

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

LINDA KIRBY,

Complainant,

v.

OHIO EDISON COMPANY,

Respondent.

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Case No. 18-0691-EL-CSS

OHIO EDISON COMPANY'S POST-HEARING REPLY BRIEF

I. Introduction

Complainant Linda Kirby (“Complainant”) filed her post-hearing brief (“Complainant’s Brief”) on September 16, 2021. Complainant’s Brief fails to address the four-factor test articulated in *In re Pro Se Commercial Properties*. Specifically, it is her burden to prove:

[1] whether the cause of the problem was in the control of the company, [2] whether the company failed to comply with any statutory or regulatory requirements regarding the operation of its system that could have caused the outage or surge, [3] whether the company's actions or inactions constituted unreasonable service, and [4] whether the company acted responsibly in correcting the problem.¹

Further, Complainant’s Brief fails to direct the Commission to the evidence showing Ohio Edison failed to comply with statutory or regulatory requirements, or that it acted unreasonably. Commission precedent is clear that “[i]n the absence of evidence showing that [the utility] failed to comply with statutory or regulatory requirements, or that in some other manner it acted unreasonably, the Commission cannot render a finding that [the utility] is responsible for the damages to the complainant's property.” *In re Pro Se Commercial Properties*, Case No. 07-1306-EL-CSS, *10 (Op. and Order Sept. 10, 2008). Complainant has failed to meet her burden under the *In re Pro Se Commercial Properties* test and Ohio Edison cannot be found liable for the alleged damages to Complainant’s cattle.

II. Law and Argument

A. Complainant’s Brief fails to set forth the correct standard and does not address the four factors listed in Ohio Edison’s Post-Hearing Brief.

In complaint proceedings, the burden of proof rests with the Complainant. *Grossman v. Pub. Util. Comm.*, 5 OhioSt.2d 189, 214 N.E.2d 666 (1966). Therefore, a complainant must present evidence in support of the allegations made in a complaint. As explained above, in cases

¹ See *In the Matter of Pro Se Commercial Properties v. The Cleveland Electric Illuminating Company*, Case No. 07-1306-EL-CSS, *6 (Op. and Order Sept. 10, 2008) (“*In re Pro Se Commercial Properties*”).

like this where a complainant seeks damages as a result elevated NEV, the complainant has the burden of proving four factors specific to that cause of action. *See In the Matter of Pro Se Commercial Properties* at *6.

Here, Complainant has failed to satisfy her burden under that four-factor test. Rather, the evidence in this case shows that: (1) the cause of the elevated NEV on Complainant's property has not been conclusively determined as being caused by something in Ohio Edison's control; (2) Ohio Edison complied with all statutory and regulatory requirements regarding the operation of its system; (3) Ohio Edison, through its actions, provided reasonable service; and (4) Ohio Edison acted responsibly in responding to Complainant's trouble calls and installing a neutral isolator after confirming elevated NEV on Complainant's property. Ohio Edison is therefore not responsible for any alleged damages to Complainant's farm cattle or property.

B. Ohio Edison acted responsibly in confirming elevated NEV before installing a neutral isolator and Ohio Edison's actions constituted reasonable service.

Complainant's entire argument, as outlined in her brief, is that Ohio Edison's service to Complainant's farm was unreasonable and inadequate. The evidence in the record, however, clearly show that Ohio Edison's actions constituted reasonable service. It should first be noted that Complainant argues that little weight should be given to Mr. Hintz's testimony because he is an employee of Ohio Edison and according to Complainant, "not a neutral expert." This is simply an attempt by Complainant to impeach the witness after the fact, instead of attacking the testimony at the hearing. Mr. Hintz was duly sworn prior to taking the stand and testifying at the hearing.² Mr. Hintz testified about his personal knowledge of the facts of the case and specified what actions Ohio Edison takes when it receives reports of elevated levels of NEV and was subject to cross-examination. Further, although Complainant makes much of the fact that Mr. Hintz does not recall

² Hearing Transcript at p. 71.

Mr. Dismukes calling him on his cellphone to discuss his October 30, 2017 findings even though Mr. Dismukes had Mr. Hintz's business card, it was established during Mr. Hintz's testimony that his cell phone number was not listed on his business card at the time.³ The existence of these telephone calls are suspect at best and should not diminish the credibility of Mr. Hintz. In the end, Mr. Hintz's testimony should be given just as much weight as Complainant's hired expert, Daniel Dismukes, who does "all of [Double K Kirby Farm's] maintenance and everything like that."⁴

Complainant's only arguments related to Ohio Edison's actions are: (1) Ohio Edison should have observed the same or similar readings as Dan Dismukes and installed a neutral isolator on October 31, 2017, or (2) Ohio Edison should have taken the word of "a qualified expert" that a neutral isolator was necessary on October 20, 2017.⁵

Complainant's first argument appears to be an attempt to cast doubt on Ohio Edison's testing procedures on October 31, 2017. However, there is no evidence in the record that supports Complainant's argument. Complainant's expert even testified that he "wasn't able to observe [Ohio Edison's] testing procedure" and that "[p]ossibly they were inaccurate in measuring," but he just doesn't know.⁶ Mr. Dismukes agreed that sitting at the hearing he could not critique Ohio Edison's testing procedure because he did not know what the testing procedure included.⁷ Complainant has not presented any evidence to support a theory that Ohio Edison's testing for NEV was inadequate or unsatisfactory.

