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## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

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,

v.

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

Respondents.

Case Nos. 04-28-EL-CSS  
05-803-EL-CSS  
05-1011-EL-CSS  
05-1012-EL-CSS

**REPLY MEMORANDUM IN SUPPORT OF RESPONDENTS'  
MOTION TO REVISE PROCEDURAL SCHEDULE**

In the opening paragraph of their response, Complainants claim to want a procedural schedule that serves "to benefit both parties." (Resp. at 2.) But the rest of their response suggests otherwise. On one hand, it shows that Complainants believe they are entitled to answer (or not answer) Respondents' discovery requests as they wish, in a manner and at a time of their choosing. On the other, Complainants' response shows that they believe that Respondents should be forced to disclose their responsive expert case without a full understanding of Complainants' expert opinions, and to do so on a very short schedule. Unfortunately, Complainants' position comes as no surprise in light of their "one-way" approach to discovery in this case. (See, e.g., Entry dated Aug. 10, 2007 at ¶ 11 (granting Respondents' motion to compel depositions of insurer-representatives); *id.* at ¶ 18 (granting Respondents' motion to compel

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answers to written expert discovery).) In fact, Complainants have failed to point to any prejudice or unfairness they would suffer were Respondents permitted to take the depositions of Complainants' three experts before Respondents provide expert disclosures. Because Respondents' proposed schedule is fair and allows both parties to conduct meaningful expert discovery, Respondents request that the Attorney Examiner approve it.

**I. Complainants Have Been Dilatory In Responding To Expert Discovery And Should Not Be Rewarded For Such Conduct.**

Complainants insist that their expert discovery responses were timely and complete. This is simply wrong. Respondents propounded their expert discovery requests nearly one year ago, on September 29, 2006. (See Respondents' First Set of Interrogatories and Requests for Production at Interrog. No. 9, Req. for Produc. Nos. 1, 9, attached as Exhibits MAW-1 and MAW-2.) Four months later, Complainants finally responded, stating that they would respond "in accordance with the Commission's Order." (See id.) Yet once the fact discovery period was over, Complainants not only persisted in their refusal to respond to expert discovery, but they argued (in response to Respondents' motion to compel) that they had no obligation to answer at all. (See Compl. Response to Respondents' Sixth Mot., dated Aug. 3, 2007.) The Examiner disagreed and ordered Complainants to answer the discovery. (See Entry dated Aug. 10, 2007 at ¶ 18.)

Following this order, Respondents agreed to give Complainants over a month (until September 7, 2007) to respond to the expert discovery. (See Resp. at 2.) Respondents agreed to this relatively long timeframe in exchange for the understanding that Respondents would depose Complainants' experts before Respondents provided their expert disclosures. But on September 6 (one day before Complainants' responses were due), counsel for Complainants informed Respondents that Complainants' experts would not be produced prior to the date for

Respondents' disclosures. Having received an additional month to respond to expert discovery (and only then, after being ordered to do so), Complainants should not be allowed to try a "bait and switch."<sup>1</sup>

Moreover, Complainants' argument overlooks the fact that the expert discovery responses submitted on September 7 were incomplete. Complainants represent that the expert discovery responses for Mohammad Shahidehpour were faxed to Respondents on September 7, 2007. (See Resp. at 2.) However, Complainants neglect to mention that: (1) 20 pages of Shahidehpour's 53-page response were missing from that fax (including portions of three of his substantive opinions); (2) Complainants promised to send the missing pages by Monday September 10, but did not do so until Wednesday September 12; (3) Complainants' fax on Wednesday September 12 still failed to include a list of the books and reports authored by Shahidehpour and the documents, transcripts and reports he relied on in reaching his conclusions; and (4) these additional pages were not provided until Thursday September 13. (See Whitt Aff. dated Sept. 14, 2007 at ¶ 4, attached as Exhibit A.) In fact, although Complainants represent to the Examiner that the Shahidehpour response was sent on September 7 (attached to their memo as Exhibit 1), portions of that Exhibit were not provided to Respondents until five days after that date. (See Resp. at Exhibit 1 p. 6.)<sup>2</sup> In sum, Complainants are attempting to convince the Examiner that its responses were complete and timely in an effort to shoehorn Respondents into an unfair procedural schedule. The Attorney Examiner should not reward this type of conduct.

