33

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues	)	Case No. 99-1658-EL-ETP
In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of Tariff Changes Required to Implement Retail Electric Competition	)	Case No. 99-1659-EL-ATA
In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its New Tariffs	)	Case No. 99-1660-EL-ATA
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures to Defer Costs Incurred Arising From the Implementation of its Electric Transition Plan	)	Case No. 99-1661-EL-AAM
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures to Defer Transition Costs and Continue to Defer the Unrecovered Balance of Regulatory Assets	)	Case No. 99-1662-EL-AAM

In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval to Transfer Its Generating Assets to an Exempt Wholesale Generator	)))))	Case No. 99-1663-EL-UNC

THE CINCINNATI GAS & ELECTRIC COMPANY'S MEMORANDUM IN OPPOSITION TO AK STEEL CORPORATION'S APPLICATION FOR REVIEW THROUGH INTERLOCUTORY APPEAL OF THE HEARING EXAMINER'S MAY 19, 2000 DISCOVERY RULING

I. INTRODUCTION

On May 19, 2000, the Attorney Examiner properly denied AK Steel Corporation's ("AK") Motion to Compel Discovery ("AK's Motion to Compel") for the following reasons:

(1) The information sought by AK is irrelevant to the issue properly before the Commission (May 19, 2000 Entry at ¶ 4);[1]

(2) The information sought by AK would not lead to the discovery of admissible evidence, i.e., evidence of the motives of parties to a settlement stipulation are not admissible at hearing (*Id.*);

(3) Disclosure of the information sought by AK would undermine the Commission's longstanding policy in favor of settlement agreements (*Id.*); and

(4) The Commission has authority to verify CG&E's compliance with SB3 and the Commission's rules and to audit any transactions between CG&E and its affiliates (*Id.*).

Instead of recognizing the appropriateness of the Attorney Examiner's ruling, AK instead chose to pursue certification of the ruling for interlocutory appeal. However,

[1] Specifically, the Attorney Examiner recognized that the question before the Commission is whether *the Stipulation itself* is appropriate and that materials extraneous to the Stipulation, including any alleged "side deals," etc., are wholly irrelevant to the question properly at issue. CG&E agrees with the Attorney

because AK fails to satisfy either one of the requirements for certification set forth in Ohio Administrative Code ("OAC") § 4901-1-15(B), AK Steel Corporation's Application for Review Through Interlocutory Appeal of the Hearing Examiner's May 19, 2000 Discovery Ruling ("AK's Application") should be denied.[2]

II. LAW AND DISCUSSION

Pursuant to the mandates of OAC § 4901-1-15, certification of a question for immediate interlocutory appeal is appropriate *only* if *both* of the following requirements are met:

> (1) The appeal represents a new or novel question of interpretation, law, or policy, or is taken from a ruling which *represents a departure from past precedent*; *AND*
>
> (2) An immediate determination by the Commission 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.*

OAC § 4901-1-15(B) (emphasis added). Despite its repetition of the points raised in its previously filed Motion to Compel, AK fails to satisfy either one, let alone both, of these Code requirements. Therefore, AK's Application should be denied.

A. The Attorney Examiner's May 19, 2000 Denial of AK's Motion to Compel is Wholly Consistent with Commission Precedent.[3]

AK's contention that the denial of the Motion to Compel somehow violates Commission precedent is wholly without foundation. In fact, AK fails to cite *even a single case* in support of its argument.

Examiner and contends that AK's focus upon any alleged "side deals" is simply an effort to divert the Commission's attention from the appropriate question.

[2] For a complete discussion of the myriad failings in AK's Motion to Compel, *see* The Cincinnati Gas & Electric Company's Memorandum in Opposition to AK Steel Corporation's Motion to Compel Discovery and Memorandum in Support ("CG&E's Memo in Opposition"). CG&E's Memo in Opposition is incorporated herein by reference.

AK's failure is understandable. In fact, the denial of AK's Motion to Compel is not only consistent with general Commission precedent, it is consistent with decisions reached *in other transition plan proceedings*. For example, during the FirstEnergy hearing on May 15, 2000, intervenor parties sought to explore the issue of alleged agreements other than the settlement stipulation at issue in the transition plan case. Attorney Examiner Nodes, on the basis of relevance considerations, refused to allow discussion of any alleged "other agreements:"

• • •

Q:	. . . Well, before we get into that, I note that there are two stipulations, or at least one stipulation and supplemental materials. *Have there been any other agreements* since these two have been filed that have been negotiated by the company?
Mr. Ruxin:	I object. All that the company's submitting and all that Mr. Alexander's here sponsoring are these two stipulations, settlement agreements.
Examiner Nodes:	I agree. *We're not here to look into any other agreements, if they may exist.* What is presented to the Commission are Mr. Alexander's testimony and the two sponsored exhibits . . . *Any other questions relating to other matters are not relevant for the purposes of the Commission's consideration.*

• • •

May 15, 2000 FirstEnergy Hearing Transcript at 45-46 (emphasis added); *see also* May 15, 2000 FirstEnergy Hearing Transcript at 116-120, 141-142. (The cited portions of the May 15, 2000 FirstEnergy Hearing Transcript are attached at Tab A.)

[3] For obvious reasons, AK does not argue that a question regarding the scope of discovery is a "new or novel" issue. Therefore, CG&E does not address that issue either.

Moreover, the Commission has consistently denied discovery excursions, and corresponding motions to compel, into areas deemed irrelevant to the issues properly before the Commission. *See, e.g., In the Matter of the Petition of Ameritech Ohio for Arbitration with United Telephone Company of Ohio*, 1998 Ohio PUC LEXIS 746, Case No. 98-1434-TP-ARB (December 7, 1998) (Denying a motion to compel discovery responses because "Sprint has failed to make a sufficient argument in support of relevance. . ."); *In the Matter of the Application of Cincinnati Bell Telephone Company For Approval of an Alternative Form of Regulation and For a Threshold Increase in Rates*, 1997 Ohio PUC LEXIS 928, Case No. 96-899-TP-ALT (December 5, 1997) ("Accordingly, the information requested by MCI is not relevant or reasonably calculated to lead to the discovery of admissible evidence. MCI's motion to compel is, therefore, denied.").[4]

It is apparent that the Attorney Examiner's denial of AK's Motion to Compel is consistent with Commission precedent. Thus, while a grant of AK's Motion to Compel would be at odds with Commission precedent, a denial is not. On this basis alone, AK's Application should be denied.

B. The Attorney Examiner's May 19, 2000 Denial of AK's Motion to Compel Causes AK No Undue Prejudice.

In addition to the requirement that AK establish that the denial of the Motion to Compel conflicts with Commission precedent, OAC § 4901-1-15 (B)(2) requires that AK

[4] Even OAC § 4901-1-16, actually cited by AK in AK's Application, expressly limits discovery to *relevant* matters.

establish that "an immediate determination by the Commission is needed to prevent . . . undue prejudice . . ., *should the Commission ultimately reverse the ruling in question.*" Thus, immediate Commission consideration is appropriate only when delay in consideration until an appeal from the ultimate Commission finding will operate to deny AK any meaningful and effective remedy. Here, AK will have ample opportunity to appeal all aspects of this case following the case's final resolution. Therefore, any alleged "prejudice" suffered by AK is an insufficient basis for certification of an interlocutory appeal. By way of analogy, s*ee, e.g., Sirkin v. McBurrows,* 1999 Ohio App. LEXIS 5793 (Hamilton Cty. December 3, 1999), appeal dismissed *sua sponte*, 88 Ohio St. 3d 1435 (copy attached at Tab B); *Penko v. Eastlake*, 1998 Ohio App. LEXIS 6583 (Lake Cty. December 11, 1998) (copy attached at Tab C).

