

FILE

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034569-685046

December 7, 2007

VIA HAND DELIVERY


Ms. Reneé J. Jenkins  
Director of Administration  
Docketing Department  
The Public Utilities Commission of Ohio  
180 East Broad Street, 13th Floor  
Columbus, OH 43215

Re: S.G. Foods, Inc., et al. v. The Cleveland Elec. Illum. Co., et al.,  
PUCO Case Nos. 04-28-EL-CSS, etc. (Consol.)

Dear Ms. Jenkins:

Enclosed is a copy of the Motion for Protective Order filed December 6, 2007, on e-docket. We are filing a hard copy pursuant to the Attorney Examiner's November 2, 2007 Entry in this proceeding. Hard copies are also being delivered to the Attorney Examiners assigned to the case.

Sincerely,

  
Mark A. Whitt

Enclosure

cc: Jeanne Kingery, Esq. (w/enc. (2))  
Christine Pirik, Esq. (w/enc. (2))  
Counsel of Record (w/o enc.)

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**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

Complainants have waited until now to request the MPSC subpoena. Moreover, if the discovery goes forward, Respondents will have no fair opportunity to review and analyze this information in order to include any response in Respondents witnesses' direct testimony.

Under these circumstances, Complainants should not be allowed to conduct new, wide-ranging discovery so late in this case. Therefore, Respondents respectfully request that this Motion be granted.

December 6, 2007

Respectfully submitted,

/s/ David A. Kutik

David A. Kutik (Trial Counsel)

Lisa B. Gates

Meggan A. Rawlin

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Attorneys for Respondents

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

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**MEMORANDUM IN SUPPORT OF RESPONDENTS'  
MOTION FOR PROTECTIVE ORDER**

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**I. BACKGROUND**

After having well over a year to conduct discovery in this case (and after one lengthy extension of discovery deadlines and hearing continuance), Complainants apparently are *still* not finished gathering discovery. On December 3, 2007, Complainants filed with the PUCO a copy of a "Petition for Issuance of a Subpoena," which had been filed with the Clerk of the Ingham County, Michigan Circuit Court. In the subpoena, Complainants seek broad discovery from the Michigan Public Service Commission ("MPSC") regarding its investigation of the August 14, 2003 outages. (See Ex. 1 to Pet. for Issuance of Subpoena, dated Dec. 3, 2007, attached hereto as Ex. A.) Specifically, Complainants seek: (i) to depose the MPSC representative "most knowledgeable regarding the investigation and findings of the [MPSC's] August 14, 2003

Blackout [investigation]”; and (ii) production of the MPSC’s “entire file” of its outage investigation. (*Id.*)

Because Complainants’ proposed discovery is in blatant violation of the Scheduling Order, and because Respondents will be severely prejudiced if this discovery goes forward, Respondents respectfully request a protective order prohibiting Complainants from taking it.

## II. ARGUMENT

### A. Complainants’ Proposed Discovery Violates The Scheduling Order And Prejudices Respondents.

On April 30, 2007, the Attorney Examiners issued a revised Scheduling Order setting, among other things, the deadline for fact discovery in this case:

Friday July 13, 2007 (formerly, Tuesday, May 1, 2007): All responses to requests for written discovery of factual matters, as well as all depositions related to factual matters, shall be completed.

(Entry dated Apr. 30, 2007 at ¶ 12(a).)

That deadline—which was extended at Complainants’ request—has long since passed. (*See* Complainants’ Mot. for Extension of the Procedural Schedule, dated Apr. 4, 2007.) Since that time, the parties have completed fact discovery and selected and disclosed their experts. Complainants have filed the written testimony of their experts and fact witnesses, and Respondents are required to do the same by December 17—less than two weeks away.

Seemingly out of nowhere, Complainants want to open a entirely new, wide-ranging category of discovery. Specifically, they seek the “entire file” on the MPSC’s outage investigation and someone to depose about it. (*See* Subpoena, Ex. A.) This is no small request. In fact, the MPSC’s report on the August 14, 2003 outage spans over 100 pages, including an appendix. (*See* “MPSC Report on August 14th Blackout,” located at [www.michigan.gov/mpsc](http://www.michigan.gov/mpsc).)