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<sup>1</sup> Indeed, had Complainants expressed their opposition to allowing their experts to be deposed prior to Respondents' expert disclosure date, Respondents would have brought that issue to the Commission earlier. Having waited several weeks to keep their objection to themselves and having not dealt with Respondents in a forthright and expeditious way, Complainants' efforts to hamper Respondents' efforts to prepare for hearing should not be sustained.

<sup>2</sup> As discussed below, given that Complainants seek to have Respondents provide complete expert responses a mere two weeks from the date of this filing, the matter of five or six day's delay is not insignificant.

## **II. Complainants' Responses Require Additional Discovery Before Respondents Can Complete Their Expert Disclosures.**

Aside from being late, Complainants' expert discovery responses are significantly incomplete. Respondents should be allowed to take depositions of Complainants' experts to fill in those gaps before Respondents have to provide responsive expert disclosures. Specifically, in their expert requests, Respondents asked Complainants to state or identify (among other things):

- 1) "[A]ll facts which provide the basis for each opinion"; and
- 2) "[E]ach document supplied to, reviewed by, relied on, or prepared by the witness in connection with his or her testimony in this matter."

(See Respondents' First Set of Interrogatories and Requests for Production at Interrog. No. 9(b), (d).) It should go without saying that in expert discovery, a party is entitled to know not only the opposing experts' opinions, but also the facts and documents that support those opinions.

Rather than give complete responses to the above interrogatories, Complainants offered numerous opinions with hopelessly vague or nonexistent citations to facts or evidence. For example, the Silverstein, Shahidehpour and Eckert responses contain several citations to entire depositions, with no indication of page or line numbers.<sup>3</sup> In other instances, those responses contain citations to whole (unspecified) categories of depositions or other transcripts.<sup>4</sup> Other opinions contain no factual citation whatsoever.<sup>5</sup> Not surprisingly, Silverstein herself acknowledges that her report is incomplete, noting that "[t]he source materials listed" are merely

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<sup>3</sup> See, e.g., Resp. at Exhibit 1, Silverstein Rep. at ¶¶ C.4.1, C.8, C.9, C.10.2, D.2.1, D.3.1, D.4, D.6.4, D.7.2; Shahidehpour Rep. at ¶¶ 7, 8, 91; Eckert Rep. at n. 7-12, 17, 25, 27.

<sup>4</sup> See, e.g., id., Silverstein Rep. at ¶¶ D.2.2 (citing to hundreds of pages of "dispatch phone transcripts"), D.3.1 ("other dispatcher depositions"), D.5.1 ("numerous dispatcher depositions"), D.6 ("dispatcher depositions"), D.6.1 ("[v]arious depositions"), D.7.2 (depositions of "others").

<sup>5</sup> See, e.g., id., Silverstein Rep. at ¶¶ E.1, E.2, E.2.1-E.2.4, E.3, E.3.1-E.3.5; Shahidehpour Rep. at ¶¶ 2, 16; Eckert Rep. at ¶¶ 2 (describing experience with tree-line contacts), 3 (describing purported "[i]ndustry standards and practices"), 4 (stating that line clearance issue is "obvious").

“examples of information supporting this expert witness’ facts and conclusions” and are “not exhaustive and may be amended in the future.” (*Id.*, Silverstein Rep. at 1.) In any case, these answers are neither “detailed” nor “sufficient.” (*See* Resp. at 3.)

In response to a letter pointing out these deficiencies,<sup>6</sup> Complainants argue that they should not have to include “every single fact contained in thousands of pages of deposition transcripts and exhibits.” (Resp. at 4.) But this is not a matter of identifying “every single fact.” For one thing, Complainants should be required to identify useful citation to documents or depositions for each of the expert opinions they offer. For another, this requirement must not be burdensome, not only because Complainants have not objected on that basis before, but because Complainants have already provided proper citation for other expert opinions. (*See, e.g., id.* at Exhibit 1, Silverstein Rep. at ¶¶ C.1.1, C.2.1.; Shahidehpour Rep. at ¶¶ 1, 3.)

The unsupported opinions in Complainants’ responses pertain to critically important issues in this litigation, including the condition of FirstEnergy’s operational monitoring equipment, its awareness of alleged alarm failures, dispatcher training programs and procedures, and the minute-by-minute events of August 14, 2003. These opinions may or may not have factual support. Respondents cannot know unless they have an opportunity to ask Complainants’ experts at deposition, and Respondents’ experts should not be forced to guess in the meantime.