The Commission made this very point in *In the Matter of the Amendment of Chapter 4901-1 of the Ohio Administrative Code*, 1987 Ohio PUC LEXIS 49, 87-84 AU-ORD (October 14, 1987):

> . . . It must be remembered that a party can, in due course, obtain review of any adverse ruling by briefing the issue, by filing a rehearing application should the Commission reject its argument, and ultimately, by appealing the matter to the Ohio Supreme Court. Because an immediate ruling is essential only where the potential for undue prejudice and expense exists, the rule should require that a party establish the need for an immediate Commission determination before any interlocutory appeal will be entertained. Moreover, the rule should protect the hearing officer, the other parties to the proceeding, and the Commission from the burden of responding to interlocutory appeals which have no realistic chance of success. . .

In short, AK has not shown that either undue prejudice or undue expense will result from the Attorney Examiner's ruling. AK possesses a meaningful and full opportunity to appeal, assuming the Stipulation is approved, without recourse to an

immediate interlocutory appeal. Therefore, certification of this issue for immediate interlocutory appeal is inappropriate. On this basis alone, AK's Application should be denied.

IV. CONCLUSION

The denial of AK's Motion to Compel is consistent with Commission precedent and does not prejudice AK in any way sufficient to support certification. AK has failed to satisfy either prong of the two-part test applicable to its request for certification. Therefore, AK's Application should be denied.

Respectfully submitted,

Michael D. Dortch (0043897)
Brian T. Johnson (0065417)
Baker & Hostetler LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215
Telephone (614) 228-1541
Facsimile (614) 462-2616

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of The Cincinnati Gas & Electric Company's Memorandum Contra AK Steel Corporation's Application for Review Through Interlocutory Appeal of the Hearing Examiner's May 19, 2000 Discovery Ruling was served by first class U.S. mail, postage prepaid, and electronic mail upon the following, this 25th day of May, 2000.

John Bentine, Esq.
Chester, Willcox & Saxbe, LLP
17 South High Street
Suite 900
Columbus, Ohio 43215
Counsel for City of Cleveland
Counsel for American Municipal Power-Ohio, Inc.

Sally W. Bloomfield, Esq.
Elizabeth H. Watts, Esq.
Amy Straker-Bartemes, Esq.
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215
Counsel for Columbia Energy Services Corp.,
Columbia Energy Power Marketing Corp.,
PP&L Energy Plus Co., Exelon Energy,
Strategic Energy, and Mid-Atlantic Power Supply Association

David F. Boehm, Esq.
Boehm, Kurtz & Lowry
2110 CBLD Center
36 East Seventh Street
Cincinnati, Ohio 45202
Counsel for AK Steel

David L. Cruthirds, Esq.
Dynegy, Inc.
Senior Director & Regulatory Counsel
1000 Louisiana Street, Suite 5800
Houston, TX 77002-5050

Jodi M. Elsass-Locker, Esq.
Assistant Attorney General
77 South High Street, 29th Floor
Columbus, OH 43215
Counsel for Ohio Department of Development

Daniel V. Gulino, Esq.
Two North Ninth Street
Allentown, PA 18101
Counsel for PP&L EnergyPlus Co., LLC

Kevin Higgins
Consultant for Kroger Co.
Energy Strategies, Inc.
39 Market Street, Suite 200
Salt Lake City, UT 84101

Craig G. Goodman, Esq.
President
The National Energy Marketers Association
333 K Street, N.W., Suite 425
Washington, D.C. 20007
Counsel for The National Energy Marketers Association

Maureen Grady, Esq.
369 South Roosevelt Avenue
Columbus, OH 43209
Counsel for Ohio Department of Development

William M. Ondrey Gruber, Esq.
2714 Leighton Road
Shaker Heights, Ohio 44120

Ellis Jacobs, Esq.
333 West First Street
Suite 500
Dayton, Ohio 45402
Counsel for Cincinnati/Hamilton Community Action Agency and SCOPE

Lane Kollen
Consultant to AK Steel
J Kennedy Associates
570 Colonial Park Drive - Suite 305
Roswell, GA 30075

Michael L. Kurtz, Esq.
Boehm, Kurtz & Lowry
2110 CBLD Center
36 East Seventh Street
Cincinnati, Ohio 45202
Counsel for The Kroger Company

Paul Forshay, Esq.
Sutherland, Asbill & Brennan, LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
Counsel for Shell Energy Services Co., LLC

Janine Migden, Esq.
Enron Energy Services, Inc.
400 Metro Place North, Suite 310
Dublin, Ohio 43017
Counsel for Enron Energy Services, Inc.

Robert P. Mone, Esq.
Scott A. Campbell, Esq.
Thompson, Hine & Flory
10 West Broad Street
Columbus, Ohio 43215
Counsel for Ohio Rural Electric Cooperative, Inc.
and Buckeye Power, Inc.

Steven Nourse
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43266-0573

Joelle Ogg, Esq.
John & Hengerer
1200 17th Street, N.W.
Suite 600
Washington, D.C. 20036
Counsel for National Energy Marketers Association

M. Howard Petricoff, Esq.
Vorys, Sater, Seymour & Pease
52 East Gay Street
P. O. Box 1008
Columbus, Ohio 43216-1008
Counsel for New Energy Midwest, WPS Energy Services,
and Dynegy, Inc.

Judith A. Phillips
President
Stand Energy Corporation
1077 Celestial Street - Suite 110
Cincinnati, OH 45202

David C. Rinebolt, Esq.
Ohio Partners for Affordable Energy
337 South Main Street
4th Floor, Suite 5
P.O. Box 1793
Findlay, Ohio 45840

Evelyn Robinson-McGriff, Esq.
Ohio Consumer's Counsel
77 South High Street
15th Floor
Columbus, Ohio 43266-0550
Counsel for Ohio Consumers' Counsel

Elaine Saunders
LaCapra Associates
Consultant for Ohio Consumers' Counsel
333 Washington Street - Suite 855
Boston, MA 02108

Richard L. Sites, Esq.
Staff Legal Counsel
Ohio Hospital Association
155 East Broad Street
15th Floor
Columbus, Ohio 43215

Jeffrey L. Small, Esq.
Chester, Willcox & Saxbe
17 South High Street
Suite 900
Columbus, Ohio 43215
Counsel for Ohio Council of Retail Merchants
Counsel for American Municipal Power-Ohio, Inc.

Gary A. Snyder, Esq.
International Brotherhood
of Electrical Workers, AFL-CIO
Snyder, Rakay & Spicer
316 Talbot Tower
Dayton, OH 45402
Attorney for Local Union 1347

Sheldon A. Taft, Esq.
Joseph C. Blasko, Esq.
Vorys, Sater, Seymour & Pease
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Counsel for Ohio Manufacturer's Association
and Dynegy Inc.

