FILE



**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
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| In the Matter of the Complaints of S.G. Foods, Inc.; Miles Management Corp., et al.; Allianz US Global Risk Insurance Company, et al.; and Lexington Insurance Company, et al., | ) | |
| Complainants, | ) | Case Nos. 04-28-EL-CSS<br>05-803-EL-CSS<br>05-1011-EL-CSS<br>05-1012-EL-CSS |
| v. | ) | |
| The Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc., | ) | |
| Respondents. | ) | |

**RESPONDENTS' MOTION TO CERTIFY INTERLOCUTORY APPEAL OF THE MAY 24, 2007 ENTRY DENYING RESPONDENTS' MOTION TO COMPEL**

Respondents, pursuant to Rule 4901-1-15(B), Ohio Administrative Code, respectfully move for an Entry certifying an interlocutory appeal of the Attorney Examiner's denial of Respondents' motion to compel regarding Respondents' Interrogatory No. 4 and Request for Production No. 4. (*See* Entry dated May 24, 2007 at ¶ 4(a), attached as Exhibit A.)

The Examiner's decision is a departure from past Commission precedent and, if overturned at a later stage in these proceedings, would cause undue prejudice and expense to the parties in this case. Therefore, the Attorney Examiner should certify an interlocutory appeal of this decision to the Commission. A Memorandum in Support is attached to this Motion.

May 30, 2007

Respectfully submitted,

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| The Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc., | ) | |
| Respondents. | ) | |

**MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO CERTIFY INTERLOCUTORY APPEAL OF THE MAY 24, 2007 ENTRY DENYING RESPONDENTS' MOTION TO COMPEL**

## I. INTRODUCTION

It is axiomatic that a party must have standing to bring a claim. In order to have standing, Complainants in inadequate service cases must establish an injury due to the alleged inadequate service. And where an insurance company is the complainant, the insurer may bring a subrogation claim only when the insurer paid its insured pursuant to a contractual duty. The May 24, 2007 Entry effectively prohibits Respondents from investigating Complainants' standing to bring this claim, and thus deprives Respondents of a viable defense.

The May 24 Entry is erroneous in two key respects. First, if Complainants paid insurance claims for damage that arose from back-up system failures rather than from inadequate service,

those Complainants do not have standing. In this case, the Allianz Complainants' document production suggests that the damage to their insured was caused by failures in their insured's own back-up systems, not by the August 14, 2003 outage. Contrary to the Attorney Examiner's decision, this is not a question of damages; it is a question of whether the customer has been damaged at all. This is a plausible, alternative explanation for Complainants' injury—in other words, their standing to bring this claim.

Second, in order to have standing, Complainants must have paid outage-related claims pursuant to an insurance policy or other contractual obligation. Complainants' underwriting files may contain evidence that they paid claims as volunteers without any contractual duty to do so. The files may also contain Complainants' assessment of their insureds' back-up facilities. Because the underwriting files pertain to Complainants' standing, they are relevant and should be produced.

Under Rule 4901-1-15(B), the Attorney Examiner may certify an interlocutory appeal to the Commission of a discovery order where the order "represents a departure from past precedent" and where "an immediate determination is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question." The Attorney Examiner's decision of May 24, 2007 meets both of these criteria, and it should be certified to the Commission as an interlocutory appeal.

## II. ARGUMENT

### A. The Examiner's Decision Regarding Discovery Of Back-Up Systems Is A Departure From Past Precedent.

Complainants purport to be subrogees of insureds who suffered losses as a result of the August 14, 2003 outage. Therefore, to have standing, Complainants must have paid insurance

claims resulting from the outage – and not from some other cause that happened also to occur on August 14. The Attorney Examiner acknowledges this basic requirement:

> The examiner agrees with respondents insofar as they maintain that, for the insurance companies to be appropriate subrogees and represent the insureds in these matters, they must have paid an insurance claim resulting from the alleged inadequate service in these proceedings to the insureds.

(*See* Entry dated May 24, 2007 at ¶ 4(a) (emphasis added).)

To investigate Complainants' standing, Respondents served Interrogatory No. 4, which states:

> For each Insured identified in response to Interrogatory No. 1, identify:
>
> a. Any surge protection, voltage regulation or other protective equipment installed between 2000 and the present;
>
> b. Any stand-by generation, back-up power supply or other alternate source of electrical supply installed between 2000 and the present;
>
> c. The date any such equipment described in subparts (a) and (b) above was installed and first functioning; and
>
> d. The dates after the date identified in subparagraph (a) when the equipment described in subparagraphs (a) and (b) above was out of service, under repair or otherwise not usable.[1]

After Complainants refused to provide this information, Respondents moved to compel its production. (*See* Respondents' Second Mot. to Compel Disc.)