Tellingly, Complainants refer to the investigation by the U.S.-Canada Power System Outage Task Force and NERC as evidence that Complainants’ experts’ opinions and the bases therefor should be well known to Respondents. But the obtuse and unfair nature of that investigation is the very reason why *full* disclosure is required now. As Respondents have previously demonstrated in this case:

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<sup>6</sup> Respondents informed Complainants of the inadequacies of their expert discovery responses in a letter from David Kutik to Charles Tuffley, dated September 10, 2007 (attached hereto as Exhibit MAW-3).

- Respondents were not given any opportunity to review any data relied upon by the investigation.
- Respondents were not given any opportunity to review any models or simulations undertaken by the investigation, including the opportunity even merely to purchase certain software.
- Respondents were never given any opportunity to review any methodology used by the investigation.
- Respondents were never given the qualifications of anyone who worked on or who contributed to the investigation.

(See Memo. in Support of Mot. to Exclude Evidence at 4-8, dated Oct. 15, 2004, Case No. 04-28-EL-CSS.) Thus, to the extent that Complainants' experts intend to parrot or rely upon the investigation and its reports, then it is all the more imperative that Complainants be required to come forward and disclose the complete bases of their experts' opinions. Having been denied any opportunity to understand the bases of that investigation, Respondents should be afforded that opportunity now. For these reasons, Respondents should be permitted to depose Complainants' experts before Respondents provide their expert disclosures.

### **III. Complainants' Proposed Schedule Is Contrary To Their Own Prior Proposals And Is Unfair.**

Complainants suggest three changes to Respondents' proposed schedule. First, Complainants state that although Silverstein and Shahidehpour are available for depositions "by the end of September or early October," Eckert is not available until October 15 or 16, 2007. (Resp. at 3.) Therefore, Complainants propose October 19, 2007 as the date certain by which those depositions must take place. (*Id.* at 5.) As an initial matter, if the last deponent is available on October 16, it is unclear why Complainants would propose October 19 as the deadline, unless Complainants are again seeking to disrupt discovery by reserving the right to schedule an expert deposition on the same day Respondents propose to provide their expert disclosures. In any case, Respondents have proposed October 5 as the deadline for depositions of Complainants' experts,

and it appears that Complainants are able to produce Silverstein and Shahidehpour by this date. Therefore, the Examiner should adopt Respondents' proposed October 5 deposition deadline as to those witnesses.<sup>7</sup>

Second, Complainants suggest that depositions to preserve the testimony of third parties are inappropriate because the fact discovery deadline has passed. Complainants apparently confuse two distinct types of depositions: those taken by adverse parties for discovery purposes and those taken by parties to preserve testimony for hearing. See Turner v. Carter, No. 99 CA 231, 2001 Ohio App. LEXIS 3272, \*6 (Ohio App. 5th Dist. May 14, 2001) ("[U]nder Civ. R. 30 and Civ. R. 32, [party] had the option to depose his own witness before trial to preserve his testimony."); see also O.A.C. 4901-1-21(N) ("Depositions may be used in commission hearings to the same extent permitted in civil actions in courts of record."). Moreover, Complainants have never previously objected to preservation depositions taken after the close of fact discovery. Because preservation depositions are not discovery depositions, the Examiner should incorporate Respondents' proposed December 14 deadline.

Third, Complainants propose that Respondents provide expert disclosures by September 28. As described above, Respondents are entitled to depose Complainants' experts before doing so, and the September 28 deadline does not afford that opportunity, in light of the experts' availability. For that reason alone, this date should be rejected.

Also, Complainants' proposed deadline is inconsistent with their position mere weeks ago. Prior to the break-down in negotiations over the procedural schedule, Complainants agreed that Respondents could produce expert disclosures by October 5—one week later than the date they propose now.

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<sup>7</sup> Respondents are amenable to taking the Eckert deposition after October 5, so long as they may provide their expert disclosures after that deposition.