With its subpoena, Complainants have requested all the workpapers, internal memoranda, investigative reports and other documentation underlying that report.

This kind of broad request is a classic example of fact discovery, and in this instance, it will unquestionably introduce new facts, new documents and new witnesses into the case. Indeed, until Complainants' December 3 subpoena, the identity and the testimony of the MPSC representative, along with the documents collected and generated by the MPSC in its outage investigation, were never at issue in this case.

But this is not the time for new fact discovery. That deadline passed months ago. Moreover, the purpose of discovery deadlines is to give the parties a fair opportunity to investigate, to learn the basis of the opposing party's case and to narrow issues for hearing. By introducing new facts, witnesses and documents into the case—less than a month before hearing—Complainants' proposed discovery does just the opposite. Further, there is no good reason why Complainants did not conduct this discovery *months* ago, while fact discovery was still on-going. Whether Complainants' last-minute subpoena arises from a lack of diligence or wilful gamesmanship, in either case, it should not be tolerated.

Moreover, as it stands, Complainants seek new documents and the deposition of a new witness on December 13—four days before Respondents are required to file written testimony and less than a month before hearing. There is no telling whether or how this new information will be relevant to the issues at hearing. Indeed, had this discovery gone forward at the appropriate time, additional requests and depositions of MPSC personnel may have been in order. However, given Complainants' delay, Respondents are left with no fair opportunity to analyze, respond to or conduct additional discovery regarding this new information. The Scheduling

Order ensured that both parties had this opportunity with respect to all documents and witnesses in this case, and Complainants should not be allowed to short-circuit that process now.

**B. Complainants' Proposed Discovery Is Fact Discovery, Not Deposition Preservation.**

Complainants' proposed discovery may stem from a fundamental misunderstanding of the Scheduling Order, which sets the deadline for testimony preservation:

December 14, 2007: Any third-party depositions necessary to be taken to preserve testimony shall be completed.

(Entry dated Sept. 28, 2007 at ¶ 2.)

Complainants have scheduled the MPSC deposition to fall just before this deadline, on December 13. But this preservation deadline does not apply to that discovery. The September 28 Order allows a party to depose its own third-party witnesses who cannot be physically present at hearing. Such depositions “preserve” the witnesses’ testimony so that the party can present it at hearing in written form. (*See* Respondents’ Mot. to Revise Procedural Schedule, dated Sept. 7, 2007, at 4 n. 5 (observing that “there may be potential third-party witnesses who are beyond the control of any party and who reside outside of Ohio”).) This device is commonly used in civil litigation when, for example, witnesses residing in a foreign jurisdiction cannot practicably be compelled to attend a hearing. *See* Ohio R. Civ. P. 32(A)(3) (permitting use of depositions at hearing if witness is beyond subpoena power of the court in which the action is pending); *see also* *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.”).

In this case, Respondents have scheduled depositions of such third parties. For example, yesterday, Respondents took the deposition of William Brumsickle, an officer of SoftSwitch Technologies, Inc. (“STI”), in order to authenticate data produced by STI regarding voltages and

interruptions of service throughout parts of the Eastern Interconnection. This data was made available previously as part of the discovery in this case. Similarly, today, Respondents will take the deposition of a representative from PJM, to authenticate certain PJM documents. These documents were also previously made available to Complainants.

In contrast, Complainants' proposed deposition of an MPSC representative is not aimed to preserve testimony. Rather, Complainants want to discover the facts and findings related to the MPSC's outage investigation, and Complainants have issued broad documentary and deposition requests for that purpose. (*See Subpoena, Ex. A.*) This is an important difference, and in granting Respondents' request for a preservation deadline (over Complainants' objection), the Examiners also noted it, explaining that that discovery deadlines "applied to the discovery process and did not envision depositions to preserve testimony." (Entry dated Sept. 19, 2007 at ¶ 9.) Complainants' attempt to gather facts and analysis from a third party is a perfectly reasonable discovery method, but as described above, fact discovery in this case ended months ago.

