

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Evelyn and John Keller,

Complainants,

v.

Ohio Power Company,

Respondent.

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Case No. 12-2177-EL-CSS

**COMPLAINANTS' MEMORANDUM IN OPPOSITION TO RESPONDENT'S
MOTION FOR PROTECTIVE ORDER**

Introduction

This complaint alleges injury to consumers as a result of Respondent's negligence in its vegetation control and repair procedures. Necessarily, the information relevant to these issues is within the possession and control of Respondent – what was done, who did it, when was it done (or not done) and why. In responding to Complainants' discovery requests, Respondent identified several individuals as having knowledge of issues involved in this matter. When Complainants asked to depose the individuals identified by Respondent, Respondent balked and took the position that Complainants should be satisfied to depose only two individuals selected by Respondent. The position of Respondent is without merit and the requested protective order should not be issued.

Events Leading To This Discovery Dispute

During the Settlement Conference in this case held on September 11, 2012, Complainants indicated the desire to conduct discovery. Respondent asked that discovery be "informal" and Complainants then spent several months attempting to obtain information via informal discovery requests. When it became clear that Respondent would not provide

meaningful information in response to informal requests, in December 2012 Complainants served a formal discovery request. On January 25, Respondent completed its responses. Respondent's answers identified 10 individuals with knowledge of issues in this case. On January 30, Complainants asked to schedule depositions of those individuals identified by Respondent¹ and served a notice of deposition on February 25, seeking depositions to commence on March 14.

Respondent objected to having 10 depositions in what it claimed was essentially a "small claims case."² Respondent said it had selected two employees to be Respondent's witnesses and indicated that Complainants should be satisfied to depose those two employees, even though Respondent admits others also have knowledge of the issues in this action. Complainants indicated a willingness to start by deposing the two individuals selected by Respondent, but wanted to reserve the right to depose some or all of the other eight individuals identified by Respondent, if Complainants determined such additional depositions were needed after completing the depositions of the first two individuals. Respondent proposed April 3 and 4 for the depositions of the two persons selected by Respondent, but refused to conditionally schedule the depositions of the remaining eight persons. Complainants expressed a concern that if the first two depositions were not completed until April 4, there was insufficient time to attempt to schedule and conduct any necessary remaining depositions before the May 2 deadline for Complainants to respond to Respondent's Motion to Dismiss, especially in light of

¹ The number of persons sought to be deposed results entirely from Respondent's answers. If Respondent had identified only five individuals in its discovery responses, Complainants would be seeking to depose only five individuals.

² Respondent is correct that in this action Complainants only seek \$1,500 and, because the amount is small, it is unusual to conduct much discovery. Normally in a case of that magnitude the parties would engage in routine settlement discussions to avoid that effort. Here, however, Respondent has made it clear it has no interest in trying to settle this case.

Respondent's expressed opposition to additional depositions. Respondent then filed the subject motion for a protective order.

Argument

There are three issues presented with respect to Respondent's Motion for Protective Order: first, whether all discovery should be stayed until a ruling on Respondent's motion to dismiss; second, whether discovery should be limited to the two persons selected by Respondent; and third, the scheduling of additional depositions beyond the first two. These issues will be separately addressed below.

1. Discovery ought not be stayed pending a ruling on Respondent's motion to dismiss.

Respondent argues that all discovery should be stayed until a ruling on its motion to dismiss, citing to *In the matter of the Complaint of McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services*, Case No. 11-3407-TP-CSS. Respectfully, the primary issues in *McLeodUSA* were issues of law,³ not fact, and where the threshold issues are legal, it is reasonable to stay factual discovery until the legal issues have been resolved. Here, by contrast, this complaint alleges negligence, which is inherently factual in nature. Respondent's tariff allows for recovery of damages in the event of negligence, and the question of whether negligence occurred is a question of fact. Respondent's motion to dismiss is framed in terms of

³ The motion to dismiss filed by AT&T in *McLeodUSA* on July 5, 2011 clearly states that the complaint must fail as a matter of law: **"The Complainants allege that AT&T violates the obligation under Section 251(c)(6) of the 1996 Act to charge collocation rates that are 'just, reasonable and nondiscriminatory.' Complaint, sec. 34. Complainants have no such claim as a matter of law."** Motion, page 4. Also, on page 11: **"While the Commission has delegated authority to consider a claim for breach of an interconnection agreement (a claim that Complainants have not and cannot make in this case), the Commission has no delegated authority to entertain Complainants' free-standing claim that AT&T Ohio's method of billing for collocation power violated federal law. R.C. Sec 4927.04."** The issues were thus legal, not factual.

factual matters; Respondent does not claim that Complainants' complaint should be dismissed as a matter of law; rather in the first substantive paragraph of its motion it frames the applicable standard as whether it used "reasonable diligence" – certainly a factual, not legal, standard. As such, it is entirely reasonable and necessary that factual discovery be conducted before a ruling on Respondent's motion to dismiss.