³ See *id.* at p. 83; see also Exhibit B to Summary of Dismukes Testimony.

⁴ Hearing Transcript at p. 12.

⁵ October 20, 2017 is not a relevant date under the facts presented at the hearing. According to the testimony of Dan Dismukes, he did not come to the Kirby property and test for NEV until October 30, 2017. See Dismukes Testimony at p. 1.

⁶ Hearing Transcript at p. 58.

⁷ *Id.*

Complainant's second argument, that Ohio Edison should have taken the word of Mr. Dismukes and installed a neutral isolator as soon as Mr. Dismukes observed elevated levels of NEV, is contradicted by Mr. Dismukes' testimony. Mr. Dismukes admits that he would expect Ohio Edison to test the levels of NEV after receiving a complaint.⁸ Further, Mr. Dismukes agrees that Ohio Edison should not be expected to install a neutral isolator if Ohio Edison does not register elevated levels of NEV on the property.⁹ And although Complainant appears to argue that Ohio Edison's actions of replacing the neutral isolator in June 2020 shows that Ohio Edison did not need to verify elevated levels of NEV before installing a neutral isolator, Complainant misses the key distinction between the events that occurred in 2017 and 2020; elevated levels of NEV were already verified by Ohio Edison in 2017 and a neutral isolator was installed. Ohio Edison's actions in 2020 were to simply replace the already existing neutral isolator. As Mr. Hintz testified, the verified elevated levels in 2017, "was the justification for putting in the isolator [in 2020]."¹⁰

Ohio Edison promptly installed a neutral isolator after confirming elevated levels of NEV at the pad-mounted transform on Complainant's property. Ohio Edison's witness testified that Ohio Edison does not install an isolator immediately as a precaution because investigation and testing is needed to verify the source of the elevated NEV. Specifically, Ohio Edison's witness testified that "it's a false sense of security just to put [a neutral isolator] in when possibility there might be issues beyond our system that is causing [elevated NEV]."¹¹ Mr. Hintz also testified that you must "identify the problem first before you start trying to prescribe the cure."¹²

⁸ *Id.* at p. 67.

⁹ *Id.* at pp. 57-58.

¹⁰ *Id.* at p. 100.

¹¹ *Id.* at p. 74.

¹² *Id.* at p. 78.

While Complainant's expert testified that in his experience, he has seen a neutral isolator installed less than twenty-four hours after elevated NEV is detected, Complainant has not identified any evidence in the record supporting the position that installing a neutral isolator within 4 days of a utility confirming elevated levels of NEV is unreasonable. Complainant has not identified any legal requirements or industry standards that specifies installation within twenty-four hours. The evidence in the record is that Ohio Edison's investigation and installation of a neutral isolator two business days after confirmed elevated levels of NEV "is reasonable, fast service that reflects the high priority with which Ohio Edison treats NEV complaints."¹³ Further, Mr. Hintz testified that it is not his experience that a neutral isolator is installed within twenty-four hours after a NEV complaint.¹⁴

Ohio Edison promptly responded to each of Complainant's trouble calls in October and November 2018 and each time tested for elevated levels of NEV. Once elevated levels of NEV were confirmed by Ohio Edison, Ohio Edison installed a neutral isolator within 4 days.

IV. Conclusion

Complainant did not meet her burden of proof under the Commission's four factor test outlined above. On the other hand, Ohio Edison presented ample evidence that it acted responsibly in responding to Complainant's trouble calls and installing a neutral isolator after confirming elevated NEV on Complainant's property. Accordingly, Ohio Edison Company respectfully requests that the Commission dismiss the Complaint in its entirety, with prejudice.

¹³ Hintz Testimony at p. 13.

¹⁴ Hearing Transcript at p. 73.

Respectfully submitted,

/s/ John W. Breig, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing Post-hearing Reply Brief was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 30th day of September 2021. A copy of the foregoing was served by electronic mail to the following person on this 30th day of September 2021:

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Summary: Brief Ohio Edison Company's Post-Hearing Reply Brief electronically filed by Mr. John W. Breig on behalf of Ohio Edison Company