Information regarding back-up systems is critical to understanding whether Complainants have standing to bring this claim, as illustrated by the back-up system failures of Republic Engineered Products ("Republic"), the insured of the Allianz Complainants. Republic submitted insurance claims arising from several shut-downs of a blast furnace, including a shut-down that

[1] Respondents have subsequently limited this request to information about any stand-by generation, back-up power supply, or other alternate source of electrical supply, as sought in subparts (b), (c), and (d). (*See* Letter from M. Whitt to D. Galivan, dated Feb. 7, 2007, attached as Exhibit B, page 1.)

occurred on August 14, 2003. Documents already produced in the case suggest that the August 14, 2003 shut-down resulted from a year-long pattern of failures in Republic's own back-up systems, not the August 14, 2003 outage. (*See* AIGREP 00111 (prior shut-downs and August 14, 2003 shut-down are "significantly intertwined from a loss adjustment perspective"), attached as Exhibit C.) If these failures caused Republic's loss, the insurance claim paid by the Allianz Complainants would not "result from the alleged inadequate service" and, by the terms of the Examiner's decision, Complainants would not have standing as subrogees.

However, despite acknowledging the basic standing requirement in inadequate service cases, the Attorney Examiner denied Respondents' motion, reasoning that "information such a[s] back-up power [sic] pertains to damages, and damages are not an issue in these cases before the Commission." (*See* Entry at ¶ 4(a).) The Examiner then instructed that in order to evaluate whether Complainants have standing as subrogees, Respondents "should review the claim files to determine if the complainant insurance companies did, in fact, pay a claim to the insureds for the time period in question." (*Id.*) (emphasis added).

The Entry is contrary both to established Commission precedent and to the Examiner's own acknowledgment that a Complainant has standing only if it paid a claim "resulting from the alleged inadequate service." Commission precedent requires that, at this stage in the proceedings, Respondents be allowed to pursue evidence in support of their theory that Complainants lack standing.[2] For example, in *Kohli v. PUCO* (1985), 18 Ohio St. 3d 12, the damage that formed the basis of the complainant's standing was a drop in the milk production of its cows. The Ohio Supreme Court affirmed the PUCO's order finding no inadequate service, relying on evidence presented at the hearing that the complainant's own facilities were partly

[2] A decision regarding the admissibility of the evidence Respondents are seeking is appropriate at hearing. To deny Respondents access to the information at this early juncture is both premature and prejudicial to Respondents.

responsible for the drop in production. *Id.* at 14. In *Carpet Color Sys. v. Ohio Bell Tel. Co.*, No. 85-1076-TP-CSS (Opinion and Order of Sept. 9, 1987), Carpet Color complained of various problems with its telephone service and alleged that Ohio Bell was to blame. The Commission permitted Ohio Bell to present evidence that those problems resulted from Carpet Color's own telephone terminal equipment. *See id.* at 1987 Ohio PUC LEXIS 1526 *11-23. Also, the Attorney Examiner correctly notes that the Commission did not decide the customer sensitivity issue in *Miami Wabash Paper LLC v. Cinn. Gas & Elec. Co.* However, the respondent in that case was allowed to present evidence regarding the customer's facilities; it was only after the Commission found no inadequate service that it declared this issue moot.

Contrary to the Examiner's decision, information relating to the back-up systems of Complainants' insureds does not pertain to damages. Rather, it provides a plausible, alternative explanation of those damages: the losses for which Complainants paid claims arose from failures in their insureds' own back-up systems, not the August 14, 2003 the outage. This information is relevant because if a Complainant paid a claim arising from damage caused by a back-up system failure rather than by the outage, then that Complainant does not have standing to bring this case. Respondents are entitled to discovery that supports this theory.

The Attorney Examiner's "time period" approach to standing is fundamentally inconsistent with the Commission's injury-based rule, i.e., the requirement that the complainant establish a link between the inadequate service and damages. In fact, a "time period" approach effectively eliminates the established injury-based rule. Certainly, an injury that merely occurs in the same "time period" as the alleged inadequate service was not necessarily caused by that service. For example, under the Examiner's approach, a Complainant who paid a claim arising from a simple car accident that happened to occur on August 14, 2003 would have standing to

bring an inadequate service case against Respondents because the claim was paid during the same "time period" as the outage—even though the accident had nothing to do with the outage. The May 24 Entry is an invitation for parties to file claims against utilities that have nothing to do with utility service.

Commission precedent does not permit the radical interpretation of standing embodied in the May 24 Entry. Even if Republic's loss was contemporaneous with the August 14, 2003 outage, Complainants have no standing if that loss was caused by failures in Republic's own back-up systems. The Examiner's decision has no basis in Commission precedent and should be certified to the Commission for further review.