2. Complainants ought not be limited to deposing the two persons selected by Respondent.

The purpose of discovery is primarily to investigate factual matters within the possession and control of the opposing party. Here, Respondent's written responses to discovery requests identify ten individuals with knowledge of issues raised in this case. (See Responses attached hereto as Exhibit 1, paragraphs 2, 6 and 17). Until they are deposed, Complainants cannot know what each individual knows or did. Respondent advances the novel argument that it should be entitled to determine which of the persons it identified as having knowledge can be deposed. Respondent says that it selected two employees to be its witnesses, and Complainants should be satisfied to depose these two persons. Respectfully, Complainants are not willing to so limit their discovery. One can reasonably expect that the individuals selected by Respondent to be witnesses in this case are the individuals prepared to best advance Respondent's position – in other words, to say what Respondent wants to be said. Complainants wish to inquire as to the other persons with knowledge to find what they know – and some of those other identified persons may have knowledge which is helpful to Complainants' position and contrary to Respondent's position.

Complainants have no desire to waste their or Respondent's time, and agreed to start by deposing the two individuals selected by Respondent. However, if following those two

depositions Complainants determine additional depositions are needed, they should and must be allowed to conduct additional depositions.

3. It is reasonable to conditionally schedule potential depositions sooner rather than later.

The trigger for this discovery dispute was Complainants' request to conditionally schedule depositions of the remaining eight persons identified by Respondent as having information as to issues in this case. Although the notice of deposition was filed February 25, Respondent has said the first dates available for the deposition of its two selected persons are April 3 and 4. Complainants agreed to those dates, but are concerned that if, at the completion of those two depositions Complainants determine that some or all of the additional depositions are necessary, they will not be able to schedule and complete those soon enough to properly prepare a response to Respondent's motion to dismiss, which response is due not later than May 2. Due to Respondent's strong position that only two depositions are needed, Complainants have a reasonable concern that Respondent will resist or delay requests for additional depositions during the short time frame between April 4 and May 2. All Complainants have sought was to conditionally schedule additional depositions which may be necessary; that request was reasonable and proper and Respondent's motion should be denied.

Respectfully submitted,




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Attorney for Complainants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail and regular U.S. mail on the following persons this 21 day of March 2013:

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John K. Keller

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Case No. 12-2177-EL-CSS

RESPONDENT AEP'S ANSWERS TO COMPLAINANTS
SECOND DISCOVERY REQUESTS

Respondent Ohio Power Company (hereinafter "AEP") hereby responds to Complainant's Second Discovery Requests.

GENERAL OBJECTIONS

1. All of the responses set forth below are based solely upon the information and documents presently available to AEP. Discovery will continue as long as permitted and the investigation by AEP, AEP's attorneys, and AEP's agents will continue throughout this proceeding. As the investigation and discovery proceed, witnesses, facts, documents, and evidence may be discovered that are not set forth herein but that may be responsive to these Discovery Requests. The following responses are given without prejudice to AEP's right to alter or amend these responses as the result of subsequently discovered evidence and to present such evidence in any proceeding, including, but not limited to, expert testimony, discovered or obtained after the date of these responses.

2. Nothing herein shall be construed as an admission by AEP with respect to the admissibility or relevance of any documents produced. Further, AEP's responses are made without in any way waiving:

a. The right to object on the grounds of competency, relevancy, materiality, hearsay or on any other proper ground to the use of any such information for any purpose, in whole or in part, in any subsequent stage of proceeding in this action or any other action; or

b. The right to object on any and all grounds, at anytime, to any other discovery procedure relating to the subject matter of these discovery requests.

3. Because discovery in this matter is still ongoing, AEP expressly reserves the right to supplement and amend its responses.

Subject to the foregoing, AEP responds to the discovery requests as follows:

DISCOVERY REQUESTS

1. Produce all easements or rights-of-way pursuant to which AEP or any of its affiliates (collectively "AEP") operate electric lines along SR 315 between Jewett Road and Powell Road in Delaware county (unless otherwise stated, all requests regarding the "Subject Area" refer to this geographic area).

Response: AEP objects to this request to the extent that it is overly broad and burdensome and requests information that is irrelevant to this matter. Subject to and without waiving these objections, AEP is in the process of gathering the easement and right-of-way for the location of the downed tree on S.R. 315 between Jewett Road and Powell Road.

2. When and by whom were trees and/or other vegetation in the Subject Area marked during 2012 for attention?

Response: The trees and/or other vegetation on Circuit 3101, which includes the Subject Area, were marked by Ty Carpenter on April 13, 16, 17, 19, 23, 24, 25 and 26, 2012 and on May 1, 2, 3, 7, 8, 9, 10, 14, 15 and 16, 2012.

3. Identify and produce all documents relating to the activity described in request #2, including instructions, contracts, time sheets, reports, and other documents.

Response: AEP has attached all of the responsive documents to this request identified by Bates numbers 1-24.

4. Identify by number and/or name and by a map the distribution line of which the line in the Subject Area is a part.

Response: The Subject Area is a part of Circuit 3101 (Sawmill). AEP has a map of the distribution line. However, the map is proprietary in nature and will be disclosed upon execution of a protective agreement.

