

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

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Attempting to justify what is one of numerous failures to comply with the Commission's orders, the Insurer Complainants say that their proposed deposition of the Michigan Public Service Commission ("MPSC") is necessary to preserve testimony. Yet, their opposition brief does not refute the two bases for the instant motion.

Complainants don't dispute that what they seek is expert testimony. Any testimony regarding the conclusions of the MPSC's investigation is opinion -- and therefore expert -- testimony. They also do not dispute that they never disclosed their intent to call anyone from the MPSC as an expert until well after the date for disclosure of their experts. Instead, Complainants claim that they have been surprised somehow by Respondents' expert, Dorian Conger, who has demonstrated that the direct cause of the outages to the customers at issue here was a voltage

collapse in Michigan and a resulting cascade eastward into Ohio. Contrary to Complainants' position, FirstEnergy has very publicly advocated that events outside of FirstEnergy's system contributed to customer outages in northern Ohio. (See Statement from FirstEnergy Corp., August 18, 2003 (attached as Exhibit A)). In fact, in FirstEnergy Corp.'s most recent 10K filing with the Securities and Exchange Commission, the Company states:

We believe that the final report [of the U.S.-Canada Power System Outage Task Force] does not provide a complete and comprehensive picture of the conditions that contributed to the August 14, 2003 power outages and that it does not adequately address the underlying causes of the outages. We remain convinced that the outages cannot be explained by events on any one utility's system. The final report contained 46 "recommendations to prevent or minimize the scope of future blackouts." Forty-five of those recommendations related to broad industry or policy matters while one, including subparts, related to activities the Task Force recommended be undertaken by FirstEnergy, MISO, PJM, ECAR, and other parties to correct the causes of the August 14, 2003 power outages.

In addition, in her deposition, one of Complainants' witnesses, Alison Silverstein, admitted that she was aware of the data from SoftSwitch Technologies, Inc. (a company that monitors grid conditions throughout the country), data upon which FirstEnergy's expert Conger relies and which show the pattern of outages starting in Michigan and moving eastward. (Deposition of Alison Silverstein at 105-106, attached as Exhibit B.) Complainants' claim of surprise rings hollow, and is a vain effort to deflect attention from the weakness in the substance and preparation of their case.

Nor do Complainants explain why the request for documents in their proposed subpoena (for the MPSC's investigation files) is proper. Simply put, a request for documents has nothing to do with preserving testimony. The reason for Complainants' failure to address this point is obvious: they can't refute it.

Apparently, by their citation to the MPSC's website, Complainants will seek to introduce the MPSC's investigation report. Yet, as the Commission has already determined with respect to

the report from the United States-Canada Power System Outage Task Force, a governmental report providing opinions is improper hearsay and is inadmissible under Rule 803(8) of the Ohio Rules of Evidence. The parties' attention and resources should not be diverted at this late stage for the futile exercise of soliciting testimony regarding a document that will not be admitted.

Complainants' have all of the information that supports Respondents' experts' opinions; it has been provided by Respondents. They cannot credibly argue that they will be unable to address these opinions or that they will be otherwise prejudiced. If Complainants want to prove that Respondents' experts are wrong, these experts will be available for cross-examination on the materials that they have relied upon.

Complainants "best defense is a good offense" approach should be seen for what it is. As they have throughout the case, they want to flaunt the rules and blame FirstEnergy for their own lack of diligence. Having failed to realize that Respondents' not so secret position -- unlike the myopic view of Complainants' experts -- that events outside of the FirstEnergy control area were relevant, Complainants cannot be heard now to say that they need a chance to develop new evidence at this late stage. Seeking to have a new expert testify two business days before Respondents' testimony is due, with less than two weeks notice, is patently unfair. Complainants know this and have attempted to bend the rules accordingly.<sup>1</sup>

For these reasons, and for the reasons stated in Respondents' memorandum in support, Respondents motion for protective order should be granted and the proposed deposition should not go forward.

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<sup>1</sup> Complainants again try to gain some sympathy by arguing that they have received 215,000 documents from Respondents. In addition to being wrong (it was 215,000 pages) and irrelevant (exactly why this matters is left unsaid), Complainants ignore the fact that the volume that was produced was directly the result of the overbroad requests made by Complainants. In essence, having asked for a lot of documents, they cannot now complain that they received a lot of documents.

December 10, 2007

Respectfully submitted,

/s/ David A. Kutik

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply in Support of Respondents' 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 10th day of December, 2007.

