

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of )	
<b>EDITH LEE-PAYNE</b> against <b>THE DETROIT</b> )	
<b>EDISON COMPANY, DTE ENERGY COMPANY,</b> )	Case No. U-15532
and <b>MICHIGAN CONSOLIDATED GAS COMPANY.</b> )	
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At the July 16, 2009 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman  
Hon. Monica Martinez, Commissioner  
Hon. Steven A. Transeth, Commissioner

**ORDER**

Procedural History

On February 9, 2009, Edith Lee-Payne (complainant) filed a complaint against DTE Energy Company, The Detroit Edison Company, and Michigan Consolidated Gas Company<sup>1</sup> (Detroit Edison), alleging that Detroit Edison violated Commission regulations by failing to properly clear trees from power lines near her home at 1952 Santa Rosa Drive, Detroit, Michigan, where an electrical fire occurred on July 4, 2003.

On March 20, 2009, Detroit Edison filed an answer and affirmative defenses denying the allegations and asserting that this proceeding is barred by *res judicata* and collateral estoppel because Ms. Lee-Payne has already adjudicated the same claims in Wayne County Circuit Court.

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<sup>1</sup>There are no allegations in the complaint involving gas service. All allegations in the complaint address services provided by The Detroit Edison Company.

Pursuant to due notice, on March 31, 2009, Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ) held an evidentiary hearing. The complainant testified and was cross-examined. Detroit Edison's witness was also cross-examined. The Commission Staff (Staff) participated in the hearing. Ms. Lee-Payne offered 88 exhibits, of which 38 were admitted into evidence. Detroit Edison offered two exhibits that were admitted.

On April 20, 2009, the complainant and Detroit Edison stipulated to the admission of an additional 15 exhibits sponsored by the complainant. The Staff did not object.

On May 1, 2009, Detroit Edison and the Staff filed briefs. Ms. Lee-Payne did not file a brief. The ALJ indicates that the complainant mailed a brief to the ALJ, the Staff, and Detroit Edison, and the ALJ took the brief into consideration in his decision. The record consists of 155 pages of transcript and 55 exhibits.

On June 9, 2009, the ALJ issued a Proposal for Decision (PFD). Exceptions were due on or before June 23, 2009. Ms. Lee-Payne filed exceptions on June 26, 2009, and a proof of service was filed on June 29, 2009. On June 30, 2009, replies to exceptions were filed by Detroit Edison and the Staff. Despite their untimely filing, the Commission will consider the exceptions.

### The Complaint

The complaint is arranged chronologically and appears to focus on allegations that Detroit Edison performed inadequate line clearance activities between 2001 and 2007, and violated rules governing complaint procedures in 2005.

The complaint alleges that Detroit Edison performed inadequate line clearance in the spring and summer of 2001. The inadequate 2001 line clearance is alleged to have resulted in tree limbs or dead trees falling on the complainant's "electrical wires" on February 1, 2002, on complainant's

service drop<sup>2</sup> on July 4, 2003, and on the gutter of complainant's garage on June 25, 2004. The July 4, 2003 incident allegedly caused a power surge that resulted in a fire causing extensive damage to complainant's home.

The complaint further alleges that Detroit Edison performed inadequate line clearance in the spring and summer of 2006. The complaint alleges that a dead tree fell on an electrical line next door to the complainant in October of 2006, and the complainant observed a live tree posing a threat to lines at the home behind the complainant's home on November 1, 2006.

The complaint alleges that each of these incidents constitutes a violation of R 460.3505 (Rule 505) and R 460.3801 (Rule 801). Rule 505 requires each utility to adopt and maintain a line clearance program that uses industry-recognized standards and meets National Electric Safety Code (NESC) standards. Rule 801 requires each utility to exercise reasonable care to reduce hazards to employees, customers, and the public. The complaint alleges that Detroit Edison's line clearance program (LCP) is faulty and was poorly carried out, resulting in the fire and the other instances of damage caused by fallen trees or limbs.