6. Identify all AEP employees, agents or contractors employed at any time during 2012 with knowledge of any of the issues in this action.

Response: AEP objects to this request to the extent that it is overly broad and burdensome. Subject to and without waiving these objections, the following people have knowledge of the issues in this action: Steve LaJeunesse, Selwyn Dias, Fred Mottice, Michele Jeunelot, and Keith Ater.

7. Describe how AEP makes decisions regarding the order of repairs in the event of a widespread outage.

Response: A description of how AEP makes decisions regarding the order of repairs in the event of a widespread outage is available on the AEP website at <https://aepohio.com/global/utilities/lib/docs/info/facts/AEPOhio-ManagingStorms.pdf> and https://aepohio.com/global/utilities/lib/docs/outages/RestorationProcess_AEPOhio.pdf, attached and identified by Bates numbers 25-27, and <https://aepohio.com/outages/faq/PowerRestoration.aspx>.

8. Describe how AEP made decisions regarding the order of repairs following the 2012 storm.

Response: AEP made decisions regarding the order of repairs following the 2012 storm according to the documents provided in its response to Request No. 7, which were created pursuant to Ohio Administrative Code (“OAC”) § 4109-1-10-08.

9. Provide a listing of each outage from the June 2012 storm, including the number of customers affected and the time of repair.

Response: AEP objects to this request to the extent it is overly broad and burdensome and requests information that is irrelevant to this matter. Subject to and without waiving these objections, AEP has attached a listing of each outage from the June 2012 storm, identified by Bates numbers 28-244.

10. Describe the manner and extent of PUCO involvement in determinations made by AEP as to the order of work to restore power after the June 2012 storm.

Response: The PUCO had no involvement in AEP’s determinations as to the order of work to restore power after the June 2012 storm other than the fact that the order of work was completed according to AEP’s policies, which were created pursuant to Commission Rule 4901:1-10-08.

11. Produce all communications between AEP and the PUCO during June and July 2012.

Response: AEP objects to this request to the extent it is overly broad and requests information that is irrelevant to this matter. Subject to and without waiving these objections, there were no written communications between AEP and the PUCO during June and July 2012 regarding the storm other than the required customer account updates sent to the PUCO as required by OAC 4109-1-10-08.

12. Has AEP paid compensation of any type to any consumers for damages resulting from the June 2012 storm?

Response: AEP objects to this request to the extent it requests information that is confidential. Subject to and without waiving this objection, AEP has not paid any compensation of any type to any customer for damages resulting from the June 2012 storm.

13. Identify all complaints against AEP alleging negligence commenced since January 1, 2000 and describe how each of these complaints were resolved.

Response: AEP objects to this request to the extent that it is overly broad and burdensome. Subject to and without waiving these objections, all complaints against AEP alleging negligence commenced since January 1, 2000 are available and searchable as public records on the Public Utilities Commission of Ohio's Docketing Information System.

14. Produce all communications between AEP and ODOT from March 1, 2012 to the present.

Response: AEP objects to this request to the extent that is overly broad and burdensome, requests information that is irrelevant to this matter, and is redundant of prior requests and therefore has been asked and answered. Subject to and without waiving this objection, there are no communications between AEP and ODOT from March 1, 2012 to the present with regard to the storm and the area of S.R. 315 between Powell Road and Jewett Road other than the communication produced in response to Request No. 1 from the Complainants' First Discovery Requests.

15. Is a road closure a factor in the determination of the order of repairs following a weather event?

Response: A road closure is a factor in the order of repairs following a weather

event only to the extent it affects the implementation of the restoration process set out in the documents in AEP's response to Request No. 7.

16. When did AEP learn of the outage of the line in the Subject Area?

Response: AEP objects to this request to the extent that it is vague. Subject to and without waiving this objection, AEP learned of an outage on Circuit 3101 in the Subject Area on or around June 29, 2012.

17. Identify the person or persons who were involved in the repairs to the electric lines in the Subject Area following the June 2012 storm.

Response: AEP objects to this request to the extent it is overly burdensome. Subject to and without waiving this objection, there were many people involved in the repairs to the electric lines in the Subject Area following the June 2012 storm, including employees from Michigan as well as Cliff Moritz, Tim Flaherty, Tony DiCenzo, Grady West, and their respective crews.

18. Identify the person or persons who were involved in dealing with vegetation in the Subject Area following the June 2012 storm.

Response: AEP objects to this request to the extent it is overly burdensome. Subject to and without waiving this objection, there were many people involved in dealing with vegetation in the Subject Area following the June 2012 storm, including Asplundh employees from Michigan as well as several local crews.

Respectfully submitted,

/s// Sophia Chang

Steven Nourse

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Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Respondent OPCo's Answers to Complainants Second Discovery Requests was served by electronic mail upon counsel for Complainant at the address listed below on this 3rd day of January 2013.

/s// Sophia Chang

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Summary: Memorandum Complainants' Memorandum in Opposition to Respondent's Motion for Protective Order electronically filed by Mr. John K. Keller on behalf of Evelyn Keller and John Keller