### B. The Examiner's Decision Regarding Production Of Underwriting Files Is A Departure From Past Precedent.

Respondents asked Complainants to produce "[a]ll underwriting files for each policy pursuant to which any Complainant paid claims arising from the August 14, 2003 Outage." (*See* Req. for Produc. No. 4.) After Complainants refused to produce this information, Respondents moved to compel its production. (*See* Respondents' Second Mot. to Compel Disc.) The Examiner subsequently denied the motion. (*See* Entry dated May 24, 2007 at ¶ 4(b).)

The Entry is erroneous in several respects. First, the Commission has already acknowledged that Complainants bring this claim under a subrogation theory. (*See* Entry dated Mar. 7, 2006 at ¶ 53.) Under Ohio law, a prospective subrogee must have paid the claim giving rise to subrogation rights pursuant to a contractual duty to do so. *See PIE Mut. Ins. Co. v. Ohio Ins. Guar. Ass'n.* (1993), 66 Ohio St. 3d 209, 213 (stating that subrogation requires that the insurer pay pursuant to a duty rather than as a "mere volunteer"). Thus, Complainants cannot bring this claim unless they are proper subrogees, and they are not proper subrogees unless they paid pursuant to a contractual duty.

The Examiner's decision effectively eliminates this basic subrogation standing requirement. First, in denying Respondents' motion, the Examiner reasoned that "these cases are not about damages and the Commission will not be addressing the issue of whether the insureds' claims were or were not appropriately paid." (Entry dated May 24, 2007 at ¶ 4(b).) However, if the insureds' claims were not appropriately paid, Complainants have no basis for bringing this complaint. Though insurance coverage issues are typically dealt with by courts of general jurisdiction, Respondents should not be required to defend this case as to these Complainants, only later to discover that Complainants had no basis for suing in the first place.

Second, the Examiner's decision prohibits Respondents from investigating whether any insured violated conditions or restrictions on coverage reflected in the underwriting files. The contents of Complainants' underwriting files are relevant to their standing as subrogees. The underwriting files may contain evidence of conditions or restrictions on coverage pertaining to a variety of issues, including maintenance of facilities and payment of premiums. If any of those conditions were violated by the insureds, the insurance policies at issue may become invalid, making any payment pursuant to them "voluntary" and thus dissolving subrogation rights.

The Examiner's decision also denies Respondents access to Complainants' own assessments of their insureds' back-up systems, which may include descriptions of the type of facilities that were installed, maintenance history and structural modifications. Underwriting files may also contain Complainants' evaluation of flaws in the back-up systems and their requirements for fixing those flaws. Complainants' assessment of their insureds' back-up systems are especially relevant in deciding whether the claims they paid were outage-related.

Further, as a substitute for standing discovery, the Examiner suggests that Respondents evaluate subrogation by "look[ing] to the policies which the insurance complainants state they

have provided or will be providing for the information relevant to these cases" to find a basis for subrogation. (*See* Entry dated May 24, 2007 at ¶ 4(b).) But this is impossible with respect to Allianz, the Complainant that paid most of Republic's claim. Complainant's Allianz policy does not include a subrogation provision. Therefore, if Allianz claims to have contractual subrogation rights, it does not appear that those rights arise from an insurance policy. Respondents should be allowed to investigate Complainants' subrogation rights by examining their underwriting files.

Further, an insurer's right to subrogation does not only arise from the presence of a subrogation clause of a policy, but also from the circumstances of the claim, *i.e.*, does the alleged loss fall within the policy's coverage. Respondents should be allowed access to discovery of the insurer's own assessments of whether the claims at issue fell within the scope of the policies at issue.

### C. The Examiner's Decision Would Cause Undue Prejudice And Expense If Overturned At A Later Stage Of This Case.

The Examiner's decision has far-reaching effects on the type of information subject to discovery and the evidence that could be admissible at hearing. In essence, the Examiner has held that information pertaining back-up systems and subrogation is irrelevant. This holding not only pertains to the discovery at issue here, but also could be read to moot any follow-up discovery related to the back-up systems of Republic or any other insured. Were the Commission to decide prior to hearing that this information is relevant, the parties would have no choice but to reengage in additional written discovery and depositions, resulting in a time-consuming and costly delay in the proceedings. Therefore, the Commission should have the opportunity to decide this issue immediately.

## III. CONCLUSION

The Attorney Examiner's decision denying Respondents' Motion to Compel is contrary to established Commission precedent and, if the Commission were to overturn it, is likely to cause undue prejudice and expense to the parties in this case. Therefore, the Examiner should certify an interlocutory appeal of this decision to the Commission.

May 30, 2007

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Certify Interlocutory Appeal and Memorandum in Support were served by facsimile (without exhibits) and U.S. Mail (with exhibits) to the following persons this 30th day of May, 2007.