The complaint further alleges that a downed live wire was left on complainant's property for approximately seven months after the fire, from July 8, 2003 to February 25, 2004, and "improperly installed work took seven months," in violation of R 460.723 (Rule 23), and R 460.744 (Rule 44) or 460.745 (Rule 45). Complaint, p. 2. Rule 23 provides that utilities shall respond to a non-utility employee who is guarding a downed live wire within 240 minutes in an urban area. Rule 44 provides that a utility shall restore service that has been interrupted due to catastrophic conditions within 120 hours, and Rule 45 provides that service shall be restored under normal conditions within 16 hours. The latter two rules provide that, if service is not restored

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<sup>2</sup>The service drop is the electrical power line that runs from the utility pole to the home's meter.

within these time frames, a residential customer is entitled to a bill credit of \$25 or the customer's monthly charge, whichever is greater.

The complaint alleges that the company did not start its investigation of the 2003 fire until 2005, and that the complainant's contacts with the company in 2005 regarding settlement were unsatisfactory, in violation of R 460.128 (Rule 28), R 460.129 (Rule 29), and R 460.130 (Rule 30).<sup>3</sup> Rule 28 provides that the regulatory procedures set by the Commission apply to all residential customer inquiries and complaints. Rule 29 provides that each utility shall maintain a customer complaint procedure and sets standards for that procedure. Rule 30 sets requirements for utility personnel to follow in handling customer complaints and inquiries.

Finally, the complaint alleges that in the spring and summer of 2006 Detroit Edison performed line clearance using "untrained, non-English speaking immigrant workers, compromising the safety of the community," in violation of Rule 801 and R 460.3802 (Rule 802). Complaint, p. 3. Rule 802 provides that each utility shall comply with federal and state occupational safety and health laws.

The request for relief asks that the Commission find the utility in violation of the rules and regulations identified in the complaint, and facilitate a settlement.

#### The PFD

On July 3, 2006, Ms. Lee-Payne filed an action in Wayne County Circuit Court against The Detroit Edison Company, Nationwide Mutual Fire Insurance Co., and Allstate Insurance Co., Case No. 06-61882-ND, seeking damages based upon the identical claims made in this proceeding. *See*, Attachment A to Detroit Edison's answer. That action sought \$1.35 million in damages based on

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<sup>3</sup>The complaint sometimes makes reference to the rescinded versions of the referenced rules, as well as the current versions. This order refers only to the current versions of the rules identified in the complaint.

Detroit Edison's alleged failure to remove decayed trees, resulting in the July 4, 2003 fire, and the company's alleged mishandling of complainant's claims. That action was dismissed with prejudice by Circuit Court Judge Isidore B. Torres on April 13, 2007, based upon Ms. Lee-Payne's violations of court-ordered discovery, and multiple violations of a protective order regarding *ex parte* communications with Detroit Edison.

The ALJ found that *res judicata* operates to bar the instant proceeding, because the earlier Circuit Court action was decided on its merits, both actions involve the same parties, and the issues in the second action could have been resolved in the first action. *See, Adair v State of Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). The ALJ found that a dismissal with prejudice constitutes a decision on the merits, that the parties were clearly the same, and that all claims made in the instant case could have been made in, and would have been subject to the jurisdiction of, the Wayne County Circuit Court. The ALJ further found that, given the discretionary application of the primary jurisdiction doctrine in Michigan, the claims could have gone forward in Wayne County Circuit Court without the case being referred to the Commission. *See, Rinaldo's Construction v Michigan Bell Telephone Co*, 454 Mich 65; 559 NW2d 647 (1997). The ALJ recommended that the Commission find that the complaint is barred. The ALJ addressed the merits of the complaint in the event that the Commission disagrees.

The ALJ begins by noting that, to the extent that the complainant expects the Commission to decide tort-based claims of negligence and to award damages, such claims are outside of the Commission's jurisdiction.

The ALJ found that Detroit Edison's LCP is not faulty, and that line clearance was properly carried out with respect to Ms. Lee-Payne's property. While acknowledging that the fire was unfortunate, the ALJ found that Detroit Edison did not violate any Commission rules or

regulations in its performance of line clearance activities at or near the complainant's property during the time periods alleged in the complaint. The ALJ found credible the testimony of Ms. Sorvala, General Supervisor for Line Clearance for Detroit Edison, regarding the requirements of the LCP and the performance of these activities at the complainant's address. The ALJ noted that Commission rules do not require a utility to perform line clearance around the service drop; rather, this is the responsibility of the customer because the service drop is on the customer's property and not in the utility's easement. Moreover, Detroit Edison does not own the trees that are in its easement. The ALJ found that no rule, regulation, or law requires Detroit Edison to remove all dead or diseased trees in its easement. The ALJ noted that the Staff supported Detroit Edison's LCP as appropriate.