More importantly, Complainants' proposed deadline is patently unfair. They now propose to accelerate Respondents' disclosure obligations and ask that Respondents submit expert disclosures a mere three weeks after Complainants purported to answer discovery and only two weeks before a complete set of those answers were served. After months of delay (and one requested extension of the procedural schedule), Complainants' sense of urgency about the schedule in this case is patently designed solely to impose a burden on Respondents. Indeed, Complainants' proposed deadline seems aimed only to deprive Respondents of a fair opportunity to understand Complainants' expert case and to prevent Respondents from effectively preparing their own. There is no good reason for Complainants' proposed September 28 deadline, and it should be rejected.

In fact, in all of Complainants' response, there is no suggestion of any prejudice or unfairness that Complainants will suffer if Respondents' procedural schedule is adopted. At bottom, the Examiner must decide whether to permit Respondents to take expert depositions before providing their expert disclosures. Respondents have described several discovery "gaps" that must be filled by depositions before they can offer meaningful disclosures. Complainants' best argument seems to be that they just don't want to give Respondents that opportunity. That's not good enough. Because Respondents' proposed schedule is fair and allows both parties to conduct proper expert discovery, the Examiner should enter an order adopting that proposed schedule in its entirety.

September 14, 2007

Respectfully submitted,



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Attorneys for Respondents

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum was served by facsimile (without exhibits) and U.S. Mail (with exhibits) to the following this 14th day of September, 2007.

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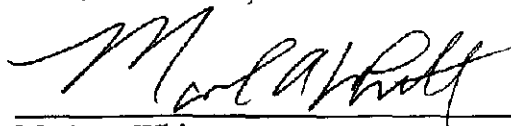
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Mark A. Whitt  
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# **EXHIBIT A**

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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
	)	05-803-EL-CSS
	)	05-1011-EL-CSS
	)	05-1012-EL-CSS
v.	)	
	)	
The Cleveland Electric Illuminating	)	
Company, Ohio Edison Company,	)	
Toledo Edison Company, and	)	
American Transmission Systems, Inc.,	)	
	)	
Respondents.	)	

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AFFIDAVIT OF COUNSEL

---

STATE OF OHIO            )  
                                  ) ss:  
COUNTY OF FRANKLIN    )

Mark A. Whitt, being first duly sworn, states as follows:

1. I am a partner in the law firm of Jones Day and one of the counsel for Respondents.
2. On September 29, 2006, Respondents served their First Set of Interrogatories and Requests for Production of Documents on the Lexington and Allianz Complainants. The Lexington Complainants provided their initial Supplemental Responses to this discovery on February 28, 2007. The attached Exhibit MAW-1 is a true and correct copy of the relevant portion of those responses. The Allianz Complainants provided their initial Responses to this

discovery on January 31, 2007. The attached Exhibit MAW-2 is a true and correct copy of the relevant portion of those responses.

3. On September 10, 2007, David Kutik, counsel for Respondents, sent a letter to Charles Tuffley, counsel for Complainants, describing various problems with the expert discovery responses of Alison Silverstein and Mohammad Shahidehpour. The attached Exhibit MAW-3 is a true and correct copy of that letter.

4. On September 7, 2007, counsel for Complainants faxed the expert discovery responses for Ms. Silverstein and Mr. Shahidehpour. The fax for Mr. Shahidehpour, which indicated that it was to be 53-pages long, was missing 20 pages. Counsel for Complainants informed Respondents' counsel that the missing pages were caused by "computer issues" at Complainants' counsel's office and that the missing pages would be faxed on Monday September 10, 2007. However, Respondents' counsel did not receive such fax on that date. On Wednesday September 12, 2007, after asking Complainants' counsel about the missing pages, Respondents' counsel received some of the missing pages, but Exhibit 3 to the Shahidehpour responses was still missing. Respondents' counsel finally received Exhibit 3 on Thursday September 13, 2007.



Mark A. Whitt

Sworn to before me

this 14th day of September, 2007.

  
Notary Public

TANNIA L. CAVENDISH  
Notary Public, State of Ohio  
My Commission Expires 12-22-07

**MAW-1**

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of S.G.  
 Foods, Inc., et al.; Miles Management Corp.,  
 et al.; Allianz US Global Risk Insurance  
 Company, et al.; Lexington Insurance  
 Company, et al.; BMW Pizza, Inc. and  
 DPNY, Inc., et al.; Triple A Sport Wears, Inc.;  
 and Dennis Kucinich;

Complainants,

v.

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

Respondents.