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FILE

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| Respondents. | | |

ENTRY

The attorney examiner finds:

(1) On August 14, 2003, portions of the northeastern part of the United States and the southeastern part of Canada experienced a widespread loss of electrical power (blackout).

(2) The complainants in these consolidated proceedings filed their complaints on January 12, 2004, June 21, 2005, and August 15, 2005. In each case, the complainants allege, *inter alia*, that the Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and/or American Transmission Systems, Inc. (collectively, the respondents) failed to furnish necessary and adequate service and facilities to the complainants and that the service and/or facilities provided by one or more of those respondents were at least partially responsible for causing the blackout, thereby causing financial harm to the complainants.

(3) In this entry, the attorney examiner will rule on four procedural motions that were filed by the parties in these proceedings:

(a) Respondents' April 18, 2007, second motion to compel discovery from the complainants in Case Nos. 05-1011-EL-CSS and 05-1012-EL-CSS (insurance complainants);

(b) Respondents' May 3, 2007, motion for reconsideration of the April 30, 2007, attorney examiner's entry extending the procedural schedule;

(c) Motions for admission *pro hac vice* filed by the insurance complainants on April 25, 2007, and May 4, 2007; and

(d) Joint motion for stipulated protective order filed on May 7, 2007, by the respondents and the insurance complainants.

**Respondents' Second Motion to Compel Insurance Complainants**

(4) On April 18, 2007, the respondents filed a second motion to compel discovery directed at the insurance complainants' responses to Interrogatory No. 4 and Request for Production No. 4. According to the respondents, these discovery requests are directly relevant to the insurance complainants' standing to maintain their claims in this case. Respondents state that, to establish standing as subrogees, the insurance "[c]omplainants must show two things: (1) that they paid claims for damages caused by [r]espondents' actions, which resulted in the August 14, 2003 outage; and (2) that they paid those claims pursuant to a duty to do so under an insurance policy." The insurance companies filed a response to the respondents' motion to compel on April 30, 2007, and the respondents' filed a reply on May 3, 2007.

(a) Interrogatory No. 4 requests information pertaining to any surge protection, voltage regulation, other protective equipment, stand-by generation, backup power supply, or alternative electrical supply utilized by the insureds. Respondents maintain that this information is

relevant to the insurance complainants' standing to maintain their claims as subrogees and in determining whether the respondents provided inadequate service. According to the respondents, it is impossible to determine if the respondents provided inadequate service or if the insurance complainants appropriately paid insurance claims without examining the role of the insureds' own back-up facilities. Respondents submit that, if this discovery request reveals that some insureds sustained losses because of their own faulty backup equipment, the insurance complainants' claims would fail, both because of a lack of standing and because inadequate service would not have been proved. Respondents maintain that they have a right to defend themselves and to demonstrate that the damage resulted from the failure of the insureds' back-up systems. The insurance complainants cite *In re Miami Wabash Paper LLC v. Cincinnati Gas and Electric, Co.*, Case Nos. 02-2162-EL-CSS and 01-3135, Opinion and Order (September 23, 2003), for the proposition that "an 'inadequate service' claim is not limited only to service provided by the utility." (Motion to Compel at 5.) In their reply, once again, they cite *Miami Wabash* as support for the proposition that "[i]n addition to showing a loss of service, a complainant must also show that it suffered some damage or loss and that this damage resulted from inadequate utility service, as opposed to inadequate customer facilities."

The insurance complainants object to this request, stating that the information is beyond the scope of the Commission's proceedings, irrelevant, and not likely to lead to the discovery of admissible evidence, and that, to the extent that the information exists, it is contained in the claim files previously provided to the respondents. The insurance complainants state that, while the question of whether an insureds' own negligence may have contributed to its loss may some day be

litigated in court, this issue will not be litigated before the Commission. According to the insurance complainants, the Commission will only answer the question of whether the respondents have provided adequate service or facilities to customers and all other issues will need to be resolved in a subsequent lawsuit in court.

Inadequate service claims arise under Section 4905.26, Revised Code. That statute does not require that complainants show damages in order to file a complaint with the Commission alleging inadequate service. The question of damages is not one that will be litigated before the Commission, but rather before a court of competent jurisdiction. Therefore, evidence that relates only to damages will not be admissible in this proceeding.

The respondents attempt to argue that evidence relating to the insureds' backup equipment will somehow address issues other than damages. With regard to both the standing issue and the substance of inadequacy of service, the respondents posit that the "service" in question covers both the service from the utility and the functioning of a customer's facilities. They cite *Miami Wabash* as support for this proposition. In the motion, a footnote describes that case as one in which "the utility defended the claim, in part, by presenting evidence that the customer's own paper-coating process was to blame for the inadequacy of the service." (Motion to Compel at 5.) The examiner would note that, in that case, no claim was made that the paper-coating process actually caused outages. Rather, that respondent claimed that the paper-coating process made the complainant hypersensitive. According to the respondent in *Miami Wabash*, the complainant should have, because of that hypersensitivity, taken steps to mitigate the effects of outages on its business.