The ALJ found that the complainant failed to show that any LCP procedures, rules, regulations, or state or federal laws were violated. The ALJ noted that it was undisputed that the tree that caused the fire fell on complainant's service drop, and not on the primary or secondary lines that Detroit Edison is required to maintain. The ALJ further noted that complainant's evidence shows that the height of the tree was only 15 feet, far too short to threaten primary or secondary lines that stand between 30-70 feet above the ground. The ALJ found that there was no evidence that the 2001 line clearance was improperly performed. The ALJ further noted that the 15 foot tree that fell on the service drop was of a very fast-growing variety. The ALJ was not persuaded by the fact that the complainant testified that the tree trunk was only four inches from the utility pole, because the height of the tree was clearly well short of the primary and secondary lines.

The ALJ recommended that the Commission find that the complainant failed to support any of her allegations regarding a flawed LCP or failure to properly carry out the LCP.

Next, the ALJ addressed complainant's argument that it took seven months for Detroit Edison to restore service to her home after the fire, which was presented during the hearing, though not immediately apparent in the complaint. Complainant testified that she served as the general contractor on her home's reconstruction, which lasted from July 2003 to February 2004. 1 Tr 90-91. She testified that she did not request restoration of her service and does not know when that request was made by her subcontractor. *Id.* The Staff did not find any violations of Commission regulations. Noting that complainant lacked actual knowledge of when a request for service restoration was made, the ALJ found that complainant did not sustain her burden of proof on this issue.

Finally, the ALJ addressed the complainant's assertions made during her day-long evidentiary hearing that she was not being given a fair hearing. The ALJ noted that Ms. Lee-Payne complained that she was given no prehearing conference or discovery, and that the Commission never investigated her complaint. The ALJ noted that no prehearing conference or request for discovery was made until the hearing was over; that several breaks were taken to accommodate the complainant, including a 90-minute break in the morning to allow the complainant to prepare her exhibits; and that the Commission had assigned a case coordinator to her complaint, participated in the hearing and the briefing, and thus had clearly investigated her claims.

The ALJ recommends that the Commission dismiss the complaint.

#### Exceptions and Replies

Complainant's exceptions do not address the PFD. They reargue the allegations of the complaint, using new factual scenarios and referring to violations of rules not identified in the complaint. The exceptions assert new claims and are accompanied by new proposed exhibits. Complainant argues that her case should not have been treated as a contested case.

Complainant primarily takes exception to the actions of Commission employees, stating that they frequently violate the Commission's Rules of Practice and Procedure, and to the actions of the ALJ, referring to the March 31 hearing as "not remotely fair or impartial." Exceptions, p. 3.

The complainant takes general exception to the Commission's handling of her case, stating:

The Complainant takes exception especially with the attorneys for the Commission and the Respondent and the administrative law judge for deciding an outcome favoring the utility despite overwhelming evidence of their responsibility for the complaint. . . . [T] he dismissal warrants taking the decision to another level. If the matter is settled with the Commission or the Respondent it will go no further. The Judicial Tenure Commission and Attorney Grievance Commission are the proper forums. They can administer the proper discipline if any.

Exceptions, pp. 7-8. The exceptions express complainant's disagreement with the ALJ's recommendations.

In reply, Detroit Edison points out that the exceptions are largely an attack on the Commission and an attempt to insert new claims based on extra-record material. Detroit Edison argues that the exceptions do not meet the standards of 1999 AC, R 460.17341(4) (Rule 341) that require them to "clearly and concisely recite the specific findings of fact and conclusions of law to which exception is taken or the omission of, or imprecision in, specific findings of fact and conclusions of law to which the party excepts." Further, Detroit Edison points out, the exceptions were not timely filed and on that basis alone should be disregarded. Detroit Edison notes that, despite the complainant's reliance on the Commission's Rules of Practice and Procedure in her numerous complaints about the handling of her case, the complainant failed to comply with the filing deadline, and is, under Commission rules, not entitled to consideration of the exceptions. *See*, 1999 AC, R 460.17109(2).