Case Nos. 04-28-EL-CSS  
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 05-1012-EL-CSS  
 05-1014-EL-CSS  
 05-1020-EL-CSS  
 03-1833-EL-CSS

**(NON-REPUBLIC) INSURANCE COMPANY COMPLAINANTS' SUPPLEMENTAL  
 RESPONSE TO RESPONDENTS' FIRST SET OF INTERROGATORIES AND  
 REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rules 4901-1-16, 4901-1-19 and 4901-20 of the Ohio Administrative Code Complainants Lexington Insurance Company, Frankenmuth Mutual Insurance Company, Charter Oak Fire Insurance, The Automobile Insurance Company of Hartford, The Standard Fire Insurance Company, Travelers Indemnity Company of America, Travelers Indemnity Company of Connecticut, Travelers Indemnity Company, Travelers Property Casualty Company of America, Phoenix Insurance Company, St. Paul Mercury Insurance Company, St. Paul Surplus Lines Insurance Company, United States Fidelity & Guaranty, Allied Mutual Insurance Company and Nationwide Mutual Insurance, as subrogees of their insureds, ("Non-Republic Insurance Company Complainants") by and through their attorneys, Grotfeld & Densberg,

**INTERROGATORY NO. 16:** For each person whom Complainants intend to call as an expert witness at the hearing in this matter:

- a. State the substance of each opinion on which the witness will testify;
- b. State all facts which provide the basis for each opinion on which the witness will testify;
- c. Provide a summary of the witness's background and qualifications;
- d. Identify each document supplied to, reviewed by, relied on, or prepared by the witness in connection with his or her testimony in this matter; and
- e. Identify by caption, agency or court, case name, and case number all other proceedings in which the witness has testified on the same or a similar topic in the past ten years.

**RESPONSE:**

Complainants object to this interrogatory, as they have not yet determined who they will call as an expert. Complainants will identify their experts in accordance with the Commission's Order.

**INTERROGATORY NO. 17:** Identify each document Complainant intends to offer as evidence at the hearing in this matter.

**RESPONSE:**

Complainants object to this interrogatory, as discovery is ongoing and incomplete. The documents that will be used at the hearing have not been determined, as written discovery is not completed and no depositions have occurred. Complainants will provide a list of exhibits in accordance with the Commission's Order. Subject to and without waiving this objection, Complainants believe that the following documents will be submitted;

1. The insurance policy for each insured listed in Exhibits A-O of Complainants' Amended Complaint.

**REQUEST FOR PRODUCTION OF DOCUMENTS**

**REQUEST FOR PRODUCTION NO. 1:** All documents and things identified in response to FirstEnergy Respondents' First Set of Interrogatories.

**RESPONSE:**

Please see claim files previously produced.

**REQUEST FOR PRODUCTION NO. 2:** All documents and things reflecting any damages allegedly sustained by each Insured arising from the August 14, 2003 Outage.

**RESPONSE:**

Please see claim files previously produced.

**REQUEST FOR PRODUCTION NO. 3:** All insurance policies pursuant to which Complainant paid claims to any Insured for losses allegedly sustained from the August 14, 2003 Outage.

**SUPPLEMENTAL RESPONSE:**

Please see attached disks which contain the following:

1. Policies of Charter Oak Fire Insurance; The Automobile Insurance Company of Hartford; The Standard Fire Insurance Company; Travelers Indemnity Company of America; Travelers Indemnity Company of Connecticut; Travelers Indemnity Company; Travelers Property Casualty Company of America; Phoenix Insurance Company; St. Paul Mercury Insurance Company; St. Paul Surplus Lines Insurance Company; and/or United States Fidelity & Guaranty, including:
  - Complete copy of the policy for Carlyle Concierge LLC
  - Endorsements that differ from those on the Carlyle policy:
    - ☐ Mama Mia's Pizza
    - ☐ Zoss The Swiss Baker
    - ☐ All Ohio Five Jay's
    - ☐ Aladdin's Baking Co.

**RESPONSE:**

Complainants object to this Request to Produce as it is vague, ambiguous and overly broad. Subject to and without waiving this objection, please see claim files previously produced.

**REQUEST FOR PRODUCTION NO. 9:** A curriculum vitae for each expert witness.

**RESPONSE:**

Please see Response to Interrogatory 16.