Continuing with the respondents' footnote, they do correctly note that the Commission did not, in *Miami Wabash,* reach the merits of the argument (that the paper-coating process was "to blame" for service inadequacy). They suggest that what is relevant is "that the utility was allowed to introduce evidence of the customer's own facilities and operations in assessing the adequacy of service." The examiner would point out that the evidence in *Miami Wabash* related to a possible duty to mitigate damages. The Commission, in its opinion and order, specifically framed the issue in this regard, stating that the question was moot in light of its finding that service was adequate and that it would not "address the issue of whether an unusually sensitive customer, faced with inadequate service, is required to mitigate its damages to the extent possible." Thus, this evidence was not addressed in any way by the Commission in its consideration of the adequacy of service. The conclusion that service was adequate was reached before the Commission stated that the issue of a possible responsibility to mitigate was moot. Thus, evidence relating to the customer's facilities in that case did not relate to the assessment of the adequacy of service.

The respondents also rely on two other precedents for the proposition that, "[w]here the customer's own facilities are responsible for service interruption, the Commission may consider them." *Kohli v. Pub. Util. Comm.*, 18 Ohio St. 3d 12 (1985); *In the Matter of the Complaint of Carpet Color System v. Ohio Bell Telephone Co.*, Case No. 85-1076-TP-CSS. They ask that discovery be compelled so that they can "gather information regarding the nature and state of repair of the insureds' back-up facilities and their potential role in causing the damage at issue."

It is critical, in considering the motion to compel discovery regarding back-up facilities, to keep in mind the use of the word "cause." The

respondents argue in terms of causation of the damage. However, it is actually causation of the outage that is relevant. Note that, even as described by respondents, *Kohli* and *Carpet Color* actually considered whether the complainants' own equipment caused the "problem," not the damage. If the Commission were to consider how the damage was caused, then it would, by definition, be considering mitigation, as well. The question before the Commission goes to the adequacy of the service, by the respondents, to the customers.

Therefore, the examiner fails to see how the information requested by the respondents in Interrogatory No. 4 is relevant and likely to lead to the discovery of admissible evidence in the cases pending before the Commission. The examiner agrees with the respondents insofar as they maintain that, for the insurance companies to be appropriate subrogees and represent the insureds in these matters, they must have paid an insurance claim resulting from the alleged inadequate service in these proceedings to the insureds. If the respondents are trying to discern whether the complainant insurance companies are appropriate subrogees, they should review the claim files to determine if the complainant insurance companies did, in fact, pay a claim to the insureds for the time period in question. Information beyond this inquiry relating to information such a back-up power pertains to damages, and damages are not at issue in these cases before the Commission. Accordingly, the respondents' motion to compel discovery for Interrogatory No. 4, should be denied.

(b) Request for Production No. 4 asks for the insureds' underwriting files. According to the respondents, this information could reveal "the insurers' risk evaluation and conditions or restrictions on coverage, which, if violated, could invalidate the policy." Respondents argue that

this request is relevant and discoverable because it may contain assessments of the insureds' back-up power systems and because it may contain information relating to the insurers' standing as subrogees. The respondents submit that, if the insurers were not obligated to pay claims under their policies, they do not have standing to maintain their claims.

The insurance complainants object to this request stating that the information is beyond the scope of the Commission proceedings, irrelevant, and not likely to lead to the discovery of admissible evidence. According to the insurance complainants, the defense that there is some limitation in the underlying insurance policy and, therefore, there was actually no coverage for an insureds' loss, is beyond the scope of the Commission's jurisdiction and is more appropriately brought in a tribunal intended to resolve questions regarding insurance coverage. Furthermore, the insurance complainants point out that all of the pertinent information has been provided or will be provided to the respondents in the form of the insurance policies themselves. The insurance complainants aver that, "[i]f the policy language is clear and unambiguous, Ohio law forbids any consideration of extrinsic evidence (such as underwriting files) in determining whether there was coverage for a particular insureds' loss."

It appears that the respondents are seeking information from the underwriting files that will negate the insureds' claims to the insurance complainants. Again, these cases are not about damages and the Commission will not be addressing the issue of whether the insureds' claims were or were not appropriately paid. Rather, the Commission will be considering the allegations made by the insurance complainants, on behalf of the insureds to which claims were paid, that the respondents provided inadequate

service. With that scope in mind, the underwriting files are not relevant in these proceedings. For purposes of these proceedings, the respondents should look to the policies which the insurance complainants state they have provided or will be providing for the information relevant to these cases. Accordingly, the respondents' motion to compel discovery for Request for Production No. 4 is denied.

