, correct?
- A. Correct.
- Q. And you, you know, took – I think you had said you took Kevin at his word because he had some knowledge in how to read, and obviously he had worked with Mr. Dismukes, right?
- A. And he had mentioned also he said that the cows were starting to get edgy. I believe that was the word he used. I believe that's in my testimony. So it kind of added up, okay, obviously behavior of the animals is starting to change back. He took a reading that kind of indicated maybe this think is no longer keeping that isolation, that actually now the systems are back bonded together again. When those isolators fail, they actually short which essentially ties -- ties everything back together. And so it gave all the indications that the isolator needed to be replaced so that's why we moved it and did just that.
- Q. So you took – took Kevin at his word with his readings, correct, and his comments regarding the behavior of the animals, that things are changing, they are getting edgy again.
- A. Well, I've done enough of these in the past that, yeah, we've replaced isolators and that's usually how it comes to be. You know, we will get a call from a customer we haven't talked to in 5, 6, 7, 8, 10 years, hey, I think there is a problem. Well, you know, we will go ahead and replace that isolator and that's – so it was typical what we would do.
- Q. Okay. And I notice you took his word for the readings and you took his word based on what he was saying and that's –
- A. I did.
- Q. Okay. And then ultimately you determined that some of his readings were incorrect or he had a wrong setting; is that correct?
- A. It was a wrong setting which was giving him false readings, yes.

*See*, Transcript pgs. 95, 96.

### **III. ARGUMENT**

#### **A. Ohio Edison's services to Double K were unreasonable and inadequate.**

As a preliminary matter, very little weight should be given to Hintz's testimony. Hintz's testimony is inconsistent. And he is a 35 year employee of Ohio Edison. He is not a neutral expert.

Dismukes, on the other hand, is a qualified neutral expert who has no affiliation with Double K. Dismukes discovered several elevated readings at Double K on October 30, 2017 using basic and simple measurement techniques. Ohio Edison came out the next day and found no elevated readings. Dismukes found that curious.

More curious, Dismukes discussed his October 30, 2017 findings with Hintz to no avail. Hintz would not take the word of a qualified expert who discovered several elevated readings (although Hintz subsequently replaced the neutral isolator based only on the word and faulty readings of Kevin Kirby). And, for some reason, Hintz did not even recall either of two conversations with Dismukes (despite the fact Dismukes had a picture of Hintz's business card attached to his testimony).

Regardless, on November 8, 2017, Ohio Edison was able to verify elevated readings at Double K. However, Ohio Edison did not actually install the isolator until November 13, 2017, because of its internal processes when addressing a storm. Certainly, Ohio Edison should have procedures in place to promptly and appropriately address customer concerns during storms. Storms and outages from storms are a regular occurrence.

The bottom line is Dismukes, found elevated readings at Double K on October 30, 2017. Ohio Edison was at the property a day later. Ohio Edison could and should have observed the same or similar readings and installed a neutral isolator on October 31, 2017. In the alternative, Ohio Edison should have taken the word of a qualified expert that a neutral isolator was necessary

on October 20, 2017. Ohio Edison's failure to do so caused substantial damage to Double K. Accordingly, the PUCO should find Ohio Edison's services were unreasonable and inadequate.

**IV. CONCLUSION**

Ohio Edison should have installed a neutral isolator at Double K on October 31, 2017. PUCO should find Ohio Edison did not provide Double K with reasonable and adequate services.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the forgoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 16<sup>th</sup> day of September 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

*/s/ Brian M. Garvine*  
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**Case No(s). 18-0691-EL-CSS**

Summary: Brief Complainant's Initial Brief electronically filed by Ms. Barb Ballard on behalf of Double K Kirby Farms and Kirby, Linda