Kimberly J. Wile, Esq.
McNees, Wallace & Nurick
21 East State Street
Suite 910
Columbus, Ohio 43215
Counsel for IEU-Ohio

Bruce J. Weston, Esq.
169 W. Hubbard Avenue
Columbus, OH 43215-1439
Counsel for People Working Cooperatively, Inc. (PWC)

One of the attorneys for
Cincinnati Gas & Electric Company

THE PUBLIC UTILITIES COMMISSION
STATE OF OHIO

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In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Transition Plans and For Authorization to Collect Transition Revenues.) Case No. 99-1212-EL-ETP

- - -

In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Tariff Approval.) Case No. 99-1213-EL-ATA

- - -

In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Certain Accounting Authority.) Case No. 99-1214-EL-AAM

- - -

Hearing Room 11-B/C
Borden Building
180 East Broad Street
Columbus, Ohio 43215
Monday, May 15, 2000

Met, pursuant to assignment, at 9:00 o'clock a.m.

BEFORE:

Dwight D. Nodes and Steven Lesser, Attorney-Examiners.

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VOLUME VI

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Page 42

Q. That's correct.
A. Yes, I do.
Q. And are you appearing here as the sponsor of this exhibit, Mr. Alexander?
A. Yes, I am.
Q. And that consists of 18 -- 19 pages, including signature, and then several attachments; is that correct?
A. Yes.
Q. Attachments through No. 8?
A. Yes.
Q. You also have before you a document that's been marked as Joint Exhibit No. 2.
A. That is the Supplemental Settlement Materials?
Q. That's correct. And are you the sponsor of that --
A. Yes, I am.
Q. -- as well?
And that consists of six pages plus Supplemental Attachments 1, 2, 3 and 4?
A. Yes, it does.
Q. And are they correct and accurate?
A. Yes.
Q. Mr. Alexander, with respect to Joint Exhibit No. 2, does it provide benefits in addition to those contained in Joint Exhibit No. 1?
A. Yes, it does.

Page 43

Q. And are they explained in the exhibit itself?
A. As you go through the exhibit item by item, yes, it would be.
Q. And with respect to Joint Exhibit No. 2, does it retract or diminish any of the benefits provided in Joint Exhibit No. 1?
A. No, it does not. It expands those benefits.
Q. And finally, Mr. Alexander, with respect to Exhibit FirstEnergy 15, do the general discussions of the benefits and process of the stipulation apply equally to Joint Exhibit 2 as they do to Joint Exhibit 1?
A. Yes, they would. Obviously, Joint Exhibit 2 expands on a number of those and enhances some of the benefits that are described in my testimony. So you'd have to try to line them up and see where the ultimate benefit arose.
For example, the easiest one is my testimony refers to a shopping credit incentive on -- for commercial and industrial customers being 25 percent and 10 percent respectively. The supplemental stipulation or settlement agreement provides those numbers to be 30 percent and 15 percent. So to that extent, you'll see those -- that kind of enhancement in the supplemental stipulation. Otherwise, my testimony is pretty straightforward with respect to the stipulation.
Q. And you're also sponsoring Joint Exhibit No. 2?
A. Yes, I am.

Page 44

MR. RUXIN: Your Honor, I move the admission of Joint Exhibits 1 and 2 in addition to 15, subject to cross-examination.
EXAMINER NODES: All right. Thank you.
Mr. Bruce.
MR. BRUCE: Thank you, your Honor.

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CROSS-EXAMINATION

BY MR. BRUCE:
Q. Mr. Alexander, my name is Kerry Bruce. I represent the City of Toledo.
A. Good morning.
Q. Somewhat of a housekeeping matter. The direct testimony that I have for you didn't seem to match the pages that you described. Is there a second version of your direct testimony?
A. Not that I know of.
Q. All right. The direct testimony that I have for you consists of 22 pages with the last page as having your last answer "Yes". How many pages do you have?
A. I've got 22 pages.
Q. All right. Can we go back to your corrections, then, and see if I can --
A. Sure.
Q. -- locate them?

Page 45

The first one --
A. It could just be on the machine it was printed on.
EXAMINER NODES: Actually, I think the first one appeared on Line 11 rather than Line 13, is what I had.
MR. BRUCE: I'm sorry, what page?
EXAMINER NODES: Page 9, Line 11, Mr. Alexander deleted the word "retail". I believe he identified it as Line 13, and it's actually on Line 11.
MR. BRUCE: Okay. And what was the --
EXAMINER NODES: And then the second one --
THE WITNESS: Was on Page 18, question begins, "Why were these adjustments to RTC and GTC made?" The last line of that question where it talks about CEI.
BY MR. BRUCE:
Q. Are we deleting the entire sentence?
A. No. Just deleting the "for" after "CEI" and substituting "by", b-y.
Q. Thank you.
If I ask you a question about your direct testimony, it doesn't match, please bear with me if for any reason they're different?
A. We'll find the reference.
Q. All right. On Page 11 -- Well, before we get into that, I note that there are two stipulations, or at least one stipulation and supplemental materials. Have there been any

Page 46

other agreements since these two have been filed that have been negotiated by the company?
MR. RUXIN: I object. All that the company's submitting and all that Mr. Alexander's here sponsoring are these two stipulations, settlement agreements.
EXAMINER NODES: I agree. We're not here to look into any other agreements, if they may exist. What is presented to the Commission are Mr. Alexander's testimony and the two sponsored exhibits, Joint Exhibit 1 and Joint Exhibit 2. Any other questions relating to other matters are not relevant for the purposes of the Commission's consideration.
MR. BRUCE: I understand, your Honor. I was just trying to see if another matter has been docketed that I am not aware of.
EXAMINER NODES: Okay. Fair question.
BY MR. BRUCE:
Q. Are you aware of any other agreements that have been docketed with the Commission that are not -- that were subsequent to the two exhibits that you have proffered today?
A. No.
Q. Turning to your testimony on Page 11, you indicate in the middle of the page that the shopping credits with incentives are available to all customers. Later on in the stip- -- in the stipulation, it talks about the deferral of the difference between the original shopping credit amount and the amount

Page 47

that's deferred.
Is there a deferral of amounts for customers who do not take the FirstEnergy market support generation?
A. Let me -- Let me clarify, because initially your question contained a misstatement in it.
Shopping credits -- Shopping incentives are available to all customers that choose to shop, not to all customers. All customers that choose to shop will receive a shopping incentive and a credit on their bill. The amount that we will defer will be the difference between that shopping incentive for a customer that shops and the market support price.
Q. It doesn't matter, then, whether that customer takes any of the FirstEnergy market support generation?
A. That's correct.
Q. Thank you. You indicate that once the 20 percent shopping level is reached, the incentives will not be further increased. Is that statement changed at all by the supplemental settlement?
A. I don't think it's changed by the supplemental. I think it's clarified by the supplemental testimony -- or, supplemental settlement.
The -- And I think it's -- I think the clarification is good because it wasn't our intent in the first one to limit it. Every year the market support pricing increases under the -- under the transaction, under the settlement as we

Page 48

proposed it. That increase to reflect inflation otherwise would apply to the shopping incentive, the multiplier.
The only part that we were talking about not increasing on an annual basis after you got to 20 percent shopping is the what I'll call the enhanced shopping incentive, starting at 30 percent, going to 35 percent. That additional 5 percent is not to be increased or not to be added on.
But that doesn't affect the fact that there will be a natural increase in the shopping credits merely because the base price that there are -- that they are multiplied against increases due to inflation.
Q. Following up on that, under the supplemental settlement, can FirstEnergy still request of the Commission that the incentives be reduced after the 20 percent is reached?
A. Yes.
MR. RUXIN: Object.
EXAMINER NODES: He's already answered.
MR. RUXIN: Could we have the answer read back, then? I didn't hear him.
EXAMINER NODES: Yes.
(Question read back as requested.)
EXAMINER NODES: Go ahead.
BY MR. BRUCE:
Q. Mr. Alexander, do you have both settlements in front of you, the stipulation and the supplemental?