**REQUEST FOR PRODUCTION NO. 10:** All exhibits Complainant intends to introduce at hearing.

Please see claim files previously produced. In addition, please see the Interim and Final Reports of US-Canada Task Force. Complainants reserve the right to supplement this Request following the completion of additional fact discovery.

Respectfully submitted,



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Attorneys for (Non-Republic) Insurance Company  
Complainants

Dated: February 28, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing (Non-Republic) Insurance Company Complainants' Responses to Respondents' First Set of Interrogatories and Requests for Production of Documents was mailed by ordinary U.S. mail, to the following persons this 28<sup>th</sup> day of February, 2007.

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Christina L. Weeks

**MAW-2**

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of S.G.	)	
Foods, Inc., et al.; Miles Management Corp.,	)	
et al.; Allianz US Global Risk Insurance	)	
Company, et al.; Lexington Insurance	)	
Company, et al.; BMW Pizza, Inc. and	)	
DPNY, Inc., et al.; Triple A Sport Wears, Inc.;	)	
and Dennis Kucinich;	)	
	)	
Complainants,	)	Case Nos. 04-28-EL-CSS
	)	05-803-EL-CSS
v.	)	05-1011-EL-CSS
	)	05-1012-EL-CSS
The Cleveland Electric Illuminating	)	05-1014-EL-CSS
Company, Ohio Edison Company,	)	05-1020-EL-CSS
Toledo Edison Company, and	)	03-1833-EL-CSS
American Transmission Systems, Inc.	)	
	)	
Respondents.	)	

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**(REPUBLIC) INSURANCE COMPANY COMPLAINANTS' RESPONSE TO  
RESPONDENTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR  
PRODUCTION OF DOCUMENTS**

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Pursuant to Rules 4901-1-16, 4901-1-19 and 4901-20 of the Ohio Administrative Code Complainants Allianz Global Risks U.S. Insurance Company, Lexington Insurance Company and Royal Indemnity Company, as subrogees of Republic Engineered Products, Inc. ("Republic Insurance Company Complainants") by and through their attorneys, Grotefeld & Denenberg, L.L.C., respond to Respondents' First Set of Interrogatories and Requests for Production of Documents as follows:

- c. **Facts in support of Complainants' allegations of inadequate facilities are identified in Complainants' Complaint and in the Joint Task Force Report.**
- d. **Joint Task Force Report and other documents in the possession and control of Respondents.**

**INTERROGATORY NO. 14:** Identify each individual with knowledge of the facts underlying any claim contained in the Amended Complaint, and identify each fact that such person is believed to know.

**RESPONSE:**

Complainants object to this interrogatory, as discovery is ongoing and incomplete. The identity of all those with knowledge of the facts underlying this claim is not known, as written discovery is not completed and no depositions have occurred. Complainants will provide a list of witnesses in accordance with the Commission's Order. Subject to and without waiving this objection, Complainants believe each individual insured listed in Exhibits A-O of Complainants' Amended Complaint has knowledge of the dates and times the service was interrupted and the damages sustained as a result thereof.

**INTERROGATORY NO. 15:** Identify all reinsurance payments or other reimbursements received by Complainant for losses allegedly sustained by paying claims arising from the August 14, 2003 Outage.

**RESPONSE:**

Complainants object to this interrogatory, as it seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

**INTERROGATORY NO. 16:** For each person whom Complainants intend to call as an expert witness at the hearing in this matter:

- a. **State the substance of each opinion on which the witness will testify;**
- b. **State all facts which provide the basis for each opinion on which the witness will testify;**

- c. Provide a summary of the witness's background and qualifications;
- d. Identify each document supplied to, reviewed by, relied on, or prepared by the witness in connection with his or her testimony in this matter, and
- e. Identify by caption, agency or court, case name, and case number all other proceedings in which the witness has testified on the same or a similar topic in the past ten years.

**RESPONSE:**

Complainants object to this interrogatory, as they have not yet determined who they will call as an expert. Complainants will identify their experts in accordance with the Commission's Order.