**Respondents' Motion for Reconsideration of the Extension of the Procedural Schedule**

(5) At a prehearing conference in this matter held on October 25, 2006, the parties and the examiner discussed the schedule for the completion of discovery, the filing of testimony, and the hearing. The schedule for these proceedings was determined at that conference, and was subsequently ordered, by entry dated October 26, 2006.

(6) On April 3, 2007, the insurance complainants filed a motion for an extension of the procedural schedule and a motion for continuance of the hearing as established in the attorney examiner's October 26, 2006, entry, for a period of 120 days. On April 10, 2007, respondents filed a memorandum contra the insurance complainants' motion for a continuance of the hearing.

(7) By entry issued April 30, 2007, the attorney examiner concluded that, while a 120-day extension was not necessary, a shorter extension would be appropriate. Accordingly, the attorney examiner set forth a revised schedule for these proceedings and changed the date for the commencement of the hearing from the original date of October 16, 2007, to January 8, 2008.

(8) On May 3, 2007, the respondents filed a motion for reconsideration of the decision in the April 30, 2007, attorney examiner's entry to extend the procedural schedule in this case. Respondents state that the insurance complainants did not demonstrate good cause, as required by Rule 4901-1-13, Ohio Administrative Code (O.A.C.), to extend the schedule. According to the respondents, the original procedural schedule gave the parties a year to prepare for hearing and the insurance

complainants wasted several months by not engaging in discovery. Respondents argue that the delay by the insurance complainants in prosecuting this case has resulted in substantial prejudice to the respondents. Respondents contend that witnesses' abilities to recall the events have faded, some witnesses have retired, and other witnesses are in poor health. On May 7, 2007, the insurance complainants filed a response to respondents' motion for reconsideration, and on May 8, 2007, the respondents replied.

(9) While the attorney examiner acknowledges the concerns raised by the respondents regarding the extension of the procedural schedule, it is necessary that all parties have an opportunity to complete discovery and that sufficient time is allotted in the scheduling of all phases of the proceeding to enable all parties to prepare adequately for the hearing. With the exception of the respondents' attempt to change to the structure of the schedule in these cases, the respondents did not raise any new issue that was not thoroughly reviewed previously. The attorney examiner continues to believe that, given the on-going disputes and status of discovery, it is necessary to grant a brief extension. However, in light of the fact that these proceedings have been going on for an extended period, any further requests for delay will not be granted. Accordingly, the respondents request for reconsideration is denied.

**Motion for Admission *Pro Hac Vice***

(10) On April 25, 2007, motions for admission *pro hac vice* were filed by the insurance complainants to admit Gary R. Chopp and Melinda A. Davis to practice before the Commission in these proceedings for the insurance complainants. On May 7, 2007, a motion for admission *pro hac vice* was filed by the insurance complainants to admit Charles R. Tuffley to practice before the Commission in these proceedings for the insurance complainants. The attorney examiner finds that the motions for admission *pro hac vice* should be granted.

**Joint Motion for Stipulated Protective Order**

(11) On May 7, 2007, the respondents and the insurance complainants filed a joint motion requesting approval of a proposed protective order. The parties state that they have

agreed to the proposed protective order in an effort to facilitate the discovery of certain trade secrets and critical infrastructure information. The examiner understands that, during discovery, parties may need to share information that they wish to ensure remains confidential. Rule 4901-1-24, O.A.C., provides that the examiner may, upon motion made, issue an order providing that confidential information not be disclosed or be disclosed only in a designated way. However, that rule also states that no such motion may be filed until the moving party "has exhausted all other reasonable means of resolving any differences with the party seeking discovery." Further, the motion must be accompanied by a memorandum in support, setting forth the specific basis of the motion; copies of subject discovery requests; and an affidavit of counsel setting forth efforts made to resolve differences with the party seeking discovery. These requirements were not met in this motion. Further, the rule does not provide for the issuance of a general protective order, covering unspecified future materials. Therefore, the motion will be denied. The attorney examiner would note, however, that nothing prevents the parties from entering into an enforceable confidentiality agreement on substantially the terms set forth in their proposed order. The examiner would also point out that, in the event that confidential information must be filed with the Commission, Rule 4901-1-24(D), O.A.C., sets forth procedures for the issuance of protective orders relating to such filings.