Page 49

A. Yes.
Q. I'd like you to turn to Paragraph 5 of the supplemental settlement. The second sentence -- I'm sorry. Are you there?
A. Yes.
Q. The second sentence indicates that an additional 1,120 megawatts, as measured as the distribution meter during the months of September through May, is being offered. I'm not sure if I understand correctly. Is that the provision where the company is picking up the line losses, is being applied to an additional 1,120 megawatts, or is the company actually increasing its market support generation by an additional 1,120 megawatts?
A. Well, this is nonmarket support generation, so this is generation that is otherwise coming into the system that does not -- that's beyond the -- either the company's generation or not included in that.
What we're doing is treating that generation coming to our system exactly the same as market support generation. So, effectively, there will be 2,240 megawatts of capacity available inside the FirstEnergy interface without a line loss charge from the transmission system to the distribution or customer meter.
Q. Do you have any estimate of the dollar amount of these line losses, assuming that all 2,240 megawatts is exercised?
A. Well, I haven't calculated it, but the line losses on

Page 114

MR. ECKHART: Yes, your Honor. Thank you.
BY MR. ECKHART:
Q. Back to the questions regarding the installed capacity, and to move one step further, does FirstEnergy or any of the operating companies have leases or commitments for capacity other than its own installed capacity?
A. I believe we have a short-term arrangement with the Ludington Pump Storage Facility in Michigan, and I don't recall how many years that -- that runs, but maybe another year or so.
Q. Is that all that you know of?
A. Yes.
Q. Would you agree that the 1,120 megawatts of capacity you have dedicated to competitive suppliers is not really 20 percent of the total of your 12,000 megawatts?
A. Mathematically, that's correct.
Q. Is there any other --
A. 1,100 is not 20 percent of 12,000.
Q. Is there any other way to look at it than mathematically?
MR. RUXIN: I object.
EXAMINER NODES: Sustained.
BY MR. ECKHART:
Q. What other way would you judge whether the commitment of 1,120 megawatts is sufficient to supply 20 percent of your current customer load?

Page 115

A. Well, what we did for -- If you take the companies, that's CEI, Toledo and Ohio Edison's average hourly loads, and you subtract out of those loads customers that are under contract, the remaining hourly load times 20 percent would be slightly below a thousand megawatts.
Q. Well, you do have an obligation to supply those customers under contract with capacity; do you not?
A. Yes.
Q. How many of those customers -- or, how many customers on the three companies are interruptible customers?
A. I don't know.
Q. Do you know what the -- what part of the capacity of the three companies is used to supply interruptible customers?
MR. RUXIN: I object. What does this have to do with the stipulation?
EXAMINER NODES: Mr. Eckhart.
MR. ECKHART: Your Honor, they are claiming that this commitment of 1,120 megawatts is a very beneficial concession to the customers. I'm just trying to test that, see how beneficial it is.
EXAMINER NODES: Well, it -- Overruled.
THE WITNESS: Can I have the question read, please?
(Question read back as requested.)
THE WITNESS: From recollection, the interruptible load for all of FirstEnergy's companies, because I don't have it

Page 116

by just Ohio but would include Pennsylvania, is about 700 megawatts. And, again, the 12,000 megawatts that we talked about earlier includes megawatts that are owned by our Pennsylvania subsidiary.
BY MR. ECKHART:
Q. What part of the 12,000 is owned by the Penn Power?
A. I don't know.
Q. What units does Penn Power own any part of your capacity in?
A. Perry, Beaver Valley 2, Mansfield 1, 2 and 3, Sammis 6 -- no, excuse me, Sammis 7. And from recollection, that's all I can recall.
Q. How -- How big is Penn Power in terms of kilowatt-hour sales a year compared to Ohio Edison; what part of Ohio Edison is it?
MR. RUXIN: I object.
EXAMINER NODES: Sustained.
Let's move on with something that's related to the stipulation or the testimony.
MR. ECKHART: But, your Honor, I happen to think this is. If you don't, you can say so.
EXAMINER NODES: I did.
MR. ECKHART: I heard you.
BY MR. ECKHART:
Q. What -- On Page 11, the question and answer beginning

Page 117

on Line 6, what is the rationale for the provision in the stipulation that sets a 100-megawatt limit on the maximum amount of capacity available for FirstEnergy's competitive affiliates for residential customers?
MR. RUXIN: Well, your Honor, I -- I'm not sure I understand what "rationale" means. But to the extent Mr. Eckhart is attempting to explore the negotiations that led to the selection of the 100 megawatts, I have to object to that.
EXAMINER NODES: You want to ask what it means, that's one thing, as long as we don't get into settlement discussion issues. If you can modify your question to that extent.
MR. ECKHART: Well, let me try to phrase it that way.
BY MR. ECKHART:
Q. What is the result or what does this mean that there's a hundred-megawatt limit on the maximum amount of capacity available to FirstEnergy's competitive affiliates for residential customers?
A. Well, under the original stipulation, the -- which is what this is addressing, there was a limit on what FirstEnergy Services, essentially our competitive side, could -- could utilize of this capacity that was made available. The effect is to allow more of this capacity to be made available to nonaffiliated companies, nonaffiliated with FirstEnergy companies, and, therefore, create more activity in the market.
Under the supplemental stipulation, effectively, the

Page 118

company has agreed that it will release any capacity it has or any amount of the capacity it has in the 11- -- in the 1,120 megawatts to third-party marketers.
Q. Was there any -- Is there any limit on what part of that 1,120 megawatts or the remaining 1,020 that is available to FirstEnergy's affiliates? Is it all -- all the rest of it available to FirstEnergy's affiliates?
A. It is available to FirstEnergy affiliates; however, under the supplemental stipulation, if a marketer has a retail customer and the 1,120 megawatts is otherwise fully committed, FirstEnergy will release the capacity that was committed to it and essentially give it to the third-party marketer for sale into our service territory.
Q. Would Cleveland Public Power be available to ask for or request any part of this 1,120 megawatts for its customers?
A. No.
Q. Why not?
A. Because the stipulation requires that they be a retail customer of one of the operating companies. And they must remain a distribution company -- company customer.
Q. Well, could the City of Cleveland itself become a marketer separate from CPP, take some of this capacity?
MR. RUXIN: I think I have an objection because that question calls for a conclusion about the constitutional home rule powers of the City of Cleveland, which is well beyond the

Page 119

scope of the witness' testimony.
EXAMINER NODES: I think it's speculative, at best, to assume that there's going to be some branching off or subsidiary of Cleveland Public Power that would somehow qualify for competitive retail provider status. I'll sustain the objection.
BY MR. ECKHART:
Q. Well, more directly then, regarding the City of Brook Park, did you make an arrangement with them whereby they would be able to be a marketer for this power?
MR. RUXIN: I object. The company's offered no arrangements other than Joint Exhibit 1 and Joint Exhibit 2.
MR. ECKHART: Well, I think they have -- the witness has to testify to that, not the counsel.
EXAMINER NODES: We laid the ground rules right up front about the only thing that was being presented and subject to cross-examination would be the testimony as well as the two offered stipulations that are before the Commission; so I'll sustain the objection.
MR. ECKHART: Well, I'd like the record to note that I strongly disagree with the approach of the Bench, and I think that those issues regarding the side deals made by FirstEnergy with all of these people who entered into the stipulation are important issues in this case, and I expect that I will argue that at the appropriate time.
EXAMINER NODES: All right. Well, your objection is