**INTERROGATORY NO. 17:** Identify each document Complainant intends to offer as evidence at the hearing in this matter.

**RESPONSE:**

Complainants object to this interrogatory, as discovery is ongoing and incomplete. The documents that will be used at the hearing have not been determined, as written discovery is not completed and no depositions have occurred. Complainants will provide a list of exhibits in accordance with the Commission's Order. Subject to and without waiving this objection, Complainants believe that the following documents will be submitted;

- 1. The insurance policy for each insured listed in Exhibits A-O of Complainants' Amended Complaint.
- 2. All non-privilege documents from each claim file listed in Exhibits A-O of Complainants' Amended Complaint.
- 3. All photographs taken by any party.
- 4. All documents produced by Defendants and other Complainants.
- 5. All documents relied upon by the task force in drafting U.S.-Canada Power System Outage Task Force Report.

**REQUEST FOR PRODUCTION OF DOCUMENTS**

**REQUEST FOR PRODUCTION NO. 1:** All documents and things identified in response to FirstEnergy Respondents' First Set of Interrogatories.

**RESPONSE:**

Please see claim files previously produced.

**REQUEST FOR PRODUCTION NO. 2:** All documents and things reflecting any damages allegedly sustained by each Insured arising from the August 14, 2003 Outage.

**RESPONSE:**

Please see claim files previously produced.

**REQUEST FOR PRODUCTION NO. 3:** All insurance policies pursuant to which Complainant paid claims to any Insured for losses allegedly sustained from the August 14, 2003 Outage.

**RESPONSE:**

Complainants are collecting copies of these policies. Copies will be provided upon receipt.

**REQUEST FOR PRODUCTION NO. 4:** All underwriting files for each policy pursuant to which any Complainant paid claims arising from the August 14, 2003 Outage.

**RESPONSE:**

Complainants object to this Request for Production as it seeks information that is beyond the scope of the PUCO proceedings. Further, the information sought is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

**REQUEST FOR PRODUCTION NO. 5:** All documents relating to any claims by Complainant as a subrogee for a utility service outage.

**REQUEST FOR PRODUCTION NO. 9:** A curriculum vitae for each expert witness.

**RESPONSE:**

**Please see Response to Interrogatory 16.**

**REQUEST FOR PRODUCTION NO. 10:** All exhibits Complainant intends to introduce at hearing.

**Please see claim files previously produced. In addition, please see the Interim and Final Reports of US-Canada Task Force. Complainants reserve the right to supplement this Request following the completion of additional fact discovery.**

Respectfully submitted,



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and

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Attorneys for (Republic) Insurance Company  
Complainants

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing (Republic) Insurance Company Complainants' Responses to Respondents' First Set of Interrogatories and Requests for Production of Documents was mailed by ordinary U.S. mail to the following persons this 31<sup>st</sup> day of January, 2007.

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September 10, 2007

## VIA FACSIMILE AND U.S. MAIL

Charles R. Tuffley, Esq.  
Denenberg Tuffley, PLLC  
21 E. Long Lake Rd.  
Suite 200  
Bloomfield Hills, MI 48304

Re: Lexington Insurance Co., et al. v. FirstEnergy Corp., et al.  
Case Nos. 05-1011-EL-CSS and 05-1012-EL-CSS

Dear Chuck:

Late on Friday, I received the response of Alison Silverstein and the partial response of Mohammed Shahidehpour to Respondents' (hereinafter, "FirstEnergy") Expert Interrogatory Number 16. (You indicated that computer problems prevented you from providing Shahidehpour's complete response.) Both responses are grossly inadequate and require immediate supplementation.

As you know, FirstEnergy's interrogatory calls for each expert to "state the substance of each opinion on which the witness will testify" and also to state or identify (among other things):

1. "[A]ll facts which provide the basis for each opinion on which the witness will testify," and
2. "[E]ach document supplied to, reviewed by, relied on, or prepared by the witness in connection with his or her testimony in this matter."

The responses you provided are seriously deficient in three respects. In dozens of instances, citations to supporting facts are omitted entirely, are incomplete, or are so vague as to be useless. Indeed, Silverstein acknowledges that her response is incomplete – she states that the "source materials listed" are merely "examples of [supporting] information" but are "not exhaustive" and "may" be amended at some unspecified date in the future. This alone shows that Complainants have failed to comply with their discovery obligations.