Detroit Edison notes that the Commission's February 27, 2009 notice of hearing clearly states that an evidentiary hearing will take place on March 31, 2009. Detroit Edison points out that



complainant stated that she chose to represent herself and understood that the hearing was “formal” (1 Tr 10), and only alluded to expecting a different kind of hearing near the end of the day (1 Tr 148). Detroit Edison argues that MCL 460.58 governs customer complaints to the Commission and requires a formal evidentiary hearing, which is in the nature of a contested case. Detroit Edison contends that complainant failed to show any clear error of law or abuse of discretion in the PFD. The company argues that she failed to meet her burden of proof. *See*, 1999 AC, R 460.17515.

In its replies, the Staff points out that Rule 341(2) states that “If a party does not file exceptions to a proposal for decision within the time permitted by this rule, any objection to the proposal for decision is waived.” The Staff also notes that the PFD clearly states that seasonably filed exceptions must reach the Commission on or before June 23, 2006. Complainant’s did not. Thus, the Staff argues, complainant has waived her right to object to the PFD.

Like Detroit Edison, the Staff further notes that the exceptions fail to follow Rule 341(4) in that they do not reference findings of fact or conclusions of law made in the PFD, but rather reargue the case, attempt to present new evidence, and express disagreement with the ALJ’s recommendations.

The Staff argues in support of the PFD. The Staff urges the Commission to dismiss the case on grounds of *res judicata*. If the Commission declines, then the Staff urges the Commission to adopt the ALJ’s recommendation to dismiss the case, and find that complainant was afforded a full and complete hearing.

### Discussion

The doctrine of *res judicata* operates to bar a second, subsequent action on the same claims when (1) the prior action was decided on the merits, (2) both actions involve the same parties or

their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Adair*, 470 Mich at 121. MCR 2.504(B) provides that an action may be subject to involuntary dismissal where a party fails to comply with court rules or a court order, and that, unless otherwise specified, “a dismissal under this subrule . . . operates as an adjudication on the merits.” MCR 2.504(B)(3). Circuit Court Judge Isidore B. Torres dismissed the court action with prejudice based upon Ms. Lee-Payne’s violations of court-ordered discovery, and multiple violations of a court-issued protective order. Thus, the dismissal of Ms. Lee-Payne’s circuit court action operates as a decision on the merits. That action was between the same two parties. Finally, the Commission finds that each claim brought in this case arises from the same transaction and set of events brought before the circuit court, and could have been raised and decided there. *See, Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). The Commission agrees with the ALJ that the doctrine of *res judicata* operates to bar this second proceeding on Ms. Lee-Payne’s claims against Detroit Edison based on the alleged failure to trim and remove trees.

Despite the fact that this action is barred by *res judicata*, the Commission will address the merits of the complainant’s allegations regarding Detroit Edison’s LCP and complaint process.

A case that is brought against a utility on the basis of a customer’s complaint is guided by the contents of the complaint.

Ms. Lee-Payne presented evidence showing that a dead or diseased tree, known as an ailanthus, of about 15 feet in height and located four inches from a utility pole, fell on her service drop on July 4, 2003. The tree was owned by her neighbor. The downed power line resulted in a fire that caused extensive damage to her home. Over the next year she rebuilt her home. She does not know when electrical service was restored, and she made no allegation that she was entitled to

receive a bill credit that she did not receive. 1 Tr 91. Thus, the Commission finds no violation of Rule 44 or 45.

Complainant presented no evidence related to the allegation that a downed wire was left in her yard. Thus, the Commission finds no violation of Rule 23. She presented no evidence regarding any alleged violations of Commission rules related to the complaint procedure, other than her testimony that the Staff did not investigate her complaint. The Commission finds no violation of Rules 28, 29, or 30. She presented no evidence related to the allegations that non-qualified personnel were involved in tree trimming in 2006. The Commission finds no violation of Rule 802.

The complainant showed that in 2001 and 2006 Detroit Edison performed line clearance around her property, and she testified that the company failed to clear trees or branches that she feels should have been cleared. In February 2002, a dead branch fell on her service drop, and in June 2004 a dead tree fell in her yard. She acknowledges that clearance around the service drop is the customer's responsibility. 1 Tr 22. Complainant asserts that the fact of the fire proves that the LCP is faulty. 1 Tr 103.