Page 120

noted on the record.
BY MR. ECKHART:
Q. Page 12, Line 6, "While, FirstEnergy may seek to adjust the incentive after the shopping level is reached...." Do you consider that -- Do you see that?
A. Yes, I do.
Q. Assuming for now that you reach the 20 percent shopping level at the end of the first 12 months, would you contemplate seeking an adjustment at that time?
A. I think it all depends on the facts and circumstances.
Q. What facts would you expect to consider before you would seek that adjustment?
A. I would look at how the market is developing and whether or not I believe that the incentives, where they're at, is over-incentivising the marketplace.
Q. Are you talking about the shopping credit, the pennies per kilowatt figure?
A. 45 percent in the case of -- 45 percent above the market price in the case of residential customers, 30 percent in the case of commercial, and 15 percent in the case of industrial customers.
Q. And mechanically, assuming that you do decide that there should be some adjustment at any time during the market development period, are you saying that you would file a formal application with this Commission?

Page 121

A. Well, there are two kinds of adjustments that can occur to the shopping credit incentive. One is automatic, and that is if you haven't reached the 20 percent targets by particular dates, then there's an automatic 5 percent increase for the commercial and the industrial classes.
I don't believe that needs Commission approval, other than the fact that they're going to have to file new tariffs that would -- that would show that -- that change and, therefore, there would be a compliance filing necessary.
With respect to an adjustment downward as a result of having more than 20 percent shop, that would require a formal application with the Commission and action by the Commission before any adjustment would be made.
Q. Would you contemplate that that would be in this same docket, the 99-1212 case, or some new case?
A. I have no idea.
Q. How do you control such an adjustment to make sure that it doesn't result in the shopping level falling below 20 percent?
A. Like in anything, there would be evidence presented to the Commission and they would make a determination based on that evidence as to whether they thought it was appropriate. And, again, a lot of it depends on the facts and circumstances that are occurring as the market, in fact, is developing over this five-year development period.

Page 138

function of the incentivized shopping credit, by class, and if you assume 20 percent shopped, you could multiply that incentivized shopping credit by those numbers of kilowatt-hours, and that would be how much would be deferred. So it's pretty readily calculable from the information that's in the stipulation.

Q. Page 21 of your testimony, the basic question, "Do you believe the Commission should approve the Stipulation?" And particularly the second sentence, "It will take time for customers to understand this new market and to appreciate the opportunities and risks it presents".

Do you contemplate that the education plan will help the customers understand the opportunities and the risks?

A. I think customer education is a critical part of opening a market as complex as the electric market. So yes, I believe that, in time, like most advertising programs, it's going to take time for customers to understand and appreciate it, no matter how many dollars we spend. But it is a critical part of developing a market of this type.

Q. What particular risks do you contemplate that the education plan will explain to the customers?

A. Well, I think in this case you're going to have to take them to fairly basic contractual risks in terms of how secure is the supply; what are the marketer's rights to cancel the contract; is it an interruptible supply or firm supply; some

Page 139

of the more basic concepts that we deal with every day in the electrical industry, that customers are now going to have to deal with on an individual customer basis.

So yes, I think the educational process is going to have to get into that level so that they become comfortable in understanding and appreciate what can happen to them in this marketplace. It becomes more significant the closer and closer you get to the end of the market development period.

Q. Isn't it part of this whole process that these marketers will have to become certified by the Public Utilities Commission before they can enter into this competitive market?

A. There will be a certification process, yes.

Q. And would you contemplate that the PUCO would certify some marketer who was not going to be able to reliably perform the contracts it enters into?

A. I think the Commission is going to try to do the best job they can to certify suppliers, but that's not what I was getting to.

I was getting to basic contractual risks in this environment, even with a qualified and certified supplier.

Q. Well, are those risks any different for the customer who is a customer of a certified supplier than a customer of FirstEnergy?

A. I don't know how to answer that question. FirstEnergy, as far as I know, will not become -- will not

Page 140

become a certified supplier. FirstEnergy Services will. And again, it's the contractual risk that the customer has to understand.

Q. Well, will the risk be any different for the FirstEnergy Services company than for any of these certified marketers?

A. Customer risks will not be any different. Customer risks in terms of interruptible contracts, in terms of contracts that last four months, doughnut contracts, contracts that allow the marketer to cancel at any time, contracts that have a floating price depending on what the market price is, all of those things are going to have to be understood by the consumer because they are going to face all of them in the future.

Q. Will they face those same risks with dealing with the FirstEnergy Services Company?

A. To the extent we offer those kind of contracts, yes.

Q. The -- On Page 21, Line 16 -- and I'm just about done -- you say, "The generation commitment approach in the Stipulation will provide stability in a growing retail market...." Will that tend to reduce the risk you're talking about?

A. No.

Q. Why not?

A. Because there's nothing in the generation commitment that affects the marketer's relationship with the customer who

Page 141

is trying to sell him an interruptible contract, a contract that floats with the market price. Just because the marketer is going to pay 3 cents, doesn't mean he can't offer a contract to a customer that floats with market. And if a customer chooses that option because it might have a lower up-front cost, it could find themselves in a different situation in summer than in winter and fall.

So I think all of those things need to be factored into.

Q. Well, all I asked you was does the generation commitment reduce the risk at all, in any way.

A. Not the risk I was talking about.

Q. Okay. What about, and I must say I don't understand the phrase, "the headroom uncertainty". What do you mean by that?

A. Well, that's the difference between market prices at which marketers are acquiring power at wholesale, and the shopping credit to customers.

Q. And you think this stipulation is going to eliminate that?

A. Eliminates it as to the generation commitment made by the company.

Q. Are you familiar with the objections to your application which were filed by the Ohio Consumer's Counsel?

A. No.

Page 142

Q. Did you look at them at all?
A. No, I didn't.
Q. Did they come up in any way in your discussions with Consumers' Counsel in regard to settling and getting their signature on the stipulation?
MR. RUXIN: I object.
MR. COHEN: I object, also, your Honor.
EXAMINER NODES: I think that's a pretty easy one. Sustained.
MR. ECKHART: I have no further questions. Thank you.
EXAMINER NODES: Mr. Lesser has got just a couple of real brief questions.