**C. To The Extent Complainants' Proposed Discovery Relates To Expert Discovery, It Is Also Untimely And Improper.**

The proposed deposition is also improper for another reason: it improperly and belatedly seeks to introduce new experts. To the extent that Complainants will seek to adduce the conclusions of the MPSC regarding what caused the outages on August 14, 2003, the Complainants will be seeking opinion testimony. This opinion testimony necessarily must be considered to be expert testimony.

The Scheduling Order required Complainants to "identify, by name and position, all experts they intend to call as witnesses on their behalf, and set forth a description of their testimony" by August 15, 2007. (Entry dated Apr. 30, 2007 at ¶ 12(b).) Deadlines for



Complainants to produce those experts for deposition and to file those experts' testimony have also passed. (See Entry dated Sept. 28, 2007 at ¶ 2 (requiring depositions by October 5 and filing of testimony by November 9).)

Because Complainants have missed the deadlines to designate and produce additional "experts" from the MPSC, none of their requested discovery can be used for that purpose. Further, it is far too late for Complainants to claim that their experts may properly rely on this discovery. Complainants filed their expert testimony almost a month ago, and Respondents' experts are now completing their responsive testimony, which is due on December 17. Complainants' expert case should not be a moving target, and they should not be allowed to rely on new facts, documents or analysis from the MPSC.

### **III. CONCLUSION**

For the reasons stated above, Respondents respectfully request that Respondents' motion for a protective order be granted, that Complainants' attempt to obtain late discovery and/or expert testimony be barred, and that such depositions be ordered not to be held.

December 6, 2007

Respectfully submitted,

/s/ David A. Kutik

David A. Kutik (Trial Counsel)

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Meggan A. Rawlin

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Attorneys for Respondents

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Protective Order was filed on e-docket and served by facsimile or e-mail and by ordinary U.S. mail on the following this 6th day of December, 2007.

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Assistant Attorney General  
6545 Mercantile Way, Suite 15  
Lansing, MI 48911

/s/ David A. Kutik  
An Attorney for Respondents

# **EXHIBIT A**

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM**

In the Matter of the Complaints of S.G.	)	
Foods, Inc.; Miles Management Corp.,	)	
et al.; Allianz US Global Risk Insurance	)	Case No: 07- CZ
Company, et al.; Lexington Insurance	)	
Company, et al,	)	
	)	<b>PUCO Case Numbers:</b>
Complainants,	)	Case Nos. 04-28-EL-CSS
	)	05-803-EL-CSS
v.	)	05-1011-EL-CSS
	)	05-1012-EL-CSS
The Cleveland Electric Illuminating	)	
Company, Ohio Edison Company,	)	
Toledo Edison Company, and	)	
American Transmission Systems, Inc.	)	
	)	
Respondents.	)	

**INSURANCE COMPANY COMPLAINANTS' PETITION FOR ISSUANCE OF A  
SUBPOENA FOR A CASE IN A FOREIGN STATE**

NOW COME Insurance Company Complainants Allianz Global Risk US Insurance Company, et al and Lexington Insurance Company, et al ("Complainants") by and through their attorneys, Denenberg Tuffley, PLLC and as their Petition for Issuance of a Subpoena in a foreign state, state as follows:

1. In the Matter of the Complainants of S.G. Foods, Inc., et al v The Cleveland Electric Illuminating Company, et al, is a matter currently pending in the Public Utilities Commission of Ohio, State of Ohio, bearing Case Nos. 04-28-EL-CSS, 05-803-EL-CSS, 05-1011-EL-CSS and 05-1012-EL-CSS.

2. The instant case is a dispute between Complainants and Respondents regarding the August 14, 2003 Blackout which allegedly affected a number of businesses and residences owned by Complainants' insureds in various locations throughout Ohio. After the loss, Complainants' Insureds made insurance claims to the Complainants for coverage under their policies.

3. Complainants file this Petition seeking an Order pursuant to 2.305(e) for issuance of a subpoena (attached as Exhibit 1) to enable Complainants to seek production of documents and to take the deposition of a non-party witness: "the person most knowledgeable regarding the investigation and findings of the August 14, 2003 Blackout by the Michigan Public Service Commission, 6545 Mercantile Way, Suite 7, Lansing, Michigan 48911" and is within the jurisdiction of this Court.