It is, therefore,

ORDERED, That the respondents' second motion to compel discovery from the insurance complainants be denied. It is, further,

ORDERED, That the respondents' motion for reconsideration of the extension of the procedural schedule be denied. It is, further,

ORDERED, That the motions for admission *pro hac vice* to admit Gary R. Chopp, Melinda A. Davis, and Charles R. Tuffley be granted. It is, further,

ORDERED, That the joint motion for a stipulated protective order be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Christine M.T. Pirik
Attorney Examiner

/vrm

Entered in the Journal

MAY 24 2007

Reneé J. Jenkins
Secretary

JONES DAY

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February 7, 2007

VIA FACSIMILE AND US MAIL

Daniel G. Galivan, Esq.
The Clark Adams Building
105 West Adams St., Suite 2300
Chicago, IL 60603

Re: Lexington Insurance Co., et al. v. The Cleveland Elec. Illum. Co., et al.
Case Nos. 05-1011-EL-CSS and 05-1012-EL-CSS

Dear Dan:

We have received the discovery responses of the "Republic" and "non-Republic" complainants. I am writing to call attention to certain of these responses that we believe are evasive or deficient. Our hope is to resolve these issues with you without the need for additional motion practice. Our specific concerns are set forth below. The references to specific interrogatories and document request apply to both the "Republic" and "Non-Republic" responses.

Please note that we are continuing to review the various insurance claim files that we have received to date. If we need to follow up with you about your document production, including whether the answers to certain interrogatories can in fact be found within the claims files previously produced, we will do so after we complete our review.

Interrogatory No. 4 asks, with respect to each insured identified in response to Interrogatory No. 1, whether any such insured had surge protection equipment or backup generation equipment installed at its premises from 2000 to the present. We disagree that this information is "irrelevant" or "beyond the scope of the PUCO proceedings." The information requested in Interrogatory No. 4 is probative of knowledge by the insureds that an electric utility cannot guarantee continuous service. It is also probative of causation. If an insured went through the time and expense of installing back-up generation, but failed to properly operate or maintain its back-up system, the insured can hardly complain that its damages were caused by the utility. The insurance company complainants have the burden of demonstrating that their insureds' losses were caused by inadequate service and not their insured's own neglect. In the interest of resolving further disputes about this interrogatory and the response, we are willing to narrow our request to whether any insured had back-up or stand-by generation (excluding surge protection) at its premises on August 14, 2003. Do not simply refer to the claim files. Based on our review of claims files thus far, whether a customer had back-up generation is not mentioned in most of the files.

Interrogatory No. 7 asked complainants to identify each tariff provision that the Respondents allegedly violated and the facts that complainants contend support a finding of such a violation. While it may well be that discovery is "ongoing and incomplete," this is not an excuse for an evasive answer. If complainants allege tariff violations, we are entitled to know what tariffs were allegedly violated and the facts that complainants will rely on to attempt to prove the violation. Complainants should not need to take discovery to know whether their claims are based on any alleged tariff violations. And if Complainants do not intend to present evidence of any tariff violation, we are entitled to know that as well.

The responses to Interrogatory Nos. 8 through 12 are deficient for the same reason as the response to Interrogatory No. 7. The Amended Complaints in both the Allianz and Lexington matters specifically alleges violations of Ohio Revised Code Title 49, which by implication could also include violations of PUCO regulations and orders issued or promulgated under Title 49. (Lexington Am. Compl., Counts 1 and 2 and prayer for relief.) Under Ohio Civil Rule 11, Complainants were required to have a good-faith basis for their allegations at the time they filed the complaints. Interrogatory Nos. 8, 9 and 10 thus seek to determine the statutes, regulations and orders allegedly violated, as well as the facts that complainants allege support a finding of such violations. The answers to these interrogatories are deficient in that they disclose nothing more than the statutory provisions cited in the Amended Complaints, with no additional facts beyond those listed in the complaints. Respondents are entitled to know specifically what statutory and regulatory provisions were allegedly violated and what facts Complainants intend to rely on to try to prove the violations. The responses to Interrogatory Nos. 11 and 12 suffer an even more substantial defect in that these responses cite NERC Operating Policies allegedly violated, with absolutely no facts cited as the basis for the alleged violations.

Complainants also have not provided a verification to the interrogatory responses, as required by the PUCO's rules. Please provide one.

Request for Production No. 3 asks for copies of each insured's insurance policy. Please advise when you will produce these.

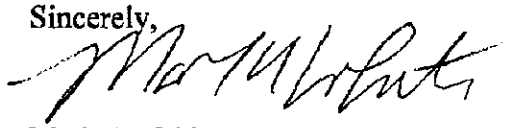
Request for Production No. 4 asks for underwriting files for each policy for each insured. This information is not "irrelevant" or "beyond the scope of the PUCO proceedings," as Complainants claim. The underwriting files may contain information reasonably calculated to lead to evidence about the nature of the insureds' facilities; for example, whether back-up generation was installed, or whether the insurance company required the insured to modify its facilities or operations in some way as a requirement for insurance coverage. These files may also disclose whether certain insureds were in fact customers of a Respondent and whether the insurers had a duty to pay the insureds' alleged losses. Additionally, underwriting files may disclose information about the insured's service characteristics and service history. We are willing to limit our request to the following insureds: Republic Engineered Products, Kowalski

Heat Treating, The Great Atlantic & Pacific Tea Company (all Ohio locations), City of Oberlin, Orca House and Heinen's (all locations).