Ms. Sorvala's testimony regarding the LCP was unrefuted. 1 Tr 110-153. She testified that she administrates the LCP, with a staff of nine people. Scheduling is done through the company's asset optimization group, which uses several sources of information to decide where clearance is needed. Clearance cycles average between two and five years, based on tree growth in the area, location of the trees, and voltage of the lines. Trimming is contracted out. The program is administered on a tree by tree basis, as different varieties of trees require different treatment. Activity sheets are completed that show, address by address, tree by tree, what was trimmed. 1 Tr 140. Trimmers must be qualified; they all undergo a union apprenticeship program of two and one

half years. 1 Tr 122. English is not a requirement; however, supervisors must be bilingual. 1 Tr 127.

The point of the LCP is to keep primary and secondary lines clear from pole to pole. These lines are between 30-70 feet high. Lower lines on poles are communications lines. Service drops are not cleared by the utility. The utility owns none of the trees that exist along its lines. If a tree is recommended for removal, the utility seeks the permission of the tree owner. After trimming takes place, a third party audit is performed which, in 2001, involved a 100% walk-down of the lines. Ms. Sorvala's staff then audits the audit. Violations (trees or limbs that were missed) are reported and resolved.

The company trims no trees outside its easement, but if branches encroach on the easement, that is, interfere with primary or secondary lines, the branches will be trimmed. The type of tree is taken into consideration. A 15-foot clearance may be created for a fast-growing willow interfering with a primary line; a four-foot clearance may be created for a slow-growing pine. For secondary lines a four to six foot clearance is sought. 1 Tr 150. Service drop clearance is the responsibility of the customer. 1 Tr 151.

In March of 2001 the lines were cleared at the Santa Rosa location, in May they were audited, and one violation was identified and resolved. The tree that caused the fire was not within the easement. Ailanthus is known as a weed tree that can grow almost anywhere, and could have been alive in 2001 but dead in 2003. The fact that it was adjacent to a power pole would not have been determinative of its fate; rather, what matters is whether the branches reach high enough to interfere with primary or secondary lines. They did not.

The complainant did not present evidence of any industry standard or NESC standard that was violated by the LCP; nor did she point to any aspect of the LCP that was violated by Detroit

Edison's actions. The Commission finds no violations of Rules 505 or 801, and that the complaint should be dismissed with prejudice.

The Commission rejects the complainant's assertions of unfair treatment. The Commission's notice of hearing sent to Ms. Lee-Payne on February 27, 2009, stated that an evidentiary hearing would take place on March 31, 2009, and gave instructions on how to seek an adjournment. Ms. Lee-Payne was advised at the outset of the hearing that she had the burden of proof, that she must establish her claims by a preponderance of the evidence, and that she had the right to an attorney. 1 Tr 10, 12-13. The hearing began with a recess to allow the parties to discuss settlement. Once the hearing commenced, Ms. Lee-Payne was afforded several recesses to arrange her evidence, and was liberally granted admission of her exhibits (including hearsay exhibits), and wide latitude in her questioning of the company witness. *See*, 1 Tr 37-38, 141-144. She was assisted in that questioning by the ALJ. 1 Tr 125-131. While it is true that, at the end of the hearing day, complainant stated that she thought "we were going to have a hearing, like a preliminary something," she quickly followed that up by saying "There was certainly enough presented here." 1 Tr 148.

As is amply demonstrated here, the Commission attempts to extend leniency to *pro se* litigants, because their task is not an easy one. The record shows that the hearing was fair and impartial, and that the complainant was treated with patience and decorum throughout. Though she never filed a brief with the Commission, she was granted consideration of the brief that she mailed to the ALJ, despite the fact that it does not appear in the record and was never formally served on the opposing parties. She was granted admission of additional exhibits by stipulation after the hearing. Finally, she failed to timely file exceptions, but was granted consideration of that filing as well.

THEREFORE IT IS ORDERED that the complaint is dismissed with prejudice.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

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Orjiakor N. Isiogu, Chairman

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Monica Martinez, Commissioner

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Steven A. Transeth, Commissioner

By its action of July 16, 2009.

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Mary Jo Kunkle, Executive Secretary