- - -

EXAMINATION

BY EXAMINER LESSER:

Q. Mr. Alexander, are you generally familiar with the Senate Bill 3 provisions of Commission rulemaking on corporate separation?
A. Generally, yes.
Q. Well, as company president, could you tell us in general what particular method does FirstEnergy plan to use to ensure that there will be no unfair or uncompetitive practices conducted by the company's affiliates?
A. Well, I think you start from a base in which you separate your organization into a competitive unit, a shared

Page 143

services unit, and a utility unit, which we are in the process of doing right now. You start off of that base.
Then you have an internal education program that clearly defines and tries to put parameters around information, that basically says the right hand can't talk to the left hand, that basically you try to put in place.
You do a lot of internal education, which we're in the process of starting right now. You build, as you go forward, systems that are not integrated, or they are integrated through a shared services unit, and then build walls in them so that one side can't get information that the other side absolutely needs.
I mean, let's face it, the utility side of this organization still needs to understand load forecasting and what's happening in the marketplace because they are still building transmission and distribution facilities. They don't have to handle the generation side of it, but that same kind of information, they need.
So you start from that basic premise and you put in place a code of conduct that assures that information does not pass from left hand to right hand. We have been operating under codes of conduct like that on the federal level now. And you try as best you can to make sure that you have a completely separated organization, which is what we're trying to accomplish.
Q. Is that plan entirely contained within the company's

Page 144

transition plan, or do you see the evolving over time?
A. My sense is, and I'll give you my general sense because I read that testimony, but not for a while. My sense is that we are probably somewhere between, at this point, 95 to 99 percent there.
As we move in time and as you start developing new systems, and you start dealing with different issues that will arise; basically issues, you know, who is going to do billing down the road, that's probably going to require some sort of change as we face that issue down the road.
If the Commission decides some other service is now competitive that used to be on the utility side, we have to deal with those kinds of issues down the road. I think we have the bulk of it in place right now to deal with the kinds of day-to-day issues we're going to face, and we'll deal with more of them as we develop new systems as a company, but I certainly wouldn't want to have to go out and buy new accounting systems and things of that nature at this point because I think it would be a tremendous waste of time.
Q. And then as the Commission reads the transition plan, the Commission though should interpret it to be in compliance with Senate Bill 3 and the Commission rulemaking on corporate separation unless there was a specific waiver in the application?
A. I think you have to look more broadly at the

Page 145

testimony. I think you have to look at how we intend to operate, which is the basics of the testimony. And if you believe that form of operation, not that the Commission's rules are unclear, but that if you believe that form of operation is not inside what you thought, then we're asking for a waiver.
I think that that explanation of how you're going to operate provides a better base for determining operations going forward than some rule that has no definition associated with it.
So I would look at the totality of the testimony, I would compare that totality of the testimony with whatever written words you are trying to determine you need a waiver for or not, and I would look at that and say, well, if that explanation demands a waiver, then you have -- then we're seeking a waiver. If that explanation of conduct is consistent with the conduct under the rules, then I would say there's no waiver required.
Q. And do you believe the technical task force, though, might be an appropriate forum to further discuss these type of issues?
A. I think that some of them will pop up in that task force. I'm not sure we have the right people there to deal with them, but I think it provides a forum for people to complain, that, "Hey, we're not sure that what you're doing here is what we would like you to do", and that allows it to get popped into

*1999 Ohio App. LEXIS 5793, **

ALAN L. SIRKIN And STEVEN E. YUHAS, Plaintiffs-Appellants, vs. RODNEY MCBURROWS, BARBARA MCBURROWS, SYLVAN P. REISENFELD, ALAN J. STATMAN, And REISENFELD & STATMAN, L.P.A., Defendants-Appellees.

APPEAL NO. C-980968

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

1999 Ohio App. LEXIS 5793

December 3, 1999, Date of Judgment Entry on Appeal

NOTICE: [*1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NOT APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Civil Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. A-9706929.

DISPOSITION: Appeal Dismissed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants challenged orders of the Hamilton County Court of Common Pleas (Ohio), which either granted a motion by appellees for protective order or denied a motion by appellants for an order compelling disclosure or an in camera inspection of allegedly privileged material.

OVERVIEW: In 1994, appellees retained appellants, attorneys, under contingent-fee agreements to pursue on their behalf a personal-injury claim. Appellees subsequently discharged appellants and, in May 1997, retained appellee attorneys to represent them on the claim, which was later settled. Appellants filed an action seeking recompense for their professional efforts on the claim. A series of motions resulted from appellants' attempts to obtain appellee attorneys' file on appellees on the personal injury claim. Appellee attorneys resisted, asserting attorney-client privilege. Appellants sought orders compelling appellee attorneys to respond, and appellee attorneys sought, successfully, a protective order on the requested file. Appellants sought review of five separate judgment entries. On appeal, the court held that it did not have jurisdiction, because none of the challenged orders were final orders under Ohio Rev. Code Ann. § 2505.02(B)(4), but constituted a provisional remedy. Thus, the court dismissed the appeal.

OUTCOME: Appeal Dismissed. The court concluded the absence of a final order deprived it of the jurisdiction to address on their merits the challenges advanced by appellants on appeal. The appellate court concluded that the entries from which appellants appealed were not "final orders" under Ohio Rev. Code Ann. § 2505.02(B)(4).

CORE TERMS: final order, protective order, provisional remedy, in camera, inspection, final judgment, attorney-client, effective, discovery, production of documents, compelled disclosure, privileged material, jurisdiction to entertain, appealable order, timely filed, sua sponte, personal-injury, contingent-fee, interrogatories, nonprivileged, discharged, disclosure, appealing

CORE CONCEPTS - ♦ Hide Concepts

Civil Procedure : Appeals : Appellate Jurisdiction : Final Judgment Rule
Ohio Const. art. IV, § 3(B)(2) confers upon courts of appeals such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district. Ohio Rev. Code Ann. § 2505.03(A) limits the jurisdiction of courts of appeals to the review of a final order, judgment or decree.

Civil Procedure : Appeals : Appellate Jurisdiction : Final Judgment Rule
See Ohio Rev. Code Ann. § 2505.02 (B).

Civil Procedure : Appeals : Appellate Jurisdiction : Final Judgment Rule
Ohio Rev. Code Ann. § 2505.02 (A)(3) defines a "provisional remedy" as a remedy sought in a proceeding ancillary to an action and specifically includes in its nonexclusive list of examples a remedy sought in a proceeding for the discovery of a privileged matter.

HEADNOTES: APPELLATE REVIEW/CIVIL

SYLLABUS:

A civil appeal must be dismissed for lack of jurisdiction, when the orders from which the appeal derives, which effectively deny compelled disclosure of allegedly privileged material, do not constitute "final orders" because appellate consideration of the orders on appeal from the entry of final judgment in the action will not operate to deny the appellants a "meaningful or effective remedy." R.C. 2505.02(B)(4)(b).

COUNSEL: Eli Namanworth and Namanworth & Bohlen Co., L.P.A., for Plaintiffs-Appellants.

George D. Jonson and Montgomery, Rennie & Jonson, for Defendants-Appellees.

JUDGES: SHANNON, Judge GORMAN, P.J., and SUNDERMANN, J., concur. RAYMOND E. SHANNON, retired, from the First Appellate District, sitting by assignment.

OPINIONBY: SHANNON

OPINION:

Please Note: We have *sua sponte* removed this case from the accelerated calendar.

SHANNON, Judge

Plaintiffs-appellants Alan L. Sirkin [*2] and Steven E. Yuhas have taken the instant appeal from five separate judgment entries, by which the trial court either granted a motion by the appellees for a protective order or denied a motion by the appellants for an order compelling disclosure or an *in camera* inspection of allegedly privileged material. The appellants advance on appeal three assignments of error. We do not, however, reach the merits of the challenges presented on appeal, because none of the entries from which the appellants have appealed is a final order.

In 1994, defendants-appellants Rodney and Barbara McBurrows retained attorneys Sirkin and Yuhas under contingent-fee agreements to pursue on their behalf a personal-injury claim. The McBurrowses subsequently discharged Sirkin and Yuhas and, in May of 1997, retained

attorneys Sylvan P. Reisenfeld and Alan J. Statman to represent them on the claim.