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## **ATTACHMENT A**

**FirstEnergy Corp.**  
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**For Release: Upon Receipt**

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**STATEMENT FROM FIRSTENERGY CORP.**

*With service restored to our customers, we're collecting and analyzing data regarding our system, and would expect that the same effort is under way at utilities and regional transmission operators across the region.*

*Contrary to misinterpretations that identified FirstEnergy as the cause of the widespread outage, it is clear that extensive data needs to be gathered and analyzed in order to determine with any degree of certainty the circumstances that led to the outage. What happened on Thursday afternoon is a very complex situation, far broader than the power line outages we experienced on our system.*

*From the preliminary data we are gathering -- and based on what others are providing -- it is clear that the transmission grid in the Eastern Interconnection, not just within our system, was experiencing unusual electrical conditions at various times prior to the event. These included unusual voltage and frequency fluctuations and load swings on the grid.*

*Contrary to speculation, these unexplained conditions were detected as early as noon on Thursday in the broad region, not just within our system.*

*As reported in yesterday's statement by the North American Electric Reliability Council (NERC), "Pinpointing the exact cause of the blackouts will be a challenging task; events that occurred on one utility's system may have been affected by events on utility systems elsewhere in the Eastern Interconnection." According to NERC's President and CEO Michehl Gent, "... any attempt on our part to identify the cause of the outages at this point would be speculative and premature ..."*

*Further, as stated by the Midwest Independent System Operator in a news release yesterday, "More data on system conditions and outages that were occurring throughout the Eastern Interconnection need to be gathered and analyzed before conclusions can be reached."*

*FirstEnergy is committed to working with the U.S. Canadian Task Force and other appropriate groups involved to determine the sequence of events that led to the outage and what needs to be done by all of us in the region to prevent it from happening again.*

**Forward-Looking Statement:** This news release includes forward-looking statements based on information currently available to management. Such statements are subject to certain risk and uncertainties. These statements typically contain, but are not limited to, the terms "anticipate," "potential," "expect," "believe," "estimate," and similar words. Actual results may differ materially due to the speed and nature of increased competition and deregulation in the electric utility industry, economic or weather conditions affecting future sales and margins, changes in markets for energy services, changing energy and commodity market prices, replacement power costs being higher than anticipated or inadequately hedged, maintenance costs being higher than anticipated, legislative and regulatory changes (including revised environmental requirements), availability and cost of capital, inability of the Davis-Besse Nuclear Power Station to restart (including because of any inability to obtain a favorable final determination from the Nuclear Regulatory Commission) in the fall of 2003, additional adjustments which may result from the audited restatement of the 2002 financial statements and the restatement and review of the first quarter of 2003 for the Company and the re-audit of 2000 and 2001 financial statements for Cleveland Electric Illuminating and Toledo Edison, inability to accomplish or realize anticipated benefits of strategic goals, further investigation into the causes of the August 14, 2003, power outage, and other similar factors.



## **ATTACHMENT B**

ORAL DEPOSITION OF ALISON SILVERSTEIN

CAUSE NOS. 04-28-EL-CSS 05-803-EL-CSS, 05-1011-EL-CSS

05-1012-EL-CSS

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1 you call Phase 2 of the investigation?

2 A Yes. This is part of the cascade phase.

3 Q Now, other than the information that you had  
4 received from the companies that were affected by the  
5 blackout -- and by that, I also am including  
6 reliability coordinators -- did you receive  
7 information or use information from any other entity  
8 to determine your sequence of events?

9 A Only one other company, and that was a  
10 set -- a company whose name I have just gone blank on  
11 that had data recorders on a number of industrial  
12 customers across the Midwest and New York and New  
13 England. And we used their data in -- to show  
14 frequency in the task force report, and they are  
15 credited there. Much of the source data for 16:05:57  
16 came from FirstEnergy.

17 Q Okay. The name of the company, can you --  
18 do you have a copy of the report? Would you like me  
19 to give you a copy of the report? I'd like you to  
20 give me the name of the company, please.

21 MR. KUTIK: And let's go off the  
22 record.

23 (Discussion off the record)

24 Q (By Mr. Kutik) What page, please?

25 A Figure 6.28 on Page 100, and the company is

ORAL DEPOSITION OF ALISON SILVERSTEIN

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1 SoftSwitching Technologies, Inc.

2 Q And is this the extent of the data that was  
3 used by -- or the extent of the use of the  
4 SoftSwitching -- is that what you called it?

5 A Yes.

6 Q The SoftSwitching data?

7 A Yes.

8 Q Okay.

9 A All of the other information came directly  
10 from utilities.

11 Q Okay.

12 A And specifically from their equipment  
13 recorders.

14 Q Okay. Now, the individuals who were working  
15 not only on collecting the data, but also on the rest  
16 of the working groups, they signed confidentiality  
17 agreements, did they not?

18 A They did.

19 Q And those working for those working in the  
20 working groups also signed confidentiality agreements.  
21 Correct?

22 A I believe that everyone working on the  
23 investigation signed a confidentiality agreement.

24 Q Did you?

25 A I did.

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Summary: Reply in support of Respondents' Motion for Protective Order electronically filed by Meggan A. Rawlin on behalf of The Cleveland Electric Illuminating Company and Ohio Edison Company and Toledo Edison Company and American Transmission Systems, Inc.