4. Accordingly, Complainants seek the issuance of a subpoena to allow Complainants to subpoena documents from and take a deposition of the person most knowledgeable. The documents Complainants seek production of include the following:

Your entire file pertaining to the Michigan Public Service Commission's investigation into the August 14, 2003 Blackout.

WHEREFORE, Complainants pray that this Court issue a Subpoena for the above-captioned case currently pending in Ohio, requiring that the Michigan Public Service Commission produce the person most knowledgeable for deposition at 6545 Mercantile Way, Suite 7, Lansing, Michigan 48911 on December 13, 2007 at 10:00 a.m.

DENENBERG TUFFLEY, PLLC

By:

  
Alyssa J. Endelman (P61931)  
Attorneys for Claimants Allianz, et al/Lexington, et al  
21 E. Long Lake Road, Suite 200  
Bloomfield Hills, MI 48304  
(248) 549-3900; (248) 593-5808 (fax)

Dated: December 3, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Petition for Issuance of a Subpoena was mailed by fax and First Class U.S. mail to the following persons/entities this 3<sup>rd</sup> day of December, 2007.

David A. Kutik  
JONES DAY  
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Public Utilities Commission of Ohio  
Docketing Division  
180 East Broad Street  
Columbus, OH 43215-3793

  
Alyssa J. Endelman

00167758

# **EXHIBIT 1**



Original - Return  
1st copy - Witness  
2nd copy - File  
3rd copy - Extra

Approved, SCAO

STATE OF MICHIGAN  
JUDICIAL DISTRICT  
30th JUDICIAL CIRCUIT  
COUNTY PROBATE

**SUBPOENA**  
Order to Appear and/or Produce

**CASE NO.**  
07- -CZ

Police Report No. (if applicable)

Court Address  
341 S. Jefferson, Mason, MI 48854

Court telephone no.  
(517) 483-8500

Plaintiff(s) Petitioner(s)

☐ People of the State of Michigan  
☒ S.G. Foods, Inc., et al

☒ Civil ☐ Criminal

☐ Probate In the matter of

Defendant(s) Respondent(s)

The Cleveland Electric Illuminating, et al

Charge:

In the Name of the People of the State of Michigan. TO: **Michigan Public Service Commission**  
**6545 Mercantile Way, Suite 7**  
**Lansing, MI 48911**  
**Attn: Legal Department "Person Most Knowledgeable"**

If you require special accommodations to use the court because of disabilities, please contact the court immediately to make arrangements.

**YOU ARE ORDERED:**

☐ 1. to appear personally at the time and place stated below. You may be required to appear from time to time and day to day until excused.

☐ The court address above ☒ Other: Michigan Public Service Commission, 6545 Mercantile Way, Suite 7,  
Lansing, MI 48911

Day	Date	Time
Thursday	December 13, 2007	10:00 a.m.

☒ 2. Testify at Deposition - "The person most knowledgeable regarding the investigation and findings of the August 14, 2003 Blackout"

☒ 3. Produce/permit inspection or copying of the following items: **Your entire file pertaining to the Michigan Public Service Commission's investigation into the August 14, 2003 Blackout.**

including, but not limited to, all notes, electronic data, invoices, work orders, diagrams, photos and videos.

☐ 4. Testify as to your assets, and bring with you the items listed in line 3 above.

5. Testify at deposition.

☐ 6. MCL 600.6104(2), 600.6116, or 600.6119 prohibition against transferring or disposing of property attached.

☐ 7. Other:

<input checked="" type="checkbox"/> 8. Person requesting subpoena Alyssa J. Endelman	Telephone no. (248) 549-3900
Address 21 E. Long Lake Road, Suite 200	
City Bloomfield Hills	State Zip MI 48304

NOTE: If requesting a debtor's examination under MCL 600.6110, or an injunction under Item 6, this subpoena must be issued by a judge. For a debtor examination, the affidavit of debtor examination on the other side of this form must also be completed. Debtor's assets can also be discovered through MCR 2.305 without the need for an affidavit of debtor examination or issuance of this subpoena by a judge.



**FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT.**

12/3/07  
Date

Attorney: Alyssa J. Endelman

61831  
Bar no.

Court use only

☐ Served

☐ Not Served

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