While represented by Reisenfeld and Statman, the McBurrowses settled their claim. The settlement prompted Sirkin, in October of 1997, and Yuhas, by amendment of Sirkin's complaint in June of 1998, to file an action against the McBurrowses, Reisenfeld and Statman, and the law firm of Reisenfeld & Statman, L.P.A., [*3] seeking recompense for their professional efforts on behalf of the McBurrowses on the claim.

On December 30, 1997, Sirkin filed the first in what would become a series of motions, through which the parties would play out their struggle over the discovery of matters contained in Reisenfeld and Statman's file on the McBurrowses' personal-injury claim. In his initial motion, Sirkin sought an order compelling Reisenfeld and Statman's production of the file. Reisenfeld and Statman resisted compelled production of the file with a motion seeking a protective order. In support of the motion, they asserted that the matters contained in the file were protected by the attorney-client privilege. Alternatively, they argued that the matters contained in the file were not discoverable, because the Ohio Supreme Court's decision in *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St. 3d 570, 629 N.E.2d 431, which limits the recovery of a discharged contingent-fee attorney to *quantum meruit*, rendered the file's contents irrelevant. By entry dated February 11, 1998, the trial court granted the protective order upon its determination that the matters sought [*4] to be discovered were protected by the attorney-client privilege.

In February of 1998, Sirkin submitted to Reisenfeld and Statman his second and third sets of interrogatories and requests for the production of documents, and in March and May of that year, he filed motions seeking orders compelling responses to his discovery requests. On June 22, 1998, with reference to its February 11 protective order, the trial court denied Sirkin's motions.

Two weeks later, Sirkin filed a motion seeking reconsideration of the February 11 protective order and the June 22 entry denying his motion to compel or, alternatively, an *in camera* inspection of the case file, with an order compelling production of the file's nonprivileged communications. By entry dated July 24, 1998, the trial court denied the motion.

Finally, in September of 1998, Sirkin and Yuhas moved for an *in camera* inspection and an order compelling disclosure of the nonprivileged matters sought in a flurry of interrogatories and requests for admissions and the production of documents submitted by Sirkin and Yuhas to Reisenfeld and Statman. By separate entries dated November 30, 1998, the trial court denied Sirkin and Yuhas's [*5] motion and granted Reisenfeld and Statman's motion for a protective order.

On December 9, 1998, Sirkin and Yuhas filed the instant appeal from (1) the February 11, 1998, protective order, (2) the June 22, 1998, entry denying the March and May 1998 motions for an order to compel, (3) the July 24, 1998, entry denying reconsideration or an *in camera* inspection, (4) the November 30, 1998, entry denying the September 1998 motion for an *in camera* inspection and an order to compel, (5) the November 30, 1998, protective order, and (6) "all other provisional remedies in this matter that result in a final order."

The appellees subsequently moved to dismiss the appeal. In support of their motion, they asserted that the appeal was, with respect to the February, June and July entries, not timely filed and that this court was, in the absence of a final appealable order, without jurisdiction to entertain the appeal. By entry dated February 26, 1999, we overruled the motion.

However, the submission of this cause for a determination on the merits again presents this court with the question of our jurisdiction. See *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St. 3d 543, 544, 684 N.E.2d 72, 73. [*6] Our inquiry leads us to conclude that the absence of a final order deprives us of the jurisdiction to address on their merits the challenges advanced by the appellants on appeal. n1

----------Footnotes----------

n1 App.R. 4(B)(5) permits a party to file a notice of appeal within thirty days of the entry of "a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties," but only "if an appeal is permitted from [such] a judgment or order." Our determination that none of the entries from which the appellants have appealed constitutes a final appealable order preempts any inquiry into whether, with respect to the February, June and July entries, this appeal was timely filed.

----------End Footnotes----------

Section 3(B)(2), Article IV of the Ohio Constitution confers upon courts of appeals "such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * * ." R.C. 2505.03(A) [*7] limits the jurisdiction of courts of appeals to the review of a "final order, judgment or decree." R.C. 2505.02(B) defines a "final order" to include:

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(A)(3) defines a "provisional remedy" as a remedy sought in "a proceeding ancillary to an action" and specifically includes in its nonexclusive list of examples a remedy sought in "a proceeding for * * * [the] discovery of [a] privileged matter * * * ." n2

----------Footnotes----------

n2 Under former R.C. 2505.02, a discovery order entered in an action that was not a "special proceeding" was not a "final order." See *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83, paragraph seven of the syllabus. The General Assembly amended the statute, effective as of July 22, 1998, to include in its definition of a "final order" an order that grants or denies a "provisional remedy." Amended R.C. 2505.02 controls our determination of the finality of the orders from which this appeal derives, because the statute, by its terms, "applies to and governs any action * * * pending in any court on [its] effective date * * * ." R.C. 2505.02(D).

----------End Footnotes---------- [*8]

The entries from which this appeal derives variously protected the appellees from or denied the appellants compelled disclosure of the matters sought to be discovered, on the ground that those matters were protected by the attorney-client privilege. Each entry, therefore, constitutes "an order that grants or denies a provisional remedy." Moreover, with respect to that "provisional remedy," each entry may fairly be said to "in effect determine[] the action * * * and prevent[] a judgment" favorable to the appellants.

The effect of each entry, however, is to leave the allegedly privileged material undisclosed. If this court determines, on appeal from the entry of the final judgment in this action, that the trial court erred in granting the appellees' protective orders or in denying the appellants' motions to compel or for an *in camera* inspection, we are empowered to reverse the judgment and remand the matter for a new trial. Under these circumstances, we cannot say

that a delay in appellate consideration of these entries until an appeal from the ultimate entry of final judgment in this action would operate to deny the appellants "a meaningful or effective remedy." See R.C. 2505.02(B)(4)(b); [*9] see, also, *Penko v. Eastlake*, 1998 Ohio App. LEXIS 6583 (Dec. 11, 1998), Lake App. No. 98-L-186, unreported (citing *Polikoff v. Adam* [1993], 67 Ohio St. 3d 100, 616 N.E.2d 213, to hold that orders denying compelled disclosure of privileged material are not "final orders" under R.C. 2505.02[B][4], because "the issues surrounding these provisional orders will survive unchanged until a final decision * * * in [the] case"). Cf. *Gibson-Myers & Assocs., Inc. v. Pearce*, 1999 Ohio App. LEXIS 5010 (Oct. 27, 1999), Summit App. No. 19358, unreported (holding that an order compelling the production of documents that constitute trade secrets is a "final order" under R.C. 2505.02[B][4], because the "proverbial bell" rung by compelled disclosure of the undiscoverable material "cannot be unrung" on appeal from a final judgment in the action).

Accordingly, we conclude that the entries from which the appellants have appealed are not "final orders" under R.C. 2505.02(B)(4). In the absence of a final order, we are without jurisdiction to entertain the appellants' appeal. We, therefore, *sua sponte* dismiss this appeal.

Appeal dismissed. [*10]

GORMAN, P.J., and SUNDERMANN, J., concur.

RAYMOND E. SHANNON, retired, from the First Appellate District, sitting by assignment.

*1998 Ohio App. LEXIS 6583, **

MICHAEL ROBERT PENKO, Plaintiff-Appellant, - vs - CITY OF EASTLAKE, et al., Defendants, JOSEPH GIBSON, Defendant-Appellee.