Request for Production No. 7 asked for a copy of each insured's electric bill for the period covering August 14, 2003. This information is not "beyond the scope of the PUCO proceedings." It goes to the key issue of establishing whether each insured was a customer of a Respondent. As you know from the Commission's prior orders in this case, only customers of a Respondent have standing to maintain a claim. Because the insurance company complainants stand in the shoes of their insureds and may only bring a claim that the insured could bring, each insurance company must demonstrate that its claims are brought on behalf of customers. The best proof of customer status is a copy of the electric bill with the insured's name on it. We recognize that customer status could be proved in other ways as well. Therefore, we are willing to revise our request to encompass any documentation that would establish that the insureds were customers. We are willing to further narrow our request to the following insureds for whom the Respondents have not been able to locate records that they are customers: DLS 2001, Inc., Mike Wade, Richard Lauffer, The Great Atlantic and Pacific Tea Company (all Ohio locations), Fidel Swain, Gerald Mortimer d/b/a Conneaut Giant Eagle, Bernice Washington, South Park Dairy Treats and Heinen's (20604 Aurora Rd. location). If we do not receive documentation that these insureds were customers, we will file a motion to have them dismissed from this action. Please provide documentation of customer statutes for the listed individuals by February 15. Do not tell us to look for this information in the claim files. We have already looked and for most of the claim files we currently have, the information isn't there.

Please contact me if you have any questions about the issues raised in this letter and how we might resolve them. We would appreciate a response to this letter by February 15 which, as you know, is the deadline imposed by the Attorney Examiner for all complainants to respond to Respondents' discovery. If you will commit to getting back to us by that date, we will agree to an extension until February 28 for the production of the Nationwide claims files, as requested by your partner Jeffrey Learned.

Sincerely,



Mark A. Whitt

cc: David A. Kutik, Esq.
Meggan A. Rawlin, Esq.
Gary D. Benz, Esq.
Jeffrey R. Learned, Esq.

Crawford®
Technical Services

*Joseph A. Casey*
Executive General Adjuster
Joseph_Casey@us.crawco.com

December 5, 2003

As Per Attached Schedule of
Insurers

**ADJUSTERS' INTERIM – REPORT NO. 3**

| | | |
|---|---|---|
| Policy Number | : | As per Schedule |
| Insurers Reference | : | To Be Advised |
| Our Reference | : | 2098-3901 |
| Insured | : | Republic Engineered Products |
| Situation of Damage | : | 1807 East 28th St.<br>Lorain, OH 44055-1883 |
| Business | : | Manufacturing-SBQ Steel |
| Usage of Building | : | Manufacturing |
| Day and Date of Loss | : | Thursday, August 14, 2003 |
| Cause of Loss | : | Power Outage-Under Investigation |
| Reserve | : | $110,000,000 Gross of Deductible |

AIGREP 00102

**A. Utilization of existing inventory to offset Sales Loss.**

The relevance of this aspect has some bearing with respect to both this occurrence as well as the January 17, 2003 loss. Although it has been determined that the January 17, 2003 and August 14, 2003 occurrences are separate incidents they are significantly intertwined from a loss adjustment perspective.

The Insureds accountant, PriceWaterhouseCoopers, has already presented claim for the January claim that does not take into account existing inventories and their utilization to offset a sales loss due to a production stoppage. Retained accountants on behalf of Insurers, Matson, Driscoll & Damico have taken said inventory into consideration, obviously affecting the BI value for the "Period of Restoration" calculated. In our estimation the foregoing clauses support our accountants position that inventory should be used to offset an incurred production loss as stated in Loss Provision 9.B.2. and Memoranda 2 in section 7.C.4.

In addition, the relevance with respect to this occurrence is the effect of the operation of the No. 4 Furnace, which was brought on line to offset the production loss during the projected "Period of Restoration" associated with the demised No. 3 Furnace. Although currently the No. 4 Furnace has not reached the pre-loss output of the No. 3 Furnace, presumably on the date the No. 3 Furnace would have been repaired with all reasonable due diligence and dispatch, the Insured would have the capacity to produce almost double their pre-loss inventory. If the Insured was to operate both Furnaces for a short duration, much of the lost production inventory / shortfall could conceivably be made up. Assuming there is a market for the Insureds' product, the possibility would be that in addition to offsetting the current production loss through the operation of the No. 4 Furnace, some "make-up" of prior lost production could be realized.

We are currently investigating the market conditions to see if the demand exists for additional quantities of the SBQ product produced by the Insured. We will also be examining the net effect on sales and pricing to determine if the continued operation of both furnaces has the potential to reduce losses or cause price reductions thereby eroding the Insureds profitability.