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Other examples of Complainants' failure to provide complete responses regarding the documentation or factual basis to support their experts' opinions include:

**Silverstein's Response:**

- Opinion C.4.1: Cite to "Spidle deposition" without page references.
- Opinion C.8: Cite to Folk deposition without page references.
- Opinion C.9: Cite to Porter, Schwartz, and Elliot depositions without page references.
- Opinion C.10: Cite to "Investigation of FirstEnergy's Energy Management System Status on August 14, 2003" without page references or bates ranges.
- Opinion C.10.2: Cite to "Sanicky deposition" without page references.
- Opinion C.11.3: Cite to "NERC Review at 22" without providing sufficient information to identify that document.
- Opinion C.12.1: Cite to "U.S.-Canada Interim Report on Vegetation Management" and "FERC Utility Vegetation Management Final Report" without page references. You further cite to "Kevin Eckert report" without providing any report or giving any indication when you will provide such a report.
- Opinion D.2.1: Cite to "Depositions by Sanicky, Elliott, Porter" without page references.
- Opinion D.2.2: Cite to pages 103-107 without reference to a deposition. You also cite to hundreds of pages of "dispatch phone transcripts of conversations with AEP, MISO, PJM" without providing specific page references or bates ranges.
- Opinion D.3.1: Cite to "Spidle deposition" without page references. You also cite "other dispatcher depositions indicating lack of awareness of problem until later in the afternoon" without identifying those depositions or page references. Further, you

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cite "NERC Review of Operations" without providing sufficient information to identify that document.

- Opinion D.4: Cite to "Depositions by Sanicky, Porter, Sidle [sic], Schwartz, Folk" without page references.
- Opinion D.5.1.: Cite to "Numerous dispatcher depositions, e.g., Sanicky at 108-109 and Folk at 140-141" without identifying the "numerous" other dispatcher depositions to which you refer.
- Opinion D.6: Cite to "dispatcher depositions" without reference to specific depositions or page numbers.
- Opinion D.6.1: Cite to "Various depositions, including Folk at 142-147" without specifying the "various" depositions or page references.
- Opinion D.6.3: Cite to hundreds of pages of "Control room telephone transcripts, dispatcher depositions" without reference to specific transcripts, depositions, or page numbers.
- Opinion D.6.4: Cite to deposition by "Porter" without page references and to depositions by "others" without specificity.
- Opinion D.6.6: Cite to hundreds of pages of "Dispatcher depositions; Control room telephone transcripts" without reference to specific depositions, transcripts, or page numbers.
- Opinion D.7.2: Cite to "Depositions of Spidle, Schwartz, others" without identifying "others" and without page references.
- Opinion E.1: No cite.
- Opinion E.2: No cite.
- Opinion E.2.1: No cite.
- Opinion E.2.2: No cite.
- Opinion E.2.3: No cite.

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- Opinion E.2.4: No cite.
- Opinion E.3: No cite.
- Opinion E.3.1: No cite.
- Opinion E.3.2: No cite.
- Opinion E.3.3: No cite.
- Opinion E.3.4: No cite.
- Opinion E.3.5: No cite.

**Shahidehpour's Response:**

- Opinion 2: No cite.
- Opinion 7: Cite to "Depositions by Jerry Sanicky, Cliff Porter, Bill Spidle, Bob Schwartz, David Folk" without page references.
- Opinion 8: Cite to "Various sections of Depositions by Jerry Sanicky; Bill Schwartz; Mike McDonald; David Elliott" without page references.
- Opinion 9: Cite to "David Folk Deposition" without page references.
- Opinions 13-15: Page 6 is missing in its entirety.
- Opinion 16: No cite.

The inadequacy of these responses underscores the need for FirstEnergy to depose Complainants' experts before FirstEnergy provides expert disclosures on the agreed-to date of October 5 (a proposal that you continue to reject without justification). FirstEnergy's experts necessarily must respond to Complainants' experts. Any response is impossible without knowing the specific facts upon which Complainants' experts base their opinions.

Given FirstEnergy's need to have complete discovery responses immediately, I will expect to receive from you, before the close of business tomorrow, a date certain by which your

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experts will supplement their responses to Interrogatory 16, and dates on which your experts will be available for deposition. I also need to have you verify that your experts have not prepared any document other than those that we have already seen. If you intend not to provide these things, please let me know immediately, and we will file the appropriate motions with the Commission.

Very truly yours,



David A. Kutik

cc: Attorney Examiner Jeanne Kingery

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bcc: Mr. Gary Benz  
Mr. Robert Reffner