ACCELERATED CASE NO. 98-L-186

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY

1998 Ohio App. LEXIS 6583

December 11, 1998, Decided

PRIOR HISTORY: [*1]

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas Case No. 97 CV 001323.

DISPOSITION: JUDGMENT: Appeal dismissed.

CORE TERMS: effective, provisional remedy, appealable, provisional, appealing, marked, appealable order, principal cause, final judgment, new trial, ancillary, interlocutory, adjudicates, conclusions of law, findings of fact, summary judgment, special proceeding, substantial right, appeal following, effective date, entire case, unchanged, labeled, vacates

COUNSEL: MICHAEL ROBERT PENKO, pro se, Eastlake, OH (Plaintiff-Appellant).

ATTY. VINCENT A. FEUDO, Cleveland, OH (For Defendant-Appellee).

JUDGES: HON. DONALD R. FORD, P. J., HON. JUDITH A. CHRISTLEY, J., HON. WILLIAM M. O'NEILL, J. CHRISTLEY, J., O'NEILL, J., concur.

OPINIONBY: Donald R. Ford

OPINION: MEMORANDUM OPINION

FORD, P.J.

On August 20, 1998, appellant filed a notice of appeal of four separate decisions of the Lake County Court of Common Pleas. Each of these decisions was issued on July 21, 1998.

The first judgment entry marked, apparently by appellant, as Exhibit 253 states, in relevant part:

> "Plaintiff's Motion in Opposition to Case Reassignment C.P. Sup.R.4, Plaintiff's Objection to Magistrate's Decision, and Plaintiff's Request for Findings of Fact and Conclusions of Law (O.R.C. 52) are hereby denied. Plaintiff's Motion to Strike Defendant's Brief in Support of Magistrate's Decision O.C.R. 12(F) is hereby granted, and Defendants *[sic]* Brief in Support of Magistrate's Decision is hereby stricken."

The second judgment entry marked, apparently [*2] by appellant, as Exhibit 255 states, in relevant part:

> "Defendant's *[sic]* Theodore Klammer's Motion to Dismiss for Failure to State a Claim is well taken and hereby granted. The Motion for Protective Order for Defendant Theodore Klammer, and Plaintiff's Motion to Strike O.R.C. 12(F) are denied."

The third judgment entry marked, apparently by appellant, as Exhibit 256 states that plaintiff was "granted leave, up to and including fourteen (14) days from the date of this entry, to respond to Defendants' Motion for Summary Judgment."

The fourth judgment entry marked, apparently by appellant, as Exhibit 257 states, in relevant part:

> "Plaintiff's Motion to Compel Discovery (First and Second) is granted in part and denied in part. Plaintiff's Motion is granted as it relates to Interrogatories 28 and 29. Plaintiff's Motion is denied as it relates to Interrogatories 30 and 31, and pursuant to the discussion above. Plaintiff's Request for Hearing, Sanctions, Attorney Fees, and Costs is denied."

This court must determine whether these orders are final appealable orders. Such a determination is made here by applying both the requirements of Civ.R. 54(B) and the recently [*3] amended R.C. 2505.02 defining final appealable orders. See *Noble v. Colwell* (1989), 44 Ohio St. 3d 92, 540 N.E.2d 1381, syllabus:

> "An order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ. R. 54(B) in order to be final and appealable."

The record reflects numerous defendants in this case. The judgment entry labeled Exhibit 255, which grants defendant Klammer's "Motion to Dismiss for Failure to State a Claim" does not contain the required Civ.R 54(B) language "no just reason for delay," nor does it grant or dismiss the remaining causes of action against the other defendants. As a result, this judgment entry is not a final appealable order.

Civ.R. 54(B) states:

> "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties [*4] only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The remaining orders are interlocutory in nature. Whether such rulings of the trial court are final appealable orders must be determined in accordance with the recently amended provisions of R.C. 2505.02, effective July 22, 1998. R.C. 2505.02 now provides as follows:

> "(A) As used in this section:
>
> "(1) 'Substantial right' means a right that the United States Constitution, the

Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

"(2) 'Special proceeding' means an action or proceeding that is specially created by statute [*5] and that prior to 1853 was not denoted as an action at law or a suit in equity.

"(3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence.

"(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

"(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

"(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

"(3) An order that vacates or sets aside a judgment or grants a new trial;

"(4) An order that grants or denies a provisional remedy and to which both of the following apply:

"(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

"(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all [*6] proceedings, issues, claims, and parties in the action.

"(5) An order that determines that an action may or may not be maintained as a class action.

"(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

"(D) This section applies to and governs any action, including an appeal, that is pending in any court on the effective date of this amendment and all claims filed or actions commenced on or after the effective date of this amendment, notwithstanding any provision of any prior statute or rule of law of this state."

Assuming *arguendo* that the judgment entries labeled as Exhibits 253, 255, 256, and 257 are provisional remedies being ancillary to the primary cause of action and that the rulings in these judgment entries meet the requirements of R. C. 2505.02(B)(4)(a) that each ruling "in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy, [*7] " the rulings would still fail to meet the provisions of R.C. 2505.02(B)(4)(b) that "the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

The appellant, in this case, is not denied a "meaningful or effective" remedy of these issues

until the entire case is litigated. Whether a remedy is meaningful or effective essentially is determined by whether or not a delayed review of such a "provisional decision" would be impractical, or stated another way, would the appellant essentially be deprived of a remedy because the passage of time makes moot any review sought?

An appropriate standard to determine whether an appeal, at the conclusion of a case, is "a meaningful or an effective remedy" is one enunciated by the Supreme Court of Ohio in the case of *Polikoff v. Adam* (1993), 67 Ohio St. 3d 100, 616 N.E.2d 213. This standard was originally created to determine the existence of a special proceeding with a substantive right. It is now more applicable to the new standards necessary to determine whether a provisional remedy is [*8] a final appealable order.

In *Polikoff,* the Supreme Court of Ohio held the following:

> "***We find that the facts needed to analyze this precise issue will be unchanged by the ultimate disposition of the underlying action.***"

In the present case, the trial court's orders denying appellant's motion opposing case reassignment, appellant's objections to the magistrate's decision, and appellant's request for findings of fact and conclusions of law are provisional orders. These orders and the issues surrounding them will continue to exist until the entire case is determined. These orders neither reveal privileged information nor prevent the appellant from proceeding with his principal cause of action. The issues surrounding these provisional orders will survive unchanged until a final decision is reached in this case.

Further, an order granting the appellant a fourteen-day extension to respond to appellee's motion for summary judgment is interlocutory and has no effect upon the ultimate issues of the case.

Lastly, the order denying, in part, a motion to compel discovery is also not a final appealable order. It is provisional being ancillary to the principal cause of action. [*9] It does not disclose confidential information to the appellant nor does it prevent the appellant from presenting his case further. This issue will still exist at the conclusion of appellant's principal cause of action.

For the foregoing reasons, the judgment entries appealed by the appellant are not final appealable orders, pursuant to either Civ.R. 54(B) or R.C. 2505.02 as amended, effective as of July 22, 1998.

Accordingly, this appeal is, *sua sponte,* dismissed.

Appeal dismissed.

Donald R. Ford

PRESIDING JUDGE DONALD R. FORD

CHRISTLEY, J.,

O'NEILL, J.,

concur.

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